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Daniel D. Polsby

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ENDING THE WAR ON DRUGS AND CHILDREN

DANIEL D. POLSBY*

I. INTRODUCTION

I am much in favor of decriminalizing the commerce in and use of most¹ recreational drugs. I believe that, on net, this policy would leave society better off than it is now. Acknowledging that the matter is, however, uncertain, it also seems to me that uncertainties, at least of this kind, ought to be resolved in favor of liberty. Still, the most prominent arguments for decriminalization, such as those of Ethan Nadelmann² and Arnold Trebach,³ seem to me decidedly unsatisfying. They lack an appreciation for the tragic dimension of the problem. Decriminalization would certainly do much harm; it is just that failure to decriminalize must also do much harm. I do not believe that the legalization argument has much of a chance if its burden is to show that this reform would definitely, or probably, lower the social costs associated with drugs. But it is possible to show that the *distributional* consequences of legalization would improve the world. That is the argument I sponsor here.

II. LEGALIZATION MUST HAVE HEAVY COSTS

It seems to me that all arguments for decriminalizing⁴ drugs are dismissable out of hand unless they assume that such a reform would result in materially increasing the amount of experimental, and also chronic, use by minors. That significant new public health (and other) costs would thus accrue must also be assumed. Such predictions emerge straightforwardly from price

* Kirkland & Ellis Professor of Law, Northwestern University School of Law. Grateful acknowledgment is due to Professor Kleiman and Professor Meares for their helpful comments on an earlier draft.

1. One must reserve the case of genuinely criminogenic substances for separate and more detailed discussion. There is some evidence that amphetamines, at least in some of the forms in which they are illicitly used, can provoke belligerent, assaultive behavior in otherwise peaceable people. How much third-party harm is thus implicated in the real world seems not to be definitely known, but the matter is worth careful study. Of course it is a complicating factor in policy analysis that alcohol is almost certainly much more criminogenic than any other ingested substance.

2. Ethan A. Nadelmann, *The Case for Legalization*, 92 PUB. INTEREST 3 (1988).

3. ARNOLD S. TREBACH, *THE GREAT DRUG WAR* (1987).

4. This essay rejects the convention, observed by some analysts and perhaps useful in some contexts, of distinguishing between "legalization" and "decriminalization" of drugs, or distinguishing the "war on drugs" from ordinary, workaday criminal law enforcement of prohibitionist drug laws. I shall use these respective terms interchangeably.

theory, but even if one did not *actually* predict these bad outcomes, presuming them produces an altogether fair allocation of proof burdens in this particular public conversation. Accordingly, it seems to me that the case for decriminalization begins with a heavy handicap. Moreover, this handicap becomes even heavier when the focus turns to children, because, unlike the case with adults (where the matter is not at all cut-and-dry),⁵ it ought to be axiomatic that the enjoyment which children might derive from using recreational drugs cannot be counted as “benefits” in any cost-benefit analysis of removing criminal law from center stage in the regulation of drugs, any more than the enjoyment which bank robbers derive from their occupation can be counted in the cost-benefit analysis of bank robbery. The matter is therefore simple. Categorically, children must not use recreational drugs at all, and if we weaken (let alone abolish) criminal sanctions on adult use, that must undermine that object, and we shall have more of that which (we say) we would like to have none at all. The first question that has to be addressed, then, is whether this (assumed) state of affairs, all by itself, ends the debate. My answer is “no.”

III. CRIMINALIZATION “TO PROTECT THE INTEREST OF CHILDREN” CANNOT BE JUSTIFIED

We should not seek to structure the affairs of the entire society around the interests of the children—the X additional experimenters and the Y additional regular users—who would be harmed if the possession and use of cocaine, heroin and marijuana by adults were no longer punished by the criminal law. In the first place, as a general matter it is unwise to define the rights of adults according to worries about the susceptibilities of the most vulnerable, but in the second place, at least in this context, it is not even coherent to try to do so. The matter of drug policy is not too different in posture from that of pornography, which we first began to seriously face in this country in the mid-1950s. Under the rule of *Regina v. Hicklin*,⁶ an 1868 case from the Court of Queen’s Bench, the obscenity question was “whether the tendency of the matter charged . . . is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.”⁷ By implication, the rights of all should be determined by the vulnerabilities of the peculiarly susceptible. The United States Supreme Court rejected this as a tenable

5. There is not much of a case to be made for nakedly paternalistic drug prohibition of adult use because there is little reason to suppose that the government’s generic information about what is good for a person will regularly beat individuals’ specific information about what is good for them. But the possibility of justifying a prohibitionist regime on self-paternalistic grounds remains a troubling possibility. See generally Thomas C. Schelling, *The Intimate Contest for Self Command*, 60 PUB. INTEREST 94 (1980).

6. 3 L.R.-Q.B. 360 (1868).

7. *Id.* at 371.

approach in *Roth v. United States*⁸—a First Amendment case to be sure, but still one that asks for an answer to the same question, *whether there is a limit, defined by nuisance to the population as a whole, beyond which we should not feel free to childproof the world.* Cigarettes and alcoholic beverages are, of course, cliché examples of products tolerated in the interest of all though they are never (we may presume) appropriately used by children. But more generally, as everyone who has ever lived in a family well knows, there are many situations in which “what is good for the child” and “what is good for the family as a whole” may be thought of as in tension. There is *no* legal or moral rule that dictates that the child’s interest, considered in isolation (as though that were realistically possible!) must always prevail.

The question of decriminalization must be answered, not by looking at the effects on children, but on society as a whole. And if those interests uncontroversially do embrace that which affects the health and welfare of all children, certain children, or for that matter any one child, they certainly do not do so lexically in regard to drugs. And indeed, one might go a step further and insist that it is not even meaningful to defend criminalization as an attempt to respect the interests of children vis-à-vis drugs as a preemptive first priority. The world is too complicated for any such thing to be possible. Though X number of children are (we assume) spared any involvement with drugs because drugs are illegal, Y number of children are *injured* because drugs are illegal—because:

- (1) one or both of their parents have legal difficulties because drugs are illegal; or
- (2) their neighborhoods are more dangerous because deadly criminals try to monopolize drug distribution channels by violent means,⁹ which leads to
- (3) massive disinvestment in neighborhoods so affected¹⁰—that is, the flight of both financial and human capital,¹¹ which harms
- (4) the life chances of children, which not only accelerates (3), but which also increases the hedonic rationality of children taking drugs (because their opportunities for personal fulfillment through licit means will be less) as well as the instrumental rationality of children dealing drugs

8. 354 U.S. 476 (1957).

9. Alfred Blumstein, *Youth Violence, Guns, and the Illicit-Drug Industry*, 86 J. CRIM. L. & CRIMINOLOGY 10 (1995).

10. John J. DiIulio, Jr., *The Impact of Inner City Crime*, 96 PUB. INTEREST 28, 36 (1989).

11. WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED* (1987).

(because, thanks to (3), alternative economic opportunities will be less available to them, and protecting their reputation for being criminally uninvolved will be less valuable).

This position is not by any means a comprehensive indictment of the war on drugs (or the policy of criminalizing drug abuse), but it does very well for beginning a discussion meant to focus on children. And although this account is full of conjecture about what the facts, if only we could know them, would show (and in all probability so it must remain), it seems no longer possible to doubt that the sketch, in its essentials, is accurate. The cost side of the war on drugs must be far, far larger than the \$12,500,000,000 that has recently been spent annually in the federal government's war on drugs, most of it on drug-specific interdiction and law enforcement,¹² and at least as much spent by states on the same business. The costs of criminalization are to be found in the damage done to human beings and communities by unsustainable attempts to exceed the limits of the criminal sanction.¹³ I shall not argue the case for the social gains to be realized from transferring anti-drug law enforcement efforts to other, more socially productive lines in the government budget. For reasons to be explained presently, these opportunity costs are, properly considered, quite small and possibly even non-existent.

The violent crime wave of the late 1980s and early 1990s has almost certainly been the unintended consequence of prohibitionist drug laws, just as the violent crime wave of the 1920s was the unintended consequence of the Eighteenth Amendment's prohibition on alcohol. Unlike the great crime wave of the late 1960s and 1970s, the crime wave that began in the mid-1980s was not driven by demographic, but by economic, factors. Thirty years ago as the Baby Boomers came of age, there was a sizable increase in the relative size of the population of young males, and with it an increase in crime, which is largely a behavior of young males. Nothing of the sort happened in the mid-1980s.

Scholars have noticed the coincidence between the arrival of crack cocaine as an important commercial commodity and the spiking of the rates of murder and victimization among urban males age fourteen and older. Crack cocaine, unlike the powdered kind, usually trades in small batches. A given kilogram of cocaine will yield ten to twenty times as many retail transactions in the form of crack than it will in the form of powder. This means that the coming of crack portends a large expansion of job opportunities in the retail end of the drug trade. The war on drugs cannot plausibly be blamed for the development of the crack cocaine trade, but more or less coincident with the arrival of crack, the

12. NATIONAL DRUG CONTROL STRATEGY BUDGET SUMMARY 214 (1992).

13. HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968).

budget for the war on drugs began to skyrocket, ultimately *sextupling* in a matter of only a dozen years. Obviously the war on drugs must have created, even if transiently, a window of economic opportunity for young men willing to put up with the rapidly increasing risks, legal and illegal, of drug dealing. Potential competitors abandoned the marketplace, voluntarily or because they were arrested, or—as has apparently happened in tens of thousands of cases since the mid-1980s—because they were murdered. Large amounts of cash rewarded those who remained, but also attracted violence, further diminishing competition and heightening the returns in the business. The homicide victimization risks for African American males age eighteen to twenty-four more than doubled in these years, to over 100 in 100,000. Alfred Blumstein argues that this increase was caused by “the recruitment of young people into illicit drug markets.”¹⁴

This explanation is persuasive so far as it goes, but it leaves a crucial loose end: it does not explain why, for the first time since crime statistics have been kept, the victimization experience of *younger* teenagers, whose likelihood of killing or being killed had historically been no greater than that of their parents, began more nearly to resemble that of their older brothers. Why should the war on drugs be triggering an increase in these numbers? Here is what must have been happening:

- Young drug dealers, arbitraging the relative leniency of the juvenile justice system toward drug offenses, began for the first time to be drawn into the drug business in sizable numbers.
- The reason for this phenomenon is that the legal risks for adults associated with drug dealing began to intensify at this time as a part of the war on drugs, not only because more law enforcement effort was focused upon drug dealing but
- because sanctions for adult drug law violations began to escalate rapidly in harshness, while the punishments for most other crimes were not being aggravated as much or at all. Because of the increasing *relative* harshness of the drug laws,
- older boys and young men with criminal predispositions would in many cases be better off on the margin if they substituted robbing drug dealers (whose ranks were beginning to include significant numbers of juveniles) for dealing drugs themselves.

14. Blumstein, *supra* note 9, at 10.

- Unless he arms himself, a fourteen-year-old is not usually a match for an eighteen-year-old in a showdown. This explains why one should expect to see increased demand by juvenile drug dealers for firearms, namely to protect inventory and receipts from predation by older boys and young men with recently changed legal incentives.
- Unless he arms himself, an eighteen-year-old boy is not usually a match for a fourteen-year-old with a gun. This situation explains why one should expect to see increased demand for firearms by young adults who prey on younger drug dealers.

I suggest this is a credible sketch of what Blumstein has called an “arms race” on city streets. A murder epidemic was the result. But this epidemic was highly localized in the statistics. The rate of murder for the population as a whole continued its secular, post-1970s decline,¹⁵ and even the rate for the black population, apart from the young male cohorts, was declining.¹⁶ But the experience of non-white teenagers and young men became so frightful so abruptly, it persuaded Americans that our country was experiencing a pandemic of violent crime. It was not, nor anything like it. What it was experiencing, rather, was collateral damage from the war on drugs.

IV. THE PEACE DIVIDEND

Suppose we canceled the war on drugs tomorrow. What sort of peace dividend could we realistically expect? Any such dividend would probably not be dramatic, I think, and would likely be realized mainly in a more or less distant future. The current inventory of convicted offenders would still have to be attended to and, because if past experience is any guide, forty percent of them will find their way back to prison within thirty-six months of being released, and two-thirds or so of them will within five years. Their recidivism will continue to impose costs both in the public and in the private sector. It might at first seem this fear is misplaced, because, after all, if drugs are legal, why should one expect released drug offenders to return to a life of crime? The answer is: it is true, that is, that convicted drug criminals could not go back to a life of dealing illicit drugs if dealing drugs were legal. But there is little evidence to support the hope that, deprived of gainful employment in the narcotics trade, dope-dealing ex-cons would turn to minimum-wage jobs rather than other criminal activities. Despite well-publicized declarations to the contrary, there is very little worthwhile evidence that the current prison population of drug offenders contains any appreciable fraction of

15. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, 1993 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 388 fig.3.7 (Kathleen Maguire & Ann Pastore eds., 1994).

16. *Id.*

temperamentally inert flower children, ensnared by happenstance in the war on drugs. Though the matter could use more study, it appears that overwhelmingly, corrections departments' prison clientele consists of persistent repeat offenders—people who have accumulated long records of arrests and convictions before they ever see the inside of a prison. The speculation to the contrary seems to be based on looking at the specific crimes for which incarcerated felons were convicted. But this methodology hardly suffices in a world where considerably in excess of nine in ten convictions are the result of plea bargains. It is specious to infer that a guilty plea to a non-violent crime suggests that one is dealing with a non-violent person. The Illinois Criminal Justice Information Authority, for example, has recently compiled data which show that a prior conviction for a drug crime is a far better predictor of a later conviction for a crime against the person than (for example) a prior conviction for theft or retail theft. Many authorities support the same point. Criminals are not, on the whole, specialists but opportunists whose behavior is a portfolio of both violent and non-violent offending.

One should not take from the foregoing that drugs “cause” crime. Rather, drug abuse seems to belong to a set of risk-taking behaviors, which include crime but which encompass the whole range of risky activities in which human beings engage, and which as any auto insurance underwriter would be glad to confirm are more characteristic of the young, the poor and the male than of any other part of the population. There is nothing that public policy can or should try to do about the “male” part of the equation. The “young” part we can deal with by waiting it out: the offense profiles of forty-year-old and older criminals descends rapidly toward the innocuous. The “poor” part, unfortunately, we can affect hardly at all. The private sector does not, on the whole, like ex-cons very much, and probably could not readily or soon be persuaded to drop its prejudices against drug felons just because drugs had been made legal. For the same reason that one should not expect drug legalization to reduce pressure on corrections budgets, one should not expect it to reduce pressure on law enforcement budgets. Just because criminals deal illegal drugs does not mean that making drugs legal will swiftly reduce the quantity of criminally disposed individuals in circulation. The one and only sure means of doing that in the short run is prison. It is consequently reasonable to suppose that ending the war on drugs would simply enable law enforcement to redeploy their assets against what, for the time being, would be the same number of criminals as before, with the only difference being that in this reformed world, criminals might be *harder* to take out of circulation than when drugs were illegal. Suppose, in response to legalization, criminal careers verged into behavior that was harder to detect and prosecute than drug crimes? In that event, one should expect to see even *more* pressure on law enforcement budgets than we see now.

Of course, in the longer run, legalization of drugs would dry up a good deal of the financial incentive to embark on a life of crime. Over the years, one should expect this money squeeze to cause smaller numbers of youngsters to be sucked out of the margin and into the criminal demimonde. Because there will be fewer fourteen-year-old criminals, there should be fewer fourteen-year-old victims. In time, the population at greatest risk for victimization should renormalize to the relatively low rates that would and should have been seen all along if only there had never been a war on drugs. But, in the mean time (as previously noted) legalization of drugs must equate to at least a modest retail price reduction, which means increased availability, which in turn means some amount of increased consumption at least in the short run, which must in turn lead to increased near-term demands on public health resources.¹⁷ Even small average changes in the population's use of narcotic drugs would be expected to produce quite substantial changes in the tail of the distribution where drug abuse was more acute and self-destructive. And in addition, one must expect to see something that every parent definitely, definitely does not want to see: more kids getting stoned more often.

V. LEGALIZATION ANYWAY

I have suggested that a decision to abandon the war on drugs presents a textbook case of the hardest sort of sale known to public policy: large costs near term, small and unimportant benefits near term, conjecturally large benefits in the out-years, if ever. At this point in the argument, readers may wonder exactly whose side I am really on. The method of the argument to this point, though, has been to set aside, indeed to give away, the rhetorical apparatus in which the debate about legalization is usually couched. While it is fair enough to judge the efficacy and effects of the war on drugs by the standards and in the language of policy analysis, the underlying behavior, to which the reproach of criminality attaches, must ultimately be judged according to its inherent evil. This is not, of course, to say that context and consequences do not enter into judgments of categories of acts as evil or not, but realistically, the abuse of drugs imposes costs primarily on the abuser himself. There are well-known exceptions: pregnant women can damage their unborn children by smoking cocaine; people stoned on marijuana are dangerous drivers, and so on. Where drug use imposes serious third-party harms, there it makes sense for the criminal law to intervene. It does so not on the basis of the trifling claim that there is something evil about the drugs, but on the basis of the ancient and rooted proposition that one has a duty to refrain from inflicting harm on others. But

17. MARK A. R. KLEIMAN, *MARIJUANA: COSTS OF ABUSE, COSTS OF CONTROL* 173-75 (1989) (citing negative health effects associated with marijuana, cocaine, and heroin use).

the drug itself is not an intelligible proxy for the third-party harms to which it may lead.

Many years ago the sociologist Howard Becker claimed that the interesting thing about marijuana was how the society selected the object of what it would call deviant behavior.¹⁸ Why alcohol “yes” and marijuana “no”? Drugs are a symbol, and who has regulatory possession of that symbol tells us what set of values are dominant in society. The war on drugs appears to be a dominance display gone amok. But the reason that the war should be abandoned is not because it is futile (though it is) and not because of the perverse behavioral incentives it looses upon the world (though it does that, too). The real reason it should be abandoned is that the behavior against which it is ultimately directed—self-medication with a psychoactive drug—is, from society’s viewpoint, simply no big deal. That it does hold a potential for damaging the republican character, as James Q. Wilson has argued, one may stipulate. That it can lead to self-destruction and to damaging one’s personal and business relationships is clear. But to proceed from these concessions to criminalization is a *non sequitur*. Many other self-indulgences, sexual, gustatory, cupidinous and so on, can and do have a similar bad effect on human beings and their lives. This fact is not an argument for treating these behaviors as crimes. In general it would be well if national drug policy were driven by the tort principle for the assignment of liability espoused by Guido Calabresi,¹⁹ namely, that socially costly behavior should be charged to the account of whoever was in the best position to affect whether the risk that led to the cost would be run in the first place, and to calculate whether running it was worthwhile. This criterion unequivocally points toward the individual drug user.

Thus, even on the pessimistic assumption that the cancellation of the war on drugs would not lead to an immediate social surplus—because gains, if any, from relaxing law enforcement would be offset by losses in public health accounts—at least the costs in the reformed world would be borne more fully by those who ought to bear them. These are the drug users themselves rather than taxpayers and citizens who must endure the increasingly hecklesome interference imposed by drug enforcement and its adjectives such as difficulty in crossing international frontiers, increased income tax auditing and anti-money laundering supervision of cash flows, and the danger, inconvenience and unfairness of a world where harsh legal penalties ensure the existence of a flourishing illegal market and a cadre of gangsters to support it.

18. Howard S. Becker, *Becoming a Marihuana User*, 59 AM. J. SOC. 235 (1953).

19. E.g., GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970); Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972).

Whatever else may be said of this proposed redistribution of the social costs of drugs, it is quite predictable that it is likely to be regressive to some extent. The adage that "liberty favors the wise" is, after all, but a sunny way of stating a dark moral: *liberty punishes the foolish*, which, in any society will tend to include disproportionately the young, the impulsive and (because safety is a superior good) the poor. Hence legalization probably violates Rawls' maximin principle,²⁰ something that might well be enough all by itself to mobilize respectable opinion against the whole idea. Yet perhaps the least-well-off members of society are actually better off when they possess both their own liberty and the consequences of their abuse of it than they would be without any liberty but that of enjoying the fruits of Leviathan's wisdom. This, finally, must be the argument for legalizing drugs or anything else that is dangerous mainly to oneself. It is hard to understand why it has not had a more sympathetic audience.

20. JOHN RAWLS, A THEORY OF JUSTICE 152-61 (1971) (distributional changes are disfavored if they damage the position of the least well-off).