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## SYMPOSIUM

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# Drug Legalization

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### Foreword

On December 29, 2002, the American Philosophical Association's Committee on the Philosophy of Law sponsored a symposium on the drug legalization at the Annual Meeting of APA's Eastern Division in Philadelphia, Pennsylvania. At a time when the "war on drugs" has been increasingly assailed not only for its effectiveness but also for its legitimacy, the symposium was an expression of concern with both the social effects of drugs and drug legislation as well as its ideological underpinnings. The lead presenter was Douglas Husak, a preeminent

philosophical critic of the legal status quo, and his contribution was critiqued by George Sher. A second position paper was delivered by Peter de Marneffe, taking a position that, if not completely in support of the current legal situation, was at least sympathetic to some of the concerns it embodies. His paper was responded to by Daniel Shapiro. All four papers have been revised for publication, and Lester Hunt, who chaired the session, has generously contributed an Epilogue.

JOHN KLEINIG

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## Four Points About Drug Decriminalization

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DOUGLAS HUSAK

Philosophers have been strangely silent about the topic of illicit drugs, even though it is a gold mine of philosophical questions. It is distressing to see how few of the dozens of books now available on current moral and social issues contain sections on drug issues. It seems far more pressing to question the punishment of drug users than the execution of murderers—mostly because there are so many more of them. Approximately 80 to 90 million people have used illicit drugs at some point in their lives. There are well over 400,000 drug offenders in jail, about 130,000 for possession alone. Unlike the case of capital murder-

ers, it is plausible to suppose that drug users should not be punished at all, and this is what I want to argue here.

I suspect that the best single explanation for the philosophical neglect of this topic is that it has a considerable empirical content. When I raise this issue with my undergraduate classes, and ask why we should or should not punish drug users, less than a minute is needed before someone makes a controversial empirical claim about the effects of given drugs on users or on society in general. No one can hope to address the set of moral and legal issues about drug decriminalization without knowing a lot of facts about drugs and drug users. Contrast this with abortion, in which the relevant facts can be learned fairly quickly. Philosophers understandably tend to shy away from topics with a heavily empirical component.

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Yet without the input of philosophers, the field has been left largely to scholars in criminal justice, nearly all of whom profess to have no theory of criminalization, but seem mostly to be consequentialists. They prepare cost-benefit analyses of the relative merits of criminalization and decriminalization. Many have concluded that our

current drug laws are ineffective and counterproductive. They are probably correct, but that is not the line of inquiry I want to pursue here. As philosophers, I think we should be more interested in examining arguments of principle.

## I The Meaning of Decriminalization

First, there is absolutely no consensus among those of us who work in criminal theory about the meaning of such terms as *legalization* or *decriminalization*. So I resort to stipulation. What I mean by the use of the term “decriminalization” in this context is that the *use* of a given drug would not be a criminal offense. I take it to be a conceptual truth for which I will not argue here that criminal offenses render persons liable to state punishment. Thus anyone who thinks that the use of a given drug should be decriminalized believes that persons should not be punished merely for using that drug.

I am aware that there is enormous confusion about this topic. In polls, many respondents report that they do not want to see a given drug decriminalized, but do not favor punishing people who merely use that drug. If my account of decriminalization is accepted, this response is incoherent.

For a number of reasons, this definition of decriminalization is deceptively simple. First, there really is little punishment for use today. In most but not all jurisdictions, what is punished is possession rather than use. Technically, then, drug use is generally not criminalized. But I take the fact that statutes punish possession rather than use to be relatively unimportant. Possession is punished rather than use because it is easier to prove. In what follows, I ignore this complication and continue to suppose that decriminalization pertains to drug use. Except perhaps in fantastic cases, no one can use a drug without possessing it.

Second, there is no clear understanding of what kinds of state responses amount to punishments. Many reformers argue that drug users should be fined rather than imprisoned, and they call this idea decriminalization. Others argue that drug users should be made to undergo treatment, and they also call this idea decriminalization. Whether these proposals are compatible with what I mean by decriminalization depends on whether fines or coerced treatment are modes of punishment rather than alternatives to punishment. I think both fines and coerced

treatment are modes of punishment. Even though they are probably preferable to what we now do to drug users, these responses are ruled out by decriminalization as I construe it. But that is a quibble I hope not to worry about. Simply put, whatever you take punishment to be, that is what decriminalization forbids the state from doing to people who merely use drugs.

Third, decriminalization as I propose to define it has no implications for what should be done to persons who *produce* or *sell* drugs. Therefore, it is not really a comprehensive drug policy that can rival the status quo. The considerations that I think work in favor of decriminalizing use are somewhat different from those that apply to the decriminalization of production and sale, so I propose to put production and sale aside in this essay. This is bound to disappoint some people. Many thinkers are attracted to decriminalization, or reluctantly driven to support it, because they hope to end the violence, black market, and involvement of organized crime in drug transactions today. These sound like worthwhile objectives, but drug decriminalization per se does not achieve them. I think we should start by clarifying what should happen to drug users, and *then* move to the issue of whether or how production and sale should be regulated. Again, I am aware that many thoughtful people believe that these topics should all be tackled simultaneously, but I think it is easier to proceed one step at a time.

Finally, I admit that there is something odd about my understanding of decriminalization. What I call decriminalization in the context of drugs is comparable to what was called prohibition in the context of alcohol from 1920 to 1933. During those memorable years, production and sale were banned, but not the use or mere possession of alcohol. If we replicated that approach in our drug policy, I would call it decriminalization. That is admittedly odd, but it underscores the fact that our response to illicit drug users today is far more punitive than anything we ever did to drinkers.

## II The Best Reason to Decriminalize Drug Use

With these preliminaries out of the way, let me proceed to the basic question to be addressed. In my judgment, the fundamental issue is not whether to *decriminalize* the use of any or all drugs, but whether to *criminalize* the use of any or all drugs. The status quo must be defended. If this is the right question to ask, I would now like to offer what I believe to be the most plausible answer to it: The best reason *not* to criminalize drug use is that no argument in favor of criminalizing drug use is any good—no argument is good enough to justify criminalization. I want to make three points about this general strategy for decriminalization.

First, I recognize that this approach is not very exciting. My reason to oppose criminalization does not invoke any deep principle worth fighting about like freedom of speech or religion. I am not sure that there is any deep principle that *all* drug prohibitions violate. In particular, my approach does not invoke the principle that some libertarians cite: the “freedom to do whatever you want to your own body.” I do not invoke this principle because I do not believe it is true. I am not a libertarian. Whether you have a right to do something you want to your body depends on what happens when you do it.

Then again, *some* drug prohibitions seem to violate deep principles that philosophers should care about. This becomes more apparent when you pause to consider exactly what it is that drug proscriptions are designed to prevent. Most drugs have a legitimate use, so drug consumption per se is rarely prohibited. Instead, the use of most drugs is prohibited only for a given purpose. To get directly to the heart of the matter, the proscribed purpose is usually to produce a state of intoxication or a drug “high.” In case there is any doubt, let me cite the California criminal statute regulating nitrous oxide. This statute makes it a crime for “any person [to possess] nitrous oxide . . . with the intent to breathe [or] inhale . . . for purposes of causing a condition of intoxication, elation, euphoria, dizziness, stupefaction, or dulling of the senses or for the purpose of, in any manner, changing . . . mental processes.”<sup>1</sup> The ultimate objective of this statute is to prevent persons from breathing something in order to change their mental processes. It is hard to see why this objective is legitimate in a state committed to freedom of thought and expression.<sup>2</sup> I am not sure that *all* drug prohibitions so transparently jeopardize our right to freedom of thought. In any event, I do not believe we need to

appeal to any deep principle to resist drug prohibitions generally.<sup>3</sup>

Second, my case is necessarily inconclusive. I am in the unenviable position of trying to prove a negative. How can I hope to show that no argument in favor of criminalizing drug use is good enough? All I can ever aspire to do is to respond to the best arguments that have been given. I am reminded of a remark made by Hume. “Tis impossible to refute a system, which has never been explain’d. In such a manner of fighting in the dark, a man loses his blows in the air, and often places them where the enemy is not present.”<sup>4</sup> This is the predicament someone faces in trying to defend drug decriminalization. I am usually asked to go first on panels convened to debate drug decriminalization, but I think I should go last so that I can respond to what others think are good reasons for criminalization.

Third, my case for decriminalization has the advantage of making minimal assumptions about justice. I assume that no one should be punished unless there are excellent reasons for doing so. Punishment, after all, is the worst thing our state can do to us. The imposition of punishment must satisfy a very demanding standard of justification.<sup>5</sup> It is hard to imagine that anyone would reject this assumption.

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Thus my case against criminalization depends on the claim that no case for criminalization has been adequately defended. It is utterly astounding, I think, that no very good argument for drug prohibitions has ever been given. When I am asked to recommend the best book or article that makes a philosophically plausible case for punishing drug users, I am embarrassed to say that I have little to suggest.<sup>6</sup>

Let me then cut directly to my own conclusions. No single argument for decriminalization responds to all

arguments for criminalization. We must respond argument-by-argument, and, I think, drug-by-drug. We may have good reasons to criminalize some drugs, but not others. For example, I do not know anyone who wants to punish persons who use caffeine. Surely this is because of empirical facts about caffeine—how it affects those who use it and society in general. I can certainly *imagine* a drug that people should be punished for using. Such

drugs are easy to describe; they are vividly portrayed in great works of fiction. Consider the substance that transformed Dr. Jekyll into Mr. Hyde. If a drug literally turned users into homicidal monsters, we would have excellent reasons to prohibit its consumption. Fortunately, no such drug actually exists. In fact, I have never seen a persuasive argument for punishing persons who use any drug that I am aware is widely used for recreational purposes.

### III Criminalization

Any good reason to criminalize a kind of behavior invokes a theory of criminalization. We cannot decide whether we have a good reason to punish persons who use drugs in particular unless we know what would count as a good reason to punish anyone for anything. We do not really have a theory of criminalization in the real world, unless “more is always better” qualifies for a theory.<sup>7</sup> I want to pause briefly to describe what passes for a theory of criminalization in our constitutional law today.<sup>8</sup> Most laws limit or restrict liberties. When the constitutionality of these laws is challenged, courts respond by dividing liberties into two kinds: *fundamental* and *non-fundamental*. The constitutionality of legislation that restricts a fundamental liberty is subjected to “strict scrutiny” and is evaluated by applying the onerous “compelling state interest” test. Virtually all criminal laws, however, limit non-fundamental liberties, and they are assessed by applying the much less demanding “rational basis” test. Under this test, the challenged law will be upheld if it is substantially related to a legitimate government purpose. The legitimate government purpose need not be the actual objective of the legislation—only its conceivable objective. Since only those laws that lack a conceivable legitimate purpose will fail this test, courts almost never find a law to be unconstitutional when non-fundamental liberties are restricted. As a result, the state needs only some conceivable legitimate purpose to enact the great majority of criminal laws on the books today—most notably, drug prohibitions, which are always evaluated by applying the rational basis test. So persons who break these laws can be punished simply because the state has a rational basis to do so.

What is remarkable about this approach is its complete indifference to the distinction between criminal and non-criminal legislation.<sup>9</sup> It is one thing to enact non-criminal laws that pass the rational basis test. But it is quite another when criminal legislation is assessed by

that same standard. Criminal law is different—it is importantly dissimilar from other kinds of law. Many of the arguments I have heard for drug prohibitions do a perfectly good job explaining why rational persons might well decide not to use illicit drugs, or why the state may have good reasons to discourage people from using drugs, but I fear they do not provide a justification for *punishing* drug users.

If our theory of criminalization in the real world is so bad, one would have thought that the most distinguished criminal theorists of our day would have had lots to say to rectify the situation. But they have said surprising little. They mostly continue to argue about the *harm principle*. But debates about whether to accept the harm principle in our theory of criminalization do not get us very far when trying to decide whether to punish drug users. We have excellent reasons to punish people who commit theft or rape. These offenses harm others by violating their rights. But this rationale cannot explain why drug users should be punished. I do not think there is any sense of harm or any theory of rights that can be invoked to show that I harm someone or violate his rights when I inject heroin or smoke crack. At most, I risk harm to myself or to others when I use a drug. I conceptualize offenses that create only a *risk* of harm that may or may not materialize as *inchoate* offenses—similar to attempt, solicitation, or conspiracy. If I am correct, the criteria we should apply to assess the justifiability of drug proscriptions are those we should apply to assess the justifiability of inchoate offenses. Unfortunately, we have no such criteria. Almost no theorist has tried very hard to extend a theory of criminalization to conduct that creates a risk of harm rather than harm itself.<sup>10</sup>

Notice, however, the enormous burden an argument for criminalization would have to bear. As I have said, there are about 80 or 90 million Americans who have used an illicit drug at some point in their lives. That is



approximately 42 percent of our population aged 12 and over. About 15 million Americans used an illicit drug last year, on literally billions of occasions. Very few of these occasions produced any harm. Longitudinal studies do not indicate that the population of persons who ever have used illicit drugs is very different from the population of lifetime abstainers in any ways that seem relevant to criminalization. So any argument for punishment would have to justify punishing the many, whose behavior is innocuous, for the sake of some objective that results in a very tiny percentage of cases. Many attempted murders result in successful murders, which are harms, but very few instances of drug use bring about any result we should describe as significantly harmful.

When you cannot possibly punish *all* of the people who commit a crime, you can only punish *some*. Inevitably, those who get arrested, prosecuted, and sentenced are the least powerful. Drug prohibition would have vanished long ago had whites been sent to prison for drug offenses at the same rate as blacks. Although minorities are no more likely to use illicit drugs, they are far more likely to be arrested, prosecuted, and punished when they do. This is one of the features of drug prohibitions that should outrage us all. Some people try to package

drug prohibitions as a benefit to minorities, but there is plenty of evidence that they devastate minority communities and will continue to do so as long as enforcement is so selective. And yet enforcement will always be selective, since every offender cannot possibly be punished.

If drug prohibitions are so bad for minority communities, one may wonder why minority leaders are not more outspoken about the drug war. In fact, blacks are more ambivalent than whites about drug policy.<sup>11</sup> Overall, blacks tend to have more negative opinions about drugs (both licit and illicit) than whites. At the same time, blacks are less likely than whites to believe that the solution to the problem is to enforce prohibition with severe punishments. Black mothers who are staunchly anti-drug are not enthusiastic about policies that lock up their sons and daughters for lengthy periods of time. But why are blacks not even more critical of the status quo? No one explanation can be given. But my own hypothesis cites the role of religion on attitudes about drugs. Although opinions about drug policy vary somewhat with age, education, income, and gender, no variable correlates with anti-drug attitudes more closely than religion and, at least in the United States, protestant Christianity in particular.

#### IV Predictions: A Bad Reason to Criminalize

I have space to provide a brief critique of only *one* argument, and I apologize in advance if I neglect the reader's own candidate for the best reason to criminalize drug use. I will not comment on drugs and kids, drugs and health, drugs and crime, or drugs and morality. But I think the argument I discuss here may be the most common. It rests on predictions that the use of drugs would soar if we stopped punishing persons who use them. This argument, I think, flounders on both empirical and normative grounds.

I begin with the empirical considerations. My conclusion is that we simply do not have any good basis to predict how the amount of harm caused by drugs would change if we did not punish those who use them. Many persons find my uncertainty to be unwarranted. Economic models indicate that the frequency of use is a function of costs: decriminalize use, and the monetary and non-monetary costs of drugs will go down. The trouble is that all predictions about how rates of consumption will rise after use is decriminalized assume that nothing else will change. One thing we can predict is that many other

things will change if drug use is decriminalized. Let me mention just a few things that might very well change, and that make all such predictions perilous.

I begin by challenging the claim that decriminalization will cause the monetary price of drugs to plummet. Why assume that decriminalization will make illicit drugs significantly more affordable? Decriminalization itself, as I have emphasized, need not allow illicit drugs to be sold with impunity. If decriminalization does not extend to sale, it need not have much affect on the monetary cost of drugs. But even were sale decriminalized, illicit drugs would become subject to taxation. I will not try to estimate the optimal rate of taxation. Whatever the exact amount, we can be sure that taxes would add enormously to the price of newly decriminalized drugs.

Another factor influencing the price of decriminalized illicit drugs is very difficult to estimate. If illicit drugs are anywhere near as harmful as many people believe, some mechanism must be created to compensate victims for the harms they suffer when drugs are used. These harms might befall users themselves, or be suffered by others.

One way to compensate victims for each of these kinds of harms is by allowing lawsuits against producers of illicit drugs. We have been reluctant to allow such lawsuits in the cases of tobacco, alcohol, or firearms; powerful lobbies have fought against them for years. But we need not be so reluctant if we establish a new system of sale for illicit drugs. Producers could be made to pay for the costs of the various harms that their customers cause to themselves or to others. Producers would be able to pay these costs, and remain in business, only if they could pass them along to buyers by raising their prices. How much of an increase in price would be needed to compensate all of the victims for the harms they suffer when illicit drugs are used? No one can be sure. We cannot begin to answer this question unless we know how dangerous illicit drugs really are. I believe that the dangers of illicit drugs tend to be grossly exaggerated. Even if I am mistaken about the dangers of illicit drugs today, we can be confident that illicit drugs would be less dangerous in a world in which production and sale had been decriminalized. In such a world, suppliers would have enormous incentives to make their drugs as safe as possible in order to limit the amount of money they would be required to pay when harm was caused by the use of their product. If a given drug is very dangerous, we might even find that no company could hope to make a profit by selling it, and the drug would disappear from the lawful market. We simply do not know how dangerous illicit drugs will turn out to be after decriminalization, but financial incentives are bound to make them less harmful.

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*Illicit drugs would be less dangerous in a world in which production and sale had been decriminalized.*

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As a result of these two factors, we have almost no basis for estimating how the monetary price of decriminalized drugs would differ from their price in today's black market—if, that is, decriminalization were extended to production and sale. We do not know how much states will decide to tax the sale of drugs. In addition, we do not know how much sellers will have to charge in order to survive when lawsuits are brought against them. If this latter figure is high, drugs will be expensive, and fears about cheap drugs will be put to rest. If this figure is low,

the price of drugs will decrease. But if the amount sellers must charge as a result of these lawsuits is low, it means that drugs will turn out to be less dangerous than we thought. If drugs turned out to be less dangerous than we thought, we will come to wonder why we were so worried about making them more affordable in the first place.

However uncertain we may be about how decriminalization will affect the monetary price of drugs, it will clearly eliminate the non-monetary cost of use. People will no longer fear arrest and prosecution. To the extent that this fear has helped to keep illicit drug use in check, we can anticipate that decriminalization would cause the incidence of drug use to rise. But to what extent? How will consumption change if drug users need not worry about punishment? No single piece of evidence on this point is decisive. But several factors suggest that the threat of punishment is not especially effective in curbing drug use. In what follows, I will describe a number of reasons to doubt that the removal of criminal penalties would cause a significant increase in the use of illicit drugs.

One source of evidence is obtained through surveys. People who have never used drugs are asked to explain their reasons for abstaining, and to speculate about how their willingness to experiment would be affected by a change in the law. Very few respondents cite their fear of punishment as a substantial factor in their decision not to try drugs.<sup>12</sup> The more dangerous the drug is perceived to be, the smaller the number of respondents who mention the law when asked to explain their reluctance to use it. Other surveys ask former users why they decided to quit. Those who once used drugs are asked why they do not continue to do so today, and to explain why their behavior has changed. Very few respondents report that fear of arrest and prosecution led them to stop using drugs. They cite a bad experience with a drug or some new responsibility, like a job or a newborn, but rarely mention the risk of punishment.<sup>13</sup> Of course, the value of these kinds of surveys is questionable. We may doubt that people have accurate insights into why they behave as they do, or what might lead them to behave differently. Surely, however, these surveys provide better evidence than mere conjecture. These surveys suggest that the fear of punishment is not a major factor in explaining why drug use is not more pervasive than it is.

For further evidence about how the fear of punishment affects the incidence of drug use, we might examine how trends in illicit drug use over the past thirty years are correlated with changes in law enforcement. If the fear of punishment were a significant factor in deterring illicit drug use, one would expect that rates of consumption

would decline as punishments increased in frequency and severity. There is no correlation, however, between the frequency and severity of punishment and trends in drug use. If we look at the decade from 1980 to 1990, a case could be made that punishments were effective in deterring use. The incidence of illicit drug use, which peaked in 1979, steadily decreased throughout the 1980s. But frequent and severe punishments have not caused further declines during the 1990s; drug use has remained relatively flat in the past decade. We reach the same conclusion when we examine the data on a state-by-state basis. States with greater rates of incarceration for drug offenders tend to experience higher rates of drug use. Prohibitionists who predict a massive increase in drug use after decriminalization must struggle to explain these data. If punitive drug policies keep drug use in check, why do actual trends in drug consumption prove so resistant to the massive efforts we have made to punish drug users?

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Additional evidence can be gleaned from the experience of other countries, where the fear of arrest and prosecution for the use of given drugs is practically nonexistent. Most European countries have lower rates of illicit drug use, even though given drugs are often higher in quality, lower in price, and less likely to result in punishments. American teenagers consume more marijuana and most other illicit drugs than their European counterparts, although European teens are more likely to smoke cigarettes and drink alcohol. Consider the Netherlands, which is known for its relatively permissive drug laws. Although marijuana prevalence rates are roughly comparable in the two countries, about twice as many residents of the United States have experimented with other kinds of illicit drugs. In general, data from other parts of the world provide better evidence for an inverse than for a positive correlation between severities of punishments and rates of illicit drug use. Admittedly, however, this evidence is inconclusive. No country in the world has implemented decriminalization as I have defined it here.

The history of the United States provides further reason to doubt that fear of punishment plays a major role in

reducing the use of illicit drugs. We must keep in mind that, for all practical purposes, drug prohibition did not begin until the early part of the twentieth century. In the nineteenth century, purchases of opium, morphine, cocaine, and marijuana were subject to almost no restrictions. Americans could buy these drugs in many different varieties from several different sources, including by mail order. But even though criminal penalties were not imposed for the use of opiates and cocaine, these drugs were probably less popular than today. Admittedly, however, the verdict of history is mixed. Most Americans agree that our era of alcohol prohibition was a dismal failure. By most accounts, however, per capita consumption of alcohol decreased throughout prohibition, and did not return to pre-prohibition levels for many years. This finding has led some social scientists to conclude that prohibition “worked” after all—if a reduction in use is the most important criterion of success. Others are skeptical. Curiously, however, even those social scientists who insist that alcohol prohibition was effective almost never recommend that our country should reinstate that policy.

Trends in the use of *licit* drugs provide yet another source of evidence. Prohibitionists tend to point to a reduction in illicit drug use over the last twenty years as a reason to believe that severe punishments have been effective in curbing drug use. Comparable declines in the use of alcohol and tobacco, however, have taken place over this same period of time, even without the threat of criminal liability. Rates of monthly illicit drug use in the United States peaked at about 14 percent in 1979, steadily declined to a low of just above 5 percent in 1992, and slowly increased thereafter to about 6 percent in 2001. Trends in alcohol and tobacco use exhibit more similarities than dissimilarities with these patterns. The overall use of alcohol and tobacco declined throughout the 1980s, and rebounded somewhat during the 1990s. We have ample evidence that the use of licit drugs can be decreased without the need to resort to criminal sanctions. We should assume that the same is true of illicit drugs.

If changes in the certainty and severity of punishment are not major factors in explaining trends in illicit drug use, what *does* account for these patterns? This is one of the most fascinating and difficult questions that arises about drug use, and I confess to having no good answer to it. Trends in the use of both licit and illicit drugs are as baffling and mysterious as trends in fashion. Unless we have better theories to explain why people use drugs, our forecasts about the future are bound to be simplistic. No one has a convincing explanation of why the use of a given drug increases or decreases within a given group in



a given place at a given time. By 2001, the popularity of crack in inner cities had waned enormously. Crack is no longer regarded as “cool” or “hip.” Why? No simple answer can be given. Most experts believe that a heightened consciousness about health contributed to the reduction in the use of licit drugs during the 1980s. But what caused this growing concern about health, and why did it not lead rates of drug use to fall still further throughout the 1990s? Again, no answer is clearly correct. But credibility is strained if we suppose that a factor is important in accounting for decreases in the consumption of alcohol and tobacco but unimportant in accounting for decreases in the consumption of illicit drugs, especially when the patterns of these decreases are roughly comparable. In any event, we have little reason to believe that punishments play a central role in explaining trends in drug use.

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I have provided several reasons to doubt that punishment is needed to keep rates of illicit drug use within reasonable bounds. But skepticism about the efficacy of punishment as a deterrent to drug use is only a small part of the reason why predictions about drug use after decriminalization are so tenuous. Recall the terms of decriminalization that I have offered here. The only change that this policy requires is that the state would not *punish* anyone simply for using a drug for recreational purposes. The state may adopt any number of devices to discourage drug use, as long as these devices are not punitive. Even more important, institutions other than the state can and do play a significant role in discouraging drug use. After decriminalization, some of these institutions might exert even more influence. Private businesses, schools, insurance companies, and universities, to cite just a few examples, might adopt policies that discriminate against drug users. Suppose that employers fired or denied promotions to workers who use cocaine. Suppose that schools barred students who drink alcohol from participating in extracurricular activities. Suppose that insurance companies charged higher premiums to policy holders who smoke tobacco. Suppose that colleges denied loans and grants to undergraduates who use marijuana. I do not

endorse any of these ideas; many seem unwise and destined to backfire. Removing drug-using kids from schools, for example, seems destined to *increase* their consumption. I simply point out that such institutions could have a far greater impact than our criminal justice system on people's decisions to use drugs.

Predictions about drug use after decriminalization are confounded by yet another phenomenon—the “forbidden fruit” effect. Many people, adolescents in particular, are attracted to an activity precisely because it is forbidden or perceived as dangerous. Much of the thrill of illicit drug use stems from its illegality and the culture of deviance that surrounds it. Might the use of some illicit drugs actually *decrease* because they are no longer forbidden? If we change the law, the appeal of illicit drugs will be changed as well. To what extent? No one knows. Although many scholars have noted the forbidden fruit effect, serious research has yet to demonstrate its real significance.

Alarming predictions about future use assume that the drugs of tomorrow will resemble the drugs of today. This assumption seems extraordinarily naïve. The development of new and different substances makes predictions about consumption enormously speculative. Even though many illicit drugs—heroin and LSD, for example—were originally created by pharmaceutical companies, reputable corporations have tried hard to disassociate their drug products from illicit drugs. Decriminalization may lead pharmaceutical companies to expend their talent and ingenuity to create better and safer recreational drugs. One can only wonder about the products that might be developed if the best minds were put to the task. If more enjoyable and less dangerous drugs could be perfected, consumption might boom. But the development of better and safer drugs would make the increase in consumption less of a problem.

Whether or not better drugs appear on the market, no one can predict how users will substitute newly decriminalized drugs for existing licit drugs. After decriminalization, consumers will have lawful alternatives that we take for granted in other contexts. We simply do not know whether and to what extent users will substitute newly decriminalized drugs for those licit drugs they now tend to prefer. If a great deal of substitution takes place, the enormous social harm presently caused by tobacco and alcohol might decline considerably. So the total amount of harm caused by *all* categories of drugs might actually *decrease*, even if the consumption of illicit drugs were to *increase*. I do not find this conjecture so implausible. Over time, one would expect that users would tend to gravitate toward those drugs that could be integrated more easily



into their lifestyles. In particular, we should welcome a possible reduction in alcohol use. As any college administrator knows, alcohol is the drug implicated in most of the date rapes, property damage, and violent behavior on campus. A possible decrease in alcohol consumption is one of the silver linings on the feared black cloud of drug decriminalization.

For all of these reasons, we should avoid predictions about how the decriminalization of drugs will affect rates of consumption. An even more important point is that these empirical conjectures are not especially relevant to the topic at hand. We are looking for a respectable reason to criminalize drug use. Predictions about how decriminalization will cause an increase in drug use simply do not provide such a reason. Indeed, this reason could be given against repealing virtually any law, however unjustified it may be. Let me illustrate this point by providing an example of an imaginary crime that I assume everyone would agree to be unjustified. Suppose that the state sought to curb obesity by prohibiting people from eating pizza—an offense that would pass the rational basis test, by the way. Suppose that a group of philosophers convened to discuss whether we should change this law and decriminalize pizza consumption. Someone would be likely to protest that repealing this law would cause the consumption of pizza to increase. I imagine

they would be correct. But surely this prediction would not serve to justify retaining this imaginary prohibition. If we lacked a good reason to attack the problem of obesity by punishing pizza eaters in the first place, the effects of repeal on pizza consumption would not provide such a reason. And so with drugs. Unless we already *have* a reason to punish pizza consumption, the prediction does not provide a good reason to *continue* to punish it.

If there is a good reason to criminalize illicit drug use, we have yet to find it. We need a better reason to criminalize something other than predictions about how its frequency would increase if punishments were not imposed. These predictions are dubious both normatively and (in this case) empirically. Despite my uncertainty about the future, there is *one* prediction about which we can be absolutely confident. After decriminalization, those who use illicit drugs will not face arrest and prosecution. The lives of drug users would not be devastated by a state that is committed to waging war against them. Punishment, we must always be reminded, is the worst thing a state can do to us. The single prediction we can safely make about decriminalization is that it will improve the lives of the hundreds of thousands of people who otherwise would be punished for the crime of using drugs for recreational purposes.

#### NOTES

[These comments are drawn from two books I have written about drug prohibitions. See Douglas Husak: *Drugs and Rights*, Cambridge: Cambridge University Press, 1992; and *Legalize This! The Case for Decriminalizing Drugs*, London: Verso Press, 2002.]

1 *Cal. State Penal Code*, §381(b) (2002).

2 This point is made nicely by Richard Boire. See his <http://www.cognitiveliberty.org>.

3 I would be happy to be mistaken about this. Anyone who is more confident in his ability to identify and defend deep principles that are violated by all drug prohibitions is welcome to enlighten and assist me.

4 David Hume, *A Treatise of Human Nature*, (Selby-Bigge ed, 1968), Book III Section 1 p.464.

5 See Douglas Husak: "Limitations on Criminalization and the General Part of Criminal Law," in Stephen Shute and A.P. Simister (eds), *Criminal Law Theory: Doctrines of the General Part*, Oxford: Oxford University Press, 2002, p. 13.

6 When I lecture about this topic, I try to anticipate and respond to an argument that I think people in the particular audience are likely to hold. Invariably, among the first points raised in the ensuing discussion is: You did a fine job with the argument you addressed, but you did not respond to some

other argument. Of course, the argument to which I did not respond is the very argument which I addressed in a previous lecture, when someone in the audience protested that I neglected the argument to which I am now responding. This is all very frustrating. Again, I find myself in the predicament described by Hume.

7 William Stuntz, "The Pathological Politics of Criminal Law," *Michigan Law Review* 100 (2001), p. 508 n.5.

8 For a more detailed elaboration, see Erwin Chemerinsky, *Constitutional Law: Principles and Policies*, New York: Aspen, 1997, pp. 414-17, 533-45.

9 See Sherry Colb, "Freedom from Incarceration: Why Is This Right Different from All Other Rights?" *New York University Law Review* 69 (1994), p. 781.

10 But see Douglas Husak: "The Nature and Justifiability of Nonconsummate Offenses," *Arizona Law Review* 37 (1995), p. 151.

11 U.S. Department of Justice, Bureau of Justice Statistics: *Sourcebook of Criminal Justice* (29th ed., 2001), Table 2.49.

12 See Robert J. MacCoun and Peter Reuter, *Drug War Heresies*, Cambridge: Cambridge University Press, 2001, pp.82-84.

13 See Mitch Earlywine, *Understanding Marijuana*, New York: Oxford University Press, 2002, p.247.

