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Towards New Perspectives on Drug Control: A Negotiated Settlement to the War on Drugs

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Abstract

The terms of American drug policy are conceived on the model of the current rhetoric of a war on drugs in which victory must be unconditional, namely, no drug use.

KEYWORDS: drug, control, war

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The terms of American drug policy are conceived on the model of the current rhetoric of a war on drugs in which victory must be unconditional, namely, no drug use. I believe that the terms both of this policy and its supporting rhetoric are radically misconceived both on grounds of political morality and of effectiveness. If it would be desirable to reduce drug use in the United States (which I am prepared to concede), that end could be more sensibly achieved without inflicting on the body politic the costs in political immorality of current drug policy. In this brief expose, I summarize arguments which I have made elsewhere to the effect that our prohibitory drug policies are both morally wrong as well as remarkably ineffective,¹ and call for a negotiated settlement of the "war on drugs." This would allow sensible regulatory policies (akin to those familiar in the regulation of alcohol and tobacco sale and use) to shape drug use in ways less crassly violative of a decent respect for persons.

I. Against a Prohibitionist Drug Policy

My objection to our current prohibitionist drug policy is that its prohibitions either fail to rest on any coherently defensible theory of secular harms or worsen whatever harms are incident to drug use.

The first point is an issue of philosophical liberalism: In a community of persons committed to radically diverse moral and religious traditions, the just scope of criminal sanctions must be limited to the enforcement of those public standards of action and forbearance from action which secure respect for general goods which all can accept as the conditions that enable them to pursue their ends, whatever their ends may be. Put simply, criminal sanctions must be justifiable in

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1. See Richards, *Drug Use and the Rights of the Person: A Moral Argument for the Decriminalization of Certain Forms of Drug Use*, 33 RUTGERS L. REV. 607 (1981); D. RICHARDS, *SEX, DRUGS, DEATH AND THE LAW: AN ESSAY ON HUMAN RIGHTS AND OVERCRIMINALIZATION* 157-212 (1982).

terms of protecting persons from harms, the deprivation of such general goods.² But, the prohibition of drug sale and use often cannot be defended on such grounds. Often, the distaste for forms of drug use reflects not neutral assessments of imminent risks to life or health, but ideological judgments about legitimate experience and even life style (the role of one drug as opposed to another drug or activity in different patterns of social life). The enforcement of such judgments through criminal prohibitions thus deprives people of the right to make reasonable judgments about the regulation of consciousness, mood, and experience (an aspect of the general good of control of one's mind) either where there is no risk to life or health, or where such risks might reasonably be taken in view of their role in the larger pattern of a well lived life. Not only do these prohibitions either fail to rest on any harm or on any harm sufficient to justify prohibition, but the harms they do combat are often incoherently pursued. What coherent theory of harms can explain the different ways our law treats alcohol and nicotine use in contrast to marijuana and cocaine use? A dominant cultural consensus of legitimate drug use (alcohol, nicotine) enjoys a kind of cultural hegemony at the expense of a genuine pluralism of alternative cultural patterns, ways of life, and spiritual perspectives. The true nature of the judgments underlying our prohibitory drug laws is reflected in both the substance and rhetoric of the "war on crime": The aim is not a reasonable concern with shifting patterns of drug use in ways that heighten the benefits and reduce the harms, but the ugly Manicheanism of the wars of religion.

The consequence of this uncompromising prohibitionist and extirpatory policy may have been, if anything, to tilt the balance of drug use in more harmful directions than otherwise. For example, because the Food and Drug Administration does not regulate the sale of heroin, the buyer is never sure of what she is getting and may accidentally take a fatal overdose. The lack of appropriate medical supervision over the sterilization of hypodermic needles used to inject heroin accounts for the diseases found at the site of injection. In addition, the illegality of drug use discourages the addict from seeing a physician. A physician, if consulted, might detect symptoms of illness that are masked by the addiction. Malnutrition, for example, is common among addicts and is

2. The *locus classicus* for this argument is John Stuart Mill's *ON LIBERTY* (Alburey Castell ed. 1947) (originally published 1859). An extremely important recent restatement of Mill's argument is Joel Feinberg's *HARM TO OTHERS* (1984). Cf. 2D. RICHARD T. ANDERSON AND THE CONSTITUTION (1986).

caused both by lack of interest in food and by a lack of money due to the crime tariff (the excessive price of the drug attributable to the costs of illegality—avoiding police detection). In short, the evils of heroin use, often alleged as a ground for criminalization, may be fostered by prohibitory criminalization; many of these dangers could be appreciably reduced if heroin use were legal and regulated, as it is in Britain.³

II. Favoring a Regulatory Drug Policy

I believe that this kind of consequence of a prohibitory policy (namely, worsening, not mitigating harms) pervades any such policy which unjustly criminalizes conduct on sectarian or ideological grounds which fail to accord a fair respect for people's judgment about general good. Because reasonable people know that the prohibitory laws are unjust in principle, the legitimacy of such laws is undermined by both a sense of hypocrisy about the underlying judgment of harms and a sense of injustice about its contempt for personal judgment. Disobedience to such laws is therefore natural at least in a political and constitutional culture as rights-based as the United States. And because the policy of such laws is not regulatory but prohibitory, a public — not inclined to obey laws which create evil where none often naturally exists — is also deprived of any reasonable regulatory guidance about realistic risks of harms to which they would give weight if they had confidence that the assessments were realistic and were addressed to their sense of self-respect as persons responsible for making such assessments and decisions. In effect, the fictionalization of harms (used to justify prohibitionist extirpation) distorts appreciation of the realistic risks of harms from certain kinds and contexts of drug use.

In the nature of things, the proper policy—to achieve both these desiderata (realism and respect for persons)—is not our current prohibitory policy, but a regulatory policy. This should be keyed both to realistic assessments of levels of harm and circumstances of use in which people are reasonably apprised of such harms and positioned to reduce them appropriately (including, where appropriate, licensed sale and use⁴) in light of their judgment about proper trade-offs between these risks and other benefits. The current legal treatment of alcohol and nicotine sale and use is a useful analogy. Though both alcohol and nico-

3. For pertinent citations, see *SEX, DRUGS, DEATH AND THE LAW*, *supra* note 1, at 167-68 and accompanying notes.

4. See *id.* at 190-92.

tine use often inflict a balance of harm over benefit, a regulatory policy has been found to be both more respectful of a just right of personal judgment in these matters and for that reason more likely to lead to patterns of use less harmful over all than a prohibitory policy. If Americans are, for example, now drinking less, that may be because people know that their responsible judgment at least in these matters is respected and because they exercise such responsible judgment with confidence that the cumulative medical evidence about its harms to health is realistic.

It is wholly consistent with this approach to drug policy that one believe that levels and kinds of drug use in the United States often do more harm than good, and that steps should reasonably be taken to shift this balance. My responsive point would be that a prohibitory policy (resting on both a normatively inappropriate and unrealistic end—total extirpation) is not a reasonable step in this direction and that a regulatory policy is.

If our prohibitory drug policy is as wrong-headed and as self-defeating as I believe it is, the answer is to discontinue forthwith the "War on Drugs." We need rather a kind of negotiated settlement in which the current level of illegal drug sales and use might be a kind of working *modus vivendi* if sellers and buyers agreed to observe appropriate regulations of sale and use keyed to realistic assessment of harms. Both society and the drug trade would gain from this negotiated settlement, and that would be the key to its political realism and stable workability. Society would secure a regulatory interest in shifting patterns of drug use towards a balance of benefit over harm; the drug trade would secure markets unhampered by the substantial costs of the concealment of illegality (the crime tariff). It would suffice for the realism and workability of such a negotiated settlement that there is some equilibrium point or range of equilibrium points in which society would gain more control over both levels and kinds of drug use (than it currently has) and the drug trade would retain sufficient profitability even with lower prices because the exorbitant costs of illegality would evaporate (maintaining private armies, smuggling, etc.). Indeed, legality itself might be a status reward independently valuable to relevant businesspeople; people in the drug trade would be no less (and no more) reputable than Seagram. The measure of success of this program would not be ending drug use but shifting current patterns of drug use into less destructive forms through engaging (not degrading) the responsible judgment of people.

This is, of course, a distinctly nonutopian solution to the drug