Nova Law Review

Volume 11, *Issue* 3 1987 *Article* 6

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Abstract

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KEYWORDS: war, drugs, society

Vice Policy in a Liberal Society: An Analysis of the Impasse in the War on Drugs*

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I. Theoretical Foundations of the Current Muddle

The liberal order rests on the assumption that individuals making their own choices about their own well-being will make better choices for themselves than the state could choose for them. The liberal order of free markets and free individual choice of personal consumption cannot easily deal with the need, real or perceived, to control a range of market-mediated consumption activities believed to be morally degrading, socially dangerous, or otherwise noxious. Prostitution, pornography, gambling, and the use of intoxicating or habit-forming substances ("drugs") are all potential subjects of vice control.

Our current vice control policies — including our policies concerning the sale and consumption of intoxicants — are incoherent and frequently counterproductive. In part, this stems from conflicts between liberal values and institutions and strong illiberal currents of belief. The Moral Majority may have renamed itself Liberty Federation, but its leaders do not believe that individuals should be at liberty to choose to consume prostitutes' services, pornographic movies, casino gambling, or heroin. They believe that the decision to consume any of those commodities is necessarily wrong, due to the nature of the activities, the nature of human beings, and the structure of the revealed moral law. They further believe that limiting the scope of those wrong choices is a legitimate governmental function. When these "Biblical" beliefs are widely held in an institutionally liberal society, some incoherence of policy is a natural result.

But some of the incoherence and irrationality comes from a failure to think clearly about the *liberal* bases of vice control policy. As long as we insist on thinking of all vice control as representing the incursions of Babbitts and Mrs. Grundys into what ought to be unconstrained

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* This article is a revised version of an article appearing in 6 J. POLICY ANALYSIS 242 (1987).

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choices — as long as we reason as if there is no difference, in principle, between forbidding the sale of PCP to 14-year-olds and forbidding the sale of chocolate to overweight adults — we cannot begin to think seriously about what a liberal vice control policy should look like. It should not surprise us if the resulting policies are both illiberal and unsuccessful.

In what follows, I will argue that there is good theoretical basis for a liberal vice policy, at least if we take liberalism to be what John Stuart Mill taught rather than what Robert Nozick and the Cato Foundation think he should have taught. In addition, I will explain that basis and how it might be applied to the analysis of drug policy. I deliberately draw most of my examples from the licit intoxicant alcohol and licit addictive nicotine — this to demonstrate that the first step in rationalizing drug policy is to consider currently licit and currently illict drugs together rather than separately.

II. Reasons for Intervention

My analysis begins with the fundamental Millian assumption that it is the business of the state to allow individuals to advance their own welfare according to their own lights rather than to enforce on them some vision of the good life. Under what circumstances would that assumption still allow state intervention in private consumption activities and the production activities which serve them?

External Costs in Consumption. Clearly, where my consumption activities directly affect the welfare of others, an optimum will not be achieved unless those external effects are brought home to me. Smoking in a crowded elevator is one obvious example: the slogan "It's all right to smoke as long as you don't exhale" makes the point.

External Costs in Production. Your owning and using ivory billiard balls is your business; your buying them, by creating a market for smuggled ivory, interferes with my ability to see live elephants (or just to derive satisfaction from the knowledge that they exist). If the import and sale of ivory is easier to control than elephant poaching, a consumption restriction may well substitute for production controls. The same principles apply to "snuff" movies and photographs of children being used sexually.

Behavioral Consequences of Consumption. If the civil and criminal laws were perfectly and costlessly enforceable, then any tendency of some consumption behaviors to produce subsequent wrongful acts by the consumer could be adequately controlled by lawsuits and prosecutions. In fact, however, our civil and criminal laws do a miserable job, and rely almost exclusively on self-control by citizens. Consumption activity that weakens self-control — alcohol consumption is the most obvious example — therefore both further strains the capacity of the system and leads to an increase in the number of wrongful acts committed.

As a Millian liberal, I should not care whether you get drunk; but I should care if you get drunk and beat your children, drive your car into mine, or maim someone in a barroom brawl. Again, liquor may be easier to control than inebriated behavior.

The practical importance of the external costs of alcohol consumption is not subject to much dispute: from one-third to one-half of the automobile accident toll (45,000 deaths, some multiple of that number of maiming injuries, billions of dollars in medical bills and material damage); some large fraction of the child and spouse abuse; some large fraction of the other violent crime (half of imprisoned felons report having been drinking when they committed their crimes; one-quarter reports having had more than 8 ounces of absolute alcohol — about 16 drinks — in the previous 24 hours). The extent to which alcohol controls would reduce these costs is far more speculative. Under current conditions, only PCP among the illicit drugs appears to be a frequent cause of violent behavior after consumption, as opposed to (sometimes violent) acquisitive crime to gain the wherewithal for purchase.

Pecuniary Externalities. We extract taxes from those who work both to support common needs and to assist the poor. We are not, therefore, perfectly indifferent to consumption activities that tend to depress earning power.

Citizenship and Personal Responsibility. As citizens, we have common responsibilities for political life. We also rely on our fellow-citizens to adequately discharge a wide range of private responsibilities — as parents most of all, but also as neighbors — which their default would throw on the state. If it is the case (I am ignorant of the evidence) that heavy alcohol users are less attentive citizens, less competent parents, less public-spirited neighbors than moderate users or abstainers, we have reason to think about restricting alcohol use even if we regard the private welfare of drinkers as being none of our concern.

Failures of Individual Self-Control.

A. *Children.* No one would allow a baby to drink lye in the name of non-interference with private consumption activities; the baby is not capable of understanding the consequences of its actions. I would claim that a sixth-grader who has never awakened with smoker's hack is almost equally incapable of a rational choice about taking up tobacco. Clearly, the more profound and irreversible the effects of a given consumption activity (nicotine addiction is one example; schizophrenia from PCP use another) the more reason there is to limit a child's immediate freedom to choose in favor of keeping his options open for the future. Again, in a perfect world, the job of limiting the child's consumption could be left entirely to his parents; in the real world, parents as a class may need the help of the state, and the state may even insist on foreclosing certain options. (If a parent allowed a child to swallow lye, we would regard that parent as neglectful; is PCP fundamentally different?)

Vices that make it more difficult for children to learn in school are particularly matters for public concern.

As the examples of alcohol and tobacco have shown, products available to (and commercially promoted for) adults have a way of getting to children. (In addition, of course, the line between children and adults is not a bright one in principle, though it may be made so in law.)

B. *Adults*. Even adults sometimes make consumption decisions inconsistent with maximizing their own well-being as they evaluate it. This is particularly likely to be true where the pleasures are immediate and the pains deferred. T.C. Schelling cites a large variety of everyday occasions in which competent adults treat their own behavior as something requiring external control in their own interests; the assertion that everyone always chooses for his own good is either a tautology without practical significance or an empirical proposition easily refuted. If a majority of all tobacco smokers report that they regret having started to smoke and report having attempted to quit over the last year, and if a substantial minority goes to outside experts and pays them for help in quitting, it is more than mere Grundyism that regards smoking as a bad habit to be discouraged by public policy.

III. Making Vice Policy

Given these principles, where do we go from here?

The liberal critique of vice policy has two main thrusts, which may be summed up as "None of your business" and "You can't stop it anyway and you'll only make things worse by trying." The catalogue above lists some of the exceptions to "None of your business." By acknowledging them (or at least some of them) we are put in a more secure position from which to reiterate the main principle that the state has no business stepping in to stop me from doing something I enjoy just because someone else dislikes it and thinks that I would be better off not doing it.

The more practical objection to most actual drug policies remains. They reduce drug consumption only with difficulty and cause horrible side-effects:

— They create black markets (with the violence that accompanies black markets) and enrich criminals.

— They corrupt law enforcement and weaken respect for the law by turning otherwise inoffensive citizens into lawbreakers.

— They force the remaining drug users to buy impure and adulterated drugs, and to pay black-market prices. This can leave them sicker, poorer, and more likely to commit non-drug crimes than they would have been were the drugs legal.

— They put extra burdens on the criminal justice system, making drug consumption a net user of public funds and capabilities rather than a net contributor through excise taxes.

Therefore, we want drug policies to concentrate on those drugs that cause identifiable harm and to take into account the costs as well as the benefits of prohibition. Even among prohibited drugs, we should concentrate enforcement resources where they do the most good and the least harm, not necessarily on the drugs which are currently on the cover of *Newsweek*.

IV. Three Concrete Suggestions

1. *Before we legalize anything else, get control of the two major legal recreational drugs, alcohol and nicotine.* The real-dollar federal excise tax on alcohol is down by two-thirds since 1950, while consumption is up. The presumption ought to be in favor of raising that tax in preference to other taxes, up to the point where moonshining becomes a problem again. As a premium Scotch distiller once advertised, "If you worry about the price of your whiskey, you're drinking too much." The same applies to tobacco.

Laws about sales to minors should be more rigorously enforced, particularly with respect to tobacco. Advertising should be restricted to information only, like securities ads. The objection to prohibition is that demand will find a supply; but there seems to be no reason in principle or practice for continuing to allow supply to create a demand. Allowing informational ads should largely eliminate the anti-competitive effects of a straight advertising ban. At the same time, some portion of the increased tax revenues could pay for vigorous "negative advertising" of these two drugs. There is no reason to let the booze industry pretend that most of the problem with drinking comes from "problem drinkers" when millions of adolescents make a weekend ritual of drinking enough alcohol to measurably and lastingly reduce their intelligence.

2. *Ease up on enforcement against marijuana importation.* This would allow a small drop (10-20%) in the price of imported marijuana, not enough to markedly raise consumption. The price decrease would reduce the revenues of marijuana dealers; making criminals poorer is always a good thing. It would also limit the growth of domestic cultivation, which involves primarily high-potency weed likely to have worse effects on consumers than the weaker imported stuff.

Legalization is a riskier strategy. Simple arithmetic suggests that something like 3 million Americans spend most of their waking hours stoned. They don't complain about it much, or turn themselves in for treatment in any great numbers, or commit many crimes, or cause many traffic accidents that anyone knows about; all this is powerful negative evidence about the extent of the harm caused by the drug. Most people who realize that they are using too much appear to be able to quit without help.

Still, I for one would be reluctant to greatly expand the number of very heavy users, particularly among schoolchildren. If legalization of marijuana means what legalization of alcohol meant, we could expect a very substantial increase indeed; per capita alcohol consumption (and associated disease) is up by a factor of three since the end of the Noble Experiment. If marijuana legalization caused a 50% increase in very heavy use, it would be a good policy in light of the costs of prohibition. If it caused a tripling, it would be a bad policy by my lights. We can't know without trying, and once we try it we can't go back. The choice depends on your opinions about the drug, your guess about the consumption effects of legalization, and your tolerance for risk.

3. *Increase heroin enforcement, particularly at the retail level.* The major difference between marijuana and heroin is that heroin enforcement has been, by and large, a success, with heavy use of the drug restricted to a very small part of the society. No doubt, heroin prohibition has extracted a heavy price from the remaining users and their neighbors; whether that price has been justified by the benefits to potential users kept from the drug by prohibition we will never know. In any case, while the drug remains illegal, we are better off reducing its

prevalence where we can. There is now fairly good evidence that street-level heroin enforcement can reduce both drug consumption and property crime. Legalization of heroin, even if it were a good idea (which I profoundly doubt), isn't a live option. From our current position, tightening enforcement will reduce the number of regular users without much worsening the condition of those who remain, and we can effectively tighten enforcement relatively cheaply and easily. Let's do it.