

Drug Détente



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Like previous election cycles, the 2008 presidential campaign has focused heavily on various *wars*, their costs and consequences, from the “shooting wars” in Iraq and Afghanistan and the so-called war on terrorism, to metaphorical conflicts like the “war on the middle class” or the “war on illegal immigration.” And yet for all this martial rhetoric, the nation’s longest and arguably most costly battle—“the war on drugs”—has received virtually no attention. If the presidential nominees were truly serious about improving the American condition, they would make a reassessment of prohibition a top priority for the incoming administration.

No doubt, many aides would caution the new president to stay the course, suggesting that even the perception of waning drug war efforts would be bad politics. But a more thoughtful advisor would sense the soft winds of change. In May of 1989, 27 percent of Americans said illegal drugs were the most important problem facing the country; today, only 1 percent of the population reaches that same conclusion.¹ Moreover, a majority of Americans now believe possession of small amounts of marijuana should not be treated as a criminal offense, and three-quarters favor making marijuana legally available for doctors to prescribe in order to reduce pain and suffering.

Even if the new administration and its congressional partners feel they have to start small, a number of relatively modest changes could be politically smart policies and important first steps:

- Eliminate federal mandatory minimum sentences for drug crime.
- Revive the federal parole board and empower it to release drug offenders currently serving mandatory minimum sentences.
- Let the states decide whether to allow medical marijuana.
- End oppressive federal prosecutions of physicians for prescribing painkillers.
- Instruct federal law enforcement to stop treating drug offenses as unique and justifying extraordinary action.
- Shift resources to drug treatment, prevention, and education programs.

- Support harm reduction schemes, like clean needle exchange and methadone maintenance programs.
- Terminate international interdiction efforts and concomitant foreign aid packages.

Some of these changes may be obvious, such as extricating the issue of medical marijuana from the stifling control of federal law enforcement. As just mentioned, most Americans support making marijuana available as a prescription drug, and it is hard to come up with anything but heavy-handed paternalism to justify ignoring the will of the people and the limits of federalism. Other changes, like a shift toward treatment, prevention, and education, are backed by research and experience showing that carefully planned alternatives can be far more effective and economical than drug prosecution and incarceration. Likewise, harm reduction programs such as clean needle exchanges make eminent sense to those who believe it is more important to save lives and reduce suffering than to maintain message consistency and prohibitionist piety.

Most *FSR* readers and federal practitioners also understand that mandatory minimum drug laws are crude instruments with cruel consequences—for instance, lengthy obligatory sentences for low-level dealers, drug “mules,” and other peripheral players who either refuse to snitch or, being at the bottom of the black market hierarchy, lack any inside knowledge to offer federal officials. As Justice Anthony Kennedy noted, mandatory minimums have the misguided effect of taking sentencing power away from the trial judge, “the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way,” and giving it to “an Assistant U.S. Attorney, often not much older than the defendant.”²

Still other potential changes may require some explanation. Driven by hysteria concerning the prescription opioid OxyContin, the Drug Enforcement Administration began a rather reckless operation against doctors who prescribe painkillers. Whether the DEA actually nabbed drug-pushing quacks is questionable, as is the notion that federal agents should be involved in this area at all, given that the states are the ones that license and oversee the practice of medicine and have their own justice systems to

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deal with any bona fide criminals. Worse yet, the DEA cast a nationwide chill over the medical profession, with physicians fearful to prescribe the indicated medicine and their pain patients thereby receiving insufficient analgesia.

More generally, prohibition has inspired a warfare-like mentality throughout the federal government that, in turn, has prompted the militarization of drug enforcement and various shortcuts of dubious constitutionality (discussed below). As an example of the former, Congress amended the basic law preventing military entanglement in civilian policing, the Posse Comitatus Act, to allow armed service personnel to train drug agents. Many American police departments now have paramilitary units indoctrinated by the U.S. armed forces, with these units most commonly employed for no-knock drug searches of private homes. In addition, the federal government has sent billions of dollars in military aid to Latin America for interdiction efforts, with little effect on illegal distribution but many negative externalities, such as the distortion of other nations' political systems and the needless killing of innocents (including Americans abroad).

To be sure, discrete policy modifications can only mitigate the harm done by the drug war, though hopefully leading to further change. They may also ease the transition toward the inevitable demise of prohibition. Human experience suggests that the pursuit of intoxication is universal and possibly innate, corroborated by the repeated failures of government to decree sobriety. In terms of lives ruined and resources spent, however, today's drug war is by far the most damaging prohibitionist campaign of all, and it may well be the most ineffective. Despite relentless, concerted efforts by federal law enforcement—with drug offenders comprising about a quarter of all arrests, a third of all convictions, and more than half of the federal inmate population—only a small fraction of illegal drug shipments are intercepted, as evidenced by the general decline in street prices over the past few decades. One out of every seven Americans admits to using illegal drugs within the previous year, while nearly half of the population has used illegal drugs within their lifetimes. Collectively, the citizenry spent up to \$100 billion a year on cocaine and heroin alone during the previous decade, and homegrown marijuana is on par with corn and wheat as one of America's major cash crops.

Assuming drug warfare provides some ostensible benefit—maybe a marginal (and debatable) reduction in substance abuse—the costs are simply overwhelming. Thirty years ago, the federal government spent a “mere” \$65 million on the drug war. In contrast, the reported national drug budget for next year will exceed \$14 billion, a figure that may be a gross underestimate based on a little budgetary sleight of hand. In all likelihood, the real amount far exceeds \$20 billion per year, once the expense for, inter alia, prosecution and incarceration is included, plus any supplemental requests approved by Congress. Other numbers have been bandied about, with America's total drug war bill easily surpassing \$100 billion per year.

Frankly, however, calculating the aggregate expense of prohibition may be an impossible task, given the myriad areas of spending and the disinterest of drug warriors in revealing the actual cost of their crusade.

But whatever number you choose, it surely is a ridiculous price tag and one that may overlook various hidden costs. Consider, for instance, the unquantifiable yet very real burdens inflicted on families, communities, and society at large: the lost wages and taxes of inmates who may have had legitimate jobs in the outside world; the welfare and social service allocations to their dependents left behind; the devastating effects of removing entire generations of young men from already impoverished communities; the death and disease caused by adulterated street drugs and the refusal to allow clean needle exchanges; and the lethal havoc and fear wreaked by street gangs wholly financed by the black market. Drug warfare also imposes institutional costs, such as the opportunity cost to police and prosecutors who could be using these resources to pursue undisputed wrongdoers, from armed bank robbers to anti-American terrorists. As for the latter, “in light of what September 11 has taught us about the gravity of the terrorist threat to the United States,” Judge Richard Posner argued, “it becomes hard to take entirely seriously the threat to the nation that drug use is said to pose.”³

The cost to law enforcement also includes a diminished stature in the eyes of the public. What is the message sent by federal officials who intercede to prevent the seriously ill and dying from obtaining medical marijuana prescribed by their physician pursuant to state law? Among other things, it would seem the national leviathan cares more about symbolic victories in a metaphorical war than the well-being of its citizens and the sovereignty of state governments. Likewise, what does it say to victims of violent crime and their family members when federal prosecutors seek sentences for low-level drug dealers that far exceed the punishment imposed on violent criminals? “When the sentence for actual violence inflicted on a victim is dwarfed by a sentence for [a nonviolent drug crime],” Judge Paul Cassell wrote, “the implicit message to victims is that their pain and suffering counts for less than some abstract ‘war on drugs.’”⁴ And how should poor minority citizens feel when drug enforcement appears to be totally focused on them—reflected in the gross racial disproportionality in arrests, convictions, and sentences—while affluent, mostly white neighborhoods and their drug offenders seem to receive a free pass? The pattern might have nonracial explanations, of course, but racial disproportionality without invidious intent can still carry a potent racial message with an extremely negative social impact.

When individuals and entire communities perceive drug enforcement as unjust, that prosecutors and drug agents bring hardship rather than relief, it is only natural for these citizens to view law and its enforcers as illegitimate. As a result, these citizens will be less likely to

provide information or participate in the criminal process, and they might even consider lawbreaking to be perfectly acceptable. Worst of all, the clandestine nature and huge profits of drug crime have a history of breeding corruption in the ranks of law enforcement, including “on-duty officers engaged in serious criminal activities, such as (1) conducting unconstitutional searches and seizures; (2) stealing money and/or drugs from drug dealers; (3) selling stolen drugs; (4) protecting drug operations; (5) providing false testimony; and (6) submitting false crime reports.”⁵

Even the best-intentioned drug enforcers can get lost in the fog of war, where the ends always justify the means. Because drug crime is a victimless offense typically conducted in private, agents must spy on the populace, conduct undercover operations, and rely upon shady characters connected to the drug trade and willing to snitch, either to secure some bounty or to avoid their own prosecution. As demonstrated by the phenomenon of wrongful convictions, confidential informants can be both powerful witnesses in court and horribly unreliable in hindsight. Moreover, law enforcement often has an incentive not just to catch the offender in the act but also to procure additional drug transactions to increase the number of charges and thus the potential punishment. And by wielding the aforementioned mandatory minimum sentencing laws, federal prosecutors are able to threaten drug defendants with unduly harsh if not downright obscene penalties unless they plead guilty, provide information, or both.

The most enduring cost of the war on drugs, however, is the emasculation of constitutional limitations. Although prohibition has trampled upon basic structural concepts (e.g., federalism and separation of powers) and virtually every individual liberty, the constitutional provision that has been abused the most is the Fourth Amendment. By and large, the courts have acquiesced to drug enforcement tactics, whether it was trespassing on someone’s land, snooping around private buildings, sifting through garbage cans, or requiring people to urinate on command. Although the Supreme Court has said that “[t]hose suspected of drug offenses are no less entitled to [legal] protection than those suspected of nondrug offenses,”⁶ the cumulative effect of decades of submissive jurisprudence is a type of drug exception to the Constitution. Individual Justices have recognized this danger, concerned that the judiciary had become “a loyal foot soldier” in the war on drugs.⁷

So what is the solution? As a libertarian on issues of crime and punishment, I advocate an immediate end to the drug war—disband the Drug Enforcement Administration, the Office of National Drug Control Policy, and any other prohibition-related bureaucracy; wipe all drug crimes from the books, except those focused on drug activity involving minors (and anyone else who lacks the legal capacity to consent); and in general, bring the drug trade out from the underground economy and into the light of day. But it is not just libertarians who have called for a cease-fire. More than a decade ago, the conservative maga-

zine *National Review* declared that the “war on drugs is lost”⁸ and published a series of essays on prohibition’s failure. In his written contribution, the late William F. Buckley Jr. called for protest against the “wartime zeal, the legal equivalent of a My Lai massacre,” and recommended the legalization of drug sales (except to minors). Other right-leaning leaders have expressed similar views, including former U.S. Secretary of State George Schultz and the late Milton Friedman, presidential advisor and one of the twentieth century’s foremost economic scholars. Slowly but surely additional voices have joined the chorus, such as former New Mexico Governor Gary Johnson and Nobel Prize-winning economist Gary Becker.

As conceded above, the next administration and its congressional allies may feel a need to go slow, taking politically safe, transitional action. But be assured that prohibition is bound to fail and will eventually come to an end, despite any passionate arguments to the contrary. In 1930, a decade into America’s great booze ban, Senator Morris Sheppard claimed that “[t]here is as much chance of repealing [Prohibition] as there is for a humming-bird to fly to the planet Mars with the Washington Monument tied to its tail.”⁹ Only three years later, however, Congress proposed the Twenty-first Amendment, which was duly ratified by the states, and the national experiment in forced teetotalism was all over. Though it has been quite a while since America’s first drug war was declared a bust, ultimately the story will repeat itself as society comes to grips with the futility of criminalizing “capitalist acts between consenting adults.”¹⁰

Senator Obama, you admit to having used illegal drugs during the salad days of youth, which places you in good company (roughly half of the nation). And as a former community activist in poor, mostly minority communities, you surely have seen the damage the drug war inflicts on those least able to bear it. Senator McCain, although you have supported some mandatory drug sentences, you also acknowledge that “[w]e have too many first time drug offenders in prison.”¹¹ And as a man whose spouse experienced problems with drug dependence (Percocet and Vicodin), you must know that addiction is a disease that cannot be cured by the criminal justice system. So here is the question for the next holder of the most powerful office in the world: *When prohibition ends, Mr. President, and the time comes to tally the horrible wages of drug warfare and to name the heroes and heavies, will you have been on the right side of history?*

Notes

- 1 Sources for the statistics cited in this essay are on file with the editors of the *Federal Sentencing Reporter*.
- 2 Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), available at http://www.supremecourt.us.gov/publicinfo/speeches/sp_08-09-03.html.
- 3 Richard A. Posner, *Security versus Civil Liberties*, ATLANTIC MONTHLY, Dec. 2001, at 15. See also DAVID BOAZ & TIMOTHY LYNCH, CATO HANDBOOK FOR CONGRESS: POLICY RECOMMENDATIONS

FOR 108TH CONGRESS 255-56 (2005), available at <http://www.cato.org/pubs/handbook/hb108/hb108-17.pdf>.

- ⁴ *United States v. Angelos*, 345 F.Supp.2d 1227, 1251 (D.Utah 2004) (opinion of Cassell, J.).
- ⁵ General Accounting Office, Report to the Honorable Charles B. Rangel, House of Representatives, Law Enforcement: Information on Drug-Related Police Corruption 8 (May 1998), available at <http://www.gao.gov/archive/1998/gg98111.pdf>.
- ⁶ *United States v. Karo*, 468 U.S. 705, 717 (1984).
- ⁷ *California v. Acevedo*, 500 U.S. 565, 601 (1991) (Stevens, J., dissenting).
- ⁸ *The War on Drugs Is Lost*, NAT'L REV., July 1, 1996, available at <http://www.nationalreview.com/12feb96/drug.html>.
- ⁹ Ethan Nadelmann, *Should We Legalize Drugs? History Answers: Yes*, AM. HERITAGE, Feb.-Mar. 1993, at 48, available at http://www.americanheritage.com/articles/magazine/ah/1993/1/1993_1_41.shtml.
- ¹⁰ ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 163 (1974).
- ¹¹ Sentencing Project, 2008 Presidential Candidates' Platforms on Criminal Justice 9 (Mar. 2008), available at <http://www.sentencingproject.org/tmp/File/PresidentialCandidatesPlatforms.pdf>.