



2009

# The Harmful Side Effects of Drug Prohibition

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Georgetown Public Law and Legal Theory Research Paper No. 12-037

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2009 Utah L. Rev. 11-34

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# THE HARMFUL SIDE EFFECTS OF DRUG PROHIBITION

Randy E. Barnett\*

## I. INTRODUCTION: CURING THE DRUG LAW ADDICTION

Some drugs make people feel good. That is why some people use them. Some of these drugs are alleged to have side effects so destructive that many advise against their use. The same may be said about statutes that attempt to prohibit the manufacture, sale, and use of drugs. Advocating drug prohibition makes some people feel good because they think they are “doing something” about what they believe to be a serious social problem. Others who support these laws are not so altruistically motivated. Employees of law enforcement bureaus and academics who receive government grants to study drug use, for example, may gain financially from drug prohibition. But as with using drugs, using drug laws can have moral and practical side effects so destructive that they argue against ever using legal institutions in this manner.

One might even say—and not altogether metaphorically—that some people become psychologically or economically *addicted* to drug laws.<sup>1</sup> That is, some people continue to support these statutes despite the massive and unavoidable ill

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<sup>1</sup> For those who would object to my use of the word *addiction* here because drug laws cause no physiological dependence, it should be pointed out that, for example, the Illinois statute specifying the criteria to be used to pass upon the legality of a drug nowhere requires that a drug be physiologically addictive. The tendency to induce physiological dependence is just one factor to be used to assess the legality of a drug. Drugs with an accepted medical use may be controlled if they have a potential for abuse, and abuse will lead to “psychological *or* physiological dependence.” 720 ILL. COMP. STAT. 570/205 (2006) (emphasis added); *see also id.* §§ 570/207, 570/209, 570/211. Thus, applying the same standard to drug-law users as they apply to drug users permits us to characterize them as addicts if they are psychologically “dependent” on such laws. Personally, I would favor limiting the use of the term addiction to physiological dependence. As John Kaplan put the matter, “while the concept of addiction is relatively specific and subject to careful definition, the concept of psychological dependence, or habituation, often merely reflects the common sense observation that people who like a drug will continue to use it if they can—so long as they continue to like it: effects.” JOHN KAPLAN, *MARIJUANA: THE NEW PROHIBITION* 160 (1970). The same might be said about those who like drug laws.

effects that result.<sup>2</sup> The psychologically addicted ignore these harms so that they can attain the “good”—their “high”—they perceive that drug laws produce. Other drug-law users ignore the costs of prohibition because of their “economic” dependence on drug laws; these people profit financially from drug laws and are unwilling to undergo the economic “withdrawal” that would be caused by their repeal.<sup>3</sup>

Both kinds of drug-law addicts may deny their addiction by asserting that the side effects are not really so terrible or that they can be kept “under control.” The economically dependent drug-law users may also deny their addiction by asserting that (1) noble motivations, rather than economic gain, lead them to support these statutes; (2) they are not unwilling to withstand the painful financial readjustment that ending prohibition would force them to undergo; and (3) they can “quit” their support any time they want to—provided, of course, that they are rationally convinced of its wrongness.

Their denials notwithstanding, both kinds of addicts are detectable by their adamant resistance to rational persuasion. While they eagerly await and devour any new evidence of the destructiveness of drug use, they are almost completely uninterested in any practical or theoretical knowledge of the ill effects of illegalizing such conduct.<sup>4</sup> Yet in a free society governed by democratic principles, these addicts cannot be compelled to give up their desire to control the consumption patterns of others. Nor can they be forced to support legalization in spite of their desires. In a democratic system, they may voice and vote their opinions about such matters no matter how destructive the consequences of their desires are to themselves or, more importantly, to others. Only rational persuasion may be employed to wean them from this habit. As part of this process of persuasion, drug-law addicts must be exposed to the destruction their addiction wreaks on drug users, law enforcement, and on the general public. They must be made to understand the inherent limits of using law to accomplish social objectives.

This Article will not attempt to identify and “weigh” the costs of drug use against the costs of drug laws. Instead, it will focus exclusively on identifying the harmful side effects of drug law enforcement and showing why these effects are unavoidable. So one-sided a treatment is justified for two reasons. First, a cost-

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<sup>2</sup> See David C. Leven, *Our Drug Laws Have Failed—So Where Is the Desperately Needed Meaningful Reform?*, 28 FORDHAM URB. L.J. 293, 305–06 (2000) (stating that many people still support the current drug laws).

<sup>3</sup> See David R. Henderson, *A Humane Economist’s Case For Drug Legalization*, 24 U.C. DAVIS L. REV. 655, 662 (1991) (noting that some scholars argue that illegality is more profitable).

<sup>4</sup> See James Ostrowski, *The Moral & Practical Case for Drug Legalization*, 18 HOFSTRA L.REV. 607, 647–50 (1990) (many proponents of drug laws mischaracterize their effects to gain support).

benefit or cost-cost analysis may simply be impossible.<sup>5</sup> Second, discussions by persons who support illegalizing drugs usually emphasize only the harmful effects of drug use while largely ignoring the serious costs of such policies. By exclusively relating the other side of the story, this Article is intended to inject some balance into the normal debate.

The harmful side-effects of drug laws have long been noted by a number of commentators, although among the general public the facts are not as well known as they should be.<sup>6</sup> More importantly, even people who agree about the facts fail to grasp that it is the nature of the means—coercion—chosen to pursue the suppression of voluntary consumptive activity that makes these effects unavoidable. This vital and overlooked connection is the main subject of this Article.

## II. CLARIFYING OUR TERMS

The inherently destructive effects of drug laws, results from the combination of two aspects of drug prohibition that need to be distinguished. The first is the coercive nature of the means being used. The second is the type of conduct being coerced. Only by understanding the kind of conduct that is the subject of drug laws and how it differs from other kinds of conduct regulated by law can we begin to see why legal coercion is an inappropriate means in which to pursue our objectives.

Drug laws reflect the decision of some persons that other persons who wish to consume certain substances should not be permitted to act on their preferences. Nor should anyone be permitted to satisfy the desires of drug consumers by making and selling the prohibited drug. For the purposes of this discussion, the most important characteristic of the legal approach to drug use is that these consumptive and commercial activities are being regulated by *force*.<sup>7</sup> Drug-law

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<sup>5</sup> See Randy E. Barnett, *Pursuing Justice in a Free Society: Part One—Power vs. Liberty*, 4 CRIM.L JUST. ETHICS 50, 63–65 (1985) (discussing some of the problems with efforts at cost benefit calculation).

<sup>6</sup> While there certainly is no consensus on the conclusions that ought to be drawn from the facts of this tragic story, the facts themselves are not unknown in law enforcement or in academia. See, e.g., ARTHUR D. HELLMAN, *LAW AGAINST MARIJUANA: THE PRICE WE PAY* 16 (1975) (describing the costs and benefits of drug laws); JOHN KAPLAN, *THE HARDEST DRUG: HEROIN AND PUBLIC POLICY* 94–100 (1983) (noting the problems that would be remedied by free availability); Glenn Garvin et al., *Heroin: Should it be Legal—Advocates are few but Persuasive*, WASH. TIMES, Sept. 28, 1984, at A1; Alan L. Otten, *Dealing With Drugs—The Drug Trade: Experts in the Field of Narcotics Debate Ways to Curb Abuse—One Side Touts Legalization, Other Wants Crackdown; Probably Neither Is Right—Corporate Attitudes Change*, WALL ST. J., Nov. 29, 1984, at 1; Megan Cox, *Dealing With Drugs—The Drug Trade: Abuse of Narcotics in US is by No Means A Recent Phenomenon—In the 1800s Doctors’ Praise of Opium and Morphine Caused Much Addiction—Cocaine for the Common Cold*, WALL ST. J., Dec. 3, 1984, at 1.

<sup>7</sup> While force is a neglected element of a proper moral evaluation of law, it may not be a *necessary* characteristic of law. Some institutions that may be characterized as

users wish to decide what substances others may consume and sell, and they want their decision to be imposed on others by force. The forcible aspect of the legal approach to drug use is one of two factors that combine to create the serious side effects of drug-law use. The other contributing factor is the nature of the conduct that drug laws attempt to prohibit.

No one claims that the conduct sought to be prohibited is of a sort that, if properly conducted, inevitably causes death or even great bodily harm.<sup>8</sup> Smoking tobacco is bad for your health. It may shorten your life considerably. But it does not immediately or invariably kill you. The same is true of smoking marijuana.<sup>9</sup> Of course, prohibited drugs can be improperly administered and cause great harm indeed, but even aspirin can be harmful in certain cases. Further, the conduct that drug laws prohibit is not inevitably addicting.<sup>10</sup> Some users become psychologically or physically dependent on prohibited substances. Others do not.<sup>11</sup>

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genuinely legal in nature may do their work without using force. *See, e.g.*, LON L. FULLER, *THE MORALITY OF LAW* 108–10 (1965). What is important here is that the particular kind of law advocated by drug control enthusiasts is that kind that *does* involve the use of force. Therefore, in this chapter I will be using the term “law” in this limited sense, and although I will not repeatedly qualify this use in the manner suggested by Fuller’s analysis, such a limited use is intended and should be implied. *See* Dale A. Nance, *Legal Theory and the Pivotal Role of the Concept of Coercion*, 57 U. COLO. L. REV. 1, 2–3 (1985) (discussing the role of coercion in legal theory).

<sup>8</sup> Like the federal government, the State of Illinois classifies or “schedules” controlled substances according to their varying characteristics from most serious (Schedule I) to least serious (Schedule V). That drugs can cause death or great bodily harm is not a requirement for prohibition. For drugs under schedules 11–V, potential for causing death or great bodily harm is not even a factor to be considered in determining the classification of a controlled substance. *See* 720 ILL. COMP. STAT. ANN. 570/201–212 (West 2003 & Supp. 2008). Schedule I drugs are those drugs that have a “high potential for abuse” and have “no currently accepted medical use in treatment in the United States *or* lack[] accepted safety for use in treatment under medical supervision.” 720 ILL. COMP. STAT. ANN. 570/203 (emphasis added). In other words, if a drug has no accepted medical use in treatment in the United States, all that is required for it to be scheduled is that it have a “high potential for abuse.” *Id.*

<sup>9</sup> In discussing the effects of marijuana, the legislative declaration of the Cannabis Control Act of the State of Illinois states only that “the current state of scientific and medical knowledge concerning the effects of cannabis makes it necessary to acknowledge the physical, psychological and sociological damage which is incumbent upon its use.” 720 ILL. COMP. STAT. ANN. 550/1. *But see, e.g.*, Munir A. Khan, Assad Abbas, and Knud Jensen, *Cannabis Usage in Pakistan: A Pilot Study of Long Term Effects on Social Status and Physical Health*, in *CANNABIS AND CULTURE* 349–50 (Vera Rubin, ed., 1975) (“The most significant point which emerged was that in a society such as Pakistan where cannabis consumption is socially accepted, habituation does not lead to any undesirable results. . . . Our study appears to show that cannabis does not produce any serious long-term effects.”).

<sup>10</sup> “[C]ultural and social factors . . . in combination with the individual’s somatic and psychic characteristics, determine the pattern of his drug behavior once he has chosen to experiment with it. The majority of individuals who reach this point progress no further and often discontinue marihuana use.” NATIONAL COMMISSION ON MARIJUANA AND DRUG

What then characterizes the conduct being prohibited by statutes illegalizing drugs? It is conduct where persons either introduce certain intoxicating substances into their own bodies, or manufacture or sell these substances to those who wish to use them.<sup>12</sup> The prime motivation for the drug user's behavior is to alter his state of mind to get "high."<sup>13</sup> The harmful effects of the substances are not normally the effects being sought by the user; thus they are usually termed "*side effects*." People could introduce all sorts of harmful substances into their bodies, but do not generally do so unless they think that it will have a mind-altering effect. Anyone who wishes to ingest substances to cause death or great bodily harm will always have a vast array of choices available to him at the corner hardware store. A widespread black market in poisons has not developed to meet any such demand.

One can speculate about the underlying psyche of those who would engage in such risky behavior. One can argue that such persons must be "self-destructive"—that is, out to harm themselves in some way. It is doubtful, however, that such generalizations are any truer for drug users than they are for alcohol users or cigarette smokers, for whom the adverse health effects may be both more likely and more severe than those of many prohibited substances,<sup>14</sup> or for skydivers,

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ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING 44 (1972); *see also* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 13 (1967) ("Physical dependence does not develop"); Khan, Abbas, and Jensen, *supra* note 9, at 349 ("We have deliberately used the word habituation rather than addiction because we did not find either increased tolerance or withdrawal symptomatology, which are the essential prerequisites for addiction"); Kaplan, *supra* note 1, at 157–69 (arguing that there is little evidence to prove marijuana causes a physical dependence).

The Illinois statute prohibiting certain substances exemplifies the fact that drug laws are not aimed exclusively at addictive drugs. The criteria of Schedule I drugs, quoted *supra* note 8, requires only that the substance have a high potential for abuse. The other schedules make it clear that "abuse" is not the same as potential for "psychological or physiological dependence," by consistently listing them as separate factors that must be found before a drug that does have a legitimate medical usage in the United States may be legally controlled. *See* 720 ILL. COMP. STAT. ANN. 570/201–212 (West 2003 & Supp. 2008).

<sup>11</sup> For a summary of research on the pharmacology of opiates and their effects on the street user, see KAPLAN, *supra* note 6, 5–22.

<sup>12</sup> *See supra* note 8.

<sup>13</sup> One objection to the definition offered in the text for the subject of drug laws is that it would apply to alcohol and caffeine consumption and for this reason must miss some special purpose of drug laws. On the contrary, the manufacture and sale of alcohol were once made illegal for similar reasons. Only the disastrous consequences that resulted from alcohol prohibition and the social acceptability of both alcohol and coffee have kept both substances legal to date. Moreover, at least with alcohol, regulation and even prohibition is constantly being advocated by some and implemented in certain locales.

<sup>14</sup> *See* John C. Ball & John Chapman Urbaitis, *Absence of Major Medical Complications Among Chronic Opiate Addicts*, in THE EPIDEMIOLOGY OF OPIATE ADDICTION IN THE UNITED STATES 301, 304–06 (1970); World Health Org. Special Comm., *Problems Related to Alcohol Consumption: The Changing Situation*, 9 CONTEMP. DRUG PROBS. 185, 194–98 (1980). Since the much heralded appearance of the U.S. DEP'T

skiers, or bicyclers on city streets—not to mention the millions of people who refuse to wear their seat belts.

We can conclude then that the *end* or purpose of drug laws is to discourage people from engaging in risky activity in which they wish to engage either because they desire the intoxicating effects they associate with the consumption of a drug or because they desire the profit that can be realized by supplying intoxicating drugs to others.<sup>15</sup> The *means* that drug laws employ to accomplish this end is using force against those who would engage in such activities, either to prevent them from doing so or to punish those who nonetheless succeed in doing so.

With this understanding of means and ends, I now explain why using force against people who wish to use intoxicants *inevitably* harms them, harms the general public, and harms the legal system.

### III. THE HARMFUL EFFECTS OF DRUG LAWS ON DRUG USERS

At least part<sup>16</sup> of the motivation for drug prohibition is that drug use is thought to harm those who engage in it.<sup>17</sup> A perceived benefit of drug prohibition is that fewer people will engage in self-harming conduct than would in the absence of prohibition.<sup>18</sup> While the contention that drug use can be harmful will not be

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OF HEALTH, EDUC., AND WELFARE, REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE, SMOKING AND HEALTH, PUBLIC HEALTH SERVICE PUB. NO. 1103 (Jan. 11, 1964), the adverse health effects of tobacco smoking have been much studied and are quite well known.

<sup>15</sup> See *infra* notes 19–21 and accompanying text (discussing the typical policy rationales used to justify drug laws that prohibited perceived self-harming conduct).

<sup>16</sup> The other important motivation for drug prohibition is the perceived effects of drug use on the rest of society. See *infra* note 18 (Illinois legislature declaring its belief that drug consumption creates “consequences upon every element of society”). For a discussion on the countervailing costs imposed on society by drug laws will also be discussed, see *infra* Section IV.

<sup>17</sup> In its legislative declaration, the legislature of the State of Illinois expressed this typical sentiment:

The abuse and misuse of alcohol and other drugs constitutes a serious public health problem the effects of which on public safety and the criminal justice system cause serious social and economic losses, as well as great human suffering. It is imperative that a comprehensive and coordinated strategy be developed . . . to empower individuals and communities through local prevention efforts and to provide intervention, treatment, rehabilitation and other services to those who misuse alcohol or other drugs (and, when appropriate, the families of those persons) to lead healthy and drug-free lives and become productive citizens in the community.

20 ILL. COMP. STAT. 301/1-5 (2009).

<sup>18</sup> See 720 ILL. COMP. STAT. 570/100 (1998) (“It is the intent of the General Assembly, recognizing the rising incidence in the abuse of drugs and other dangerous

disputed here, there is another dimension of the issue of harm to drug users that may seem obvious to most when pointed out, but nonetheless is generally ignored in policy discussions of drug prohibition. Much of the harms associated with drug use is caused not by intoxicating drugs, but by the fact that such drugs are illegal.

#### A. *Drug Laws Punish Users*

The most obvious harm to drug users caused by drug laws is the legal and physical jeopardy in which they are placed. Imprisonment must generally be considered a harm to the person imprisoned or it would hardly be an effective deterrent.<sup>19</sup> To deter certain conduct it is advocated that we punish—in the sense of forcibly inflict unpleasantness upon—those who engage in this conduct.<sup>20</sup> In so doing it is hoped that people will be discouraged from engaging in the prohibited conduct.

But what about those who are not discouraged and who engage in such conduct anyway? Does the practice of punishing these persons make life better or worse for them? The answer is clear. As harmful as using drugs may be to someone, being imprisoned often makes matters much worse.

Normally when considering matters of legality, we are not concerned about whether a law punishes a lawbreaker and makes him worse off. Indeed, normally such punishment is deliberately imposed on the lawbreaker to protect *someone else* who we consider to be completely innocent—like the victim, or potential victim, of a rape, robbery, or murder.<sup>21</sup> We are therefore quite willing to harm the lawbreaker to protect the innocent. In other words, the objects of these laws are the victims; the subjects of these laws are the criminal.

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substances and its resultant damage to the peace, health, and welfare of the citizens of Illinois, to provide a system of control over the distribution and use of controlled substances which will more effectively: . . . (2) deter the unlawful and destructive abuse of controlled substances; (3) penalize most heavily the illicit traffickers and profiteers of controlled substances, who propagate and perpetuate the abuse of such substances with reckless disregard for its consumptive consequences upon every element of society.”)

<sup>19</sup> Imagine if we told people that if we caught them using drugs, we would send them to the Riviera for a few years, all expenses paid.

<sup>20</sup> See Stanley I. Benn, *Punishment*, in 7 THE ENCYCLOPEDIA OF PHILOSOPHY 29, 29 (Paul Edwards ed., Reprint ed. 1972) (“Characteristically, punishment is unpleasant. It is inflicted on an offender because of an offense he has committed; it is deliberately imposed, not just the natural consequence of a person’s action (like a hang-over), and the unpleasantness is essential to it, not an accidental accompaniment to some other treatment (like the pain of a dentist’s drill).”).

<sup>21</sup> Punishment is also favored on the grounds that the lawbreaker deserves to be punished. See, e.g., John Hospers, *Retribution: The Ethics of Punishment*, in ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS 181, 181–209 (Randy E. Barnett & John Hagel III eds., 1977) (discussing criminal punishment under the retributive theory). But see Walter Kaufmann, *Retribution and the Ethics of Punishment*, in ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS 211, 211–30 (Randy E. Barnett & John Hagel III eds., 1977).



Drug laws are different in this respect from many other criminal laws. With drug prohibition we are supposed to be concerned with the well-being of prospective drug users. So the object of drug laws—the persons whom drug laws are supposed to “protect”—are often the same persons who are the subject of drug laws. Whenever the object of a law is also its subject, however, a problem arises. The means chosen for benefiting prospective drug users seriously harms those who still use drugs and does so in ways that drugs alone cannot: by punishing drug users over and above the harmful effects of drug use. But the harm done by drug prohibition to drug users goes beyond the direct effects of punishment.

### *B. Drug Laws Raise the Price of Drugs to Users*

Illegalization makes the prices of drugs rise.<sup>22</sup> By increasing scarcity, all else being equal, the confiscation and destruction of drugs causes the price of the prohibited good to rise. And by increasing the risk to those who manufacture and sell, drug laws raise the cost of production and distribution, necessitating higher prices that reflect a “risk premium.”<sup>23</sup> Like the threat of punishment, higher prices may very well discourage some from using drugs who would otherwise do so. This is, in fact, a principal rationale for interdiction policies.<sup>24</sup> But higher prices take their toll on those who are not deterred, and these adverse effects are rarely emphasized in discussions of drug laws.

Higher prices require higher income by users. If users cannot earn enough by legal means to pay higher prices, then they may be induced to engage in illegal conduct—theft, burglary, robbery—in which they would not otherwise engage.<sup>25</sup> The increased harm caused to the victims of these crimes will be discussed below as a cost inflicted by drug laws on the general public. Relevant here is the adverse effect drug laws have on the life of drug users. By raising the costs of drugs, drug laws breed criminality.<sup>26</sup> They induce some drug users who would not otherwise

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<sup>22</sup> Morgan Cloud, *Cocaine, Demand, and Addiction; A Study of the Possible Convergence of Rational Theory and National Policy*, 42 VAND. L. REV. 725, 757 (1989).

<sup>23</sup> *Id.* Price increases will not incur indefinitely, however, because at some level higher prices will induce more production.

<sup>24</sup> Ian D. Midgley, *Just One Question Before We Get to Ohio v. Robinette: “Are You Carrying any Contraband . . . Weapons, Drugs, Constitutional Protections . . . Anything Like That?”*, 48 CASE W. RES. L. REV. 173, 212 (1997).

<sup>25</sup> The traditional linkage between drug use and crime can be accounted for in three ways. First, as suggested in the text, the higher prices caused by illegality induce many drug users to commit profitable crimes to pay for the drugs. Second, criminalization of drug users can force them out of legitimate employment and into criminal employment. *See infra* notes 33-34 and accompanying text. Third, not mentioned in the text, some persons who, for whatever reason, are criminally inclined may be just the sort of persons who are also inclined to use drugs. However, even if the third account is true for some (which it undoubtedly is), the first and second will be true for others; meaning drug laws are causing a comparative increase in the number of persons who are criminally inclined—an effect of drug laws that hardly benefits those drug users so affected.

<sup>26</sup> *See supra* note 25.

have contemplated criminal conduct to develop into the kind of people who are willing to commit crimes against others.

Higher prices can also make drug use more hazardous for users.<sup>27</sup> Intravenous injection, for example, is more popular in countries where high drug prices caused by prohibition drive users to the most “efficient” means of ingesting the drug. In countries where opiates are legal, the principal methods of consumption are inhaling the fumes of heated drugs or snorting.<sup>28</sup> Before the Harrison Act of 1914, “when opiates were cheap and plentiful, they were very rarely injected. Moreover, injection is rare in those Asian countries where opiates are inexpensive and easily available.”<sup>29</sup> While physical dependence may result from either inhalation or snorting, neither is as likely as intravenous injections to result in an overdose.<sup>30</sup> And consumption by injection can cause other health problems as well. For example: “Heroin use causes hepatitis only if injected, and causes collapsed veins and embolisms only if injected intravenously.”<sup>31</sup> Finally, the scourge of HIV-AIDS has been caused, in part, by the sharing of unsterilized needles by drug users.<sup>32</sup>

### C. Drug Laws Make Drug Users Buy from Criminals

Drug laws attempt to prohibit the use of substances that some people wish to consume. Thus because the legal sale of drugs is prohibited, people who still wish to use drugs are forced to do business with the kind of people who are willing to make and sell drugs in spite of the risk of punishment. Such transactions must deliberately be conducted away from the police. This puts drug users in great danger of physical harm in two ways.

First, users are forced to rely upon criminals to regulate the quality and strength of the drugs they buy. No matter how carefully they measure their dosages, an unexpectedly potent supply may result in an overdose. And if the drug

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<sup>27</sup> See KAPLAN, *supra* note 6, at 128.

<sup>28</sup> See *id.* (“For instance, in Hong Kong until recently, heroin, though illegal, was cheap and relatively available, and the drug was inhaled in smoke rather than injected. In the last few years, however, law enforcement has been able to exert pressure on the supply of the drug, raising its price considerably and resulting in a significant increase in the use of injection.”)(footnote omitted).

<sup>29</sup> *Id.*

<sup>30</sup> Shane Darke & Wayne Hall, *Heroin Overdose: Research and Evidence-Based Intervention*, 80 J. URBAN HEALTH, 189, 195 (2003).

<sup>31</sup> JOHN KAPLAN, *supra* note 6, at 9 (citing Jerome H. Jaffe, *Drug Addiction and Drug Abuse*, in GOODMAN AND GILMAN’S: THE PHARMACOLOGICAL BASIS OF THERAPEUTICS 535, 546 (Alfred Goodman Gilman et al., eds., 6th ed. 1980)). Kaplan argues that intravenous injection can also increase dependence by producing strong conditioning effects. See *id.* at 44 (citing Travis Thompson & Roy Pickens, *Drug Self-Administration and Conditioning*, in SCIENTIFIC BASIS OF DRUG DEPENDENCE 177, 177–98 (Hannah Steinberg, ed., 1969)).

<sup>32</sup> Robert W. Stewart, *Increase Urged in Government AIDS Effort*, L.A. TIMES, Feb. 17, 1987, at 3.

user is suspected to be a police informant, the dosage may deliberately be made potent by the supplier.

Second, users are likely to be the victims of crime. I would estimate that approximately half the murder cases I prosecuted as an Assistant States Attorney in Cook County, Illinois were “drug related” in the sense that the victim was killed because it was thought he had either drugs or money from the sale of drugs. Crimes are also committed against persons who seek out criminals from whom to purchase prohibited drugs. Because drug users and dealers want to avoid the police, crimes against these groups are unlikely to be reported.<sup>33</sup> As a result, these crimes are likely brought to the attention of the authorities only when a victim’s body is found.

In 1979, I obtained the confessions that were ultimately used in a prosecution involving the savage murder of three young men.<sup>34</sup> One of the three had approached four members of the Latin Kings to purchase marijuana. When his initial attempt to do business with the gang members was rebuffed, he mistakenly believed that this was due to a lack of trust—rather than a lack of marijuana, which was the case. To ingratiate himself with the gang members, he boasted (falsely) about his gang-affiliated friends and his gang membership. Unfortunately the persons he named were members of a rival street gang, the Latin Eagles. The gang members then told him that they could supply marijuana after all and asked the three to accompany them to an alley. There they were held at gun point and eventually stabbed to death. These young men were not members of any street gang. These are drug-law-related deaths. Three young men are dead because drug laws prevented them from buying marijuana cigarettes as safely as they could buy tobacco cigarettes. While smoking either kind of cigarette may have been hazardous to their health, that issue is now moot. Where and how are their deaths registered in the cost-benefit calculation of drug-law advocates?

#### *D. Drug Laws Induce the Invention of New Intoxicating Drugs*

Drug laws make some comparatively benign intoxicating drugs—like opiates—artificially scarce and thereby create a powerful black market incentive for clandestine chemists to develop alternative “synthetic” drugs that can be made more cheaply and with less risk of detection by law enforcement.<sup>35</sup> The hallucinogen, phencyclidine hydrochloride—or “PCP”—is one drug that went from industrial to recreational usage in by this route.<sup>36</sup> Some of these substitute

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<sup>33</sup> See Margaret P. Spencer, *Sentencing Drug Offenders: The Incarceration Addiction*, 40 VILL. L. REV. 335, 342 (1995).

<sup>34</sup> See *People v. Caballero*, 464 N.E.2d 223, 225 (Ill. 1984) (relating the factual details of the case).

<sup>35</sup> See Marissa A. Miller, *History and Epidemiology of Amphetamine Abuse in the United States*, in *AMPHETAMINE MISUSE: INTERNATIONAL PERSPECTIVES ON CURRENT TRENDS* 113–117 (Hilary Klee ed., 1997).

<sup>36</sup> Although originally developed by Parke-Davis, “[t]he PCP that is now on the streets is illegally manufactured. Unfortunately, it is very easy and very inexpensive to

drugs may turn out to be far more dangerous than the substances they replace, both to the user and to others.<sup>37</sup>

### *E. Drug Laws Criminalize Users*

Prohibition automatically makes drug users into “criminals.” While this point would seem too obvious to merit discussion, the effects of criminalization can be subtle and hidden. Criminalized drug users may not be able to obtain legitimate employment. This increases still further the likelihood that the artificially high prices of illicit drugs will lead drug users to engage in criminal conduct to obtain income. It is difficult to overestimate the harm caused by forcing drug users into a life of crime. Once this threshold is crossed, there is often no return. Such a choice would not be nearly so compelling, nor as necessary, if prohibited substances were legally available and reasonably priced.

Further, criminalization increases the hold that law enforcement agents have on drug users. This hold permits law enforcement agents to extort illegal payments from users or to coerce them into serving as informants who must necessarily engage in risky activity against others.<sup>38</sup> Thus, prohibition both motivates and enables the police to inflict harm on drug users in ways that would be impossible in the absence of the legal leverage provided by drug laws.

In all these ways, drug laws harm users of drugs well beyond any harm caused by drug use itself, and this extra harm is an inescapable consequence of using legal coercion as means to prevent people from engaging in activity they deem desirable. While law enforcement efforts typically cause harm to criminals who victimize others, such effects are far more problematic with laws that seriously harm the very people for whom these laws are enacted to help. Support for drug laws in the face of these harms is akin to saying that we have to punish, criminalize, poison, rob, and murder drug users to save them from the harmful consequences of using intoxicating drugs.

To avoid these consequences, some have proposed abolishing laws against personal use of certain drugs, while continuing to ban the manufacture and sale of these substances.<sup>39</sup> However, only the first and last of the five adverse consequences just discussed result directly from punishing and criminalizing users. The other three harms to the user result indirectly from punishing those who

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make, and you don't even need a chemistry background.” OAKLEY RAY, *DRUGS, SOCIETY, & HUMAN BEHAVIOR* 414 (3d ed. 1983).

<sup>37</sup> Because of the “reefer madness” phenomenon that surrounds early reports of the ill-effects of drug use, such reports should be heavily discounted until time permits more objective researchers to do more extensive studies.

<sup>38</sup> *See, e.g.*, DOUGLAS HUSAK, *LEGALIZE THIS! THE CASE FOR DECRIMINALIZING DRUGS* 149 (2002) (discussing the causal link between drug activity and corruption); ROBERT J. MACCOUN & PETER REUTER, *DRUG WAR HERESIES* 120 (2001) (describing police behavior toward informants).

<sup>39</sup> *See, e.g.*, KAPLAN, *supra* note 6, at 189–235 (1983), for such a proposal concerning heroin.

manufacture and sell drugs. Decriminalizing the use of drugs would undoubtedly be an improvement over the status quo, but the remaining restrictions on manufacturing and sale would continue to cause serious problems for drug users beyond the problems caused by drug use itself.

As long as coercion is used to reduce drug use, these harms are unavoidable. They are caused by (1) the use of force to inflict pain on users, thereby directly harming them; and (2) the dangerous and criminalizing black market in drugs that results from efforts to stop some from making and selling a product others genuinely wish to consume. There is nothing that more enlightened law enforcement personnel or a more efficient administrative apparatus can do to prevent these effects from occurring. But, as the next section reveals, enlightened law enforcement personnel or an efficient administrative apparatus are not what results from employing legal force to prevent adults from engaging in consensual activity.

#### IV. THE HARMFUL EFFECTS OF DRUG LAWS ON THE GENERAL PUBLIC

The harmful side effects of drug laws are not limited to drug users. This section highlights the various harms that drug laws inflict on the general public. There is an old saying in the criminal courts that is particularly apt here: “What goes around, comes around.” In an effort to inflict pain on drug users, drug laws inflict considerable costs on nonusers as well.

##### *A. Resources Spent on Drug Law Enforcement*

The most obvious cost of drug prohibition is the expenditure of scarce resources to enforce drug laws—resources that can thus not be used to enforce other laws or be allocated to other productive activities outside of law enforcement. Every dollar spent to punish a drug user or seller is a dollar that cannot be spent collecting restitution from a robber. Every hour spent investigating a drug user or seller is an hour that could have been used to find a missing child. Every trial held to prosecute a drug user or seller is court time that could be used to prosecute a rapist in a case that might otherwise have been plea bargained. These and countless other expenditures are the “opportunity costs” of drug prohibition.

##### *B. Increased Crime*

By artificially raising the price of illicit drugs and thereby forcing drug users to obtain large sums of money, drug laws create powerful incentives to commit property and other profitable crimes. And the interaction between drug users and criminally-inclined drug sellers presents users with many opportunities to become involved in all types of illegal conduct apart from the drug trade.

Finally, usually neglected in discussions of drugs and crime are the numerous “drug-related” robberies and murders (sometimes of innocent parties wrongly thought to have drugs) created by the constant interaction between users and

criminal sellers.<sup>40</sup> Drug dealers and buyers are known to carry significant quantities of either cash or valuable substances.<sup>41</sup> They must deliberately operate outside the vision of the police. They can rely only on self-help for personal protection.

Many drug-law users speculate quite freely about the intangible “adverse effects of drug use on a society.”<sup>42</sup> They are strangely silent, however, about how the fabric of society is affected by the increase in both property crimes and crimes of violence caused by drug laws.<sup>43</sup>

### *C. Harms Resulting from the “Victimless” Character of Drug Use*

The most overlooked and well-hidden harms to the general public caused by drug prohibition may also be the most serious. These are harms that result from efforts to legally prohibit activity that is “victimless.” It was once commonplace to call drug consumption victimless, but not anymore. Therefore, before proceeding, it is very important to explain carefully the very limited concept of “victimless” crime that will be employed in this section.

To appreciate the hidden costs of drug law enforcement, it is not necessary to claim that the sale and use of drugs are “victimless” in the *moral* sense—that is, to claim that such activity harms only consenting parties and therefore that it violates no one’s rights and may not justly be prohibited.<sup>44</sup> For this limited purpose it is not necessary to question the contentions that drug users and sellers “harm society” or that drug use violates “the rights of society.”<sup>45</sup>

Nevertheless, to understand the hidden costs of drug laws, it is vitally important to note that drug laws attempt to prohibit conduct that is “victimless” in a strictly nonmoral or *descriptive* sense: there is no victim to complain to the police and to testify at trial.

#### *1. The Incentives Created by Crimes without Victims*

When a person is robbed, the crime is usually reported to the police by the victim. When the robber is caught, the victim is the principal witness in any trial that might be held. As a practical matter, if the crime is never reported, there will normally not be a prosecution because the police will never pursue and catch the

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<sup>40</sup> See THE ROYAL COLLEGE OF PHYSICIANS, *DRUGS: DILEMMAS AND CHOICES* 93–95 (2000).

<sup>41</sup> See Chris Wilkins, *Cannabis Transactions and Law Reform*, 8 *AGENDA* 321, 328 (2001).

<sup>42</sup> See THE ROYAL COLLEGE OF PHYSICIANS, *supra* note 40, at 83–94.

<sup>43</sup> See *id.* at 88–89.

<sup>44</sup> I will discuss later the issue of whether drug laws are just. See *infra* Part V.

<sup>45</sup> See, e.g., William F. McDonald, *The Role of the Victim in America*, in *ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION AND THE LEGAL PROCESS* 295 (Randy E. Barnett & John Hagel III eds., 1977) (discussing the history of social attitudes toward crime and asserting that today “[c]rime is regarded as an offense against the state”).

robber. From the perspective of the legal system, it will be as though the robbery never took place. So too, if the victim refuses to cooperate with the prosecution after a suspect has been charged, the prosecution of the robber will usually not go forward.<sup>46</sup> What special law enforcement problems result from an attempt to prosecute crimes in the absence of a “complaining witness” who will assist law enforcement officials?

To answer this question, let us imagine that robbery—a crime that undoubtedly has a victim<sup>47</sup>—was instead a “victimless” crime in this very limited sense, and that the police set out to catch, and prosecutors to prosecute, all robbers whose victims refused to report the crime to the police and cooperate with the prosecution. How would the police detect the fact that a crime had occurred? How would they go about identifying and proving who did it? How would the case be prosecuted?

To detect unreported crimes, the police would have to embark on a program of systematic surveillance. Because they could not simply respond to a robbery victim’s complaint as they do at present, the police would have to be watching everywhere and always. Robberies perpetrated in public places—on public streets or transportation, in public alleys or public parks—might be detected with the aid of sophisticated surveillance equipment located in these spaces. Those robberies committed in private places—homes and stores would require even more intrusive practices.

If the police did detect a robbery, they would be the principal witnesses against the defendant at trial. It would be their word against that of the alleged robber. As a practical matter, it would be within their discretion to go forward with the prosecution or not. There would be no victim pressing them to pursue prosecution and potentially questioning any decision they might make to drop the charges or withhold a criminal complaint.

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<sup>46</sup> See Maria T. Lopez & Carol M. Bast, *The Difficulties in Prosecuting Stalking Cases*, 41 NO. 1 CRIM. L. BULLETIN 2 (2009) (discussing a prosecutor’s option “to either drop the case or continue the case even with a low probability of success” when an uncooperative victim’s testimony is the only evidence); Marc C. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 146 (2008) (discussing the “proof problem” presented to prosecutors when victims of alleged crimes refuse to cooperate). To enforce his decision of noncooperation, the victim always has available the threat of unhelpful testimony at trial. “I don’t remember if that is the man who robbed me” is all the victim need say to end the case—and (notwithstanding the theoretical availability of perjury charges) prosecutors know this.

<sup>47</sup> See Guyora Binder, *The Culpability of Felony Murder*, 83 NOTRE DAME L. REV. 965, 1038 (2008) (discussing robbery victims). I have chosen robbery as my example because I wish in this section to separate the issue of who is affected by a crime (who is and who is not a “victim” in this sense) from the issue of how certain crimes must be enforced in the absence of a cognizable victim-witness complainant. Robberies undoubtedly “affect” the persons who are robbed, and other persons as well. But notwithstanding these effects, if robberies were “victimless” in the sense used in the text—that is, if there was no victim complaining to the police and testifying at trial—certain unavoidable enforcement problems would develop.

We can easily imagine the probable results of such a policy of victimless robbery enforcement. To the extent that they were doing their job and that money permitted, the police would be omnipresent. One could not do or say anything in public without the chance that police agencies would be watching and recording. The enormous interference with individual liberty that such surveillance would cause is quite obvious. And putting robbery prosecutions entirely in the hands of the police would create lucrative new opportunities for corruption in at least two ways, depending on whether a crime had or had not in fact occurred.

When a crime had occurred, if the effective decision of whether or not to prosecute is solely in the hands of the police, police officers would be far more able to overlook a criminal act than they are when a cognizable victim exists. As a result, the opportunities for extortion of bribes and the incentives for robbery suspects to offer bribes are both tremendously increased.<sup>48</sup> When a crime had not occurred, the fact that the courts would be accustomed to relying solely on police testimony in such cases would give the police a greater opportunity to fabricate, or threaten to fabricate, cases to punish individuals they do not like, to coerce someone into becoming an informant, or to extort money from those they think will pay it.

All of the increased opportunity for corruption would result directly from an attempt to prosecute robberies when robbery victims do not come forward to report and prosecute the crime themselves. If robbery were victimless in this descriptive sense, the natural counterweight to these corrupt practices—the potential outrage of the victim of the robbery and the normal reliance by courts on victim testimony—would be absent.

Of course we know that this is not how robbery victims normally behave. Victims do routinely report instances of robbery, creating a case that the police department must “clear” in some way. And they are usually willing to cooperate with the prosecution, giving the police far less ability to influence the success of a given prosecution. Where a victim exists, the problem of corruption is enormously reduced; this is true even for the crime of murder where, in the absence of the victim can be a witness, a coroner’s office exists to establish causes of death.

Now suppose that, in addition to not reporting the crime and not testifying at trial, robbery victims were willing to pay to be robbed; that they actively but secretly sought out robbers, deliberately meeting them in private places so that the crime would be perpetrated without attracting the attention of the police; that billions of dollars in cash were received by robbers in this way.

Such a change in the behavior of robbery victims would dramatically affect law enforcement efforts. First, as will be discussed in the next section, the secrecy

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<sup>48</sup> See Randy E. Barnett, *Bad Trip: Drug Prohibition and the Weakness of Public Policy*, 103 Yale L.J. 2593, 2597 (1994) (reviewing STEVEN B. DUKE & ALBERT C. GROSS, *AMERICA’S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS* (1990)); Stephanie A. Martz, Note, *Legalized Gambling and Public Corruption: Removing the Incentive to Act Corruptly, or, Teaching an Old Dog New Tricks*, 13 J. L. & Pol. 453, 463 (1997) (noting police propensity for corruption in victimless crimes).



engendered by the consensual nature of this transaction would make necessary far more intrusive kinds of investigative techniques than we at first supposed. Second, the victims' willingness to pay robbers to be robbed would make robbery more lucrative than it would otherwise be and would thus increase the ability of robbers to bribe the police when they are caught.

Police who are willing to fabricate evidence against someone they knew to be a robber would expect that such a person would probably be able to afford a substantial payoff. Of course, corrupt police officers would be risking detection by honest officers and prosecutors. So we can expect that corrupt officers will attempt to minimize their risk by entering into a regular prepayment arrangement with professional robbers to ensure that they would not be arrested when they commit a robbery. Such an illicit arrangement could be enforced by the corrupt officer's credible threat to prosecute a legitimate case or, if necessary, to fabricate a case.

The sale and use of illicit drugs are like victimless robberies, including this final twist. Drug users not only fail to report violations of the drug laws, they actively seek out sellers in ways that are designed to avoid police scrutiny. Drug use is an act deliberately conducted in private. And, because drugs users desire to consume drugs, they are quite willing to pay for the product.

Because drug use and sale are "victimless" in the purely descriptive sense employed here, the hypothetical consequences of policing victimless robberies are the very real results of drug law enforcement. The next three sections will discuss some of the more serious of these consequences.

## 2. *Drug Laws and Invasion of Privacy.*

Because drug use takes place in private and drug users and sellers conspire to keep their activities away from the prying eyes of the police, law enforcement surveillance must be extremely intrusive to be effective. The police must somehow gain access to private areas to watch for this activity.

One way to accomplish this is for a police officer, or more likely an informant, to pose as a buyer or seller. This means that the police must initiate the illegal transaction and run the risk that the crime being prosecuted was one that would not have occurred but for the police instigation.<sup>49</sup> And, since possession alone is also illegal, searches of persons without probable cause might also be necessary to find contraband.<sup>50</sup>

Such illegal conduct by police is to be expected when one seeks to prohibit activity that is deliberately kept away from normal police scrutiny by the efforts of both parties to the transaction, thereby requiring police intrusion into private areas if they are to detect these acts.<sup>51</sup> It is impossible for police to establish probable

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<sup>49</sup> See, e.g., HELLMAN, *supra* note 6, at 60–88; EDWIN M. SCHUR, CRIMES WITHOUT VICTIMS 136 (1965).

<sup>50</sup> See HELLMAN, *supra* note 6, at 66–70.

<sup>51</sup> *Id.* at 103 (“[A] large proportion of . . . [marijuana] arrests result from police conduct that violates the spirit if not the letter of the Fourth Amendment’s prohibition

cause for every search for illicit drugs, no matter how small the quantity. Where no constitutional grounds exist for such an intrusion, a police department and its officers are forced to decide which is more important: the protection of constitutional rights or the political consequences of failing to get results.

### 3. *The Weakening of Constitutional Rights*

The fact that such privacy-invading conduct by police may be unconstitutional and therefore illegal does not prevent it from occurring.<sup>52</sup> Some of those who are most concerned about the harm caused by drug laws are lawyers who have confronted the massive violations of constitutional rights that drug laws have engendered.<sup>53</sup> Such unconstitutional behavior is particularly likely, given our bizarre approach to policing the police.<sup>54</sup>

At present we attempt to rectify police misconduct mainly by preventing the prosecution from using any illegally seized evidence at trial.<sup>55</sup> While this would generally be enough to scuttle a drug law prosecution, it will not prevent the police from achieving at least some of their objectives. They may be more concerned with successfully making an arrest and confiscating contraband than they are with obtaining a conviction.<sup>56</sup> This is especially true when they would have neither confiscation nor conviction without an unconstitutional search.

A policeman who is unwilling to lie about probable cause or to conceal a prior illegal search may still be inclined to make an arrest for possession of marijuana, even if he is aware that it will not stand up under judicial scrutiny. At a minimum he will have confiscated a supply of an illegal drug. The defendant will be jailed and have to post bail, and in many cases will have to hire a lawyer; these alone serve as forms of punishment. Finally, there is always the possibility that the defendant will plead guilty to a lesser offense rather than risk a felony conviction.<sup>57</sup>

In most instances, the success of a suppression motion depends on whether the police tell the truth about their constitutional mistake in their report and at

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against unreasonable searches and seizures”); see KAPLAN, *supra* note 6, at 96 (“Many of the techniques used to enforce heroin laws do end up violating the constitutional rights of individuals”).

<sup>52</sup> See Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 941–42 (1983).

<sup>53</sup> See *id.* at 975–77.

<sup>54</sup> The discussion that immediately follows in the text is only suggestive of a detailed analysis of this problem and a possible solution I have presented elsewhere. See *id.* at 937–85 (noting especially the discussion on victimless crimes spanning pages 980–85).

<sup>55</sup> See *id.* at 941.

<sup>56</sup> Comment, *Possession of Marijuana in San Mateo County: Some Social Costs of Criminalization*, 22 STAN. L. REV. 101, 114–15 (1969).

<sup>57</sup> *Id.* at 115.

trial.<sup>58</sup> They may not do so if they think that their conduct is illegal.<sup>59</sup> “There is substantial evidence to suggest that police often lie in order to bring their conduct within the limits of the practices sanctioned by judicial decisions.”<sup>60</sup> The only person who can usually contradict the police version of the incident is the defendant, and a defendant’s credibility does not generally compare favorably with that of police officers.<sup>61</sup>

Those who have committed no crime—who possess no contraband—will have no effective recourse at all. Because no evidence was seized, there is no evidence to exclude from a trial.<sup>62</sup> As a practical matter, then, the police only have to worry about unconstitutional searches if something illicit turns up; but if they can confiscate whatever turns up and make an arrest, they may be better off than if they respect constitutional rights and do nothing at all.<sup>63</sup> Moreover, by encouraging such frequent constitutional violations, the enforcement of drug laws desensitizes the police to constitutional safeguards in other areas as well.

The constitutional rights of the general public are therefore threatened in at least two ways. First, the burden placed on law enforcement officials to enforce possessory laws without complaining witnesses virtually compels them to engage in wholesale violations of constitutional prohibitions against unreasonable searches and seizures. For every search that produces contraband there are untold scores of searches that do not. Given our present method of deterring police misconduct by excluding evidence of guilt, there is little effective recourse against the police available to those who are innocent of any crime.<sup>64</sup>

Second, the widespread efforts of police and prosecutors to stretch the outer boundaries of legal searches can be expected, over time, to contribute to the eventual loosening up of the rules by the courts. In drug prosecutions, the evidence being suppressed strongly supports the conclusion that the defendants are guilty. The more cases that police bring against obviously guilty defendants, the more opportunities and incentives appellate courts will have to find a small exception here or there.<sup>65</sup> And instead of prosecuting the police for illegal conduct, the prosecutor’s office becomes an insidious and publicly financed source of political and legal agitation in the defense of such illegal conduct. As I have said elsewhere, “the arm of the government whose function is to prosecute illegal conduct is called upon, in the name of law enforcement, systematically to justify police irregularities. If these arguments are successful, the definition of illegal conduct

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<sup>58</sup> See Barnett, *supra* note 52, at 953.

<sup>59</sup> HELLMAN, *supra* note 6, at 105.

<sup>60</sup> *Id.*

<sup>61</sup> See Barnett, *supra* note 52, at 960–61.

<sup>62</sup> *Id.*

<sup>63</sup> See *id.*

<sup>64</sup> See Barnett, *supra* note 52, at 962.

<sup>65</sup> See *id.* at 959–66 (discussing the costs imposed on courts that decide to suppress evidence).

will be altered.”<sup>66</sup> Refusing to consider these long run effects on the stability of constitutional protections is both dangerous and unrealistic.

One point should be made clear. The police are not the heavies in this tale. They are only doing what drug-law advocates have asked them to do by the only means such a task can be done effectively. It is the drug-law advocates who must bear the responsibility for the grave social problems caused by their favored policies. By demanding that the police do a job that cannot be done effectively without violating constitutional rights, drug-law proponents ensure that constitutional rights will be violated and that the respect of law enforcement personnel for these rights will be weakened.

#### 4. *The Effect of Drug Laws on Corruption*

While most people have read about corrupt law enforcement officials who are supposed to be enforcing drug laws, few people are fully aware how this corruption is caused by the type of laws being enforced.<sup>67</sup> Drug laws allow the police to use force to prevent voluntary activities.<sup>68</sup> Unavoidably, the power to prohibit also gives the police a de facto power to franchise the manufacture and sale of drugs, in return for a franchise fee.<sup>69</sup>

The corruption caused by prohibiting consensual activity is increased still further by the ease with which law enforcement officers can assist criminals when there is no complaining witness. As was seen in the discussion of “victimless robberies,” without a victim to file an official complaint, it is easier for police to overlook a crime that they might see being committed. When there is no victim to contradict the police version of events, it is much easier for police to tailor their testimony to achieve the outcome they desire, for example by describing circumstances of a bad search that would lead to the evidence being suppressed and the charges dropped. When it is the word of the police against the defendant’s, the defendant usually loses. With no victim pressing for a successful prosecution, the police, prosecutor, or judge may scuttle a prosecution with little fear of public exposure.

When compared to a victim crime like robbery, the victimless character of drug offenses (in the descriptive sense discussed above), and the fact that drug users are willing to pay for drugs, creates perverse incentives. When robbery is made illegal, robbers who take anything but cash must sell their booty at a tremendous discount. In other words, laws against robbery reduce the profit that sellers of illegally obtained goods receive and thereby discourage both robbery and the potential for corruption.<sup>70</sup>

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<sup>66</sup> *Id.* at 976.

<sup>67</sup> HELLMAN, *supra* note 6, at 150.

<sup>68</sup> *Id.* at 6–8.

<sup>69</sup> See KAPLAN, *supra* note 6, at 97–98.

<sup>70</sup> Organized burglary and auto theft remain profitable victim crimes, in spite of the fact that they are legally prohibited, and the profits earned from these crimes are used in part to pay for the services of corrupt law enforcement officials. Note however that—as

Drug laws have the opposite effect. Drug law enforcement creates an artificial scarcity of a desired product resulting in sellers receiving a *higher* price than they would without such laws. While it is true that drug prohibition makes it more costly to engage in the activity, this cost is partially or wholly offset by an increased return in the form of higher prices and by attracting criminal types who are less risk-averse—that is, individuals who are less likely to discount their realized cash receipts by their risk of being caught.<sup>71</sup> For such persons, the subjective costs of providing illicit drugs are actually less than they are for more honest persons.

The extremely lucrative nature of the illicit drug trade makes the increased corruption of police, prosecutors, and judges all but inevitable. And this corruption extends far beyond the enforcement of drug laws. Beginning with the prohibition of alcohol, we have witnessed the creation of a multibillion dollar world-wide industry to supply various prohibited goods and services.<sup>72</sup> The members of this industry are ruthless profit maximizers whose comparative market advantage is their ability and willingness to rely on violence and corruption to maintain their market share and to enforce their agreements.

The prohibition of alcohol and other drugs has created a criminal subculture that cares little about the distinction between crimes with victims and those without. To make matters worse, hiding the source of their income from tax and other authorities encourages these criminals to become heavily involved in legal businesses so that they may launder their illegally obtained income. They then can bring to these “legitimate” businesses their brutal tactics, which they use to drive out honest competitors.

The fact that law enforcement personnel are corrupted by drug laws should be no more surprising than the fact that many people decide to get high by ingesting certain chemicals. Among the many tragic ironies of drug prohibition is that by attempting to prevent the latter, they make the former far more prevalent. Yet drug-law advocates typically avoid the question of whether the increased systemic

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compared with robbery—these crimes typically occur when the victim is not around, making them effectively “victimless” with respect to having occurrence witnesses available. And property insurance policies greatly reduce the victim’s enthusiasm to cooperate in the prosecution, which is another feature of a truly victimless crime.

<sup>71</sup> For a discussion of the “time horizons” of criminals that may affect their internal rate of discount, see Edward C. Banfield, *Present-Orientedness and Crime*, in *ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS* 133, 133–42 (1977); see also Gerold P. O’Driscoll, Jr., *Professor Banfield on Time Horizon: What Has He Taught Us About Crime*, in *ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS* 143, 143–62 (1977); Mario J. Rizzo, *Time Preference, Situational Determinism, and Crime*, in *ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS* 163, 163–77 (1977).

<sup>72</sup> See Morgan Cloud, III, *Cocaine, Demand, and Addiction: A Study of the Possible Convergence of Rational Theory and National Policy*, 42 *VAND. L. REV.* 725, 727–28 (1989) (stating that the illegal drug industry collects annual revenues of 100 billion dollars or more).

corruption that their favored policies unavoidably cause is simply too high a price to pay for whatever reduction in the numbers of drug users is achieved.

#### V. THE INJUSTICE OF DRUG LAWS

To this point, my argument has dwelled exclusively on exposing the hidden costs of drug prohibition—costs that unavoidably result from the fact that drug use is consensual and victimless. There is, however, a more principled lesson to be drawn from this discussion of harmful consequences of today's drug policy: Policy makers, are inherently much more limited in their ability to construct good policy than is normally acknowledged. First, policy makers suffer from a pervasive ignorance of consequences.<sup>73</sup> In advance of implementing certain kinds of social programs, it is difficult, if not impossible, to predict the precise effects they will have. The foregoing discussion of the hidden costs of drug laws illustrates that it is often very difficult even to detect and demonstrate the adverse effects of policies that have already occurred.

Second, the judgment of policy makers and other “experts” is often influenced by self-interest (as all judgment can be). After staking one's career on a commitment to certain kinds of programs, rejecting them becomes difficult when their consequences are not as expected. Jobs will be lost if programs are seen as counterproductive or harmful. In rendering opinions, such influences can be hard to resist.

To minimize decisions made in ignorance or out of self-interest, legal policy makers must somehow be constrained. And one historically important way to constrain them is by crafting general principles and rules that are based on a conception of individual rights that rests on fundamental principles of justice.<sup>74</sup>

A sound legal system requires a firmer foundation for analyzing questions of legality than ad hoc arguments about the exigencies of particular policies. It requires the identification of general principles that reduce the hidden costs of the sort we have seen results from drug laws without resorting to an endless series of explicit cost-benefit analyses. It requires principles of general application that can be defended as basically just and right, despite the fact that circumstances will arise when adherence to such principles appears to be causing harm, which a deviation from principle would seem to be able to rectify.

A legal system based on such principles—if such principles can actually be identified—would not be as vulnerable to the shifting winds of opinion and prejudice as are particularistic public-policy discussions. I have discussed the vital social role and the appropriate substance of individual rights at greater length

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<sup>73</sup> For an excellent summary of the literature that discusses the “knowledge problem” facing public policy analysts, see DON LAVOIE, NATIONAL ECONOMIC PLANNING: WHAT IS LEFT? 51–92 (1985).

<sup>74</sup> This section is based on the analysis of the pervasive social problems of knowledge, interest, and power in RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW (1998).

elsewhere and shall not repeat the analysis here.<sup>75</sup> The conclusion of such an analysis when applied to drug laws is that such laws are not only harmful, they are unjust.

The only practical way of facilitating the pursuit of happiness for each individual who chooses to live in a social setting is to recognize the rights of individuals to control their external possessions and their bodies—traditionally known as property rights—free from the forcible interference of any other person. If the pursuit of happiness is the Good for each person, then property rights are the prerequisites for pursuing that Good while living in close proximity to others. And the social prerequisites of the Good are the tenets of justice that all must live by. To deny these rights is to act unjustly.

The inalienable rights of individuals to live their own lives and to control their own bodies are, according to this analysis, essential to human survival and fulfillment in a social setting. Drug laws undermine this control by seeking to subject the bodies of some persons to the forcible control of other persons. Such laws seek forcibly to prevent persons from using their bodies in ways that they desire and that do not interfere with the equal liberty of others.

A proper rights analysis would avoid wasteful, and often irreversible, social experimentation. Two factors were seen above to generate the hidden costs of drug laws: the use of forcible *means* to achieve the *end* of controlling consensual conduct. These are the very factors that together identify drug laws as violations of individual rights and unjust interferences with individual liberty.

Just as you do not need to try PCP to know it is, on balance, bad for you, a proper rights analysis can reveal that we do not have to try drug laws to know they are socially harmful. This illustrates why a system of rights is ultimately preferable to a system of ad hoc public policy determinations. Had we adhered to a system of properly crafted individual rights, we would have avoided these serious harms in the first place.

John Stuart Mill once provided a defense of the distinction between matters of justice or rights that are properly subject to legal enforcement and matters of morality or vice that are not: “Justice is a name for certain classes of moral rules, which concern the essentials of human well-being more nearly, and are therefore of more absolute obligation, than any other rules for the guidance of life. . . .”<sup>76</sup> And “the essence of the idea of justice,” is “that of a right residing in the individual. . . .”<sup>77</sup> As Mill then concluded, “[t]he moral rules which forbid mankind to hurt one another (in which we must never forget to include wrongful interference with each other’s freedom), are more vital to human well-being than any maxims, however important, that only point out the best mode of managing

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<sup>75</sup> *See id.*

<sup>76</sup> JOHN STUART MILL, UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT 55 (Ernest Rhys ed., E.P. Dutton & Co 1920) (1910).

<sup>77</sup> *Id.*

some department of human affairs.”<sup>78</sup> The proposition that the law should not attempt to regulate all vices is, of course, much older than Mill.<sup>79</sup>

A rights analysis does it deny that drug use can adversely “affect” the lives of others. Many kinds of conduct from quitting school to having sex with strangers—can adversely affect the lives of those close to the persons who engage in such activity. But this does not justify collapsing the distinction between acts that adversely affect another and acts that violate another’s rights.

Herbert Spencer considered the objection that there is no “essential difference between right conduct toward others and right conduct toward self, [because] . . . what are generally considered purely private actions, do eventually affect others to such a degree, as to render them public actions; as witness the collateral effects of *drunkenness* or suicide.”<sup>80</sup> In this allegation, he conceded “there is much truth; and it is not to be denied that under a final analysis, all such distinctions as those above made must disappear.”<sup>81</sup> Nevertheless, the difficulty of drawing such a line is characteristic of all classifications. “The same finite power of comprehension which compels us to deal with natural phenomena by separating them into groups and studying each group by itself,” he replied, “may also compel us to separate those actions which place a man in direct relationship with his fellows, from others which do not so place him; although it may be true that such a separation cannot be strictly maintained.”<sup>82</sup>

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<sup>78</sup> *See id.* at 73.

<sup>79</sup> *See, e.g.*, Thomas Aquinas, *The Summa Theologica II*, in 20 GREAT BOOKS OF THE WESTERN WORLD 205 (Robert Maynard Hutchins & Mortimer J. Adler eds., Fathers of the English Dominican Province trans., 1952). There he poses the question, “Whether It Belongs to Human Law to Repress All Vices?” and answers in part:

Thus the same is not possible to a child as to a full-grown man, for which reason the law for children is not the same as for adults, since many things are permitted to children which in an adult are punished by law or at any rate are open to blame. In like manner many things are permissible to men not perfect in virtue which would be intolerable in a virtuous man. Now human law is framed for a number of human beings, the majority of whom are not perfect in virtue. Therefore human laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to abstain, and chiefly those that are *to the hurt of others, without the prohibition of which human society could not be maintained*; thus human law prohibits murder, theft and the like.

*Id.* at 231–32 (emphasis added). The absence of tangible “injuries to others” led some modern writers to characterize laws regulating matters of vice as “victimless crimes.” *See, e.g.*, EDWIN M. SCHUR, CRIMES WITHOUT VICTIMS 163 (1965).

<sup>80</sup> HERBERT SPENCER, SOCIAL STATICS; OR THE CONDITIONS ESSENTIAL TO HUMAN HAPPINESS SPECIFIED, AND THE FIRST OF THEM DEVELOPED 85–87 (D. Appleton and Co., 1888) (1865) (emphasis added).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*



Legal institutions are not capable of correcting every ill in the world. On this point most would agree. Serious harm results when legal means are employed to correct harms that are not amenable to legal regulation. The harmful side-effects of drug laws represent a case in point. A properly formulated analysis of individual rights provides a way of distinguishing harms that are properly subject to legal prohibition from those that are not.

## VI. CONCLUSION

An addiction to drug *laws* is caused by an inadequate understanding of individual rights and the vital role such rights play in deciding matters of legality. As a result, policies are implemented that cause serious harm to the very individuals whom these policies were devised to help and to the general public.

If the rights of individuals to choose how to use their person and possessions are fully respected, there is no guaranty that people will exercise their rights wisely. Some may mistakenly choose the path of finding happiness in a bottle or in a vial. Others may wish to help these people by persuading them of their folly and supporting them when they seek to wean themselves from their dependency.

We must not, however, give in to the powerful temptation to grant some the power to impose their consumptive preferences on others by force. This power—the essence of drug laws—is not only addictive once tasted, it also carries with it one of the few guaranties in life: the guaranty of untold corruption and human misery.