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ANSWERING THE CRITICS OF DRUG LEGALIZATION†

JAMES OSTROWSKI*

INTRODUCTION

Since the Spring of 1988, the proposal to legalize drugs has received widespread public attention. Prominent proponents of legalization include: Columnist William F. Buckley, Jr., Economist Milton Friedman, Professor Ethan A. Nadelmann, Mayor Kurt L. Schmoke of Baltimore and Federal Judge Robert W. Sweet. This paper will analyze and critique many of the arguments made against the legalization of drugs by five of its leading critics.¹ Two of these critics are politicians — former National Drug Policy Director William Bennett and New York Governor Mario Cuomo. Three are academics — James Q. Wilson, James A. Inciardi and Duane C. McBride. Many politicians have attacked the legalization concept, but Bennett and Cuomo stand out. Bennett is the “drug czar,” while Cuomo is a potential presidential candidate in 1992 and has been dubbed “America’s best political speaker” by William Safire. Additionally, both are considered intellectuals as well as politicians. Wilson, Inciardi and McBride are among the few academics who have taken direct aim at drug legalization in published articles.

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1. For a comprehensive defense of legalization on moral and cost-benefit grounds, see Ostrowski, *The Moral and Practical Case for Drug Legalization*, 18 HOFSTRA L. REV. 607 (1990). See also Nadelmann, *Drug Prohibition In the United States: Costs, Consequences, and Alternatives*, 245 SCIENCE 939 (1989).

GENERAL COMMENTS ON THE CRITICS

Cost-Analysis Lacking. All of the critics of legalization have plunged into the debate without the benefit of a comprehensive cost-benefit analysis of drug prohibition which supports their case.² I do not mean that prohibitionists have not thought about legalization in cost-benefit terms. Almost everyone does so. What I mean is that no prohibitionist has systematically analyzed all of the costs of prohibition, and then all the benefits of prohibition, put the various factors into numerical terms wherever possible, "weighed" the costs against the benefits to the extent possible, and found that the benefits exceed the costs.

The lack of solid data supporting prohibition has helped shape the nature of the critique of legalization. Some claim that we cannot legalize because we are not certain what would happen.³ Some suggest that the legalizers will not be able to get the details right.⁴ Some try to escape the cost-benefit argument entirely by arguing that legalization would have no benefits whatsoever.⁵ Each response avoids the critical fact that prohibitionists have no positive case to offer for prohibition's beneficial effects. For the most part, they are merely sniping at proposals for legalization.

Methodological Problems. Not only have prohibitionists presented no systematic cost-benefit analysis of prohibition, but their critiques of legalization have generally been methodologically unsound. Prohibitionist arguments often follow the simple *non sequitur* — "Drugs are bad; therefore, they should be illegal." Leaving aside that many of the "bad" aspects of drugs result from their illegality, this is not a good argument. A utilitarian would argue that drugs may be bad, but a war on drugs is worse.⁶ A libertarian would argue that drugs may be bad, but decisions whether to engage in (non-coercive) bad activities should be made by the individual.⁷ The crucial question in a

2. See Ostrowski, *supra* note 1, at 642-43. For a defense of legalization purely on cost-benefit grounds, see Ostrowski, *Thinking About Drug Legalization*, Cato Institute Policy Analysis No. 121 (May 25, 1989).

3. Wilson, *Against the Legalization of Drugs*, COMMENTARY 21, 28 (Feb. 1990).

4. Inciardi & McBride, *Legalization: A High-Risk Alternative in the War on Drugs*, 32 AM. BEHAV. SCIENTIST 259, 261 (1989).

5. "I find no merit in the legalizers' case." Bennett, *Should Drugs be Legalized?*, READER'S DIG., 90, 94 (Mar. 1990).

6. Ostrowski, *supra* note 1, at 641.

7. Ostrowski, *supra* note 1, at 625. A libertine might argue that drugs are good.

cost-benefit analysis of prohibition is: do drug laws cause more harm than good. To prevail in a cost-benefit analysis, prohibitionists must demonstrate *all* of the following:

- (1) that drug use would increase substantially after legalization; *and*
- (2) that the harm caused by any increased drug use would not be offset by the increased safety of legal drug use; *and*
- (3) that the harm caused by any increased use would not be offset by a reduction in the use of dangerous drugs that are already legal (e.g., alcohol and tobacco); *and*
- (4) that the harm caused by any increased drug use not offset by (2) or (3) would exceed the harm now caused by the side effects of prohibition (e.g., crime and corruption).

In the absence of data supporting these propositions, neither the theoretical danger of illegal drugs nor their actual harmful effects, is a sufficient basis for prohibition. Neither is the bare fact, if proven, that illegal drug use would rise under legalization. Prohibitionists face a daunting task — one that no one has yet accomplished or, apparently, even attempted.⁸

Any cost-benefit analysis of prohibition must separate the four categories of harm related to illegal drug use. The distinctions between these categories have been blurred in the legalization debate so far. These categories are:

8. For a more detailed discussion of the methodology of drug policy analysis, see Ostrowski, *supra* note 1, at 609. It might be noted, parenthetically, that a 1984 study by the Research Triangle Institute on the economic costs of drug abuse — [H.J. HARWOOD, D.M. NAPOLITANO, P.L. KRISTIANSEN & J.J. COLLINS, *ECONOMIC COSTS TO SOCIETY OF ALCOHOL AND DRUG ABUSE AND MENTAL ILLNESS* (Research Triangle Institute, Research Triangle Park, N.C., 1984) [hereinafter *ECONOMIC COSTS*]] — has been erroneously cited in support of drug prohibition. *N.Y. Times*, May 15, 1988, sec. A, at 1, 24; Kondracke, *Don't Legalize Drugs*, *NEW REPUBLIC*, June 27, 1988, at 16. See also *TIME*, *Frustration with the War on Drugs Kicks Off a Bitter Debate About Legalization*, May 30, 1988, at 14-15. This report, which estimates the cost of drug abuse at \$60 billion for 1983, is not, and was not intended to be, an evaluation of the efficacy of prohibition or the wisdom of legalization. It does not mention the terms "legalization" or "decriminalization" and makes no attempt to separate the costs attributable to drug use per se from the costs attributable to the illegality of drug use. In fact, the study seems to include some costs of *legal* drugs in its estimates. *ECONOMIC COSTS*, *supra*, at 49-50. Many of the costs cited are clearly the result of prohibition, the report considers only costs that prohibition has failed to prevent, making no attempt to measure the costs prevented — or caused — by prohibition. The study is therefore almost entirely irrelevant to the issue of legalizing drugs.

- (1) harm caused by prohibition;
- (2) harm prevented by prohibition;
- (3) harm not prevented by prohibition;
- (4) harm which is related to, but not caused by drug use.

Harm caused by prohibition. This category includes all the problems caused by the law enforcement approach to the drug problem. Obvious examples include: drug enforcement costs, law enforcement officers killed in drug enforcement, and police corruption related to drugs. Less obvious examples include: crime committed by people as a result of the diversion of resources away from violent crime enforcement and toward drug enforcement, drug-related AIDS, black market violence and drug-related street crime.

Harm prevented by prohibition. This category includes all of the harm that people *do not* do to themselves or others because drugs are illegal and thus less available. By and large, these are people who (a) are not currently abusing a serious legal⁹ or illegal drug, (b) would suddenly start heavy use of a newly legalized drug, and (c) would, in spite of warning labels, quality controls and objective education, recklessly cause harm to themselves after legalization. It is for the benefit of such people that the war on drugs is fought.

That such harm prevented is quite large is the main (only?) practical argument for prohibition. Strictly speaking, this category is unknowable, since human beings cannot make accurate, quantitative predictions about the future. One reason for this is that predictions themselves can affect future behavior.¹⁰ For example, dire predictions of high drug use after prohibition could well stimulate anti-drug educational, cultural and treatment efforts, which if successful, might actually lead to a reduction in drug use after prohibition.

It is generally believed that the uncertainty argument favors the status quo.¹¹ In fact, the notion that we should not legalize drugs because we are not certain what would happen has become the last refuge of many a prohibitionist. Lacking cost-benefit evidence in support of their policy, prohibitionists latch onto the uncertainty argument in the same way that criminal defense lawyers whose clients are clearly guilty latch onto the presumption of innocence. They use the uncertainty argument as a substitute for evidence they do not possess, secure in

9. See Ostrowski, *supra* note 1, at 669.

10. See M. ROTHBARD, *INDIVIDUALISM AND THE PHILOSOPHY OF THE SOCIAL SCIENCES* 33 (1979).

11. See, e.g., Wilson, *supra* note 3, at 28.

the knowledge the no one predicting the future can ever be refuted in the present.¹²

But does the uncertainty argument really favor the status quo? As previously discussed, the main practical benefit of prohibition is its alleged harm prevention value. That is, that without prohibition, harmful drug use would increase. Thus, the inability of prohibitionists to prove that harmful drug use would increase after repeal of prohibition, means that they are at the same time unable to prove that prohibition provides any practical benefit. The lack of evidence in favor of prohibition, combined with the major problems which are undeniably caused by prohibition, make a persuasive argument for repeal.

The prevention of mere drug use, without evidence of actual harm, does not qualify as harm prevented by prohibition. While mere drug use may violate norms of morality that prohibitionists believe the state must enforce, such drug use cannot be considered in a cost-benefit approach because such an approach considers only harmful consequences of drug use. But prohibitionist literature is filled with references to levels of mere drug use in certain places and times of legal availability, without any effort to demonstrate any actual harm this level of use caused.¹³

Another methodological hurdle for prohibitionists is the drug-switching/addiction-switching problem. People use drugs either to make themselves feel better than they already do, or to take away bad feelings that they have. Prohibition at best reduces the availability of certain types of drugs, but does nothing to make people feel better or take away bad feelings. Thus, presumably, people who are deprived of certain drugs by prohibition, will seek out legal drugs as a substitute (drug-switching) and/or will engage in addictive forms of behavior which do not involve drugs (addiction-switching), such as gambling or overeating. To prove that some level of harm has been prevented by prohibition, prohibitionists must also show that harmful illegal drug-taking behavior has not been replaced by harmful legal drug-taking behavior or by harmful non-drug addictive behaviors.

Harm not prevented by prohibition. This category includes all the harmful consequences of illegal drug use today, excluding those consequences traceable to the impact of prohibition as opposed to drug use per se. That is, we must conclude that

12. *Id.*

13. See, e.g., Bennett, *A Response to Milton Friedman*, Wall St. J., Sept. 19, 1989, § 1, at 30, col. 4.

prohibition has failed to prevent all acts of illegal drug use occurring today in spite of prohibition. But we must be extremely careful to separate, to the fullest extent possible, the harm caused by drug use per se from the harm caused by the fact that drug use is illegal. For example, if a man smokes marijuana today, any harmful consequences of marijuana smoking (which would occur even if marijuana was legal and quality controlled, etc.) would fall into the category of harm not prevented by prohibition. But, if the man is arrested and put through criminal court proceedings, all the financial and other costs of this proceeding fall into the category of harm caused by prohibition. Now if, unknown to the smoker, the marijuana was laced with herbicide sprayed upon it by law enforcement agents with resulting injury to the smoker, this again would amount to harm caused by prohibition.

Thus, we can conclude that any harm resulting from the use of illegal drugs falls into the category of either harm caused by prohibition or harm not prevented by prohibition. From this fact, we can further conclude that no evidence of the harm caused by current illegal drug use, without more, can be utilized as evidence in support of prohibition. Without additional data showing that the repeal of prohibition would increase the level of harmful drug use, evidence of current harm from illegal drug use — even excluding harm caused by prohibition — is of no use to the prohibitionist argument. What prohibitionists must do is (1) demonstrate that legalization would lead to some level of increased use; then (2) use evidence of harm from existing use to show the extent of the harm that would be caused by legalization. But to engage in step (2) without step (1) is meaningless.

Harm related to, but not caused by drug use. Prohibitionists often fall into the trap of scapegoatism. That is, they blame a seemingly endless list of human problems — most of which have been around for thousands of years — on the use of illegal drugs: violence, child abuse, prostitution, spouse abuse, laziness, joblessness, irresponsible pregnant women, etc.¹⁴ But prohibitionists have presented very little evidence that drug use per se is the cause of these problems. It is more likely that drug use is a mere correlative of most of these problems and that both drug use and the other problems have a separate

14. See, e.g., Bennett, *supra* note 5, at 93 (sexual abuse, child abuse); Wilson, *supra* note 3, at 24 (crack babies).

cause — the personality, character and values of the drug user, or perhaps adverse social conditions.¹⁵

We can illustrate this point by a thought experiment. Ask yourself, if a hundred nuns and a hundred congressmen smoked crack, how many would become violent and murder someone? Most reasonable people would likely answer zero. In fact, I am not aware of any wealthy person, physician or pharmacist who became violent after using cocaine, although many thousands of them have used the drug. This suggests that too often the blame for antisocial conduct is placed on the drug and not the person. As Stanton Peele writes, “it is the mark of naivete — not science — to mistake the behavior of some drug users with the pharmacological effects of the drug, as though addictive loss of control and crime were somehow chemical properties of substance.”¹⁶

Consider the following passage:

The desire for crack runs wild and takes madness into its service; any opinions or desires with a decent reputation and any feelings of shame still left are killed or thrown out, until all discipline is swept away, and madness usurps its place When crack has absolute control of a man's mind . . . life is a round of orgies and sex and so on So that whatever income he has will soon be expended . . . and next of course he'll start borrowing and drawing upon capital When he comes to the end of his father's and mother's resources . . . he'll start by burgling a house or holding someone up at night, or to clean out a church. Meanwhile the older beliefs about honor and dishonor, which he was brought up to accept as right, will be overcome by others, once held in restraint but now freed to become the bodyguard of his desire for crack Under the tyranny of his desire for crack he becomes in his waking life what he was once only occasionally in his dreams, and there's nothing, no taboo, no murder, however terrible, from which he will shrink. His desire tyrannizes over him, a despot without restraint or law.

This sad story sounds so familiar and could easily have been lifted from the latest magazine piece on crack. But the

15. Peele, *A Moral Vision of Addiction: How People's Values Determine Whether They Become and Remain Addicts*, 17 J. DRUG ISSUES 187 (1987).

16. *Does Drug Addiction Excuse Thieves and Killers from Criminal Responsibility?*, in DRUG POLICY 1989-1990: A REFORMER'S CATALOGUE 204 (The Drug Policy Foundation, 1989).

passage has been edited to substitute "desire for crack" for the author's term "master passion." The author was Plato, writing more than two thousand years before the invention of crack.¹⁷

Overview. The cost-benefit argument hinges upon whether prohibition causes more harm than it prevents. But prohibitionists have rarely if ever sought to supply evidence that meets this criterion. Rather, prohibitionists have mainly focused on the harm that prohibition has failed to prevent, and have also been guilty of smuggling into their argument various types of harm caused by prohibition and harm related to, but not caused by drug use.

THE POLITICIANS

William Bennett. William Bennett's discussion of legalization appeared in the March 1990 issue of READERS DIGEST. Bennett puts forth four main arguments against legalization:

- (1) Legalization will not take the profit out of drugs;
- (2) Legalization will not eliminate the black market;
- (3) Legalization will not dramatically reduce crime; and
- (4) Drug use is not a victimless crime.

Bennett's approach to the issue is understandable given the lack of cost-benefit evidence for prohibition. He simply denies that legalization would have any benefit at all. This allows him to avoid the difficult task of showing how the benefits of prohibition outweigh the benefits of legalization. Since Bennett "finds no merit in the legalizers' case," he feels no obligation to defend prohibition on cost-benefit grounds.

Bennett argues that since legal drugs would have to be taxed heavily, the black market could undercut the legal price and still make money.¹⁸ At its best, this is intellectually dishonest. There is no admission that the bulk of profits would dry up. For example, if legal cocaine were sold for \$10 a gram with \$5 going for taxes, it is possible that the black market might be able to sell cocaine for \$8 and still make a profit. But that would mean a loss in gross revenue of \$92 since the black market price of cocaine has been about \$100 per gram for several years.

The argument is also self-serving since the prohibitionist can always conjure up some hypothetical level of taxation that would allow a substantial level of black market activity to exist.

17. PLATO, *THE REPUBLIC*, Book Nine (Middlesex ed. 1955) (some archaic terms were deleted from the passage).

18. Bennett, *supra* note 5, at 92.

But carrying the taxation argument to extremes begs the question. To assume very heavy taxation is to negate the assumption that drugs have been legalized. Prohibitionists may not believe that what we have in mind is legalization at close to free market prices, but that is exactly what many of us have in mind.

Serious questions can be raised about whether a black market would continue to exist merely to compete with the legal market for marginal profits. These marginal profits will probably be too small to compensate drug dealers for the risk of selling drugs illegally. The black and grey markets in alcohol and tobacco today are quite small and are not a major social problem.¹⁹ Besides, the black market would have to compete with the legal market not only on the basis of price, but also on the basis of quality and safety. Since legal drugs would be subject to product liability law, an incentive to sell safer drugs would exist in the legal market. This incentive is lacking in the black market.

Bennett makes another question-begging argument — because not all drugs will be legalized, the black market will still supply drugs.²⁰ He wins a cheap victory by simply assuming as true what is in fact hotly disputed. The logic of the legalization argument runs as follows: for any drug X, the social costs of making that drug illegal, exceed the social costs of making that drug legal. That is, the prohibition of any mind-altering drug should have the same impact as the prohibition of alcohol and cocaine have had — loss of quality control, generation of crime and violence, the creation of a criminal subculture, police corruption, clogged courts and prisons, diversion of time, energy and money away from private sector solutions to drug abuse and toward law enforcement efforts.

While there are some drugs that we cringe at making legal, these are the very drugs that the public would cringe at using if they were legalized. The drugs that we feel more comfortable legalizing would for the very same reason be more widely used, and are already widely used. There is reason to believe that the most pernicious drugs would lose out to relatively safer drugs in free market competition. In the legal market, more people use caffeine than alcohol because caffeine is safer than alcohol. More people use alcohol than tobacco because alcohol is less harmful than tobacco. In the illegal market, more people use

19. Most noticeable is the grey market in cigarettes, due to ever-increasing taxes on them. A grey market sells legally produced goods illegally, e.g., to children, without taxes being paid.

20. Bennett, *supra* note 5, at 92.

marijuana than cocaine because marijuana is less harmful than cocaine. More people use cocaine than crack cocaine because they realize that crack is worse. And it is likely that more people use cocaine than heroin because they perceive that cocaine is less dangerous than heroin.²¹ Thus, the fact that a particular drug is pernicious does not suggest that it should remain illegal because its illegality will make it even more pernicious and socially costly, while its very perniciousness will dissuade large numbers of people from using it, particularly when other less pernicious drugs are available for those who want them.

Now let's assume that Bennett is right — not all drugs will be legalized. Let's just say we legalize marijuana, heroin and cocaine and nothing else. Since these drugs constitute the bulk of current black market sales, their legalization would dry up the bulk of the black market. Thus, all of the problems attributable to these drugs' share of the black market would be solved. Naturally, a black market would still exist to supply people with PCP or whatever, but this is not a problem for the legalizers. It would only mean that we were able to persuade the public to solve the bulk of the illegal drug problem, but not the entire illegal drug problem. The problems that would continue to be caused by the small remaining black market could be solved when the consensus of opinion is ready to do so by legalizing the remaining illegal drugs.

As for crack, Bennett correctly points out that it could be made easily from legal cocaine even if crack itself is not legalized.²² But he fails to acknowledge the benefits of such a scheme. The price of crack made from legal cocaine would not be much greater than the legal price of cocaine. Therefore, since the profits to be made would be quite modest, crime caused by crack users to pay for the drug would decline and violence between drug dealers fighting for the "right" to sell crack would also decline.

Bennett argues that a black market would still exist to serve children.²³ Even if true, this would still mean that the bulk of the black market would be eliminated since those under 18 years old comprise only about 7 percent of the cocaine market, while those 18-20 years old comprise another 16 percent of that market.²⁴ But Bennett's argument is misleading. If drug

21. That the evidence on this is mixed does not affect my point.

22. Bennett, *supra* note 5, at 92.

23. *Id.*

24. See NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE: POPULATION ESTIMATES 29 (1988). Actually, it is likely that these younger groups comprise an even smaller percentage of the cocaine market since this NIDA

production is legalized and drug sales for adults are legalized, then any leakage of drugs to minors would constitute a "grey market." From a social cost perspective, a grey market is far preferable to a black market. A grey market generally sells quality-controlled drugs — since it illegally sells legally produced drugs. Profit margins on the grey market are much lower than profit margins on the black market. Thus, all the consequences of high black market profits such as violence between dealers and street crime by addicts would be reduced.

In today's black market, a 12-year-old can buy crack for five or ten dollars from a drug dealer who doesn't care to whom he sells. And a 12-year-old can risk his life selling cocaine to make thousands of dollars. But no 12-year-old can buy bathtub gin or wood alcohol and there are no 12-year-olds risking their lives to make thousands of dollars selling booze on the black market. Some legal alcohol does reach minors, but at least those who sell it to them are legally accountable, and at least the alcohol they consume is not instantly poisonous like it often was during Prohibition. Thus, children would on balance benefit from legalization insofar as it directly affects them, particularly those in inner cities who now live in a violent criminal subculture. Additionally, children would benefit from legalization since they would grow up and live in a freer, safer and more harmonious society.

Bennett argues that legalization would not reduce crime because "many drug-related felonies are committed by people involved in crime *before* they started taking drugs."²⁵ But a comprehensive analysis of the drug-crime connection contradicts Bennett:

Heroin addiction can be shown to dramatically increase property crime levels A high proportion of addicts' pre-addiction criminality consists of minor and drug offenses, while post-addiction criminality is characterized more by property crime."²⁶

This study suggests that many of those who Bennett asserts were criminals before they started *taking* drugs were criminals in that they were *selling* drugs. That is, the illegality of drugs encouraged them to adopt a criminal lifestyle in the first place.

survey does not take account of the greater purchasing power of older people.

25. Bennett, *supra* note 5, at 93; see also Inciardi & McBride, *supra* note 4, at 267, 269; Wilson, *supra* note 3, at 25.

26. Speckart & Anglin, *Narcotics and Crime: An Analysis of Existing Evidence for a Causal Relationship*, 3 BEHAV. SCI. & THE LAW 259, 273 (1985).

So the argument of Bennett and others²⁷ that drug prohibition does not stimulate enormous property crime turns out to be somewhat circular. The fact that so many among the poor and minorities are involved in crime is in large part due to the fact that prohibition has created a criminal subculture in inner city neighborhoods.²⁸

The analytical error here is the failure to realize that prohibition stimulates crime in many ways. First, prohibition creates an entire class of criminals — drug users and sellers — simply by making their activities illegal. The mere illegality of drug use has two main effects: it forces drug users into a criminal subculture to obtain their drugs and it provides many drug users with criminal records or worse — prison — which makes it more difficult to secure legitimate employment, and thus avoid crime. Second, prohibition raises drug prices, forcing poorer users into street crime to support their habits. Third, by making illegal that which millions of people believe is acceptable behavior, prohibition breeds disrespect for law. Fourth, prohibition encourages people to become drug dealers by creating an extremely lucrative black market in drugs. Fifth, prohibition destroys, through drug crime, the economic viability of low-income neighborhoods, leaving young people fewer alternatives to working in the black market. Sixth, prohibition removes the settling of drug-related disputes from the legal process, creating a context of violence for the buying and selling of drugs. Seventh, prohibition diverts enforcement resources away from the prevention of coercive crimes like robbery and rape, thereby increasing the incidence of such crimes. Eighth, prohibition supplies enormous profits which subsidize organized criminal enterprises whose activities unfortunately extend beyond the realm of non-coercive crimes. Finally, prohibition, by giving the police power over desperate criminals possessing large amounts of cash, corrupts many law enforcement officials, thereby decreasing their ability to fight coercive crimes.

Although Bennett suggests that prohibition-related street crime is rare,²⁹ he contradicts himself by citing the case of a “nun who worked in a homeless shelter and was stabbed to death by a crack addict enraged that she would not stake him to

27. Inciardi & McBride, *supra* note 4, at 268-69.

28. Almost “one out of every four young black men in New York State is under the control of the criminal justice system.” N.Y. Times, Oct. 4, 1990, Sec. B, at 6.

29. Bennett, *supra* note 5, at 93.

a fix."³⁰ Then he cites another example of an addict who would do anything to get high including stealing from relatives.³¹ Bennett's assertion, based on mere anecdote, that "crime rates are highest where crack is cheapest,"³² is contradicted by evidence that in 1990, crime was up nationwide, while cocaine prices were also up significantly.³³

Bennett makes the irresistible argument that drug use is not a "victimless crime."³⁴ But this is sheer word play. Such an argument involves changing the definition of "victim" without telling the audience. Drug use certainly is a victimless crime if victim is defined in the traditional sense as one who has been subjected to force or fraud by a criminal. Drug offenses are also victimless crimes because one can be convicted of violating them even though no actual harm has been done to anyone.

Bennett, however, uses the term victimless crime in a totally different sense. Drug use is a "victimful" crime because some of the people who use drugs do bad things to others allegedly *because* of their drug-taking.³⁵ There are numerous problems with this argument. First, it assumes that drug use, as opposed to personality and other factors, is a major cause of harmful conduct. However, it is very difficult to prove this causal relationship. Nevertheless, under legalization, any actual harm a drug user might cause to person or property would be punishable and/or compensable under existing law. Furthermore, greater resources would be available to deal with actual third-party harm from drug use once these resources were no longer devoted to preventing and punishing drug use *per se*. This solution to the problem is far better than punishing all drug users to prevent some from possibly harming others. The rights of all drug users should not be infringed solely because prohibition *might* prevent *some* drug users from causing harm to third parties, when such harm is already unlawful. Besides, outlawing drug use because some users might harm others is self-contradictory since it necessitates

30. *Id.*

31. *Id.* at 93-94.

32. *Id.*

33. Associated Press, August 1, 1990 (1990 murders to exceed 1989 total by 2,000); Associated Press, October 8, 1990 (wholesale price of cocaine up about 35%; retail prices up 19%) (both sources available on LEXIS).

34. Wilson also makes this argument, *see supra* note 3, at 24. A better term for a "crime" which involves neither violence nor property theft is "non-coercive crime."

35. By the same reasoning, alcohol use would be a victimful non-crime.

harming many drug users who themselves have harmed no one.³⁶ Finally, any third party harm caused by illegal drug use today is dwarfed by the third party harm caused by illegal drug laws.³⁷ Ironically, while drug users under legalization would be legally responsible for the harm they cause to third parties, prohibitionists today are not at all responsible for the harm they cause to others. Thus, the moral argument from third-party consequences actually runs in favor of legalization, not against.

Mario Cuomo. In his 1989 State of the State speech, New York Governor Mario Cuomo was sharply critical of drug legalization.³⁸ A skilled lawyer before he went into politics, Cuomo knows how to marshal evidence in support of a case. He also knows the various rhetorical ploys that can be used when hard evidence is lacking. In September 1989, *The Economist* noted that "two senior politicians, Mr. William Bennett (President Bush's drug czar) and Mr. Douglas Hurd (Britain's home secretary), have been stirred to join the [drug legalization] debate," but that "neither Mr. Bennett nor Mr. Hurd offers any positive evidence that prohibition works."³⁹ We can now add Governor Cuomo to this distinguished list for his failure to justify the war on drugs with anything but rhetoric.

In addition to failing to prove his case, the Governor far from rebutted the argument for legalization. The argument for repealing prohibition — that prohibition fails to stop millions of Americans from using illegal drugs, but does succeed in causing black market violence and street crime, while providing drug users with such extras as AIDS and criminal records — is conveniently ignored by Governor Cuomo. Rather than confronting the legalization challenge head-on, the Governor side-steps it with standard rhetorical ploys.

First, the straw-man: "the legalizers are saying this: you've lost the war; you've tried everything you could, and you've lost. So why should we spend any more money in the combat?" There's only one small problem here — no serious proponent of legalization has made this argument. The out-of-

36. The notion that *all* illegal drug users today cause harm by subsidizing dangerous drug gangs, while a flawed argument on its own terms, can by no means be considered an argument against legalization, since legalization would put a stop to this transfer of wealth.

37. Ostrowski, *supra* note 1, at 641 *et seq.*

38. Gov. M. Cuomo, State of the State Address, Albany, New York, (Jan. 3, 1990).

39. *ECONOMIST*, Sept. 16, 1989, at 13.

pocket costs of the war on drugs are almost trivial compared to its human costs.⁴⁰

Second, the *ad hominem* attack: "Let's legalize it and hope that if some kid or somebody else gets addicted, they are not in our family; they are in someone else's family." Translation: legalizers are callous and indifferent. Only advocates of drug war have compassion; advocates of drug peace apparently have none. But when compassion really counted, when compassionate drug warriors in Albany could have saved thousands of lives by allowing clean hypodermic needles to be sold, compassion lost out to the absolutism a war mentality requires.⁴¹

Third, the red herring: legalization equals "surrender."⁴² Legalization is clearly not surrender, anymore than the Chinese students were surrendering in 1989 when they called for the repeal of another failed policy — communism. It is prohibition which surrenders drug production and sales to the black market where extremely dangerous drugs are made by vicious criminals and where artificially high profits stimulate violent battles between dealers. Legalization would in fact be victory over drug dealers who would be out of a job, victory over drug-related violence and crime, victory over drug-related AIDS, victory over police corruption and the social and economic decay caused by the illegal drug business.

Finally, the emotional appeal: "I believe this state must reject this idea as the abandonment of a whole generation of children and adults now caught in addiction and of generations to come who would be caught in addiction. I would not do it to my children. We ought not let this state do it to our children." But legalization is not an abandonment of drug abusers anymore than legalization of alcohol is an abandonment of alcohol abusers. Rather, it is a recognition that such people need to be helped, not hurt. Troubled people need police, guns, handcuffs, courts, criminal records and jails about as much as quarterbacks need interceptions.

It is odd that prohibitionists believe their concern for the welfare of drug users is proven by their willingness to put them in prison next to murderers and rapists, and the callousness of legalizers is proven by their abhorrence of such methods. It is ironic that in the same speech in which the Governor boasts of

40. The out-of-pocket cost of the war on drugs is no more than 5% its total social cost. See generally Ostrowski, *supra* note 1.

41. Ostrowski, *supra* note 1, at 637-39.

42. See also Bennett, *supra* note 5, at 90 ("I never realized surrender was so fashionable until I assumed this post"); Wilson, *supra* note 3, at 28 ("[Our goal was] not to run up the white flag of surrender").

his concern for "our children," he brags of nearly doubling prison cells. But who is going to occupy those cells but "our children," particularly our minority children, seduced by the quick highs and fast bucks of illegal drugs? Then, "our children" who have the misfortune to get mixed up in illegal drugs could well end up as mere statistics in next year's State of the State showing that the Governor can be as tough on drugs as Rockefeller, Nixon and Reagan were before him.

The streets of New York are filled with violent crime and murder. The jails are crammed with drug offenders. The courts are clogged with drug cases. The hospitals are loaded with drug-related AIDS patients. The schools look more like prisons each day with students searched for weapons and beepers. Children are risking life and limb selling a potent, unregulated drug — crack — to other children. Anywhere you look, the evidence of the failure of drug prohibition is patent — everywhere, that is, but in the Governor's State of the State address. Last year was the seventy-fifth anniversary of the war on drugs.⁴³ What Governor Cuomo is really saying is let's have another seventy-five years of failure.

THE ACADEMICS

James Q. Wilson. James Q. Wilson, probably the most influential criminologist in America, had his go at legalization in *Commentary* earlier this year.⁴⁴ He begins his argument by boasting of one of the alleged successes of prohibition — the containment of heroin.⁴⁵ He asserts that intensified law enforcement efforts under President Nixon were responsible for halting a trend toward increasing heroin use. The claim is that the number of heroin users has not increased significantly since 1972 as a result of these efforts. Even if true, this is not the type of argument that is sufficient to justify prohibition. First, the war against heroin did and does produce enormous social costs such as increased crime, corruption and drug-related AIDS.⁴⁶ But Wilson's efforts to explain why some marginal decrease in heroin use was worth the price paid are paltry at best. Prohibition's impact on drug use levels is just the beginning of the inquiry, but Wilson effectively ends there. It is no excuse that the "micro" statistics pertaining to drug use levels are more available than the "macro" statistics pertaining

43. The Harrison Narcotics Act took effect in 1915.

44. Wilson, *supra* note 3, at 21.

45. Wilson, *supra* note 3, at 21-23.

46. Ostrowski, *supra* note 1, at 641.

to social cost, although this is no doubt the case. That we are quite ignorant about the exact consequences of massive interventions into the social fabric,⁴⁷ such as the war on drugs, is a strong argument against such interventions.⁴⁸

Furthermore, even if one could somehow prove that the social costs of heroin prohibition were outweighed by a reduction in the number of heroin users, this fact alone would not be sufficient to vindicate prohibition. We would further have to know whether those deprived of heroin simply switched to some other illegal drug,⁴⁹ or some other legal drug, or to gambling, or to overeating, or to rape or to some other consciousness-altering activity, and what the social costs of these activities were compared to the social costs of the deterred heroin use.⁵⁰ We hear nothing of these matters from Wilson. Most likely, no one, including Wilson has accurate knowledge of these matters, which only means that neither Wilson nor anyone else is able to put forth an argument for prohibition that can withstand methodological scrutiny. Thus, we can dismiss Wilson's heroin argument as incomplete.⁵¹

47. Meaning the patterns of behavior and institutions which arise from the free choices of individuals.

48. See Barnett, *Curing the Drug-Law Addiction: The Harmful Side Effects of Legal Prohibition*, in *DEALING WITH DRUGS* 99 (R. Hamowy ed. 1987); Ostrowski, *supra* note 1, at 636-38; see also Hayek, *The Use of Knowledge in Society*, 35 *AM. ECON. REV.* 519 (1945); T. SOWELL, *KNOWLEDGE AND DECISIONS* (1980).

49. The leveling off in heroin use does correlate with the increasing use of cocaine. More recently, with more enforcement resources directed at cocaine, heroin use appears to be rising. Associated Press, October 8, 1990 (heroin use up in several cities including New York, Dallas and Denver).

50. The problem being that the coercive mechanism of prohibition does nothing to improve the human being or the human condition in general, and thus does nothing to eliminate the urgent need in some people to alter their consciousness. Ostrowski, *supra* note 1, at 619-20.

51. There is an important lesson here for how we can fairly evaluate the efficacy of legalization once it is enacted. The precise effects of prohibition are extremely difficult to trace. We have seen that while it is possible to argue that prohibition caused a reduction in drug use at a certain time, it is difficult to know which consciousness-altering activities those potential drug users engaged in upon being deprived of say — cocaine. Their options were many, but our means of determining this are few or nonexistent. Therefore, it would seem that the real impact of legalization should be measured, not by micro-statistics, but by macro-statistics. That is, legalization should be evaluated negatively only if it seems to produce a substantial increase in social trauma of all types. The measures of social trauma that should be evaluated include rates of murder, robbery, rape, larceny and assault, death among the young and middle-aged, child abuse cases, accidents, unemployment and other measures of economic progress in cities, etc. If legalization correlates with an improvement in these figures or stability in

Assuming that Wilson's heroin argument is incomplete, is it valid as far as it goes? Not necessarily. The problem with evaluating any reduction in the use of an illegal drug is that we do not know how much is attributable to dissatisfaction with the product or changing social fashions or self-restraint. Here again is a critical factual element of Wilson's argument on which he supplies very little data.

Common sense and data contradict Wilson's argument. Common sense suggests that since heroin is a pain-killing depressant, its main appeal lies with those at life's bottoms whose normal state of mind is pain, e.g., "young blacks in Harlem," or soldiers in Viet Nam. To paraphrase Stanton Peele, most people have better things to do than be drug addicts. Historical data suggests that with legal availability, opiate consumption peaks at a small percentage of the population and then may actually decline.⁵²

But the notion of free people acting rationally seems to be foreign to Wilson and his colleagues.⁵³ Rather, he believes that "Society is not and could never be a collection of autonomous individuals." Since an autonomous individual is one whose actions are guided by his own judgment, and such an individual could be called "free," Wilson's statement could be translated: "Society is not and never could be a collection of *free* individuals." The problem here is that society never could be a collection of non-autonomous individuals — our actions must be guided by *someone's* judgment. The only question is will it be our own or will it be another's. Will we be autonomous or will someone be "autonomous" for us?⁵⁴ If we lack the intellectual and moral abilities to run our own lives, how can we possess the seemingly greater intellectual and moral abilities needed to run other people's lives? This is the great dilemma challenging all paternalistic political theories.

The obvious answer to this of course is that "we" do not possess this ability; "they" do. "We" being the general public;

them, it should be judged a success, regardless of what the micro-statistics show. Focusing mainly on the micro-statistics, e.g., usage rates, overdose rates, will tend to produce a biased view of the impact of legalization since the *costs* of legalization are easily measurable, while the *benefits* of legalization will tend to be hidden in the macro-statistics of general social trauma.

52. D. MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL* 41-42 (1987).

53. Bennett, *supra* note 5, at 92-93; Wilson, *supra* note 3, at 26 (both disparaging drug education, i.e., rational persuasion).

54. This discussion was stimulated by Hans-Hermann Hoppe's analysis of the universalization principle of ethics. H. HOPPE, *A THEORY OF SOCIALISM AND CAPITALISM* 127-44 (1989).

“they” being the small number of people who generate public policy ideas and then guide them into legislation.⁵⁵ What the prohibitionist policy elite wants to do is be “autonomous” over the general public when it comes to drugs. That is, they wish to substitute their own judgment and will for what they perceive as the inadequate judgment and will of the public. This is arrogance of the worst kind. Are William Bennett, Mario Cuomo, James Wilson, and James Inciardi are any more qualified to dictate the details of our personal lives than Leonid Brezhnev or Mao-Ste Tung were able to dictate the details of our economic lives?

Wilson argues that “we all have a stake in ensuring that each of us displays a minimal level of dignity, responsibility, and empathy.”⁵⁶ The problem is that these moral qualities are each the function of the individual’s exercise of moral *choice*. It is precisely the goal of prohibition to eliminate choice. But the elimination of choice at the same time eliminates genuine morality. As Henry Veatch writes:

No human being ever attains his natural end or perfection save by his own personal effort and exertion. No one other than the human individual — no agency of society, of family, of friends, or of whatever can make or determine or program an individual to be a good man, or program him to live the life that a human being ought to live. Instead, attaining one’s natural end as a human person is nothing if not a ‘do-it-yourself’ job.⁵⁷

Thus, Wilson’s coercive paternalism must fail in its mission to make people better. It merely restricts “the opportunity for vice which simultaneously restricts the opportunity for virtue. In the end such efforts promote not moral excellence, but a drab form of moral mediocrity and conformity.”⁵⁸

Wilson has every right to argue that chronic cocaine use “debases” life.⁵⁹ But he should accept the fact that others share with him the same faculty of reason that allowed him to reach that conclusion in the first place. Wilson, Cuomo, Ben-

55. Thomas R. Dye estimates that no more than 3,000 people comprise the public policy elite in the United States. T.R. DYE, WHO’S RUNNING AMERICA?: THE REAGAN YEARS 14 (1983).

56. Wilson, *supra* note 3, at 24.

57. H. VEATCH, HUMAN RIGHTS: FACT OR FANCY? 84 (1985).

58. Uyl, *Freedom and Virtue Revisited*, in MAN, ECONOMY, AND LIBERTY: ESSAYS IN HONOR OF MURRAY N. ROTHBARD 202 (W. Block and L. Rockwell, Jr. eds. 1988).

59. Wilson, *supra* note 3, at 26.

nett and other advocates of drug abstinence should therefore aim arguments, and not guns, at other people.

Wilson argues against any experimentation in legalization: "If cocaine is legalized and the rate of its abuse increases dramatically, there is no way to put the genie back into the bottle, and it is not a kindly genie." This point overlooks the fact that the "genie" is already out of the bottle. Millions of Americans are using cocaine and there is apparently nothing the government can do to stop them. The likely effect of legalization would be to make black market production and distribution systems obsolete. Pharmaceutical companies and drug stores would take the place of the black market. If legalization turned out to be a failure, then the supplies of cocaine could be fairly easily confiscated. No doubt, clever speculators would stockpile cocaine, betting that it would be re-prohibited. But the impact of stockpiling in making cocaine available after re-prohibition would be balanced against the major disruption of previous black market arrangements. Each new drug prohibition benefits from a one-time reduction in drug supplies, due to time it takes for a functional black market to develop.

Wilson believes the British experience with heroin maintenance argues against legalization. The British system worked only until it was challenged by a serious drug problem in the 1960s, he argues. What he fails to mention is that the enforcement approach also cracks under the pressure of an increased demand for drugs. The classic British system was scaled back in the late 1960s, but drug use still increased. Much of this increased use was fueled not by medically dispensed heroin, but by "cheap, high-quality heroin, first from Iran and then from Southeast Asia,"⁶⁰ as Wilson himself admits. Thus, both heroin maintenance and enforcement failed to deter heroin use when there was a demand for such use. The difference is that as the British moved toward the criminal model of drug control, heroin users were forced to turn to the ever-waiting black market, leading to an "explosion of heroin importation" in the 1980s:⁶¹ "the evidence suggests that the illicit market in heroin and the involvement of criminal syndicates, increased in direct relationship to the policy of the clinics in rapidly cutting heroin prescribing."⁶²

60. *Id.* at 23.

61. Madden, *The Decline of Long Term Prescribing of Opioid Users in the United Kingdom*, 82 BRIT. J. ADDICTION 457 (1987).

62. Leach, *Leaving it to the Market*, NEW STATESMAN, Jan. 4, 1985, at 9.

Even the British government now acknowledges a "growing incidence of serious crime associated with the illegal supply of controlled drugs" and describes the drug problem as "the most serious peacetime threat to our national well-being."⁶³

Wilson and other prohibitionists argue that drugs such as cocaine are far too addictive to legalize. Legalizers respond that the data suggest that only a small percentage of those who currently use cocaine become addicted. Wilson responds: "the percentage of occasional users who become binge users *when the drug is illegal* (and thus expensive and hard to find) tells us nothing about the percentage who will become dependent when the drug is legal (and thus cheap and abundant)."⁶⁴ Of course, legalizers have no choice but to use data on illegal cocaine use since cocaine is illegal. One of the costs of prohibition is that it makes reliable data very difficult to obtain.

Nevertheless, this data does have value. It shows that the vast majority of those who have tried cocaine did not, for a variety of possible reasons, become chronic users. These reasons could include: risk of arrest, price of the drug, fear of overdose, fear of addiction, inconvenience of obtaining the drug, fear of using a potent drug, or dissatisfaction with the effects of the drug. We do know that cocaine is not so addictive that most people will continue to use it in spite of the risks and costs mentioned. But that is exactly the impression one gets from reading prohibitionist literature. The fact that the vast majority of those *who have tried cocaine* have made a rational cost-benefit judgment not to use it, suggests that the prohibitionist portrait of addictive illegal drugs is overdrawn.

Furthermore, the unique value of data showing low incidence of cocaine addiction among those who have illegally tried it, is that these people are arguably the least cautious and least risk-averse people in the population, and most likely to be prone to drug problems initially. Thus, the fact that no more than 10% of impetuous people who try cocaine become addicted suggests an even lower rate of potential addiction among the more cautious general population. Inciardi and McBride's point that "most people in the general population have never had a chance to use cocaine,"⁶⁵ is circular. They may not have had a chance to use cocaine, because, being more cautious and less interested in drug experimentation than their

63. *The Prevention and Treatment of Drug Misuse in Britain* (British Information Services, 1985) at 1.

64. Wilson, *supra* note 3, at 24 (emphasis supplied).

65. Inciardi & McBride, *supra* note 4, at 271.

drug-using fellows, they have chosen not to place themselves into situations where cocaine would be available.

The conclusions reached from examination of data on illegal drug use are consistent with data from times and places where drugs are either legal or decriminalized. Data on cocaine use in The Netherlands suggests that liberalizing drug law enforcement does not necessarily result in greater use.⁶⁶ The data available from the time cocaine was legally available suggest that cocaine use was not a major problem back then. Prior to the first national prohibition of cocaine, less than one percent of Americans regularly used the drug.⁶⁷ Furthermore, as a *legal* drug, cocaine did not cause anything like the social trauma now associated with it. A search through the New York Times Index for 1895-1904 — years of peak drug use and minimum legal controls — for articles about the negative effects of cocaine use, found none.⁶⁸ In contrast, there were 1,657 articles about the cocaine problem during the peak years of the drug war — 1979-1988.⁶⁹

The basic error that prohibitionists make in projecting large increases in drug use under legalization is to separate the seductiveness of drugs from the perniciousness of drugs. When arguing that increased use would occur, the “short-lived euphoria”⁷⁰ is emphasized. Then, when arguing why increased use should not be allowed to occur, the “severe depression”⁷¹ is emphasized. But the ups and downs of drug use are part of one package for the user. To gain the pleasure, he must endure the pain. Both factors must be considered when projecting future rates of drug use. In sum, drug tolerance and withdrawal serve as a natural check on drug use.

James A. Inciardi and Duane C. McBride. Inciardi and McBride published the first detailed critique of legalization in 1989.⁷² Their primary criticism of the concept of legalization is a strange one: “current legalization proposals are not proposals at all.”⁷³ That is, legalization proposals do not address all

66. Engelsman, *The Dutch Model*, NEW PERSP. Q. (Summer 1989) at 44-45.

67. Kolb & Du Mez, *The Prevalence and Trend of Drug Addiction in the United States and the Factors Influencing It*, 39 U.S. PUB. HEALTH REP. 1181 (1924).

68. However, one article suggested that firemen not use cocaine in their eyes to fight the effects of smoke because it might become habit-forming. N.Y. Times, Jun. 25, 1987, at A26, col. 1.

69. See N.Y. TIMES INDEX 1979-1988.

70. Wilson, *supra* note 3, at 23.

71. Inciardi & McBride, *supra* note 4, at 266.

72. *Id.* at 259.

73. *Id.* at 261.

of the detailed regulatory issues that prohibitionists would like them to address. It is difficult to think of other major policy debates that focused, not on broad questions of morality, cost and benefit, but on regulatory details. Here again, we see prohibitionists adopting a rhetorical strategy in the absence of reliable data in support of prohibition. Since the prohibitionists apparently have no cost-benefit data to support their policy, they developed the red herring of "how will it work" questions. Although the prohibitionists claim not to know what legalization would mean, that does not stop them from positing a huge increase in drug use under legalization, apparently assuming a free market model in the process.⁷⁴ Conversely, it does not stop them from arguing that due to various regulatory restrictions, legalization will not eliminate the black market.⁷⁵

The entire subject of implementing legalization should be guided by the insight that *any* system of legalization would be better than the current drug war or any escalation of that war. That point settled on cost-benefit grounds,⁷⁶ we can move to the issue of how far legalization should go. That in turn is a question, not of minute detail, but of several major issues that need to be resolved. A legalization proposal is "complete" when its author has stated a clear position on those issues — bill drafters can do the rest. Those issues are as follows:

- (1) Which drugs should be legalized?
- (2) Should there be potency restrictions?
- (3) Should there be age restrictions?
- (4) Should sales be reduced to "addicts"?
- (5) Where should drugs be sold?
- (6) Should there be a free market as to —
 - (a) price?
 - (b) advertising?

Other questions along these lines could be asked. But all such issues can be merged into one large question: which legalization regime is appropriate given legalization's risk-benefit ratio? A complete free market would present the greatest risk of increased drug use, but would eliminate the most cost because it would eliminate the black market. On the other hand, the legalization of hypodermic needles would be the least risky, but would also eliminate the fewest costs. A middle ground proposal such as maintaining addicts while in treatment would be less risky than a free market, but not nearly as effec-

74. Bennett, *supra* note 5, at 91.

75. *Id.* at 92.

76. See Ostrowski, *supra* note 1, at 641.

tive in eliminating the black market and its attendant evils. Deciding which legalization model is best involves the following steps:

- (1) evaluate the costs of prohibition (the elimination of which represents the potential benefit of legalization);
- (2) evaluate the risks of full legalization;
- (3) make a judgment as to which element has more "weight";
- (4) choose a legal regime that is appropriate given step (3).

Broadly speaking, there will be three responses to step (4). First, prohibitionists will assert that in *no* legal regime will the benefits of legalization outweigh the risks (costs). Second, those who believe that the benefits of legalization greatly outweigh the risks of ready access to drugs, will tend to favor a relatively free market model of legalization, usually dubbed "the alcohol model." Finally, those who concede that the evils of prohibition must be reduced, but who are greatly concerned with ready public access to drugs, will tend to favor regimes of heavy regulation, featuring high taxes, a total ban on advertising, etc. Thus it is ironic that prohibitionists, who would oppose legalization even if they were allowed to choose the details, have the greatest concern over the details of legalization. The debate over the details should be between those legalizers who favor a free market model and those legalizers who favor a regulatory model.

This writer, believing that the benefits of legalization *far* outweigh its risks,⁷⁷ favors the alcohol model. This model was outlined by David Boaz:

When we legalize drugs, we will in all likelihood apply the alcohol model. That is, marijuana, cocaine, and heroin would be sold only in specially licensed stores — perhaps in liquor stores, perhaps in a new kind of drug store. Warning labels would be posted in the stores and on the packages. It would be illegal to sell drugs to minors, now defined as anyone under 21. It would be illegal to advertise drugs on television and possibly even in print. Driving under the influence of drugs would be illegal, and there would be added penalties for committing crimes under their influence. . . .⁷⁸

77. See generally Ostrowski, *supra* note 1.

78. Boaz, *The Consequences of Prohibition*, in *THE CRISIS IN DRUG PROHIBITION* 6 (D. Boaz ed. 1990).

The question of how to legalize is more a question of politics than policy. The task is to construct a proposal which meets the goal of ardent legalizers — elimination of the black market and its numerous trauma — while at the same time addressing the concerns of the sympathetic public that drugs be kept from children and kept off television. Boaz's alcohol model achieves this compromise.

Returning to the major questions facing proponents of legalization, my answers would be as follows: Which drugs should be legalized? All consciousness-altering drugs.⁷⁹ Should there be potency restrictions? No, because this would encourage grey market production with a loss in quality control. Should there be age restrictions? Yes, the age of consent in each state. Should sales be restricted to "addicts?" No, this scheme would not substantially eliminate the black market. Where should drugs be sold? In specially licensed stores. Should there be a free market as to — (a) price? Yes. (b) advertising? Advertising on television should be restricted. Private social pressure should be relied upon to restrain other methods of advertising.⁸⁰

Inciardi and McBride concede that legalization would reduce the systematic violence associated with the illegal drug trade, but assert that "in all likelihood *any declines in systematic violence would be accompanied by corresponding increases in psychopharmacologic violence.*"⁸¹ The problem here is that, while systematic drug violence is estimated to annually cause about 825 murders and murders incident to drug-related street crime cause an additional 1,200 murders each year,⁸² there is no reliable estimate of murders allegedly caused by the chemical effects of illegal drugs. When the New York City Police Department announced that 38% of murders in the city in 1987 were "drug-related," Deputy Chief Raymond W. Kelly explained: "when we say drug-related, we're essentially talking about territorial disputes or disputes over possession We're not talking about where somebody is deranged because they're on a drug. It's very difficult to measure that."⁸³

79. See discussion on William Bennett, *supra* at notes 18-37 and accompanying text.

80. For example, many newspapers do not carry advertisements for sexually explicit movies, Nazi party rallies, etc.

81. Inciardi & McBride, *supra* note 4, at 273 (emphasis in original). See also Wilson, *supra* note 3, at 25.

82. Ostrowski, *supra* note 1, at 647-51.

83. N.Y. Times, Mar. 23, 1988, at B1.

Thus, there is no basis to argue that an increase in chemically-induced murders would negate the reduction in drug-related murders that legalization would certainly cause. When the drug most associated with chemically-induced violence — alcohol — was legalized, the murder rate dropped dramatically.⁸⁴

Inciardi and McBride's paper is marred by the following rhetorical tirade: "The legalization of drugs would be an elitist and racist policy supporting the neocolonialist views of underclass population control."⁸⁵ The notion that legalization is "neocolonialist underclass population control" is gibberish. More intelligible is the now common charge that legalization is a racist proposal.

The charge of racism is of mostly psychological significance. First, it is the type of red herring that is thrown out by those who are devoid of both methodology and data to support their position. Second, the charge of racism is interesting because it requires as a premise the notion that blacks are less capable of acting responsibly under conditions of freedom than whites. This comes quite close to being a racist belief itself. But it is belied by the facts. In the most vulnerable age group — 12-17-year-olds, whites are more likely than blacks to have used alcohol in the last month (27.4 to 15.9%), cigarettes (13.9 to 5.1%), marijuana (6.8 to 4.4%), cocaine (1.3 to less than 1%),⁸⁶ and psychotherapeutics (2.9% to 1.1%).⁸⁷ In the other age groups, illegal drug use among whites was higher than among blacks in each group except those over the age of 35.⁸⁸

Since no prohibitionist has produced evidence of intentional racism among legalizers, what they must mean is that legalization would be racist in effect. But the reverse is true — it is prohibition which is racist in effect. In general, a greater portion of prohibition's costs are born by those in minority communities than by those in white communities. Even Wilson admits this.⁸⁹ In general, the benefits of prohibition, if any, are disproportionately felt in white areas. The reasons for this are fairly simple. It is low-income people who are more likely to sell drugs than high-income people. Therefore, drug markets and the violence they stimulate tend to be located in low-income neighborhoods. Since drug suppliers and retailers operate there, drugs are more readily available in low-income

84. Ostrowski, *supra* note 1, at 641.

85. Inciardi & McBride, *supra* note 4, at 279.

86. Author's estimate based on 1988 NIDA study, *supra* note 24.

87. See generally 1988 NIDA survey, *supra* note 25.

88. *Id.* at 18.

89. Wilson, *supra* note 3, at 25.

areas than in high-income areas. Furthermore, it is low-income users, naturally residing in low-income areas, who tend to commit the street crime due to the high price of illegal drugs. Higher income users are more likely to dip into their savings accounts, take a second mortgage or embezzle at work. Finally, while whites sell drugs, black dealers tend to be arrested more frequently. Blacks are arrested on drug charges out of proportion to their level of drug use.⁹⁰ In sum, the notion that legalization is a racist policy is absurd.

Wilson's claim that "people are not calling for legalization" in low-income neighborhoods⁹¹ is misleading. Two recent polls show that blacks are supporting legalization somewhat more than the national average.⁹² The claim by many whites that legalization is a racist policy apparently has not been accepted by blacks themselves.

ELITISM AS THE UNIFYING THEME OF THE PROHIBITIONISTS

In 1990, a Senate Judiciary Committee report⁹³ concluded that the nation's homicide toll would break a decade-old record in that year, largely because drug dealers are fighting over "scarce" supplies of cocaine, using assault rifles as their weapon of choice. It appears that the government — perhaps unwittingly — has finally conceded that drug prohibition causes violent crime and murder. For what else can cause allegedly "scarce" supplies of cocaine but anti-drug law enforcement? Perhaps the next admission will be that drug prohibition — by making clean needles scarce — caused the drug-related AIDS catastrophe. Other admissions could follow in rapid succession: that drug prohibition stimulates a massive amount of street crime. Prohibition clogs the courts and prisons, corrupts policemen, fosters a criminal subculture in poor neighborhoods, makes drug dealers rich, and so on.

What is the point of a policy which causes such a mess? Stripped to its essence, drug prohibition is based on the undemocratic⁹⁴ belief of an elite,⁹⁵ that while *they* are intelli-

90. See N.Y. Times, Oct. 4, 1990, at B6.

91. Wilson, *supra* note 3, at 25.

92. L.A. Times, Dec. 12, 1989; *Targeting Systems, Inc.*, Feb. 4, 1990.

93. SUMMARY OF FINDINGS OF A MAJORITY STAFF STUDY PREPARED FOR THE USE OF THE SENATE COMMITTEE ON THE JUDICIARY, 101st Cong., 2d Sess. 100 (1990).

94. "Democracy" here defined as a social system in which, in addition to being given an equal voice in choosing their rulers, individuals for the very same reason are given a large measure of control over the details of their personal lives.

gent enough and responsible enough to see the wisdom of avoiding harmful drug use, the vast bulk of the American people are not. “[Americans] would be up to their necks [in drugs] under legalization,” warns William Bennett.⁹⁶ Only the threat of jail time will deter Americans from destroying themselves with drugs, the prohibitionists believe. Prohibition is therefore premised on a denial of the intelligence and responsibility, and thus the rights and freedoms of the American people to run their own lives.

In short, because the drug warriors don’t trust the American people to act responsibly, they are supporting a policy they now admit causes violence and murder across America. But when all the ugly consequences of prohibition are laid bare, serious questions arise, not about the intelligence and responsibility of the American people, but about the intelligence and responsibility of the prohibitionists. Is it intelligent to support a policy which creates a criminal black market worth more than many large industries combined? Is it intelligent to remove potent drugs from any sort of legal regulation or quality control? Is it responsible to support a policy which causes so much pain and suffering for so many people: drug murder victims, residents of high crime areas, drug-related AIDS victims, and residents of countries like Colombia where drug terrorism is a fact of daily life?

Prohibitionists — whose touchstone is preventing harm to innocent third parties caused by drug users — have rather unintelligently and irresponsibly supported a policy which produces a massive amount of harm to innocent third parties.

Now, in their defense, it can be said that prohibitionists did not necessarily intend to create all these negative side effects. They simply did not know in advance that they would occur. True enough. But no one does or can know all the consequences of grand social experiments like the war on drugs. We’re just too stupid. We just don’t have the brains required to run other peoples’ lives.

Since we lack the skill to foresee all the negative consequences of telling others how to live, we should restrain that powerful impulse in the first place. Prohibitionists — who

95. “Elite” meaning a group which is able to dictate coercive behavioral controls to the general public, based on their belief that the public is unable to decide certain matters for themselves due to their moral and intellectual inferiority. For example, Wilson writes, “great personal commitment” is “in short supply among . . . young people, disadvantaged people . . .”, Wilson, *supra* note 3, at 27.

96. Bennett, *supra* note 5, at 91.

believed they were an elite group who could micro-manage other people's personal affairs need to learn self-restraint and humility. They need to realize that far from being superior to the American people in running their lives; they are in fact inferior. With all our imperfections and limitations, we individual Americans are better able to manage our own lives than politicians and bureaucrats and policemen and drug czars.

