

# Book Review

## **Bad Trip: Drug Prohibition and the Weakness of Public Policy**

*America's Longest War: Rethinking Our Tragic Crusade Against Drugs.* By Steven B. Duke & Albert C. Gross. New York: G.P. Putnam's Sons, 1993. Pp. xix, 348. \$26.95.

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### INTRODUCTION

Popular support for drug prohibition—especially among those who have given the matter any thought—is like support for George Bush just after Operation Desert Storm: very broad and very thin. Perhaps some personal experiences of mine will illustrate why.

*Personal Anecdote Number One:* In the early morning hours of February 24, 1979, Michael Salcedo, his brother Arthur, and their friend Frank Mussa decided to buy some marijuana. Because marijuana is illegal, they could not go to the same legitimate businesses that sell tobacco or alcohol. So the three young men set out for Latin Eagles territory on the north side of Chicago; specifically to King Kastle, a hamburger stand that gang members were known

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to frequent. When they arrived there, Michael approached gang members Juan Caballero, Placedo LaBoy, Nelson Aviles, and Luis Ruiz, and asked if they would sell him some marijuana. Ruiz replied truthfully that they had no marijuana to sell and did not know where any might be found. Thinking that perhaps Ruiz and the others did not trust them, Michael told Ruiz that he knew Jose Cortez, a member of the Latin Eagles. Ruiz then asked Michael if he was an Eagle. Michael said he was and boasted that he had ridden with the Eagles when they went on "hits" against their archrivals, the Latin Kings.

Had Michael actually been as knowledgeable about gangs as he was attempting to demonstrate, he would have been aware of a critical fact: the persons with whom he was speaking were members of the Latin *Kings*, not the Latin Eagles. Their response to Michael's braggadocio was to tell him that they did have marijuana to sell after all. The gang members then accompanied the three young men to their car, and directed them to drive to an alley where they would do the deal. Upon arriving in the alley, they instructed Michael to accompany them around a corner. After turning the corner, Ruiz revealed their deception and the four proceeded to beat Michael until they were "satisfied." Ruiz and LaBoy then returned to the car and drove around the corner to pick up Michael and the others.

After driving to another alley, Caballero and LaBoy ordered Michael and Frank out of the car, took them at gunpoint to a gangway, and told them to lie face down in the snow. Meanwhile, in the car, Aviles stabbed Arthur to death. Then, LaBoy led Frank back to the car, pushed him on top of Arthur's body, and stabbed him to death. Finally, Caballero forced Michael into the car, shoved him on the bodies of his brother and friend, and stabbed him to death. Each youths' throat was slit before each was stabbed repeatedly in the chest.

We learned these chilling facts from the court-reported confession of Juan Caballero. As an Assistant State's Attorney, I took both that statement and an oral confession from Luis Ruiz.<sup>1</sup> After Caballero signed his statement, I asked him, "If you had to do it over, would you do it again?" He replied, "If it was a sure thing." When I told him that there is no such thing as a sure thing, he remarked that "lots of Kings have killed people without getting caught." I responded that he got caught, but if he had it to do over, would he do it again? He answered, "I'd kill Michael for sure; I don't know about the other two."

The moral of this story: *Drug prohibition kills*. There were no actual illicit drugs in this story. Drug prohibition "worked" insofar as the members of the Latin Kings had no marijuana to sell on that fateful night. Yet three young men are dead, because drug prohibition made it impossible for them to buy marijuana from a safe and legal supplier, as they might have bought alcohol or tobacco. Had the local liquor or *drug* store sold marijuana, these young men

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1. For a more detailed account of the facts in this case, see *People v. Ruiz*, 447 N.E.2d 148 (Ill. 1982), and *People v. Caballero*, 464 N.E.2d 223 (Ill. 1984).

would have lived. Perhaps smoking marijuana would have been harmful to their health; drug prohibition was fatal.

Since these three deaths in 1979, prohibition has taken the lives of thousands more. As the war on drugs has escalated, so too has the violence. When I was a prosecutor, over half of the murders I prosecuted were “drug-law related” in the sense that the victim was killed as a result of a drug deal gone bad or a robbery of someone suspected of having either valuable drugs or money from selling drugs. To illustrate the typical drug-prohibition-related murder, I might have detailed the story of brothers Robert and George King, whom I prosecuted for brutally stabbing Gregory Perkins to death with a pair of scissors. Perkins was known to sell marijuana and therefore was believed to have a large sum of money in his possession. He did not, but he died anyway.

*Personal Anecdote Number Two:* In 1976, when I was a law clerk for the State’s Attorney’s Office of Cook County, the average caseload per judge was well over 400. In those days, plea bargaining was notorious, leading to such travesties as the “Cook County Voluntary,” the name used to describe how the system typically dealt with the murder of one spouse by the other. Despite clear evidence of murder, unless the victim was someone special, such cases routinely were pled out as voluntary manslaughters. Rapes routinely were reduced to aggravated battery. Car thieves and burglars had to be convicted dozens of times before being imprisoned. It simply was not possible to bring even a small fraction of cases to trial, and defense lawyers knew it. So most cases ended with extremely lenient deals.

This was just about the time that the federal Law Enforcement Assistance Administration began to expend federal funds on local law enforcement. One of my first tasks as a law clerk assigned to a felony trial court was to select the approximately one quarter of the docket that would be assigned to new felony trial courts opening up on the West Side. By the time I returned to the felony trial courts as an Assistant State’s Attorney in 1979, the caseload in each courtroom was down to between 125 and 135. This meant that as a prosecutor I could credibly threaten to try any case on the call. This, in turn, meant that I could offer plea bargains that were in my judgment correct sentences. We tried the cases we liked and pled the rest, unaffected by caseload concerns. However, that was before the “War on Drugs” really started to heat up.<sup>2</sup> By the 1990’s, the caseload had once again climbed to over 400, even though the number of courts had greatly increased. Give-away plea

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2. One of the reasons that Bernard Carey, the State’s Attorney for whom I initially worked, was defeated in 1980 by Richard M. Daley was Daley’s charge that Carey was too “soft” on drug prosecution. Indeed, Mr. Carey did have a very lenient approach to first-time possession offenses.

bargaining was once again rampant, especially for those accused of property crimes.<sup>3</sup>

The moral of this story: *There is no such thing as a free crime.* Every enforcement effort consumes scarce resources. The more conduct we define as criminal, the more that scarce resources have to be allocated selectively among different crimes. The more money and time that is spent enforcing drug prohibition, the less that is available to enforce other crimes, to provide treatment for drug users, to provide health care, to feed the poor, or to do anything else that people may value. Moreover, the inflation of crimes diminishes the significance attached to each. As more conduct is criminalized in order to “send a message” of societal disapproval, enforcement of each crime declines. Consequently, the message actually delivered to prospective criminals becomes less meaningful. Criminalizing more conduct has the paradoxical effect of making both law-abiding and law-breaking citizens breathe easier at night—the former in the short run and the latter in the long run.

*Personal Anecdote Number Three:* During the time I was a prosecutor, all drug cases in Chicago were funneled through two preliminary hearing courts. Rumor had it that one of these judges was corrupt; he allegedly disposed of drug cases based on payments from favored lawyers. (Eventually, this judge was indicted and convicted during the Operation Greylord federal probe of local corruption, but not until I had left the prosecutor’s office and entered law teaching.) As a prosecutor assigned to the courtroom of the honest judge, I was advised to beware of police reports in which the circumstances of the arrest were ambiguously described. By permitting the reporting officers to testify later that they had committed an illegal search, such reports enabled the officers to derail unilaterally a prosecution upon receipt of a bribe.

Finally, in those days, prosecutors assigned to the Felony Review Unit were not involved in approving charges or search warrants for drug cases. Three reasons were cited for this policy. First, the volume of drug cases would have diverted scarce resources away from other more important pursuits. Second, the State’s Attorney considered prosecuting drug cases to be potentially corrupting, and he wanted his prosecutors to be only minimally involved in the highly discretionary charging stage of the case. Third, in drug cases one typically had only police witnesses. Absent some evidence to the contrary, prosecutors would not question police accounts of an arrest or case

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3. This increase eventually was somewhat alleviated by the opening of special drug courts operating in the evening hours. Notice, however, that although evening hours would be much more convenient for working people, who are often the victims of crime, these new evening courts were created as a result of prohibition, rather than out of concern for crime victims. The cases in these after-hours courts are ones in which there are no civilian complaining witnesses.

and, consequently, there was not much for prosecutors to evaluate. They would of necessity simply rubber stamp the police decisions.<sup>4</sup>

The moral of this story: *Drug prohibition greatly increases official corruption.* Judges, police officers, and prosecutors are all enforcing laws in which there is no civilian complaining witness to provide an external check on police, prosecutorial, and judicial discretion. No outsider effectively knows what is going on inside the system. Given the vast amount of drug money in the black market created by prohibition, there is little to prevent law enforcement personnel from pocketing their share, save the extremely rare federal probe of local law enforcement.<sup>5</sup> And a police officer, prosecutor,<sup>6</sup> or judge corrupted by drug prohibition is very likely to be corrupted in all other matters as well.

Interestingly, when I tell these anecdotes to those who are committed to drug prohibition, most are completely unaffected by them. Shockingly, they are unmoved even by the murder of Frank, Arthur, and Michael. They argue that it was these young men's desire for marijuana, not drug prohibition, that is to blame. Some even imply by their tone that these three youths got what was coming to them. These claims imply either that death is an appropriate sanction for using marijuana or that we have more important concerns than the lives of these three young men. So much for the compassion allegedly motivating laws designed to protect potential drug user from themselves. Such compassion is highly selective. The mere fact that hundreds of thousands of citizens have lost their freedom, jobs, families, homes, health, or lives as a direct result of drug prohibition means little to committed prohibitionists<sup>7</sup> and

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4. This policy was reversed upon the defeat of Bernard Carey and the election of Richard M. Daley.

5. Note that there are no *local* probes of *federal* law enforcement.

6. I saw no indication of corruption among prosecutors during my tenure, and none was revealed by Operation Greylord. Of course, in Cook County, Illinois, one hardly needed to bribe the prosecutor when judges and police officers were so easily bribed. Still, against my advice, one of my fellow prosecutors left the office after two years to become a defense lawyer, telling me, "Randy, there's a lot of money to be made out there." He was later indicted and convicted during Operation Greylord for bribing judges. For those who smugly think that Cook County is *sui generis*, I warn you that it is not, and, in places that are not as bad, drug prohibition is rapidly erasing any remaining differences in degree.

7. In this Review, I will have much to say that is critical about the mindset of "prohibitionists"—by which I mean those who are strongly committed to and publicly advocate prohibition, and dismiss drug legalization and its proponents out of hand. I am not referring to the majority of Americans, who currently support prohibition but who are woefully uninformed of the harmful consequences of this policy.

their allies in the media.<sup>8</sup> Such is simply the price that “we” (read: others) must pay to fight against the consumption of demon drugs.

It seems that no facts are sufficient to shake the prohibitionists’ faith in this tragic policy. As I have suggested elsewhere, some persons act as though they are *addicted* to drug laws, with all the connotations of irrationality that term is meant to convey when applied to drug users.<sup>9</sup> Consequently, they are unlikely to be swayed by the copious facts and arguments presented in *America’s Longest War*<sup>10</sup> by Yale Law Professor Steven B. Duke and attorney Albert C. Gross. Fortunately, the ranks of ardent prohibitionists are thinning. Those Americans who continue to support prohibition are increasingly receptive to possible alternatives. Their minds are open now as never before. For them, the publication of this book is timely indeed and they should avail themselves of it.

The case against prohibition is overwhelming precisely because so many different types of considerations all point to a single solution: the legalization of illicit drugs. The complexity of the case against prohibition means, however, that it cannot be presented adequately by a few anecdotes or even a lengthy essay. Nothing less than a book-length treatment will suffice and, fortunately, that book has been published. *America’s Longest War* is an ambitious effort to evaluate the effectiveness of the policy of prohibition.<sup>11</sup> It accomplishes this by marshalling the empirical research that has been done on both drugs and drug prohibition and then offering persuasive analysis of this data. In this Review, I shall be able to touch upon only a few evocative highlights.

In Part I, I relate some of the least known and most provocative facts that Duke and Gross report about licit and illicit drugs. In Part II, I discuss the

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8. I do not wish to suggest that the members of the media uniformly favor prohibition. To the contrary, my experience with reporters suggests that many have a great sympathy for legalization. However, my experience also has taught me the limits of media influence. It takes two to tango. Those members of the media who wish to create a drumbeat for a particular policy or against a particular politician need collaborators who will continue to produce “news” stories—hearings, press conferences, studies, demonstrations, etc.—that they can cover. Many powerful special interests support drug prohibition; none oppose it. So, despite their willingness to consider legalization seriously, the media has little manufactured news to cover that would continually expose the public to negative stories about drug prohibition. Ironically, it is the comparative *smallness* of the illicit drug “problem” that makes ending this prohibition more difficult than ending alcohol prohibition. Too few people use illicit drugs to constitute a major political force. But they do make great heretics. See *infra* notes 60-61 and accompanying text.

9. See Randy E. Barnett, *Curing the Drug-Law Addiction: The Harmful Side Effects of Legal Prohibition*, in *DEALING WITH DRUGS: CONSEQUENCES OF GOVERNMENT CONTROL* 73 (Ronald Hamowy ed., 1987) [hereinafter *DEALING WITH DRUGS*]. Although I would prefer to confine the term “addiction” to the concept of *physical* dependence, prohibitionists do not do so. Instead, they also include the much fuzzier concept of *psychological* dependence. See *id.* at 74 n.1. This type of dependency refers to persons who continue to use drugs despite the demonstrable harm they are causing to themselves. In this sense, it is fair to say that some persons appear to be addicted to drug laws.

10. STEVEN B. DUKE & ALBERT C. GROSS, *AMERICA’S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS* (1993) [hereinafter *AMERICA’S LONGEST WAR*].

11. Nor is it alone. See DANIEL K. BENJAMIN & ROGER L. MILLER, *UNDOING DRUGS: BEYOND LEGALIZATION* (1991) (advocating end of *federal* prohibition, in favor of state-by-state experimentation); *THE CRISIS IN DRUG PROHIBITION* (David Boaz ed., 1990) (collection of essays questioning merits of drug prohibition); *DEALING WITH DRUGS*, *supra* note 9 (same).

origins of drug prohibition. If the merits of drug prohibition are to be questioned seriously, then the many myths about drug use must be challenged—and Duke and Gross have done so effectively. In Part III, I relate the grave social costs of drug prohibition that Duke and Gross document and add a few they missed. The harmful consequences discussed in Part III each reflect the morals of the stories with which I began this Review.

In Part IV, I examine the prevailing “public policy” approach to lawmaking that is responsible for the origination and continuation of the drug war and advocate a more principled approach. As I make clear, this is not a critique of public policy *analysis*, the source of much very useful information. Rather, I criticize adherents of a public policy model of decisionmaking that rejects what they refer to as a “simplistic” or “doctrinaire” reliance on general principles or individual rights to decide questions of legal coercion. Instead, they posit that legal coercion is best guided by “public policy experts” who are competent to formulate “rational” solutions to what they abstractly define as “social” problems. I argue that the evidence presented in *America’s Longest War* is an indictment, not only of the War on Drugs, but also of this method of legal decisionmaking, though Duke and Gross seem not to appreciate fully this important lesson. Although adherence to sound principles does not substitute for the knowledge provided by good public policy analysis, I explain why the use of legal coercion to pursue worthwhile public policy objectives should be constrained by principles or rights.

Finally, in Part V, I briefly consider alternatives to the current regime of prohibition, including the form of legalization favored by Duke and Gross. Although far preferable to the status quo, I discuss how the principles identified in Part IV reveal deficiencies in their proposal.

## I. THE FACTS ABOUT LICIT AND ILLICIT DRUGS

*America’s Longest War* begins by comparing the harmfulness of legal drugs—tobacco and alcohol—with those substances—marijuana, heroin, and cocaine—against which the government supposedly has declared war.<sup>12</sup> Duke and Gross organize their presentation of empirical research on each drug around its physical and psychological effects, its criminogenic effects, and its positive and negative health consequences. While the story they tell is not new, it is widely neglected.

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12. The “War on Drugs” is a misnomer. “War” has actually been declared on drug users, their suppliers, and those persons whose property has allegedly been used by a drug user. This is a peculiar sort of war, in which the enemy consists mainly of citizens who, unlike other combatants, must not under any circumstances fight back. Of course, it is not a war at all—except perhaps a civil war. The metaphor of war is sheer bravado used by committed prohibitionists to enlist everyone in what is supposed to be a common struggle against a common enemy.

Of all five of these drugs, tobacco is the one that is both the most clearly detrimental to the health of users (and perhaps even nonusers) and the most addictive. Even prisoners cannot be compelled to give up their addiction:

In the summer of 1992, the State of Vermont decided to prohibit smoking in its prisons. A black market emerged and the price of a pack of cigarettes jumped nearly 2000 percent to a price of about \$40. A single cigarette sold for \$3, more than the price of a pack on the legitimate market. Threats and violence were used to get cigarettes. Some prisoners traded other drugs and sex for tobacco. In November 1992, Vermont wisely rescinded its tobacco-in-prison prohibition.<sup>13</sup>

Interestingly, many who have been addicted to both tobacco and heroin “contend that kicking tobacco was more difficult than kicking heroin.”<sup>14</sup>

Duke and Gross show alcohol to be far more potentially harmful to one’s health than marijuana:

The adverse health consequences of chronic heavy drinking are staggering. When taken in large quantities—perhaps three or four ounces per day—alcohol is a poison that rivals nicotine in its pernicious effects on the human body. . . . It causes three types of liver damage: fatty deposits, hepatitis, and cirrhosis, the ninth-leading cause of death in 1986. Regular alcohol use can precipitate esophagitis, exacerbate peptic ulcers and increase the risk of gastrointestinal cancer and pancreatitis. Chronic alcohol abuse contributes to cardiac dysfunction and other cardiovascular disorders, including hypertension. Alcohol also adversely affects immune, endocrine and reproductive functions.

Heavy, prolonged alcohol consumption also takes a terrible toll on the human brain, causing dementia, blackouts, seizures, hallucinations and peripheral neuropathy.<sup>15</sup>

On the other hand, we all know that consuming alcohol in moderation causes few, if any, health problems. Numerous studies have even shown “that drinking moderately is associated with *reduced* cardiovascular disease, for both men and women.”<sup>16</sup> The reasons for this are a matter of considerable

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13. AMERICA’S LONGEST WAR, *supra* note 10, at 26. Duke and Gross also relate the story of the tobacco worker strike in Italy, where the state has a monopoly on tobacco:

Within three weeks, the price of a pack of cigarettes rose as high as \$35; prostitutes were pricing their services in cigarettes; a man was mugged in Florence with the threat, “Your cigarettes or your life.” Smokers created miles of stalled traffic while driving to Switzerland and France to buy tobacco.

*Id.* at 26-27.

14. *Id.* at 26 (endnotes omitted).

15. *Id.* at 34 (endnotes omitted). I have included here only a fraction of the adverse health effects reported by Duke and Gross.

16. *Id.* at 35-36 (emphasis added).



speculation, but the phenomenon is well confirmed by much empirical research.

With respect to alcohol, experience should have taught us that prohibition would (and did) eliminate the potential benefits of alcohol for many without eliminating its abuse by those who are willing to flout the law. At a minimum, those who favor prohibition as a way of protecting would-be alcohol abusers from themselves are willing to prevent others from enjoying the health and other benefits of consuming alcohol in moderation. Drinking in moderation requires individual judgment of the sort that is required in every other facet of life: it simply cannot be dictated from above.

Alcohol is also more conducive to violence, at least in our culture, than either cocaine or heroin. Duke and Gross find that “[o]n balance, . . . the data seem to support the common understanding or folklore that [alcohol] intoxication leads to violence.”<sup>17</sup> In comparison, the criminogenic effects of both cocaine and, especially, heroin are relatively benign:

At one time, it was commonly claimed that the propensity of addicts to commit crimes was directly caused by the drug’s effect on the brain, producing moral weakness and a thirst for violence. Such claims have from time to time been made about every recreational drug, *even tobacco*. But there has never been any evidence to support the theory with respect to heroin, any more than there was any support for identical claims about marijuana. No intelligent person really believes such theories today. On the contrary, the prevailing view is that much, perhaps most, of the addict’s criminality is simply and solely the result of the interaction of his addiction and the law’s prohibition.<sup>18</sup>

Prohibitionists respond that the demonstrable harmfulness of alcohol and tobacco does not justify expanding the number of harmful substances legally available to Americans. This assumes, however, that increased choices will necessarily increase the number of drug abusers. As Duke and Gross repeatedly emphasize, it overlooks the extent to which persons seeking to abuse intoxicating drugs make their choices from among the drugs available to them.<sup>19</sup> Prohibitionists also overlook the extent to which prohibited

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17. *Id.* at 40.

18. *Id.* at 64 (emphasis added) (endnote omitted).

19. For example, Duke and Gross explain:

Most people who use recreational drugs do not want to die or become addicted; they simply assume the risk of doing so because they have little choice other than forgoing the drug. Were prohibition repealed, many people who now smoke crack, snort cocaine powder or mainline heroin would revert to the forms of these drugs that existed prior to the Harrison Act: liquid potions like the original Coca Cola, laudanum, or Mariani’s wine; or low-potency tablets. These diluted forms of cocaine and opiates are far safer and less addictive than the forms that prohibition has produced.

*Id.* at 197.

drugs—especially marijuana—are far less detrimental to health than those now legally available, in which case substitution would be an improvement.

Despite years of federally subsidized research, the claimed adverse health effects of marijuana are still highly speculative.

Approximately 100 million Americans over the past three decades have smoked (or eaten) marijuana. Millions of these have used marijuana on a regular, almost daily basis for decades. Despite these massive numbers of long-term users, no reliable evidence has appeared that such use has *any* adverse effects on their physical health. . . .

Other societies have used marijuana for centuries. Yet in no society has any official or respected study found serious adverse physical effects on humans from smoking marijuana. Indeed, in no less than nine official investigations of the problem, in both the United States and elsewhere, none have found any significant adverse effects on human health, even mental health.<sup>20</sup>

Duke and Gross report that “no death from a marijuana overdose has ever been established.”<sup>21</sup>

Moreover, marijuana offers significant and, in some cases, unique therapeutic benefits.

Clinical and research evidence has established that marijuana has clear therapeutic value for some illnesses. . . .

The most widely accepted and best-documented medical use of marijuana is the alleviation of nausea that accompanies use of some chemotherapy drugs. . . .

Some cancer-chemotherapy drugs are extremely toxic substances, which often cause patients to retch violently. The vomiting is so overpowering and uncomfortable that many cancer patients develop anticipatory nausea, which eventually makes it impossible for them to participate in chemotherapy. Marijuana—provided illegally by compassionate nurses, doctors, family members or friends—has prolonged or saved the lives of many cancer victims.<sup>22</sup>

Marijuana is an effective treatment for glaucoma, the vision-threatening pressure that can develop in the eyes. It is also an effective analgesic, relieving chronic pain.<sup>23</sup>

Nonetheless, countless people continue to be imprisoned for growing and consuming this plant. The Salcedo brothers and Frank Mussa were murdered trying to purchase this drug from illicit sources. The federal Drug Enforcement

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20. *Id.* at 51.

21. *Id.*

22. *Id.* at 185-87 (endnotes omitted).

23. *See id.* at 186-87.

Administration continues to classify marijuana as a Schedule I substance—meaning that it is both *highly dangerous* and has *no known medical use*—despite the fact that in 1988 its own chief administrative law judge, Francis L. Young, recommended that marijuana be rescheduled to permit doctors to prescribe it to patients. He concluded:

The evidence in this record clearly shows that marijuana has been accepted as capable of relieving the distress of great numbers of very ill people, and doing so with safety under medical supervision. It would be unreasonable, arbitrary and capricious for the DEA to continue to stand between those sufferers and the benefits of this substance in light of the evidence.<sup>24</sup>

Duke and Gross report that “John C. Lawn, the administrator of the Drug Enforcement Administration, rejected Young’s recommendations. Lawn ordered that marijuana’s Schedule I classification be retained.”<sup>25</sup>

In war, it is said, truth is the first casualty. To be blunt, many committed prohibitionists inside and outside of government who profess to care so much about the morals of others routinely lie or willfully mislead the public about nearly every aspect of both drugs and the policy of prohibition.<sup>26</sup> Our consistent experience with drug prohibition—from marijuana, to heroin, to cocaine—is that when careful empirical studies are eventually performed, they reveal the initial official accounts to be either false or wildly exaggerated.<sup>27</sup> Rarely, if ever, does law enforcement then reverse itself or even moderate its rhetoric.

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24. *Id.* at 184.

25. *Id.*

26. For example, Duke and Gross discuss the famous televised address in which President Bush announced the escalation of the drug war. To illustrate that the drug trade had become so pervasive and brazen that it now extended to within a few yards of the White House, Bush held up a bag of crack cocaine that had been sold to undercover law enforcement officers by 19-year-old drug dealer Keith Jackson in Lafayette Park directly across from the White House. But “[f]ar from being a regular trader at that venue, Jackson needed travel directions from his sham ‘customers’ to enable him to find the White House.” *Id.* at xv. In sum, to help justify prohibition, either the President of the United States or his law enforcement agents (or both) lied to or willfully misled the American people about the extent of the drug trade.

27. PCP, for example, was declared by prohibitionist authorities to be the monster drug of the 1970’s—a reputation that has survived to this day—despite the fact that little about its effects had been scientifically demonstrated at the time:

Some reports in the scientific literature associate violence with PCP use. Users, however, do not. . . . When violence occurred it was either against property or a panic reaction to restraint attempts. . . . PCP can appeal to those looking for: euphoria (low dose); a wasted, body-wide anesthetic effect with supersensitivity to sensations—the out-of-body stage (a moderate dose); or an incoherent, immobile, conscious state (a high dose). If you’re having trouble getting a feel for PCP, you’re in good company. Even users can’t agree what the experience is like. One third of PCP users say it’s unique, another third say it’s like the hallucinogens or marijuana, and the last third isn’t sure. When neither the users, the researchers, nor the clinicians can agree on the experience, the mechanisms, or the symptoms, you know that more research is needed.

OAKLEY RAY, *DRUGS, SOCIETY, & HUMAN BEHAVIOR* 415-16 (1983). Notwithstanding the surfeit of scientific knowledge, the use and sale of PCP was prohibited.

Duke and Gross present even more counterintuitive evidence about heroin and cocaine. Although both drugs are far less benign than marijuana—and Duke and Gross do not skimp in describing these adverse effects—neither is the monster it has been depicted by prohibitionists. For example:

Most users of cocaine suffer no serious physical or social problems from it. That is why even people who should have known better trumpeted it during the seventies as a nonaddictive, harmless drug. Before the crack era, only a fraction of cocaine users developed dependence upon cocaine. Estimates range from about 2 percent to 20 percent, with 5 to 10 percent being a reasonable approximation.<sup>28</sup>

And as for heroin:

As with marijuana, study after study has failed to find that the regular use of heroin, in conditions of relatively free availability, produces any substantial adverse effects on mental or physical health. As put by Edward Brecher, “There is . . . general agreement throughout the medical and psychiatric literature that the overall effects of opium, morphine, and heroin on the addict’s mind and body under conditions of low price and ready availability are on the whole amazingly bland.”<sup>29</sup>

Even the notorious heroin overdose is itself a mystery. Because resistance enables heroin addicts to inject massive quantities of the drug without adverse effects,<sup>30</sup> the most likely causes of heroin overdoses are drugs that are “cut” with substances such as quinine which can cause severe allergic reactions, the consumption of heroin in combination with alcohol or barbiturates, and unexpectedly pure doses of heroin (known as “hot shots”) provided to unwitting users either by accident or as a way of murdering bothersome customers, persons suspected of being informants, and even persons who for one reason or another have become problems for corrupt law enforcement agents.

At some juncture, however, one must wonder about the point of producing evidence of the actual effects of illicit drugs. A system that can criminalize a substance as demonstrably benign as marijuana can hardly be expected to make a “rational” decision concerning heroin and cocaine. Therein lies the weakness of government by “public policy”—a subject to which I shall return in Part IV.

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28. AMERICA’S LONGEST WAR, *supra* note 10, at 70-71.

29. *Id.* at 62.

30. *See id.* at 63 (“Addicts who build up tolerance can inject an enormous quantity of heroin without killing themselves. . . . There is . . . no established dosage of unadulterated heroin that is clearly sufficient to kill an addict, yet addicts die every day from their injections.”).

## II. THE ORIGINS OF DRUG PROHIBITION

After considering the effects of the drugs themselves, Duke and Gross trace the origins of drug prohibition. The history is fascinating. Each step along the way involved not only deliberate fabrications about the drug in question, but also racial stereotypes and prejudice.<sup>31</sup> For example, cocaine was thought to be a drug favored by blacks, and prohibitionists feared that this subculture would spread to the white middle class. The prohibitionists also believed that drugs such as cocaine, marijuana, and opium “might inspire minority males to act violently or express sexual interest in white women.”<sup>32</sup> Marijuana was also identified with “violent” Mexicans. Ironically in light of the widespread propaganda by prohibitionists today that drug use inevitably leads to lack of productivity and social withdrawal, Samuel Gompers and organized labor were among the leaders of the movement against opium. Gompers “complained that their opium use gave Chinese immigrant workers an unfair advantage in the labor market. The Chinese were said to be able to work longer and harder because of the drug.”<sup>33</sup>

Less well known, but no less important is the unintended role that organized medicine played in promoting prohibition. The initial regulation of cocaine and opiates was designed to eliminate competition posed to “legitimate” physicians and pharmacists from other sources of cocaine and opium.

The practitioners of nineteenth-century medicine had little power to cure disease. The main thing the physician could do was to make the patient feel better, and “opiates were preeminent for these functions and were apparently used with great frequency.” The physician was in competition with the pharmacist, however, since both could and did dispense opiates and other drugs. In fact, both were in competition with the corner grocery store; anyone could sell drugs to anyone else. The physicians and pharmacists needed to have this changed. The change began in England, with the Pharmacy and Poisons Act of 1868, which forbade the sale of opiates by anyone other than a pharmacist.<sup>34</sup>

In 1914, the same movement led to the Harrison Act in the United States. Contrary to popular opinion today, that Act

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31. See *id.* at 82-83, 90-94. The influence of racial and ethnic prejudice on the origins of drug prohibition is discussed in more detail in Ronald Hamowy, *Introduction: Illicit Drugs and Government Control*, in *DEALING WITH DRUGS*, *supra* note 9, at 1, 12-13, 17, 26.

32. AMERICA'S LONGEST WAR, *supra* note 10, at 83. They continue: “Thus, after much racist anti-Chinese agitation, California's legislature in 1881 outlawed the opium dens where the San Francisco police claimed they had ‘found white women and Chinamen side by side under the effects of this drug—a humiliating sight to anyone with anything left of manhood.’” *Id.*

33. *Id.* at 59.

34. *Id.* at 82 (citations omitted).

fell far short of outright prohibition of cocaine and opiate distribution. First, it exempted potions and patent medicines sold over-the-counter and by mail order if the concentrations were below specified limits. Second, pharmacists could sell the drugs on prescription by a physician, and physicians could prescribe them. Physicians could also distribute the drugs themselves, and were not even required to keep records of their distributions on house calls. Drug distribution had become medicalized in America.<sup>35</sup>

Duke and Gross cite approvingly Edward Brecher's statement that "[f]ar from appearing to be a prohibition law, the Harrison Narcotic Act on its face was merely a law for the orderly marketing of opium, morphine, heroin, and other drugs."<sup>36</sup>

The right of the physician to prescribe was spelled out in seemingly unambiguous terms: "Nothing . . . in this section shall apply . . . to the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this Act in the course of his professional practice only." Says Brecher, "It is unlikely that a single legislator realized in 1914 that the law Congress was passing would later be deemed a prohibition law."<sup>37</sup>

Although not noted by Duke and Gross, this legislation was actually part of a bigger picture. Today we commonly identify "morals" legislation with fundamentalist religious movements and believe that these statutes have existed since colonial days. Most laws of this sort, however, were actually first enacted during the Progressive Era as part of a much broader push by organized medicine to "medicalize" conduct that formerly had been thought of as evil or sinful, but of a private nature. This movement led to a variety of new laws prohibiting all sorts of "unhealthy" conduct, including sexual conduct.

By the end of the nineteenth century, medical science had elaborated a comprehensive doctrine relating sexual indulgence and mental disease. As a result, when, largely at the urging of physicians and moral reformers, a flood of legislation restricting sexual conduct was introduced in the period from 1880 to 1920, the theoretical foundation, scope, and direction of these new laws were provided primarily by the scientific conclusions earlier reached by physicians and psychiatrists.<sup>38</sup>

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35. *Id.* at 84.

36. *Id.* at 85.

37. *Id.*

38. Ronald Hamowy, *Preventive Medicine and the Criminalization of Sexual Immorality in Nineteenth Century America*, in *ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS* 35, 44 (Randy E. Barnett & John Hagel III eds., 1977). Hamowy notes:

[I]n 1915 alone—not an atypical year with respect to this kind of legislation—over eighty bills concerning the regulation of sexual behavior were introduced into the state legislatures, of

This effort led as far as statutes in both Indiana (enacted in 1881) and Wyoming (enacted in 1890) that included the following language in their criminal codes: "Whosoever entices, allures, instigates or aids any person under the age of twenty-one years to commit masturbation or self-pollution shall be deemed guilty of sodomy."<sup>39</sup>

Ironically, then, the Harrison Act, enacted during this period to medicalize drug distribution, became legal prohibition as a result of its contrary interpretation by law enforcement authorities. They argued "that addiction is not a 'disease,' the addict who seeks a maintenance dose is therefore not a 'patient' and maintenance doses are therefore not supplied 'in the course of [a doctor's] professional practice.'"<sup>40</sup> In *United States v. Jin Fuey Moy*,<sup>41</sup> the *Lochner*-era Supreme Court initially rejected this interpretation:

Only words from which there is no escape could warrant the conclusion that Congress meant to strain its powers almost if not quite to the breaking point in order to make the probably very large proportion of citizens who have some preparation of opium in their possession criminal or at least *prima facie* criminal and subject to the serious punishment made possible by § 9. It may be assumed that the statute has a moral end as well as revenue in view, but we are of opinion that the District Court, in treating those ends as to be reached

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which over half were passed into law. These included statutes dealing with the age of consent, indecent exposure, obscene publications, sexual perversion, adultery, fornication, and various aspects of prostitution—including pandering, pimping, keeping a house of prostitution, soliciting, and transporting for the purposes of prostitution. The rationale, eagerly adopted by the state legislatures, that excused such wholesale incursions into the private lives of citizens was that provided by medical science—namely, that these new laws did not issue from any attempt to enforce a particular value system but were scientifically grounded in the conclusions reached by preventive medicine and sexual hygiene. Their aim was not to make Americans moral, but to prevent them from becoming sick.

*Id.* at 75-76.

39. *Id.* at 78. Hamowy extensively discusses the widespread belief among physicians and psychiatrists in the late nineteenth century that, like so-called "gateway" drugs today, chronic masturbation led to insanity and to other types of sexual misconduct and therefore justified coercively subjecting females to clitoridectomies and males to castration and "infibulation." *See id.* at 44-69.

Infibulation . . . consisted of piercing the prepuce at the root of the glans with a silver needle, the ends of which were then tied together. The result, we are informed, was erections to [sic] painful as to be practically impossible, and an almost certain end to masturbation among the patients upon whom he had operated.

*Id.* at 59. Nor did this movement lack adherents. In a paper that received widespread publicity when presented to the International Medico-Legal Congress in 1893, Dr. F.E. Daniel

was injudicious enough to drop the pretense of employing castration as a therapeutic measure for masturbation. Rather, he suggested the procedure be used primarily as a *punishment* for all sexual pervers, including habitual masturbators. "It is not alone in asylums," he holds, "that castration should be done. . . . Rape, sodomy, bestiality, pederasty and habitual masturbation should be made crimes or misdemeanors, punishable by forfeiture of all rights, including that of procreation; in short by castration, or castration *plus* other penalties, according to the gravity of the offense."

*Id.* at 64. Hamowy reports that this paper "was published in no fewer than three medical journals." *Id.*

40. AMERICA'S LONGEST WAR, *supra* note 10, at 85.

41. 241 U.S. 394 (1916).

only through a revenue measure and within the limits of a revenue measure, was right.<sup>42</sup>

Three years later, after the passage of the Eighteenth Amendment requiring alcohol prohibition, the government's interpretation was accepted by the Court in the 5-4 decision of *Webb v. United States*.<sup>43</sup> In the companion case of *United States v. Doremus*,<sup>44</sup> the dissent made clear its view that the government's assertion of power under the Harrison Act was beyond the delegated powers of the federal government and represented an unconstitutional violation of the Tenth Amendment.<sup>45</sup> "In any event," write Duke and Gross, "by 1919 we had acquired—almost by accident and contrary to the will of the 1914 Congress—opiate and cocaine prohibition along with alcohol prohibition."<sup>46</sup> The Marijuana Tax Act followed in 1937.

Duke and Gross also consider recent revisionist accounts of alcohol prohibition, which contend that the Great Experiment was not the unmitigated disaster it is usually thought to be. Duke and Gross conclude that "if consumption of alcohol was reduced, it wasn't by much; the costs of enforcement, in money, corruption, crime, disrespect for law, alcohol and related poisonings far exceeded, by virtually anyone's measurements, the tiny gains in alcohol control."<sup>47</sup> Alcohol prohibition did lead Americans to shift their consumption patterns away from comparatively less potent forms of alcohol such as wine and beer—the production and distribution of which were more easily detected by law enforcement—to distilled spirits, which were more concentrated, easier to manufacture in illicit stills, and consequently more

42. *Id.* at 402.

43. 249 U.S. 96 (1919). Duke and Gross explain this reversal:

[A] marked change in attitude toward drugs had occurred. We had fought World War I, the 18th Amendment requiring Prohibition had been passed, and we fell into a period of intolerant, suspicious nationalism. According to David Musto, drug addiction by 1918 was perceived as a threat to the national war effort.

AMERICA'S LONGEST WAR, *supra* note 10, at 86. To appreciate better the judicial reaction to the ratification of alcohol prohibition, consider that today any newly developed intoxicant that can be used as a substitute for a currently illegal drug is instantly prohibited without any scientific showing of dangerousness.

44. 249 U.S. 86 (1919).

45. *Id.* at 95 (White, C.J., dissenting). The four dissenters adopted the reasoning of the district court which dismissed the indictment on the ground that the regulation of the practice of medicine was a reserved power retained by the states. The lower court contended:

To extend the incidental moral objects of the taxing measure by a liberal construction would be to unfairly and without certain right encroach upon the state's sovereign powers. . . .

It is accordingly held that the indictment does not state an offense against the laws of the United States, in that the acts of the defendant charged in the words of the statute to have been omitted and committed therein are violations of police regulations incidental to the taxing purpose of the act, but which do not tend to render effectual its prime object, revenue. To that extent the act is in violation of article 10 of the amendments to the Constitution of the United States.

*United States v. Doremus*, 246 F. 958, 965 (W.D. Tex. 1918). Of course, those were the quaint old days when Congress thought it needed to enact a constitutional amendment to empower it to prohibit the manufacture and distribution of alcohol.

46. AMERICA'S LONGEST WAR, *supra* note 10, at 86.

47. *Id.* at 90.



difficult to police. It has taken several decades for this Prohibition-induced taste for “cocktails” to abate and for the more traditional preference for wine and beer to reassert itself—much to the chagrin of distillers.

Experience with alcohol prohibition reveals that making a highly desired substance illegal creates powerful economic incentives to find substitutes that are cheaper and easier to produce, in part, because their manufacture or importation are not currently the target of law enforcement efforts. Perhaps most destructively, prohibition leads to more concentrated or potent intoxicants that are easier to conceal from law enforcement during distribution, but which may be more dangerous to consume. The prohibition of cocaine, opium, and marijuana has shared this pathology. Duke and Gross chronicle how the artificially high costs of cocaine created by prohibition begat the invention of the more addictive but much less expensive “crack” cocaine.

When administered intranasally, cocaine reaches the brain in three to five minutes. But when cocaine is smoked, the brain is bathed in about eight *seconds*. The effects from smoking are also highly concentrated whereas they are more diffuse with other methods. As a result, a very small quantity of cocaine can produce an intense though brief high if smoked. The discovery of crack reduced the cost of a single cocaine high from about \$30 to \$3 or \$4, thus placing a crack high within the financial grasp of virtually everyone. Cocaine, which had been by far the most costly drug—about four times as expensive as heroin—became democratized.<sup>48</sup>

Thus, at about the time that affluent consumers were souring on the drug, the higher prices of powdered cocaine caused by prohibition led to the invention of a cheaper and more dangerous form of the drug, thereby greatly broadening the market for cocaine among the poor.

Furthermore, in cultures where opiates are legal, they are primarily consumed by smoking, snorting, or inhaling heated fumes. Each of these practices may lead to addiction, but only rarely if ever to death or disease. Injection, a more efficient method of consumption resulting from the artificially high prices created by prohibition, carries with it the dangers of overdose and now AIDS, and much more easily leads to dependency. “[B]efore the Harrison Act,” wrote John Kaplan, “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>49</sup> And, as Duke and Gross note, “[i]n Hong Kong, where needles are legal and cheap, there is no drug-related AIDS.”<sup>50</sup>

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48. *Id.* at 69.

49. JOHN KAPLAN, *THE HARDEST DRUG: HEROIN AND PUBLIC POLICY* 128 (1983).

50. *AMERICA'S LONGEST WAR*, *supra* note 10, at 194.

In their discussion of the history of prohibition, however, Duke and Gross neglect the role played by U.S.-sponsored spraying of Mexican marijuana fields with the toxic defoliant paraquat in the 1970's in shifting consumer demand in the 1980's towards cocaine.<sup>51</sup> Forced by the destruction of Mexican fields and the consumer's reluctance to buy potentially tainted marijuana,<sup>52</sup> drug suppliers turned to Colombia as a source of unsprayed marijuana.<sup>53</sup> When the Drug Enforcement Agency responded by strengthening its interdiction efforts in South Florida and the Caribbean, distributors began to favor the more concentrated Colombian cocaine over bulkier, easier-to-detect marijuana.<sup>54</sup> Suppliers told consumers that the newly plentiful cocaine was an excellent, if not superior, substitute for marijuana. Consumers tried it and liked it, until experience with the drug eventually revealed it to be more subject to abuse than had previously been thought. By the 1990's, demand among the more affluent had begun to shift back to marijuana, much of it domestically cultivated—only now to strains with much greater potency.

In sum, to avoid detection by law enforcement, the predictable response of drug producers and distributors is to produce more concentrated forms of intoxicants. Because they are more potent, these new versions are often more dangerous to consumers. Here, as elsewhere, the unintended consequences of prohibition are as pervasive as they are destructive.

### III. THE SOCIAL COSTS OF DRUG PROHIBITION

The costs imposed on both drug users and nonusers by drug prohibition are so massive and complex that they cannot fairly be summarized here. The adverse effects on the legal system alone, some of which I attempted to illustrate by the anecdotes with which I began this essay, are stunning. Undeniably, drug prohibition greatly increases both property crime (to pay for artificially inflated drug prices) and violent crime (to protect drug-dealing territory and to rob and kill those suspected of having valuable drugs or money from the drug trade). Perhaps just as important but less well recognized is the diversion of scarce resources away from other crimes or other nonlegal uses:

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51. Although they neglect this episode in their history of prohibition in Chapter 5, they do mention it in passing later in the book when discussing why the drug war cannot succeed. *See id.* at 217 ("Marijuana eradication turned some users on to cocaine."). They also note that a "1989 DEA study found that 7 percent of the nation's marijuana is contaminated by paraquat. Thus, for the sake of drug prohibition, our government has been willing to expose a significant percentage of America's 21 million pot smokers to poisoning by a toxic chemical." *Id.* at 195 (endnotes omitted).

52. Although paraquat is a defoliant intended to destroy crops, when they see their fields sprayed, growers try to harvest and send their now-tainted plants to market before the plants die.

53. *See* Thomas E. Ricks, *The Cocaine Business: Big Risks and Profits, High Labor Turnover*, WALL ST. J., June 30, 1986, at A1 ("The destruction of the Mexican crop gave Colombia marijuana growers a shot at the U.S. market . . ."); *see also* Alan Riding, *Shaken Colombia Acts at Last on Drugs*, N.Y. TIMES, Sept. 11, 1984, at A1, A16.

54. *See* Ricks, *supra* note 53, at A16 (describing how suppliers "decided to drop bulky marijuana in favor of cocaine, which is easier to move by air").

As of 1989, drug possessors and traffickers represented roughly 21 percent to 24 percent of the 395,553 inmates of the nation's county and municipal jails and an estimated 25 percent to 35 percent of the 710,054 convicts serving sentences in the state and federal prisons. Thus, in 1989, drug prohibition forced our penal institutions to warehouse somewhere between 260,000 and 343,000 people, who otherwise would not have burdened that system. If we add those who were imprisoned not for drug crimes but for drug-related crimes (such as crimes to get drug money, or murders and assaults arising out of the drug business) we could include another 150,000 to the total. Thus, about half of our penal population is there because of drug prohibition.<sup>55</sup>

The misery inflicted on those swept up into the legal system, those who are victimized by both violent and nonviolent offenders subject to "early release" programs designed to make room for the influx of drug offenders, and those whose crimes are not pursued because police or prosecutors are instead pursuing drug offenders is staggering. To use the terminology of economics, these are among the "opportunity costs" of prohibition.

The most ardent prohibitionists are also typically the most concerned with the breakdown of the family and the rise of the "underclass," especially in the inner cities. Yet, none of these partisans takes into account how their own favored policy of drug prohibition contributes to these phenomena:

Nationwide, one out of four black males in his twenties is in prison or under some form of court supervision, such as probation or parole. Of black males aged eighteen to thirty-five, the court-enmeshed figure is 42 percent in Washington, D.C., and a mind-boggling 56 percent in Baltimore. Fewer than one in sixteen white males of the same age are caught up in the criminal justice system.

As many as 70 percent of black men in Washington D.C., are arrested before they turn thirty-five. Although about 77 percent of current illegal-drug users are white . . . [n]ationwide, about 45 percent of drug arrests are of African-Americans.

. . . .  
. . . The young people who are punished more severely than many murderers, rapists or bank robbers lose any residual opportunities for a productive life and are taken from their mates and their children. Many forces help to produce the deplorable absence of fathers in the rearing of America's black children, but a major force is drug prohibition.<sup>56</sup>

Duke and Gross also devote a chapter to the effect of drug prohibition on our constitutional liberties. Police are literally busting down doors throughout

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55. AMERICA'S LONGEST WAR, *supra* note 10, at 179 (endnotes omitted).

56. *Id.* at 169-70.

the United States. Some of these home invasions are even televised on such programs as *Cops*.<sup>57</sup> The Supreme Court has so deferred to police decisions to search and arrest in drug cases that some scholars now speak of the “drug exception” to the Bill of Rights.<sup>58</sup> Duke and Gross describe many areas in which the powers of law enforcement have greatly expanded and the constitutional protections afforded all citizens have contracted. I will list only a few: the Fourth Amendment’s prohibition against unreasonable searches or seizures has been severely weakened by a variety of new exceptions, the Sixth Amendment’s right to counsel has been weakened by the prosecution of criminal defense lawyers, the traditional right to an appeal of criminal convictions has been relaxed in drug cases by eliminating oral arguments and published opinions,<sup>59</sup> and the property rights acknowledged by the Fifth Amendment have been greatly undermined by civil asset forfeitures. When the drug war finally ends, these rights and freedoms will only be regained with great struggle.

Apparently, no price is too high to keep a comparatively small minority of Americans from getting high. The underlying logic and motivation of the war on drugs can perhaps best be understood as a modern example of the theory used to justify the Inquisition: the doctrine of righteous persecution. Drug use is heresy and heretics must be punished for their own good as well as to preserve the morality of society.<sup>60</sup> As explained by George Smith:

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57. I advise those evaluating the merits of drug prohibition to watch this show. Although critics condemn such “reality-based” programs as too violent, the violence on *Cops* is usually committed by the police during drug busts, and it is real, not a re-enactment. Real as well is the demonstration of how the privacy of one’s home and car is now virtually nonexistent in poorer neighborhoods—both minority and white. That audiences do not consider the police conduct on this show outrageous is a disturbing sign of the extent to which the drug war has undermined the public’s understanding of and support for constitutional rights.

58. See Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257 (1984); Steven Wisotsky, *Crackdown: The Emerging “Drug Exception” to the Bill of Rights*, 38 HASTINGS L.J. 889 (1987). But see Diane-Michele Krasnow, *To Stop the Scourge: The Supreme Court’s Approach to the War on Drugs*, 19 AM. J. CRIM. L. 219 (1992) (arguing that recent changes in the Court’s Fourth, Sixth, and Eighth Amendment jurisprudence reflect “a pragmatic balance between stopping the scourge of drugs and protecting the Bill of Rights”).

59. Duke and Gross quote the late civil libertarian Justice Thurgood Marshall as saying, “If it’s a dope case, I won’t even read the petition. I ain’t giving no break to no dope dealer.” AMERICA’S LONGEST WAR, *supra* note 10, at 134.

60. See GEORGE H. SMITH, ATHEISM, AYN RAND, AND OTHER HERESIES 233-37 (1991).

Can coercion change a person’s beliefs and compel him to do good? No, said Augustine, but coercion can provide an incentive to avoid evil: “The fear of punishment . . . keeps the evil desire from escaping beyond the bounds of thought.” Persecution can break the bonds of habit and induce the heretic “to change his purpose for the better.”

Drug inquisitors offer the same justification for their righteous persecution of drug consumers. But what of those consumers who don’t change their habits even after they are punished? Augustine faced the same problem with heretics who had stubbornly refused to embrace Catholicism. His response has been echoed by a long line of drug inquisitors: “Is the art of healing, therefore, to be abandoned, because the malady of some is incurable?”

*Id.* at 234-35.

The modern drug inquisitor is another Augustine dressed in secular garb. Whereas Augustine sought to save the religious heretic from a literal hell, the modern inquisitor seeks to "save" the social heretic (the drug consumer) from the metaphorical "hell" of his "addiction." And just as Augustine's theory wreaked havoc in previous centuries—so the same theory, when secularized and applied to the "war on drugs," has created social turmoil and devastated hundreds of thousands of lives through imprisonment.<sup>61</sup>

This persecution is made possible by the demonization of drug users and by their relatively small numbers.

The religious nature of the anti-drug crusade is exemplified by then-drug "czar" William Bennett's call that California drastically increase its punishment of casual marijuana users. "The possession of all illegal drugs, even in small amounts—so-called personal-use amounts—should be punished."<sup>62</sup>

Noting that hard-core drug users constitute only 30 percent of the drug-taking population, Bennett said he wants to go after casual users, who may consume controlled substances once a week or even less often. He advocated steps such as seizing property or suspending drivers licenses to dissuade casual users from buying illegal drugs. He also called on states to enact legislation patterned after federal law that sets civil fines up to \$10,000 for those convicted of selling small amounts of drugs.<sup>63</sup>

According to Bennett's own estimates, seventy percent of those who consume intoxicants do so "*once a week or even less often.*" For consuming drugs with this degree of moderation, they should be punished, their property seized, and their drivers licenses suspended. Moderate users may not harm themselves, but they belie the ardent prohibitionist view that drug use is invariably self-destructive.<sup>64</sup> Yet such persecution is politically feasible because of the relatively small number of citizens affected. Shortly after Bennett made this statement, government surveys placed the number of casual marijuana and cocaine users nationwide at 14.5 million.<sup>65</sup>

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61. *Id.* at 233-34.

62. Ray Tessler, *Drug Chief Urges California To Reverse Its Easy Pot Laws*, S.F. CHRON., July 20, 1989, at A4.

63. *Id.*

64. Bennett's professed rationale for this increase is revealing:

"It's a national embarrassment that we are the third-largest exporter in the world of marijuana" and at the same time press foreign governments to crack down on drug production, he said.

"We cannot be saying to other countries 'you've got to get rid of those drugs or eradicate those drugs' until we get rid of them ourselves," Bennett said.

*Id.* Nowhere does he assert that, by consuming drugs once a week or less, the overwhelming majority of users are harming themselves. Rather the punishment of these people is the means to larger public policy ends.

65. See Michael Isikoff, *Federal Study Shocks Drug Experts: "Casual" Use of Pot, Cocaine Plummets, but Coke Addiction Rises*, SACRAMENTO BEE, Aug. 1, 1989, at A1 (stating that casual use of marijuana and

Duke and Gross add to this comparison of drug prohibition and religious persecution by noting that because drugs provide an alternative type of "religious" experience, they have been viewed as threats to established religions. "Precisely because the two psychic experiences, religion and drugs, are competitive, the use of drugs is often declared morally evil or blasphemous."<sup>66</sup> In sum, because drugs compete with religions by promising an alternative form of mystical experience, we can expect established religions to condemn them. Moreover, Duke and Gross argue that most mainstream religions have integrated some use of intoxicants into their ceremonies. "Wine, especially, enjoys lofty roles in religious sacraments. The use of other drugs is a challenge both to the special religious status of alcohol and to the religions which confer such status upon it."<sup>67</sup>

The analogy to the religious persecution of the Inquisition helps us to understand how so many people can be so indifferent to the suffering created by drug prohibition. And those who wonder how otherwise moral and decent people could stand by while religious dissenters were systematically imprisoned, tortured, and murdered on account of their religious beliefs should reflect upon their own indifference to the treatment of drug consumers.

#### IV. FROM POLICY TO PRINCIPLE

Trying to summarize the analysis presented in *America's Longest War* is extremely frustrating. Far more must be omitted here than can be included and what is included seems almost arbitrary. Yet, as I shall explain in this Part, the very difficulty of presenting such massive and complicated analysis is symptomatic of the most basic mistake that is made in thinking about the criminalization of conduct.

Drug prohibition is a product of the prevailing "public policy model" of decisionmaking. This model has three necessary components: (1) "public-policy experts" formulate "rational" solutions to "social" problems; (2) these solutions invariably require implementation by government coercion, either to mandate or prohibit citizen conduct or to dispense money collected by taxation; (3) this government coercion requires ratification by elected legislators and executive officials. This model contemplates only two active branches of government, with courts playing a subservient role. In this model, the courts' function is limited to determining whether particular persons have in fact violated a properly enacted statute. To pass upon the statute itself would be to make a "policy judgment," something that unelected, unaccountable judges are unqualified to do.

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cocaine fell "from 23 million people in 1985 to 14.5 million last year").

66. AMERICA'S LONGEST WAR, *supra* note 10, at 156.

67. *Id.*

The ideology of the public policy model of decisionmaking is that decisionmakers weigh the costs and benefits of human conduct as well as the costs and benefits of legally regulating or prohibiting that conduct and do so according to the will of the people. The formation of rational public policy is really a type of utilitarian decisionmaking procedure that uses legal coercion in any way that will maximize some implicit conception of aggregate welfare, constrained by the requirement that any such measures be approved by persons elected by the voting public.

Of course, this ideology is based largely on a myth or fiction, for no genuinely *comprehensive* cost-benefit analysis is even attempted, much less achieved. In the context of drugs, the public policy approach is usually no more sophisticated than the following: For a variety of reasons, using some drugs is, on balance, bad both for those who use the drugs and for others whom these people affect by their conduct. To prevent these bad consequences from occurring, we must apply legal sanctions. Legal sanctions will “send a message” of disapproval to those who normally obey the law and deter those who would otherwise act illegally. From this, the public policy approach concludes that the benefits to be gained by preventing some people from getting and using drugs outweigh the costs of such a policy.

*America's Longest War* reveals this analysis to be completely false. The book relies on data that are generally available, and in many cases, generally known as well—particularly among policymakers. Yet the drug war persists and, despite the evidence, will continue to persist for some time because the idea of ending drug prohibition is consistently rejected out of hand by almost all politicians and law enforcement personnel. The continuation of this tragic policy exemplifies the weakness of the public policy model of legal decisionmaking.

Although the shortcomings of the public policy model are multifaceted, the model is in all its guises a form of central planning and suffers from all the well-known deficiencies of this genre.<sup>68</sup> This is true even for so-called “decentralized” versions that shift some decisionmaking authority to administrative agencies, “independent” government corporations, or states and municipalities. In each of its forms, the public policy model requires that the world's myriad problems be defined as “social” problems requiring “public” solutions. In the case of drugs, for example, individual decisions to use a variety of different intoxicating substances, with a variety of different effects, in a variety of different ways, for a variety of different reasons, must be conceived as a general social problem—the “drug problem”—with enough common characteristics that it may be addressed by a “drug policy” consisting

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68. See e.g., FRIEDRICH A. HAYEK, *INDIVIDUALISM AND ECONOMIC ORDER* 77-78 (1948); see also DON LAVOIE, *RIVALRY AND CENTRAL PLANNING* (1985); THOMAS SOWELL, *KNOWLEDGE AND DECISIONS* (1980).

of general programs and a scheme of rule-governed coercive punishments administered by a legal system. This mode of decisionmaking runs afoul of the pervasive social problems of knowledge and of interest.<sup>69</sup>

The problem of knowledge is the inability of public policy experts to know enough about the subject at hand to formulate consistently welfare-enhancing public policies. At the extreme, it is impossible for any one mind or group of minds to know each of the people who choose to use drugs, their reasons for doing so, the effect of drugs upon them and their families, the alternatives available to them, their ability to cope with their behavior, and the harm that will be inflicted upon them by coercively imposed drug policies. Do we really believe, for example, that the prospective "cost" of the murder of Frank Mussa, Arthur Salcedo, and his brother Michael was actually incorporated into a utilitarian policy calculation that supposedly led to and currently supports drug prohibition?

The gross generalizations and abstractions used by public policy experts to elide these factual particulars mask those experts' pervasive ignorance and the inherent riskiness of adopting their policy "prescriptions" into law. Do we really believe, for example, that the costs imposed on *all* victims of drug-related violence have been or even could be incorporated into *anyone's* public policy model of drug prohibition? Moreover, although the model contemplates ratification of these prescriptions by popularly elected officials, the electorate gets the bulk of its information from the proponents of the policies in question. In the case of the War on Drugs, government antidrug propaganda, especially in the schools, is an integral part of the war effort.

Ironically, the problem of knowledge is typically used by adherents to the public policy model of decisionmaking as a weapon to advance their agendas. The destructiveness of the drug war can *now* be empirically demonstrated because its devastating consequences have already occurred. *Before* the policy was implemented, however, predictions about the adverse effects of prohibition would necessarily be far more speculative and abstract. Although one could have safely predicted that drug prohibition would lead to more dangerous drugs, it was impossible to predict, for example, the invention of "crack" cocaine.

Arrayed against such "speculation" are the ever-confident predictions of prohibitionists that legal coercion will eliminate or greatly reduce the use of drugs. Such confidence is displayed today, for example, by gun prohibitionists who believe that prohibition can "rid the streets" of guns, thereby seriously retarding violent crime. Despite our age-old experience to the contrary, such predictions are difficult to refute. I raise the issue of gun prohibition here, not

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69. For a brief explanation of these problems and how they are addressed by the liberal conception of several property and freedom of contract, see Randy E. Barnett, *The Function of Several Property and Freedom of Contract*, SOC. PHIL. & POL'Y, Winter 1992, at 62.



because I expect all readers to share my skepticism about the efficacy of this policy, but because we are in the “ex ante” position with respect to gun prohibition that we once were with respect to alcohol and drugs. Ex ante, nothing seems more certain to the prohibition-minded than that a legal ban of any sort will end or greatly reduce the targeted conduct. While the purported benefits of such bans are asserted by their proponents with certitude, the predictable harms are dismissed as merely speculative. In the past, the thinking goes, we were not tough or smart enough; this time we will do things right.

To their credit, Duke and Gross see that the current infatuation with gun control is as unrealistic as the goal of a “drug-free” society. They also see what most today have missed: the underlying increase in violent crime that is driving the gun prohibition agenda is related to the War on Drugs:

[T]he possession and use of guns can no more be prevented by prohibition than can the possession and use of drugs. America’s frenzied return to the murderous ways of the Wild West can be reversed only when it becomes irrational to keep or carry a gun for self-defense. That will occur when—and not before—predatory crime rates take a deep and permanent plunge. The *only* way that can happen in the near future is by decriminalizing drugs.<sup>70</sup>

No one who chooses to ignore the obvious criminogenic effects of drug prohibition can be entirely serious about the solving the problem of violent crime—particularly the violence in the drug-war-torn inner cities. Although this is not the place to discuss all the factual disputes raised by proposals to prohibit firearms,<sup>71</sup> we need not try gun prohibition to predict safely the results of such an “experiment.” The same principles that explain why drug prohibition has been such a disaster apply to gun prohibition as well.<sup>72</sup> Perhaps most importantly, we may also predict that, however destructive it may be, once enacted any such experiment is likely to be irreversible.

Emotions are at work here. Enacting statutes is seen as “doing something” about a social problem and is depicted as being morally superior to “doing nothing.” Legislators who vote for such policies are depicted in the press and in popular fiction as caring and courageous (although their courage involves imprisoning others at public expense). Those who oppose such policies are

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70. AMERICA’S LONGEST WAR, *supra* note 10, at 113.

71. Were it not beyond the scope of this Review, I might tell stories of the many middle-class African-American businessmen who have been prosecuted as criminals in “gun court” for carrying handguns for their own protection while driving through unsafe neighborhoods. Like drug prohibition, handgun restrictions have a disparate impact on minorities. See Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991) (describing historical impact of gun legislation on minorities and racial motivations behind many early laws in the United States).

72. For a fuller discussion of these principles in the context of drug prohibition, see *infra* pp. 2620-2625.

considered to be old-fashioned, small-minded, and without imagination. They are called "soft on" whatever conduct is being opposed. Most damning of all, they are charged with being indifferent to the suffering of others. After all, if a legislative initiative does not work out we can always end it. What harm is there in trying?

Plenty. Once enacted, if not before, such policies are subject to the problem of interest. This is the tendency of people to act in spite of their knowledge or to delude themselves as to the facts in order to serve their own good rather than that of the public. Enacted public policy regimes create a conflict of interests between persons who directly benefit from the policies and those who must bear the costs of the policies. Notable beneficiaries of drug prohibition include drug researchers who rely for their funding almost exclusively on government grants and, most importantly, the law enforcement agencies at all levels of government that receive massive funding for this righteous crusade and now enjoy the fruits of asset forfeitures. Politicians too benefit by trumpeting a political issue with none of the contentiousness of such subjects as abortion or taxes. When politicians cry "get tough on drugs," whose vote do they lose?

These beneficiaries of policies such as prohibition are constantly striving to recruit the public to their cause. They are adept at producing evidence showing either that current efforts are working or that the widespread failure of current efforts demonstrates the need for a massive escalation of funding. Whether continued or increased levels of funding are justified because current policies have succeeded or because they have failed will vary from expert to expert and from day to day. Those who benefit from public policies can always be relied upon to produce horror stories to illustrate the necessity of the policies in question. They are not above smearing or dismissing contemptuously those who oppose them<sup>73</sup> and ignoring any expert or official

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73. One example is William Bennett's condescending response to Nobel laureate economist Milton Friedman's thoughtful and impassioned plea for drug legalization, Milton Friedman, *An Open Letter to Bill Bennett*, WALL ST. J., Sept. 7, 1989, at A14. Bennett's reply included the following:

What surprises me is that you would continue to advocate so unrealistic a proposal without pausing to consider seriously its consequences. . . . In my judgment, and the judgment of every serious scholar in this field, the potential costs of legalizing drugs would be so large as to make it a public policy disaster. . . . As for the connection between drugs and crime, your unwavering commitment to a legalization solution prevents you from appreciating the complexity of the drug market.

William J. Bennett, *A Response to Milton Friedman*, WALL ST. J., Sept. 19, 1989, at A30. Bennett concludes:

A true friend of freedom understands that government has a duty to craft and uphold laws that help educate citizens about right and wrong. . . .

Today this view is ridiculed by liberal elites and entirely neglected by you. So while I cannot doubt the sincerity of your opinion on drug legalization, I find it difficult to respect. The moral cost of legalizing drug use is great, but it apparently lies outside the narrow scope of libertarian policy prescriptions.

. . . Your response . . . is to surrender and see what happens. To my mind that is irresponsible and reckless public policy. At a time when national intolerance for drug use is rapidly increasing, the legalization argument is a political anachronism. Its recent resurgence

commission that reaches the “wrong” result. In the world of public policy, there is no failed social program that would not work as advertised if only massive amounts of new “resources” were made available. The drug war is no exception.

Although the public policy model usually takes a “do something” approach to legislation, a concern for the problems of knowledge and interest often leads public policy experts to reject the idea of allowing individuals and associations to take a similar approach in their own lives. In the case of chemotherapy for physical illness, for example, the lack of knowledge of a drug’s safety and effectiveness coupled with the perception that unscrupulous physicians might pursue their self-interest by preying on ignorant consumers have led to heavy regulation of prescription drugs, including complete prohibition of certain drugs. Individual physicians with knowledge of particular patients and their conditions are prohibited from treating disease with any drug that has not been proven in advance to be both safe and more effective than a placebo.<sup>74</sup>

Public policy experts presumptuously take these life or death decisions out of the hands of patients and their physicians, so as to prevent the impulse to “do something” about one’s terminal illness from causing someone to expend money and hope on unproven or risky treatment. This reveals the essentially elitist and paternalistic attitudes underlying the public policy model. Public policy experts and officials are competent to implement coercive schemes to deal with vastly complicated social problems, but ordinary persons are not competent to make decisions concerning some of their most personal situations.

Were drug laws subjected to the same scrutiny as prescription drugs, those laws would immediately be withdrawn from the marketplace. Such laws cannot be shown to be either safe or effective. One may question whether such a risk-averse standard of proof is defensible in the case of prescription drugs, where individual consumers—particularly those with terminal diseases—who have personal knowledge of their own suffering and their own alternatives can assume the risk of experimental and other unproven treatments. In contrast, proponents of drug prohibition are willing to impose their treatment on others without any showing of safety or effectiveness and under circumstances in which any assumption of risk by those harmed by prohibition is entirely fictitious. Persons who are the objects of criminal persecution have in no

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is, I trust, only a temporary distraction from the genuine debate on national drug policy.

*Id.* In his reply, Bennett did not address Friedman’s central charge that, since Friedman first advocated legalization in 1972, drug prohibition has greatly aggravated rather than ameliorated the problem of illicit drug abuse.

74. Since placebos are effective in a minority of cases, drugs that do not exceed a placebo’s effectiveness may be entirely useless. On the other hand, they may actually be effective in a minority of cases. We just do not know. Simply because a drug cannot statistically outperform a placebo does not mean that it could not clinically benefit a patient who would be unaided by a placebo. Resolving this uncertainty by requiring that drugs outperform a placebo settles the case but does not answer this question.

manner freely assumed the risk of drug prohibition. Yet they must suffer the consequences nonetheless.

In sum, the public policy model of decisionmaking errs in the direction of enacting laws that rarely if ever can be repealed, regardless of how useless and damaging they may turn out to be. Such repeal then only comes after costing countless persons their happiness and even their lives. What is the alternative? Ensuring that the harmful side effects of legal coercion are incurred only when such coercion is both necessary and proper requires not problem-by-problem experimentation formulated by public policy experts constrained exclusively by electoral politics, but a commitment to what can only be called principle and a respect for properly formulated individual rights.<sup>75</sup>

Like public policy analysis, principles are generalizations, but they are generalizations that have withstood the test of time. Their validity or wisdom has been demonstrated by long and varied experience. In contrast to the formulation of "social problems" that abstract from the great diversity of individual circumstances, these generalizations usually attempt to take those circumstances into account. They are bottom-up, rather than top-down.<sup>76</sup> Such generalizations are by no means perfect guides to conduct. As factual generalizations, they do not always yield favorable outcomes even within their respective domains, though where possible this typically leads to the formulation of general exceptions. Moreover, as products of human understanding, such principles may be imperfectly formulated, though they can be refined when they are shown to be deficient. Indeed, principles are valuable guides to conduct precisely because exceptions have been recognized over time and formulations have been refined in light of ongoing experience.

Still, despite these imperfections, a legal system informed by the right set of general principles<sup>77</sup> can do a better job than a legal system guided exclusively by the public policy model.<sup>78</sup> Although there is no necessary reason why legislators may not take principles into account when fashioning legislation, experience supported by public choice theory suggests that they

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75. I shall not discuss here the precise relationship between the concept of a right and that of a principle. One might characterize a right as one kind of principle; or a right may be seen as justified by principles. In the balance of this Review, I mainly use the term "principle," rather than "right," though much of what I have to say about the former would apply as well to the latter.

76. Cf. Wallace Matson, *Justice: A Funeral Oration*, 1 SOC. PHIL. & POL'Y, Autumn 1983, at 94 (contrasting natural justice or justice from the "bottom up" with artificial justice or justice from the "top-down").

77. I would be content if those who are skeptical of identifying the "right set" of principles were equally skeptical of finding the right set of public policies.

78. The issue of whether general principles should supplement or entirely replace public policy analysis is too difficult to discuss in this Review. Still, even constraining public policy analysis by the right set of principles would be a great improvement over the status quo. Elsewhere, in the context of the Ninth Amendment, I have proposed the adoption of a judicially enforceable "presumption of liberty" that must be overcome before government may forcibly constrain the rights-respecting choices of individuals and associations. See Randy E. Barnett, *Introduction: Implementing the Ninth Amendment*, in 2 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 1 (Randy E. Barnett ed., 1993).

will often give them short shrift. When they do, courts may properly employ principles to evaluate and constrain legislation without directly engaging in public policy analysis.<sup>79</sup>

What does a more principled approach to drug prohibition reveal? Drug prohibition involves the punishment of victimless conduct. Such conduct is often defined in terms of the "harm principle": people should have the freedom to act so long as they do not harm others. Given the inherent subjectivity of "harm," however, the concept of victimless conduct cannot be taken to mean conduct with no adverse effects on others. As has long been recognized,<sup>80</sup> most conduct has what economists refer to as positive and negative externalities. The prohibitionists' argument that drug use is not truly a victimless crime because it harms many people other than the user is beside the point. Despite the existence of external negative effects, drug use is a victimless crime in the sense that it is conduct that does not physically interfere with the person or property of another. Prohibiting crimes that are victimless in this limited sense invariably leads to the sort of bad results<sup>81</sup> described in my personal anecdotes. There are at least two reasons for this.

First, such behavior is consensual and therefore all of the persons involved will take great pains to avoid detection by the police. In contrast to crimes such as rape, robbery, or theft, the absence of a complaining witness means that the conduct will not naturally be brought to the attention of the police.<sup>82</sup> Instead, the police must not only find the perpetrator of a victimless offense, they must also detect that a crime has been committed. As noted by Duke and Gross:

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79. Sometimes when courts employ principles it may appear to some to be engaged in a "crude" or "naive" type of policy analysis. Those who make this charge often do not understand or appreciate the nature of principles and how they properly constrain policy.

80. *See, e.g.,* HERBERT SPENCER, *SOCIAL STATICS* 64-65 (Robert Schalkenbach Found. 1970) (1850): Some may argue that it is not allowable to assume any essential difference between right conduct toward others and right conduct toward self, seeing that 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.

In . . . [this allegation] there is much truth, and it is not to be denied that in the final analysis all such distinctions as those made above must disappear. But it should be borne in mind that similar criticisms may be passed upon all classifications whatever. . . . 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 may also compel us to separate those actions which place 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.

81. Indeed, John Stuart Mill, the philosopher now most closely associated with the "harm principle" was a utilitarian who saw no distinction between the "moral" and "practical" dimensions of this principle. *See* JOHN STUART MILL, *UTILITARIANISM* (1861), *reprinted in* 43 *THE GREAT BOOKS OF THE WESTERN WORLD* 473b (1952) ("The 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, which only point out the best mode of managing some department of human affairs.").

82. Even though murder victims cannot complain, the crime of murder is investigated when a family member, friend, neighbor, or co-worker reports a person as missing, or when there is a discovery of a body. The position of coroner was established precisely to account for the death of all discovered bodies.

Since drug transactions take place between willing buyers and sellers, both of whom are motivated to avoid detection, law enforcement lacks its staunchest ally, the victim, who is motivated not only to report the crime but to testify against the perpetrator. Drug crimes are therefore difficult to ferret out and to prove.<sup>83</sup>

Consequently, the police must adopt entirely different and highly invasive means to detect the commission of such crimes. The use of general surveillance, random or systematic searches, undercover police, informants, electronic eavesdropping, reporting requirements, urine testing, and polygraphs are all necessary aspects of detecting victimless crimes, as is the violation of constitutional rights. Conspiracy has traditionally been among the most difficult crime to detect without creating an enormously powerful police apparatus that routinely invades the privacy of the citizenry. Yet *every* drug transaction is a form of conspiracy between buyer and seller. In sum, because of the lack of a complaining witness, the criminalization of victimless conduct will inevitably require the techniques of a police state.

The second problem with prohibiting victimless conduct is that buyers are willing to pay others to commit the offense. It is highly unusual for one person to pay someone to commit an act that physically invades the person or property of another. Contract murders are exceedingly rare. A more common example of such an arrangement is when a person buys and resells stolen goods or automobiles. To compensate the buyer for his risks, the thief who sells stolen goods receives a greatly *discounted* price for the stolen items. In contrast, with victimless crimes, the person who sells drugs receives from the buyer a greatly *increased* price to compensate her for the risks inherent in supplying the desired good. In this way, whenever there is a widespread demand for a good that is artificially in short supply due to a legal prohibition, a lucrative black market will develop, providing potentially large monetary gains to those persons who are risk-averse enough to supply the good.

The artificially inflated prices of this black market force buyers to somehow find the money to pay for the prohibited good. Many will be unable to raise the money by any but criminal means. Many will make money by committing victimless crimes such as prostitution or the sale of drugs. Others, however, will turn to burglary, theft, and robbery. Ironically, what began as victimless conduct is transformed by a legal prohibition into a reason to commit crimes that do harm victims. Moreover, to the extent that engaging in this conduct is criminal and must be hidden, even those who might pay for their behavior with legitimate employment are at constant risk of detection, loss of employment, and being forced into the criminal subculture to which they have already been exposed by the need to purchase drugs illegally.

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83. AMERICA'S LONGEST WAR, *supra* note 10, at 107.

The black market also creates an incentive for organized violence. Manufacturers and distributors live in constant fear of detection. Their very livelihood and freedom depend upon their willingness to punish anyone who would expose their conduct. Nor can they resolve any contractual disputes in courts of law—even were they the sort of persons who were otherwise disposed to do so. Rather, violent self-help is their only recourse. Even greater still, the prohibition of consensual victimless conduct contributes to violent crime by putting vast sums of money and valuable substances in the hands of persons who must deliberately do business outside the auspices of law enforcement and who themselves can never complain about their own genuine victimization. Consequently, every day persons such as Gregory Perkins who buy or sell illicit intoxicants are robbed and murdered for their money or their drugs.

Thus, prohibiting victimless conduct invariably leads to bad results not only because that conduct is consensual and there are no complaining witnesses, but also because people are willing to pay others a premium to flout the law. Moreover, like mixing cocaine with alcohol and barbiturates, the lethal interaction of these two features of prohibiting victimless conduct creates a vast potential for official corruption. The fact that there are no complaining witnesses means that it is solely up to the police to press charges. Should they decide *not* to arrest someone, no witness is likely to object—least of all the drug offender. This fact, coupled with the sea of black market money generated by prohibition, creates overwhelming opportunities for police to receive great wealth simply by looking the other way. Thousands of persons who entered law enforcement to do good will succumb to the temptation.<sup>84</sup>

Police integrity is also jeopardized by the constant and irresistible pressure to lie about the circumstances of an arrest so as to justify its legality. Integrity is like virginity; once lost it can never be reclaimed. Having lied once for a “good cause” and with the approval of one’s peers and superiors, lying can become a way of life for some police officers. At a minimum, most police officers must develop a line between lying to preserve a righteous arrest and lying to advance their own interest or to convict the innocent. This line is not always easy to distinguish or maintain.

At this point, some may ask whether other goods and services have been banned throughout history without such dire consequences. Perhaps, but such prohibitions are likely to work only when extra-legal socialization leads people to abjure the conduct in question. Under these circumstances, there is no substantial market demand for such goods or services and consequently

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84. The magnitude of the corruption effect of prohibition is difficult to establish. That such corruption exists, however, is undeniable. I once gave a speech favoring drug legalization to an Illinois law enforcement association. Many police officials including chiefs of police were in the audience. Although several expressed doubts about legalization, none contradicted my charge that drug prohibition corrupts police officers “and you know it.”

prohibition will not cause a lucrative black market. Nor are highly intrusive means required to detect prohibited conduct. Thus prohibition “works” when it is largely unnecessary. This is not to deny that laws may influence and reinforce extra-legal social sanctions. My claim is that any such reinforcement comes at a very high price, and one that is drastically and consistently underestimated.

What about the ability of law to send a message of approval about that which is permitted and disapproval about that which is prohibited? The message of approval that supposedly attaches to legally permissible conduct is an artifact of a misguided conception of law. For people with the totalitarian attitude that every type of morally objectionable conduct is potentially subject to legal regulation, legality implies approval.<sup>85</sup> In a society that recognized the person’s freedom to make mistakes or to engage in conduct of which others disapprove, however, legality need send no such message.<sup>86</sup>

As for the message sent by criminalization, one is tempted to respond that if one wants to send a message, one should call Western Union, not Congress. Duke and Gross are among the few I have read who take this issue seriously—far more seriously than do ardent prohibitionists:

Criminalizing behavior that is commonly engaged in by a substantial segment of a society inevitably debases the currency of criminal proscriptions. If a legal system declares that both drug use and robbery are reprehensible, *it is not only making a moral statement about drug use, it is making a moral statement about robbery.*<sup>87</sup>

Criminalization is then like antibiotics; neither should be overused. Doing so will tend to weaken the effectiveness of both. Moreover, as Duke and Gross observe:

The use of marijuana, cocaine or heroin cannot be the moral equivalent of murder while the smoking of tobacco and the drinking of liquor are lawful. The hypocrisy is too transparent. Drug

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85. Even the great medieval religious philosopher Thomas Aquinas did not take such a position. Replying to the question of “whether it pertains to human law to repress all vices,” he offered the following argument that strikes one as remarkably modern and even liberal:

Now human law is framed for a number of human beings, the majority of which 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*.

THOMAS AQUINAS, *THE SUMMA THEOLOGICA*, in 20 *THE GREAT BOOKS OF THE WESTERN WORLD* 232a (1952) (emphasis added). He also argued that attempting to impose “the burdens of those who are already virtuous” on “the multitude of imperfect men” would cause “these imperfect ones, being unable to bear such precepts, [to] . . . break out into yet greater evils.” *Id.*

86. However, as discussed in Part V, replacing drug prohibition with government dispensation of intoxicants *would* run afoul of this difficulty.

87. *AMERICA’S LONGEST WAR*, *supra* note 10, at 106 (emphasis added).



prohibition undermines rather than strengthens our morals and our fidelity to criminal law.<sup>88</sup>

This, in a nutshell, is the principled analysis that enables us to predict that prohibition is likely to lead to disastrous consequences without having to try it. In fact, the only time that prohibition appears to work is when it is not needed. A principled analysis does not disregard the relevant facts in favor of “simplistic” solutions to complicated problems. To the contrary, it takes the complexity of the human social condition far more seriously than so-called “sophisticated” public policy analysts, who see in legal prohibition of any undesirable behavior the simplest of solutions to complex human problems: Don’t like something? Ban it.

Given the critical tenor of my remarks to this point, I should hasten to emphasize that there is nothing inherently objectionable about a public policy *analysis*; some of my best friends do public policy analysis. Principles alone do not make us expert about any social problem; that requires the sort of information that good public policy analysis and some experience on the ground can provide. Duke and Gross’ public policy analysis, for example, teaches us much we might not otherwise have known about the consequences of the current regime of drug prohibition. What is objectionable is enacting laws sanctioning the punishment of persons *solely* on the basis of such analysis—what I have called here the “public policy model of legal decisionmaking”—unconstrained by the sort of principled analysis just outlined. Principles remind us of the inherent limits of using legal coercion and enable us to predict with a fair degree of confidence that a legal scheme that looks attractive from a public policy standpoint is likely both to lead to damaging unforeseen results and to be difficult to reverse if that should occur.<sup>89</sup>

## V. ALTERNATIVES TO PROHIBITION

A commitment to principle was once considered a virtue. This attitude was a product of a more humble view of human knowledge and interest, as well as human power, than obtains today. The dominance of the public policy model of legal decisionmaking has undercut this sentiment by promising clean solutions to intractable problems. Persons of principle are now commonly condemned—especially by academics—as “doctrinaire” or “ideologues.” Even Duke and Gross succumb at one juncture to this sort of rhetoric. When considering the appropriate form of legalization they assert that:

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88. *Id.*

89. Analogously, to understand the past, sound principles are no substitute for historical research. But historical research unguided by sound principles is likely to be seriously deficient.

Few but the most doctrinaire libertarians would favor . . . [the unfettered distribution of drugs], which threatens to replicate one of the worst problems that we now have with the largely unregulated distribution of cigarettes. Children would have easy access to drugs.

. . . [T]he unfettered option also would possess many of the disadvantages of the present regime, in which the consumer has no protection against mislabeled drugs or products tainted by toxic adulterants. There is nothing wrong with—and much to be gained by—drug regulation short of prohibition.<sup>90</sup>

Of course, following the prescriptions of “doctrinaire libertarians” would have avoided the very harms that Duke and Gross spend several hundred pages discussing. Listening to the importuning of “reasonable regulators” got us into this mess and, despite the publication of this book, seems at the moment unable to extricate us from it. For years *only* “doctrinaire libertarians” had the courage to oppose drug prohibition. Only just recently have the consequences of this policy spread so far and so wide that even law professors at respectable universities and other mainstream folks have seen the error of their prior, but of course never doctrinaire, beliefs. Moreover, there is nothing libertarian about fraud (“mislabeled drugs”) and negligence (“toxic adulterants”), much less selling dangerous goods of any kind to children—depending of course on where the uncertain line between childhood and adulthood is drawn.

Nonetheless, even the most doctrinaire of libertarians would have to concede that adopting a regulatory regime short of complete prohibition would avoid many of the most egregious costs now impelling all but the most doctrinaire of statists towards the unthinkable: complete legalization. This is why the thousands of persons who now suffer at the hands of the current regime of prescription drug regulation will have to wait for nondoctrinaire “pragmatic” policy analysts to get around to reforming that system. That is, if they live that long. Their numbers are just too few to create either adequate political pressure of the sort that AIDS activists have recently brought to bear,<sup>91</sup> or the sort of black market that inflicts sufficient damage on society as a whole to get its attention. For this reason, at the moment, few but the most doctrinaire of libertarians would argue for greatly increasing the legal rights of patients to assume the risk of unproven treatments now banned in this country. And, at the present rate, soon *only* the most doctrinaire of libertarians will be defending the rights of “pornographers” to publish and citizens to buy erotic literature.

Apart from this rhetorical lapse, Duke and Gross offer some sensible suggestions about the appropriate form of legalization. For example, they reject

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90. AMERICA'S LONGEST WAR, *supra* note 10, at 264.

91. By this analogy I mean only to suggest the type of political pressure that cancer victims and others have been unable to muster. I do not mean to suggest that the political pressure generated by AIDS activists is solely a function of their numbers. The story is far more complicated than this.

the horrible but surprisingly common proposal that illicit drugs be distributed by a government monopoly:

[W]hen government is the sole legal distributor of a commodity, competition and self-interest are not available to promote the efficient workings of the market. . . . The temptation of government to increase profits by raising prices on a controversial product would also exacerbate the problems. Black markets that legalization was designed to prevent would develop parallel to the government drug-distribution system, just as illegal gambling organizations compete with state-run lotteries.

Finally, when the government has a financial interest in promoting vice, as it does in those states that have lotteries, states frequently engage in shameless promotions, even fraud, to induce their citizens to part with their money.<sup>92</sup>

One must also add to this the difficulty of projecting an attitude of societal disapproval when government is not only permitting, but also facilitating a type of potentially harmful conduct. The charge, which I criticized above, that legalization would connote societal approval, would seem a legitimate objection to government provision of intoxicants.

Duke and Gross recommend a system of licensing in which “[n]o monopolies or oligopolies should be created. Any person or organization meeting minimum requirements should get a license.”<sup>93</sup> They suggest that a

commercial licensing system should also include mandatory warning labels, generic packaging (no brand names, slogans or touting) and detailed description of contents and purities. It might also be advisable to limit the quantities of drugs that any individual could purchase, to require records of sales, and to forbid quantity-price discounts.<sup>94</sup>

They even go so far as to propose that the FDA should “approve drugs developed to provide intoxication, as well as those having ‘medical’ value. This would provide substantial incentives to the pharmaceutical companies to develop safer and less addictive pleasure drugs than most of those now on the market.”<sup>95</sup> While there is no doubt that such a system would largely end the scourge caused by prohibition and would be a much welcome development, it is not without its difficulties.

Some of these difficulties attach to all licensing regimes. Typically these measures increase the costs of products, thereby imposing some increased burdens on the poor, though hopefully not enough to recreate the vicious black

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92. AMERICA’S LONGEST WAR, *supra* note 10, at 265.

93. *Id.* at 266.

94. *Id.*

95. *Id.* at 268.

market. Few if any “pure” licensing regimes have ever failed to be converted into sources of government revenue or barriers to competition or both. After all, the government claims the monopoly on licenses and so *it* tends to extort a monopoly rent. This rent is often disguised by budget “deficits” deliberately created by inflating “costs”—usually by sweetheart agreements with politically favored groups, who may in turn pass a portion of the money back in the form of campaign contributions. Licensing schemes are also subject to capture by regulated enterprises in such a manner as to penalize competitors, especially *potential* competitors. Other problems follow from the licensing of socially stigmatized behavior. Thus the price of cigarettes and alcohol can be greatly inflated by so-called “sin taxes,” particularly if it is a minority that imbibes. It is no coincidence that taxes and other restrictions on tobacco smoking have increased as consumption has declined.

Moreover, record keeping makes invasions of privacy inevitable. Imagine an official record-keeping requirement imposed upon video stores. The demand for Robert Bork’s rental records shocked even some of his opponents. Keeping records of drug users would certainly drive many into the anonymity of a black market, particularly if the social stigma attached to drug use is increased to compensate for the absence of legal constraints.<sup>96</sup> All of this, though perhaps not inevitable, is predictable with confidence by those who understand the principles at issue.

Ultimately, this and other issues now dealt with by the public policy model require a more “doctrinaire” approach—if what this means is not unthinking or knee-jerk reactions, but instead a commitment to general principles and especially to the *individual’s right* to control his or her own body as he or she sees fit. Once more to their credit, Duke and Gross devote a chapter to the “autonomy costs” of prohibition, in which they summarize the “fairly conventional libertarian objections [to drug prohibition] that transcend time, place and society. Their persuasiveness does not depend upon the particular characteristics of a culture.”<sup>97</sup> Such objections are based on the “right to choose which drugs to use, and whether to use them at all, [which] is arguably as fundamental as the right to decide where to live, where to work, whether to marry, whether to have children, how much education to seek and how to raise one’s children.”<sup>98</sup> They consider seriously the argument that the judgment of adults about the value to them of imbibing intoxicants deserves more trust than the judgment of the state.<sup>99</sup> They also consider the argument

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96. One of the reasons that British regulation of heroin addicts, though preferable to our policies, has failed to end the black market there (and its associated crime) is the unwillingness of many addicts to submit to the record keeping and cost of seeking heroin from physicians as “treatment” for their “illness.”

97. AMERICA’S LONGEST WAR, *supra* note 10, at 154.

98. *Id.* at 152.

99. *Id.* at 152-53.

that decisions about the use of psychoactive drugs are an important part of life and of the development of individual potential.<sup>100</sup>

[T]he truth is that drugs provide great pleasures to many, including many who are not in any sense addicted. Those who feel that they are more creative or insightful or self-aware while under the influence of psychedelics or other drugs may be delusional or they may be right. Prohibitionists commonly *assume* that such claimants are delusional, but proof of that assumption is entirely absent. It is riskier to a society in the long run to prohibit access to drugs which have that potential than it is to permit such access.<sup>101</sup>

This almost sounds like the invocation of a principle.

### CONCLUSION

Although *America's Longest War* provides a breath of fresh air, Duke and Gross overlook—and in this they are in good company—the *connection* between so-called doctrinaire “libertarian” objections and the harmful “social” costs of drug prohibition they expose. A regime of rights that places the freedom and responsibility for making decisions of fundamental importance on those individuals and associations who must bear the major cost of choice is the liberal solution to the problems of knowledge and interest discussed above.<sup>102</sup> Such a regime also addresses the pervasive problem of power.<sup>103</sup> Considerations commonly characterized by nonlibertarians as “libertarian” focus on the harms directly caused to those persons who are the objects of legal coercion. By contrast, analysis stressing the harmful consequences inflicted upon the society at large are considered to be “utilitarian.” But if the foregoing analysis of drug prohibition reveals nothing else, it is that the rights that are needed to protect individual and associational freedom can be justified as necessary to avoid *both* kinds of harmful consequences.<sup>104</sup> Attempting to

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100. *Id.* at 153-54.

101. *Id.* at 154.

102. See Barnett, *supra* note 69; *supra* text accompanying notes 69-74.

103. See Randy E. Barnett, *Foreword: Can Justice and the Rule of Law Be Reconciled?*, 11 HARV. J.L. & PUB. POL'Y 597, 619-22 (1988) (describing problem of power as a special exacerbated form of the problems of knowledge and interest).

104. Cf. Randy E. Barnett, *Foreword: Of Chickens and Eggs—The Compatibility of Moral Rights and Consequentialist Analyses*, 12 HARV. J.L. & PUB. POL'Y 611 (1989). There I distinguish between moral rights analysis, which “views the actions of individuals and associations from the perspective of the individual and the association,” *id.* at 617, from consequentialist analysis, which “takes seriously the wide-reaching and highly dispersed effects that the actions of individuals and associations may often have on others,” *id.* at 618. Although I defend *both* modes of analysis, one argument I offer in favor of the former is

its ability to obviate the need for costly and potentially tragic “social experiments” that may be recommended by faulty consequentialist analyses. Even when such experiments are destructive, there is often no efficient way to terminate them. It is far better to use a moral rights analysis to look before one leaps.

achieve either individual or general welfare by ignoring these rights will invariably lead to human suffering that is as avoidable and undesirable as it is unforeseen by those who choose to rely upon a public policy model to decide matters of legality.

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*Id.* at 620; see also Randy E. Barnett, *The Virtues of Redundancy in Legal Thought*, 38 CLEV. ST. L. REV. 153 (1990) (extolling virtues of using multiple modes of analysis in reaching conclusions about legality).