

AMERICA'S UNJUST DRUG WAR

By Michael Huemer (2004)

Should the recreational use of drugs such as marijuana, cocaine, heroin, and LSD, be prohibited by law? *Prohibitionists* answer yes. They usually argue that drug use is extremely harmful both to drug users and to society in general, and possibly even immoral, and they believe that these facts provide sufficient reasons for prohibition. *Legalizers* answer no. They usually give one or more of three arguments: First, some argue that drug use is not as harmful as prohibitionists believe, and even that it is sometimes beneficial. Second, some argue that drug prohibition “does not work”, i.e., is not very successful in preventing drug use and/or has a number of very bad consequences. Lastly, some argue that drug prohibition is unjust or violates rights.

I won't attempt to discuss all these arguments here. Instead, I will focus on what seem to me the three most prominent arguments in the drug legalization debate: first, the argument that drugs should be outlawed because of the harm they cause to drug users; second, the argument that they should be outlawed because they harm people other than the user; and third, the argument that drugs should be legalized because drug prohibition violates rights. I shall focus on the moral/philosophical issues that these arguments raise, rather than medical or sociological issues. I shall show that the two arguments for prohibition fail, while the third argument, for legalization, succeeds.

I. Drugs and Harm to Users

The first major argument for prohibition holds that drugs should be prohibited because drug use is extremely harmful to the users themselves, and prohibition decreases the rate of drug abuse. This argument assumes that the proper function of government includes preventing people from harming themselves. Thus, the argument is something like this:

1. Drug use is very harmful to users.
2. The government should prohibit people from doing things that harm themselves.
3. Therefore, the government should prohibit drug use.

Obviously, the second premise is essential to the argument; if I believed that drug use was very harmful, but I did *not* think that the government should prohibit people from harming themselves,

then I would not take this as a reason for prohibiting drug use. Furthermore, premise (2), if taken without qualification, is extremely implausible. Consider some examples of things people do that are harmful (or entail a risk of harm) to themselves: smoking tobacco, drinking alcohol, eating too much, riding motorcycles, having unprotected or promiscuous sex, maintaining relationships with inconsiderate or abusive boyfriends and girlfriends, maxing out their credit cards, working in dead-end jobs, dropping out of college, moving to New Jersey, and being rude to their bosses. Should the government prohibit all of these things?¹ Most of us would agree that the government should not prohibit *any* of these things, let alone all of them. And this is not merely for logistical or practical reasons; rather, we think that controlling those activities is not the business of government.

Perhaps the prohibitionist will argue, not that the government should prohibit *all* activities that are harmful to oneself, but that it should prohibit activities that harm oneself in a certain way, or to a certain degree, or that also have some other characteristic. It would then be up to the prohibitionist to explain how the harm of drug use (to users) differs from the harms (to those who engage in them) of the other activities mentioned above. Let's consider three possibilities.

(1) One suggestion would be that drug use also harms people other than the user; we will discuss this harm to others in section II below. If, as I will contend, neither the harm to drug users nor the harm to others justifies prohibition, then there will be little plausibility in the suggestion that the combination of harms justifies prohibition. Of course, one could hold that a certain threshold level of total harm must be reached before prohibition of an activity is justified, and that the combination of the harm of drugs to users and their harm to others passes that threshold even though neither kind of harm does so by itself. But if, as I will contend, the "harm to users" and "harm to others" arguments both fail for the reason that it is not the government's business to apply criminal sanctions to prevent the kinds of harms in question, *then* the combination of the two harms will not make a convincing case for prohibition.

(2) A second suggestion is that drug use is generally *more* harmful than the other activities listed above. But there seems to be no reason to believe this. As one (admittedly limited) measure of harmfulness, consider the mortality statistics. The Office of National Drug Control Policy claims that drugs kill 18,000 Americans per year.² By contrast, tobacco causes an estimated 440,000 deaths per year.³ Of course, more people use tobacco than use illegal

¹ Husak ([b], pp. 7, 101-3) makes this sort of argument (I have added my own examples of harmful activities to his list).

² ONDCP [b]. The statistic includes both legal (prescription) and illegal drugs.

³ CDC [a], p. 300.

drugs,⁴ so let us divide by the number of users: tobacco kills 15 people per 1000 users per year; illegal drugs kill 2.6 people per 1000 users per year.⁵ Yet almost no one favors outlawing tobacco and putting smokers in prison. On a similar note, obesity may cause 420,000 deaths per year (due to increased incidence of heart disease, strokes, and so on), or 11 per 1000 at-risk persons.⁶ Health professionals have warned about the pandemic of obesity, but no one has yet called for imprisoning fat people.

There are less tangible harms of drug use—harms to one's general quality of life. These are difficult to quantify. But compare the magnitude of the harm to one's quality of life that one can bring about by, say, dropping out of high school, working in a dead-end job for several years, or marrying a jerk—these things can cause extreme and lasting detriment to one's well-being. And yet no one proposes jailing those who drop out, work in bad jobs, or make poor marriage decisions. The idea of doing so would seem ridiculous, clearly beyond the state's prerogatives.

(3) Another suggestion is that drug use harms users *in a different way* than the other listed activities. Well, what sorts of harms do drugs cause? First, illicit drugs may worsen users' health and, in some cases, entail a risk of death. But many other activities—including the consumption of alcohol, tobacco, and fatty foods; sex; and (on a broad construal of "health") automobiles—entail health risks, and yet almost no one believes those activities should be criminalized.

Second, drugs may damage users' relationships with others—particularly family, friends, and lovers—and prevent one from developing more satisfying personal relationships.⁷ Being rude to others can also have this effect; yet no one believes you should be put in jail for being rude. Moreover, it is very implausible to suppose that people should be subject to criminal sanctions for ruining their personal relationships. I don't have a general theory of what sort of things people should be punished for, but consider the following example: Suppose that I decide to break up with my girlfriend, stop

⁴ Inciardi (1993, pp. 161, 165) makes this point, accusing drug legalizers of "sophism." He does not go on to calculate the number of deaths per user, however.

⁵ Based on the assumption of 29.7 million smokers in 1999 and 7.0 million users of illicit drugs (U.S. Census Bureau [a], p. 122). However, these figures may be off by quite a bit; CDC ([a], p. 303) reports 46.5 million smokers in the same year, based on a different survey.

⁶ Based on the assumptions of 240,000 premature deaths caused by obesity in 1991 (Allison, et al.), a 61% increase in the prevalence of obesity between 1991 and 2000 (CDC [b]), a 9% increase in population between 1991 and 2000 (U.S. Census Bureau [b], p. 8), and 38.8 million obese Americans in 2000 (CDC [c]). These figures may also be off—different sources give different estimates for each of these quantities.

⁷ See Inciardi, pp. 167, 172.

calling my family, and push away all my friends. I do this for no good reason—I just feel like it. This would damage my personal relationships as much as anything could. Should the police now come and arrest me, and put me in jail? If not, then why should they arrest me for doing something that only has a *chance* of indirectly bringing about a similar result? The following seems like a reasonable political principle: If it would be wrong (because not part of the government's legitimate functions) to punish people for *directly bringing about* some result, then it would also be wrong to punish people for doing some other action on the grounds that the action has a *chance* of bringing about that result indirectly. If the state may not prohibit me from directly cutting off my relationships with others, then the fact that my drug use might have the result of damaging those relationships does not provide a good reason to prohibit me from using drugs.

Third, drugs may harm users' financial lives, costing them money, causing them to lose their jobs or not find jobs, and preventing them from getting promotions. The same principle applies here: if it would be an abuse of government power to prohibit me from directly bringing about those sorts of negative financial consequences, then surely the fact that drug use might indirectly bring them about is not a good reason to prohibit drug use. Suppose that I decide to quit my job and throw all my money out the window, for no reason. Should the police come and arrest me, and put me in prison?

Fourth and finally, drugs may damage users' moral character, as James Q. Wilson believes:

[I]f we believe—as I do—that dependency on certain mind-altering drugs *is* a moral issue and that their illegality rests in part on their immorality, then legalizing them undercuts, if it does not eliminate altogether, the moral message. That message is at the root of the distinction between nicotine and cocaine. Both are highly addictive; both have harmful physical effects. But we treat the two drugs differently not simply because nicotine is so widely used as to be beyond the reach of effective prohibition, but because its use does not destroy the user's essential humanity. Tobacco shortens one's life, cocaine debases it. Nicotine alters one's habits, cocaine alters one's soul. The heavy use of crack, unlike the heavy use of tobacco, corrodes those natural sentiments of sympathy and duty that constitute our human nature and make possible our social life.⁸

⁸ Wilson, p. 26.

In this passage, Wilson claims that the use of cocaine: (a) is immoral, (b) destroys one's humanity, (c) alters one's soul, and (d) corrodes one's sense of sympathy and duty. One problem with Wilson's argument is the lack of evidence supporting claims (a)-(d). Before we put people in prison for corrupting their souls, we should require some objective evidence that their souls are in fact being corrupted. Before we put people in prison for being immoral, we should require some argument showing that their actions are in fact immoral. Perhaps Wilson's charges of immorality and corruption all come down to the charge that drug users lose their sense of sympathy and duty—that is, claims (a)-(c) all rest upon claim (d). It is plausible that *heavy* drug users experience a decreased sense of sympathy with others and a decreased sense of duty and responsibility. Does this provide a good reason to prohibit drug use?

Again, it seems that one should not prohibit an activity on the grounds that it may indirectly cause some result, unless it would be appropriate to prohibit the direct bringing about of that result. Would it be appropriate, and within the legitimate functions of the state, to punish people for being unsympathetic and undutiful, or for behaving in an unsympathetic and undutiful way? Suppose that Howard—though not a drug user—doesn't sympathize with others. When people try to tell Howard their problems, he just tells them to quit whining. Friends and coworkers who ask Howard for favors are rudely rebuffed. Furthermore—though he does not harm others in ways that would be against our current laws—Howard has a poor sense of duty. He doesn't bother to show up for work on time, nor does he take any pride in his work; he doesn't donate to charity; he doesn't try to improve his community. All around, Howard is an ignoble and unpleasant individual. Should he be put in jail?

If not, then why should someone be put in jail merely for doing something that would have a *chance* of causing them to become like Howard? If it would be an abuse of governmental power to punish people for being jerks, then the fact that drug use may cause one to become a jerk is not a good reason to prohibit drug use.

II. Drugs and Harm to Others

Some argue that drug use must be outlawed because drug use harms the user's family, friends, and coworkers, and/or society in general. A report produced by the Office of National Drug Control Policy states:

Democracies can flourish only when their citizens value their freedom and embrace personal responsibility. Drug use erodes the individual's capacity to pursue both ideals. It diminishes the individual's capacity to operate effectively in many of life's spheres—as a student, a parent, a spouse, an employee—even as a coworker or fellow motorist. And, while some claim it represents an expression of individual autonomy, drug use is in fact inimical to personal freedom, producing a reduced capacity to participate in the life of the community and the promise of America.⁹

At least one of these alleged harms—dangerous driving—*is* clearly the business of the state. For this reason, I entirely agree that people should be prohibited from driving while under the influence of drugs. But what about the rest of the alleged harms?

Return to our hypothetical citizen Howard. Imagine that Howard—again, for reasons having nothing to do with drugs—does not value freedom, nor does he embrace personal responsibility. It is unclear exactly what this means, but, for good measure, let us suppose that Howard embraces a totalitarian political ideology and denies the existence of free will. He constantly blames other people for his problems and tries to avoid making decisions. Howard is a college student with a part-time job. However, he is a terrible student and worker. He hardly ever studies and frequently misses assignments, as a result of which he gets poor grades. As we mentioned earlier, Howard comes to work late and takes no pride in his work. Though he does nothing against our current laws, he is an inattentive and inconsiderate spouse and parent. Nor does he make any effort to participate in the life of his community, or the promise of America. He would rather lie around the house, watching television and cursing the rest of the world for his problems. In short, Howard does all the bad things to his family, friends, coworkers, and society that the ONDCP says *may* result from drug use. And most of this is voluntary.

Should Congress pass laws against what Howard is doing? Should the police then arrest him, and the district attorney prosecute him, for being a loser?

Once again, it seems absurd to suppose that we would arrest and jail someone for behaving in these ways, undesirable as they may be. Since drug use only has a *chance* of causing one to behave in each of these ways, it is even more absurd to suppose that we should arrest and jail people for drug use on the grounds that drug use has these potential effects.

⁹ ONDCP [a], pp. 1-2.

III. The Injustice of Drug Prohibition

Philosopher Douglas Husak has characterized drug prohibition as the greatest injustice perpetrated in the United States since slavery.¹⁰ This is no hyperbole. If the drug laws are unjust, then we have 450,000 people unjustly imprisoned at any given time.¹¹

Why think the drug laws are *unjust*? Husak's argument invokes a principle with which few could disagree: it is unjust for the state to punish people without having a good reason for doing so.¹² We have seen the failure of the most common proposed rationales for drug prohibition. If nothing better is forthcoming, then we must conclude that prohibitionists have no rational justification for punishing drug users. We have deprived hundreds of thousands of people of basic liberties and subjected them to severe hardship conditions, for no good reason.

This is bad enough. But I want to say something stronger: it is not just that we are punishing people for no good reason. We are punishing people for exercising their natural rights. Individuals have a right to use drugs. This right is neither absolute nor exceptionless; suppose, for example, that there existed a drug which, once ingested, caused a significant proportion of users, without any further free choices on their part, to attack other people without provocation. I would think that stopping the use of this drug would be the business of the government. But no existing drug satisfies this description. Indeed, though I cannot take time to delve into the matter here, I think it is clear that the drug *laws* cause far more crime than drugs themselves do.

The idea of a right to use drugs derives from the idea that individuals own their own bodies. That is, a person has the right to exercise control over his own body—including the right to decide how it should be used, and to exclude others from using it—in a manner similar to the way one may exercise control over one's (other) property. This statement is somewhat vague; nevertheless, we can see the general idea embodied in common sense morality. Indeed, it seems that if there is *anything* one would have rights to, it would be one's own body. This explains why we think others may not physically attack you or kidnap you. It explains why we do not

¹⁰ Husak [b], p. 2.

¹¹ Based on 73,389 drug inmates in federal prison in 2000 (U.S. DOJ [b], p. 14), 251,000 drug inmates in state prisons in 2000 (U.S. DOJ [b], p. 13), and 137,000 drug inmates in local jails. The last statistic is based on the 2000 jail population of 621,149 (U.S. DOJ [b], p. 2) and the 1996 rate of 22% drug offenders in local jails (U.S. DOJ [a], p. 1). The numbers have probably increased in the last 3 years.

¹² Husak [b], p. 15. See his chapter 2 for an extended discussion of various proposed rationales for drug prohibition, including many issues that I lack space to discuss here.

accept the use of unwilling human subjects for medical experiments, even if the experiments are beneficial to society—the rest of society may not decide to use your body for its own purposes without your permission. It explains why some believe that women have a right to an abortion—and why some others do not. The former believe that a woman has the right to do what she wants with her own body; the latter believe that the fetus is a distinct person, and a woman does not have the right to harm *its* body. Virtually no one disputes that, *if* a fetus is merely a part of the woman’s body, *then* a woman has a right to choose whether to have an abortion; just as virtually no one disputes that, *if* a fetus is a distinct person, then a woman lacks the right to destroy it. Almost no one disputes that persons have rights over their own bodies, but not over other people’s bodies.

The right to control one’s body cannot be interpreted as implying a right to use one’s body in *every* conceivable way, any more than we have the right to use our property in every conceivable way. Most importantly, we may not use our bodies to harm others in certain ways, just as we may not use our property to harm others. But drug use seems to be a paradigm case of a legitimate exercise of the right to control one’s own body. Drug consumption takes place in and immediately around the user’s own body; the salient effects occur *inside* the user’s body. If we consider drug use merely as altering the user’s own body and mind, it is hard to see how anyone who believes in rights at all could deny that it is protected by a right, for: (a) it is hard to see how anyone who believes in rights could deny that individuals have rights over their own bodies and minds, and (b) it is hard to see how anyone who believes in such rights could deny that drug use, considered merely as altering the user’s body and mind, is an example of the exercise of one’s rights over one’s own body and mind.

Consider two ways a prohibitionist might object to this argument. First, a prohibitionist might argue that drug use does not *merely* alter the user’s own body and mind, but also harms the user’s family, friends, co-workers, and society. I responded to this sort of argument in section II. Not just *any* way in which an action might be said to “harm” other people makes the action worthy of criminal sanctions. Here we need not try to state a general criterion for what sorts of harms make an action worthy of criminalization; it is enough to note that there are some kinds of “harms” that virtually no one would take to warrant criminal sanctions, and that these include the “harms” I cause to others by being a poor student, an incompetent worker, or an apathetic citizen.¹³ That said, I agree with the prohibitionists at least this far: no one should be permitted

¹³ Husak ([a], pp. 166-8), similarly, argues that no one has a *right* that I be a good neighbor, proficient student, and so on, and that only “harms” that *violate rights* can justify criminal sanctions.

to drive or operate heavy machinery while under the influence of drugs that impair their ability to do those things; nor should pregnant mothers be permitted to ingest drugs, if it can be proven that those drugs cause substantial risks to their babies (I leave aside the issue of what the threshold level of risk should be, as well as the empirical questions concerning the actual level of risk created by illegal drugs—I don't know those things). But, in the great majority of cases, drug use does not harm anyone in any *relevant* ways—that is, ways that we normally take to merit criminal penalties—and should not be outlawed.

Second, a prohibitionist might argue that drug use fails to qualify as an exercise of the user's rights over his own body, because the individual is not truly acting freely in deciding to use drugs. Perhaps individuals only use drugs because they have fallen prey to some sort of psychological compulsion, because drugs exercise a siren-like allure that distorts users' perceptions, because users don't realize how bad drugs are, or something of that sort. The exact form of this objection doesn't matter; in any case, the prohibitionist faces a dilemma. If users do not freely choose to use drugs, then it is unjust to *punish* them for using drugs. For if users do not choose freely, then they are not morally responsible for their decision, and it is unjust to punish a person for something he is not responsible for. But if users *do* choose freely in deciding to use drugs, then this choice is an exercise of their rights over their own bodies.

I have tried to think of the best arguments prohibitionists could give, but in fact prohibitionists have remained puzzlingly silent on this issue. When a country goes to war, it tends to focus on how to win, sparing little thought for the rights of the victims in the enemy country. Similarly, one effect of America's declaring "war" on drug users seems to have been that prohibitionists have given almost no thought to the rights of drug users. Most either ignore the issue or mention it briefly only to dismiss it without argument.¹⁴ In an effort to discredit legalizers, the Office of National Drug Control Policy produced the following caricature—

The easy cynicism that has grown up around the drug issue is no accident. Sowing it has been the deliberate aim of a decades-long campaign by proponents of legalization, critics whose mantra is "nothing works," and whose central insight appears to be that they can avoid having to propose the unmentionable—a world where drugs are ubiquitous

¹⁴ See Inciardi for an instance of ignoring and Lungren (p. 180) for an instance of dismissal without argument. Wilson (p. 24) addresses the issue, if at all, by arguing that drug use makes users worse parents, spouses, employers, and co-workers. This fails to refute the contention that individuals have a right to use drugs.

and where use and addiction would skyrocket—if they can hide behind the bland management critique that drug control efforts are “unworkable.”¹⁵

—apparently denying the existence of the central issues I have discussed in this essay. It seems reasonable to assume that an account of the state’s right to forcibly interfere with individuals’ decisions regarding their own bodies is not forthcoming from these prohibitionists.

IV. Conclusion

Undoubtedly, the drug war has been disastrous in many ways that others can more ably describe—in terms of its effects on crime, on police corruption, and on other civil liberties, to name a few. But more than that, the drug war is morally outrageous in its very conception. If we are to retain some sort of respect for human rights, we cannot deploy force to deprive people of their liberty and property for whimsical reasons. The exercise of such coercion requires a powerful and clearly-stated rationale. Most of the reasons that have actually been proposed in the case of drug prohibition would be considered feeble if advanced in other contexts. Few would take seriously the suggestion that people should be imprisoned for harming their own health, being poor students, or failing to share in the American dream. It is still less credible that we should imprison people for an activity that only *may* lead to those consequences. Yet these and other, similarly weak arguments form the core of prohibition’s defense.

Prohibitionists are likewise unable to answer the argument that individuals have a right to use drugs. Any such answer would have to deny either that persons have rights of control over their own bodies, or that consuming drugs constituted an exercise of those rights. We have seen that the sort of harms drug use allegedly causes to society do not make a case against its being an exercise of the user’s rights over his own body. And the claim that drug users can’t control their behavior or don’t know what they are doing renders it even more mysterious why one would believe drug users deserve to be punished for what they are doing.

I will close by responding to a query posed by prohibition-advocate James Inciardi:

The government of the United States is not going to legalize drugs anytime soon, if ever, and certainly not in

¹⁵ ONDCP [a], p. 3.

this [the 20th] century. So why spend so much time, expense, and intellectual and emotional effort on a quixotic undertaking? ... [W]e should know by now that neither politicians nor the polity respond positively to abrupt and drastic strategy alterations.¹⁶

The United States presently has 450,000 people unjustly imprisoned. Inciardi may—tragically—be correct that our government has no intention of stopping its massive violations of the rights of its people any time soon. Nevertheless, it remains the duty of citizens and of political and social theorists to identify the injustice, and not to tacitly assent to it. Imagine a slavery advocate, decades before the Civil War, arguing that abolitionists were wasting their breath and should move on to more productive activities—such as arguing for incremental changes in the way slaves are treated—since the southern states had no intention of ending slavery any time soon. The institution of slavery is a black mark on our nation’s history, but it would be even more shameful if no one at the time had spoken against it.

Is this comparison overdrawn? I don’t think so. The harm of being unjustly imprisoned is qualitatively comparable (though it usually ends sooner) to the harm of being enslaved. The increasingly popular scapegoating and stereotyping of drug users and sellers on the part of our nation’s leaders is comparable to the racial prejudices of previous generations. Yet very few seem willing to speak on behalf of drug users. Perhaps the unwillingness of those in public life to defend drug users’ rights stems from the negative image we have of drug users and the fear of being associated with them. Yet these attitudes remain baffling. I have used illegal drugs myself. I know many decent and successful individuals, both in and out of my profession, who have used illegal drugs. One United States President, one Vice-President, a Speaker of the House, and a Supreme Court Justice have all admitted to having used illegal drugs.¹⁷ More than a third of all Americans over the age of 11 have used illegal drugs.¹⁸ But now leave aside the absurdity of recommending criminal sanctions for all these people. My point is this: if we are convinced of the injustice of drug prohibition, then—even if our protests should fall on deaf ears—we can not remain silent in the face of such a large-scale injustice in our own country. And, fortunately, radical social reforms *have* occurred, more than once in our history, in response to moral arguments.

¹⁶ Inciardi, p. 205.

¹⁷ Bill Clinton, Al Gore, Newt Gingrich and Clarence Thomas (reported by Phinney). George W. Bush has refused to state whether he has ever used illegal drugs.

¹⁸ U.S. Census Bureau [a], p. 122.

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