

No price too high :
victimless crimes and the Ninth Amendment

Robert M. Hardaway ;
forewords by Gary E. Johnson and John L. Kane, Jr.

No Price Too High

*Victimless Crimes and the Ninth
Amendment*

ROBERT M. HARDAWAY

Forewords by Gary E. Johnson,
Former Governor of New Mexico
and John L. Kane, Jr.,
U.S. Senior
District Judge, Denver, Colorado

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Dedicated to Judy Swearingen

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Foreword

This book, *No Price Too High*, by Robert Hardaway, debates the effectiveness of the criminalization of illicit drugs. In an argument against the war on drugs, Hardaway refers to the results of the criminalization of prostitution and gambling. Although both are viewed as wrong, they are also seen as personal problems, not as crimes, which hurt other people. Hardaway confesses that the use of drugs will have harmful results, but only to the person using them. Thus, drug addiction is clearly a health issue, not a criminal issue.

The title of this book, *No Price Too High* sarcastically implies that, to our law and judicial system, there is "no price too high" to make something illegal, even if that only makes the problem worse. Using extensive references, Hardaway proves that the drug problem has only increased since its criminalization.

I found this book to be both interesting and enlightening. Hardaway shows the historical mistakes we made from the criminalization of personal problems such as prostitution and gambling. By making these acts illegal, prostitutes and gamblers received no solution to their problems; in fact, their problems worsened. When these issues were decriminalized in some states, prostitutes were protected and gamblers were treated—the problems declined. Hardaway states that the only way the drug problem will decrease is if drugs are decriminalized so addicts can be treated and rehabilitated.

Former Governor of New Mexico Gary E. Johnson

Foreword

We are indebted to Professor Robert Hardaway for bringing together the common effects of the so-called victimless crimes of drugs, prostitution and gambling and demonstrating quite persuasively that such laws produce unintended consequences far more damaging to our society than the defined crimes themselves. Of course, it is essential to understand just what a victimless crime is. In a sense, every crime has a victim, whether it is an individual or society at large, if for no other reason than because the law making certain conduct criminal says so. Properly understood, however, a victimless crime is proscribed consensual conduct that causes no direct harm or threat of direct harm to others not engaged in the consensual activity.

The law provides that some individuals are incapable of giving consent under any circumstances and therefore need protection. Children, mentally ill or severely limited individuals, and those under legal restraint, are incapacitated. In some instances, consent is categorically prohibited. At common law and under certain antiquated statutes, suicide is a crime. At first glance, such a law is absurd because the perpetrator cannot be penalized. I surmise the justification for the offense originates in ancient property law rather than religious objection. Dueling was likewise outlawed because consent was forced upon one challenged by the threat of being branded a coward for refusing to engage in such self-defeating activity. Other than these exceptions, the law presumes consent, which of course is an exercise of freedom.

The prohibition of any activity categorically restricts freedom and enforcing such a restriction necessarily invades privacy. Such invasions

include annoying and truly shameful activities ranging from the construction of peepholes in public toilets to the more pernicious practices of surveillance and monitoring of conversations, to betrayal by informants. Because privacy is essential to freedom, it is a value the legal process must measure as a cost of criminalizing certain kinds of activity. How that cost is measured is always a matter of dispute, primarily between those who most value freedom and those who place greater weight on order.

There are three basic matrices for resolving these disputes: The first deals with questions of fact, matters of what is and can be known, calling upon the courts to practice the discipline of epistemology. The second is the application of principles to those facts through the use of reason, which requires the discipline of logic. The third and most problematic is definition, calling for mastery of rhetoric. Professor Hardaway quotes John Stuart Mill that "wrong opinions and practices gradually yield to fact and argument." Only, he might have added, if the language used is shared. Eventually truth and reason will out.

Behind the problems of so-called victimless crimes is an absence of general legal philosophy which, in the words of Roscoe Pound, "gives us petty tinkering where comprehensive reform is needed." Professor Hardaway gives us that much needed comprehension in this book. *No Price Too High* provides a sense of the heft and purpose of the Ninth Amendment, a source of wisdom in this age of folly.

John L. Kane, Jr.

Acknowledgments

Although my name appears as author of this book, much of its content is the result of the collaborative efforts of a small army of research assistants and staff at the University of Denver College of Law who labored over a period of ten years to research and ferret out sources, data, statistics, and authorities which provide the basis for the conclusions set forth within. The following student research assistants were particularly contributive and in some cases submitted preliminary drafts of several sections of the final four chapters: Ted Burton, Molly Jensen, Holly Panetta, Chuck Piekanski, Chris Rossi, Corlese Henecke, Brook Woodward, Jennifer Cortese, Karina Condra, Steve Wienczkowski, Blake Harrison, and Jeremy Stevens. In particular I would like to thank my current student research assistant, Steven Camden, who not only provided invaluable research assistance, but also made extraordinary efforts checking citations and updating data during the final phases of the editorial process. Final conclusions expressed in the book are not necessarily those of these research assistants, and any errors in the text are mine alone.

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CHAPTER 1

Defining the Victimless Crime

He who knows only his side of the case, knows little of that... (but) wrong opinions and practices gradually yield to fact and argument.

—John Stuart Mill ¹

Every year, more than 400,000 Americans die as the result of tobacco use.² In the last quarter of the twentieth century, alcohol use resulted in the deaths of another 110,640 Americans,³ including 16,653 alcohol-related traffic deaths,⁴ and was the major factor in 50.2 percent of all homicides, 52 percent of all rapes, 62 percent of assaults, and 30 percent of suicides. Illegal drug use caused 3,562 deaths.⁵ Translated into deaths per 100,000 users, "tobacco kills 650, alcohol 150, heroin 80, cocaine 4."⁶

If a Martian were to visit the United States tomorrow and confront these statistics, the Martian might be surprised to learn that of these three substances, only drugs are criminalized. The Martian might also be surprised, indeed bewildered, to learn that although alcohol and tobacco are legal and even subsidized, American society willingly spends \$80 billion annually, arrests and incarcerates hundreds of thousands of American citizens for drug offenses (utilizing more than half of America's jail capacity and thereby necessitating the early release of many murderers, rapists, and child-molesters), conducts thousands of wiretaps, imposes sentences up to and including life imprisonment without parole for possession of less than 1.5 pounds of certain illegal drugs,⁷ forfeits billions of dollars in potential tax revenues to organized crime, and tolerates corruption and undermining of the political system—all to implement a drug war that has resulted in greater drug use after criminalization than before.

One might try to explain to the Martian that such extravagant human, social, and financial costs of criminalization (including thousands of drug-related murders and assaults) are fully justified in order to keep 3,562 Americans from possibly jeopardizing their health. After honestly conceding, however, that the harm done to most of those 3,562 Americans resulted from the effects of drug prohibition (such as contaminated drugs and unsterilized needles) rather than from the drug itself, the Martian might express even greater amazement.

We would have to admit that more than a fifth of all property crime (exceeding \$4 billion in 1974) was committed by addicts seeking money for drugs made artificially expensive by prohibition (the profits going to finance organized crime and to corrupt public officials). Nor would we dare admit that 243 addicts committed more than 473,738 crimes and that 26 addicts (denied their drug by prohibitionists) commit 22 major crimes per day.⁸ If we dared, we might attempt to lessen the strain on credibility by simply stating the moral conviction that no price is too high to pay to protect those 3,562 Americans from choosing to take drugs and possibly jeopardizing their health. (One observer has whimsically remarked that whoever those 3,562 privileged Americans are, they have launched more ships and caused the mobilization of more resources than the legendary Helen of Troy.)

America's drug laws might be difficult to explain to a Martian, but American policymakers have apparently had little difficulty in explaining them to American voters, the majority of whom overwhelmingly support such laws, or at least say they do. Although more than ninety million Americans, about 40 percent of the population, have used illegal drugs (including a former president, a former vice-president of the United States, and a former Speaker of the House),⁹ and allegedly more than twenty-three million Americans have used them during the past month,¹⁰ the American people's professed support continues for drug laws that include punishments as severe as life imprisonment without parole for possession of small amounts of drugs.¹¹

In fact, as the chapters within will reveal, the vast majority of researchers and scholars who have addressed criminalization of victimless crimes have found the costs of criminalization too great and the results not only minimal but actually counterproductive to the professed goal. Indeed, the research for this book revealed a ratio greater than ten to one in scholarly articles advocating the legalization of drugs and prostitution.

Professor James Inciardi of the University of Delaware, one of the few American academics to oppose drug legalization, recently complained that former federal drug czar William Bennett "has virtually no (scholars) helping him" in opposing drug legalization.¹² Ethan Nadelmann, a Princeton professor, complains that it is harder and harder to find opponents to drug legalization to debate him.¹³

Politicians hardly need academic support to curry electoral favor in opposing drug law reform. Politicians find simplistic slogans far easier to dispense to constituents than the results of extensive empirical and scholarly research, and comparative studies. In 1994, former president Clinton was obliged to fire his surgeon general, Jocelyn Elders, for, among other offenses, suggesting that the scholarly debate over drug reform and legalization be discussed openly as a matter of public policy. George Schultz, former secretary of state under President Reagan, gave a speech on October 7, 1989, in which he said, "We need at least to consider and examine forms of controlled legalization of drugs."¹⁴ Although Secretary Schultz was not fired for this sin, he did later add, "I find it very difficult to say that sometimes at a reception or cocktail party I advance these views and people head for somebody else. They don't even want to talk to you."¹⁵

So politically sensitive is the issue of drug legalization that when a 1979 congressional fact-finding committee looked into the properties of cocaine, a congressman interrupted a testifying expert about to volunteer his opinion about drug legalization by snapping, "I won't ask you that."¹⁶ Apparently, the congressman could not risk the press reporting an expert's opinion on drug legalization expressed at a congressional hearing.

In view of present public perceptions, the evolution of sound policy for drug legalization may take as long as, or longer than the evolution of alcohol and tobacco legalization. Although today's generation takes for granted the legalization of liquor and tobacco, the prospects for legalizing liquor were once considered far more remote than today's prospects for drug legalization. The Prohibition Amendment to the Constitution passed on a wave of popular support. In 1930, Senator Morris Sheppard of Texas scoffed at those who urged alcohol legalization by asserting, "There is as much chance of repealing the Eighteenth Amendment as there is for a hummingbird to fly to the planet Mars with the Washington Monument tied to its tail."¹⁷ Similar pronouncements were made with regard to legalizing tobacco by officials in those sixteen states that, prior to 1922, prohibited tobacco use.¹⁸ Nevertheless, the path toward legalization of alcohol and tobacco in those states was a long and arduous one, completed only when the most obstinate opponents were finally convinced that prohibition's costs to society were too high, and the rewards of criminalization to organized crime too great.

The question remains how to explain American policy on victimless crimes, of which drug policy is but one. Many books and articles have been written on the individual topics of drugs, prostitution, and gambling. All three of these societal problems have occasioned vigorous debate on whether criminalization of each serves the interests of society. However, few scholarly and popular works now available have looked at all three problems from a common perspective. This book will compare the policy rationales for each of these societal problems with a view toward creating a general theory of decriminalization.

On the issue of decriminalization, proponents and opponents alike usually begin with a general discussion of the harm each creates in society. In this respect, useful historical comparisons can be made to past debates over such other victimless crimes as consensual homosexual conduct and contraceptive use.

CONTRACEPTIVE POLICY

Contraceptives, for example, were banned in the United States for many years. The U.S. Tariff Act of 1930 forbade the import of, among other articles, any writing urging treason, murder and, "...any drug or medicine or any article whatever for causing unlawful abortion...."¹⁹ The fact that private use of contraceptive devices by consenting adults was considered a societal evil akin to murder reveals our society's frequent priority on keeping its members from engaging in private and consensual conduct the majority considers "immoral." Many state laws banning contraceptive use were even stricter than the federal law.²⁰ Laws against contraceptive use would probably still be in effect today if not for the 1965 Supreme Court case of *Griswold v. Connecticut*, which struck down a Connecticut law that made it a crime for consenting adults to use a contraceptive device. The Court held that such a ban violated a "zone of privacy created by several constitutional guarantees."²¹ Despite the *Griswold* case, however, many state legislatures found contraceptive use so abhorrent that they made it a felony to "exhibit" contraceptive devices. In 1972, for example, a Massachusetts court convicted a man of a felony for giving a lecture on contraception to students at Boston University and for exhibiting and distributing a sample of Emko vaginal foam. The U.S. Supreme Court reversed the conviction for giving the lecture on contraception (on free speech grounds), but upheld the conviction for distributing the foam.²²

As recently as 1971, the federal Comstock Act defined contraceptive material as "filthy and vile."²³ The Comstock law was named after Anthony Comstock, who introduced in Congress a bill to outlaw as unmailable any writing describing contraceptive methods and was later appointed as U.S. Postal Inspector. Comstock zealously pursued citizens whom he suspected of engaging in conduct which, though consensual, offended the morality of society. According to one historian, he enjoyed baiting doctors who engaged in promoting such activity. In one instance, he had two women associates write to a Midwestern physician, claiming that their husbands were insane and that they feared that any children might inherit their insanity. When the doctor wrote them simple advice (about contraceptive methods), Comstock had him arrested and sentenced to seven years of hard labor.²⁴

The vigorous defenders of such anticontraception laws, much like those who defend drug laws today, strongly believed that preserving the very

fabric of society depended upon preventing consenting adults from behaviors that, though voluntary, might harm themselves and potential life. Such views were apparent in laws that revealed a greater fear of what consenting adults might do in privacy than of harm to an unwilling victim. Blackstone, for example, wrote in his epic treatise on common law that the act of anal intercourse between consenting adults was a heinous offense of "...deeper malignity than rape."²⁵ In 1986, Chief Justice Warren Burger of the U.S. Supreme Court approvingly cited this Blackstone quote in upholding a Georgia statute that imposed a twenty-year prison term at hard labor on any person who engaged in consensual anal intercourse with another person (including one's heterosexual spouse).²⁶

SODOMY LAWS

As with laws against contraception, sodomy laws assume that a private act between consenting adults poses a more serious threat to society than acts of wanton violence upon unwilling victims. The former's theory of harm rests on a perceived societal need to free citizens from the very thought that others might be engaging in mutually agreeable but immoral conduct. Clearly, the common law doctrine that an act of anal intercourse between consenting adults is a greater threat to society than an act of brutal rape upon an unwilling victim is based on such a premise.

Were this common law premise a matter of theory only, the issue of decriminalization of victimless crimes would be of little but academic interest. In fact, however, the enforcement of most laws in the United States today is based on this very premise. In 1989, more than half of all scarce U.S. prison space held those convicted of crimes involving consensual conduct.²⁷ The cost of incarcerating more than one-third of a million inmates convicted of engaging in consensual acts related to drugs alone exceeded \$8 billion (not counting the lost productivity and ruined lives of those incarcerated).²⁸ Arrests for consensual sexual acts between prostitutes and willing customers constitute half the total arrests in many major cities.²⁹

SOCIETAL PRIORITIES

So committed are law enforcement officials to enforcing crimes involving consensual conduct, that they are prepared to give early release to the most vicious murderers and rapists to make in America's overcrowded prisons for those convicted of crimes involving consensual conduct. In many cases, even the most vicious and violent offenders receive probation or reduced charges or sentences to find room in the prisons for those convicted of such crimes as possessing a small amount of drugs.

In 1991, the U.S. Supreme Court upheld the mandatory sentence of a Michigan man sentenced to life imprisonment without possibility of

parole for mere possession of a pound and a half of cocaine.³⁰ The fact that first-degree murderers often receive parole in as few as three and a half years, in order to make room for drug users, has little effect on the policymakers responsible for protecting society. According to these policymakers, citizens suffer greater harm thinking about another citizen who is harming himself through willful drug use than citizens who are made personally vulnerable to the ravages of the released murderer or rapist. The drug user and his family are believed less harmed by life imprisonment without parole than by the drug itself (although at much greater cost to the taxpayer).

EFFECTS ON LAW ENFORCEMENT

Randy Barnett, a former prosecutor and assistant state's attorney for Cook County, Illinois, recently described the devastating effect the "War on Drugs" had on the prosecution of violent crimes in his district. In 1979, before the crackdown on drug users, he handled between 125 and 135 cases. With such a relatively low caseload, he took to trial those charged with the most vicious and violent crimes, offering only those plea bargains that involved fair and correct sentences for those crimes. When the war on drugs set a new priority of cracking down on drug users, however, his caseload skyrocketed to more than 400. He then had no choice but to offer "giveaway" plea bargains to even the most violent offenders. He later concluded, "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."³¹

Unlike countries in which drugs and prostitution have been legalized, the United States has deliberately placed higher priority on enforcing consensual crimes than crimes involving helpless and brutalized victims. Two poignant cases that took place less than one year apart serve to illustrate this point.

In 1991, four popular students at a middle-class high school in Madison, Wisconsin, became jealous of another classmate's new blue jeans. They took her out in a car, locked her in the trunk, and for several hours amused themselves by beating, stabbing, and sodomizing her with a sharp tire iron. When their victim dared to beg for mercy and call out for her mother, her four classmates dragged her out of the trunk, sprayed Windex on her wounds, poured gasoline over her, and then burned their screaming classmate to death. The ringleader later described what they had done by saying, "You should have seen it. It was so funny."³² After the perpetrators were convicted of first-degree murder, the judge decided to relieve the burden on the overcrowded prison system by promising the chief perpetrator of the crime that she "could do something useful with her life after

being released from prison."³³ In response to a relatively light sentence received, one perpetrator said, "It's so stupid when you think about it. I don't blame me. We just need a little growing up."³⁴

Under this nation's existing priorities, the early release of such defendants provides needed prison space for people like J. Harmelin. He was sentenced, the year before the Madison torture murders, by a Michigan court to a mandatory sentence of life imprisonment without the possibility of parole for possession of less than a pound and a half of cocaine.³⁵ Apparently, Mr. Harmelin could do nothing useful with his life after prison; policymakers decided it was necessary to incarcerate him for life in order to protect society. A half-million dollars was better spent incarcerating drug user Harmelin for life, it seems, than to parole him and make room for such violent offenders as the Madison torture murderers.

Indeed, under existing public attitudes, Mr. Harmelin may even have been fortunate to receive only a life sentence without parole. In 1989, federal drug czar William Bennett responded to a question about the feasibility of beheading drug offenders by stating, "Morally, I don't have any problem with it."³⁶ In the 1970s, several states' laws (including Georgia, Louisiana, and Missouri) proscribed the death penalty for youths older than eighteen who sold a marijuana cigarette to a youth under eighteen.³⁷ In Missouri, the sentence for a second possession of marijuana was life imprisonment without parole.³⁸ In California, a first offense of selling a marijuana cigarette carried a sentence of life imprisonment.³⁹

THE RESULTS OF STIFF PENALTIES AND ENFORCEMENT

Those committed to continued criminalization of victimless crimes theorize that heavier penalties and enforcement of such laws will result in greater compliance. In this regard, it may be useful to again make some historical comparisons.

Consider the issue of legalized abortions. Setting aside, for the moment, the question of whether abortion is a societal evil requiring suppression, consider only the question of how suppression might best be accomplished. The Netherlands, for example, with contraception and abortion legal and available on demand, has the lowest abortion rate in the world.

Contrast this low rate, however, with the abortion rate in Romania under dictator Nicolae Ceausescu, who decreed abortion a serious state crime to be enforced by the secret police. (Indeed his abortion laws appeared to have been modeled after those of Nazi Germany, the only country in history to impose the death penalty for abortion.) Under Ceausescu's brutal regime, government agents (dubbed the "menstrual police" by some Romanians) rounded up women under the age of forty-five every three months and examined them for signs of pregnancy in the

presence of agents. A pregnant woman who later failed to produce a baby at the proper time could expect to be summoned for investigation and interrogation by the secret police. Not surprisingly, abortion rates in Romania skyrocketed to the highest in Europe, with more than 60 percent of pregnancies ending in illegal abortion. In 1990, after Ceausescu was overthrown and the harsh abortion law overturned, *Newsweek* reported the poignant case of a young Romanian woman who was recovering from a self-induced abortion. "I could have killed Ceausescu for that (antiabortion) law alone," the suffering woman told a *Newsweek* reporter. "Now that it's possible to be a woman again, I'm mutilated."⁴⁰

The effects of harsh U.S. drug laws and enforcement have had similar results. During the "Drug War" of the 1980s, the federal government extracted more than \$20 billion from hapless taxpayers to fund antidrug activities and harsh law enforcement.⁴¹ When millions of children went unvaccinated and millions of Americans were homeless, more than \$10 billion was spent on drug enforcement in 1990 alone. The armed forces, including coast guard and air force auxiliaries, were mobilized in search and destroy missions and in radar and helicopter searches. U.S. troops were deployed to Colombia, and army helicopters dispatched to Bolivia. The Central Intelligence Agency and National Security Agency used spy satellites as part of the drug war. Drug arrests of American citizens doubled to more than 852,000 in 1989, causing the already bursting U.S. prison system to turn away violent offenders and give early release to many murderers, rapists, and child molesters.⁴² When the National Guard was mobilized in forty-one states, domestic wiretap authorizations skyrocketed. Similar to Ceausescu's antiabortion laws, U.S. drug laws became progressively stricter in congressional legislation enacted in 1984, 1986, and 1988.

And what was the result of such massive expenditures of public treasure, wiretaps, privacy intrusions, early release of violent offenders, and incarceration of hundreds of thousands of American citizens for drug use? Like the increased number of abortions that resulted from Ceausescu's harsh antiabortion laws, drug use increased dramatically. In 1990, the U.S. State Department reported that world production and consumption of drugs had climbed to the highest levels in history.⁴³ In such major cities as New York and Washington, D.C., police officials reported no discernible reduction in drug sales.⁴⁴ Perhaps the most disturbing result of the drug war, however, is that the United States, with 5 percent of the world's population, now consumes more than 50 percent of cocaine production—a figure (never approached) when cocaine was legal in the United States.⁴⁵

The Netherlands again provides a useful basis for comparison. Arnold Trebach's monumental study of drug usage around the world reveals that drug usage in the Netherlands declined dramatically after marijuana use was decriminalized in 1976.⁴⁶ Teen marijuana use dropped by a staggering 33 percent after legalization.⁴⁷ By 1985, only one-half of one percent of

Dutch high school students used marijuana, compared to more than five percent in the United States.⁴⁸ Although the Netherlands is known for having liberal drug laws, a recent study concluded that the Netherlands had "the lowest number of addicts in Europe and the lowest proportion of AIDS patients (3 percent) who are intravenous drug users."⁴⁹ A policy of heroin maintenance in Great Britain has resulted in a heroin addiction rate less than a third of that in the United States,⁵⁰ and drug-related crime is virtually nonexistent.⁵¹

In contrast to the United States, countries with legalized drugs have one policy view in common, namely that a small amount spent on education and treatment can have a greater effect on reducing drug addiction than a vast amount spent on arrest, incarceration, military mobilizations, and wiretaps. Indeed, the money spent on enforcing drug laws can increase, rather than reduce the rate of addiction.

In the United States, a study by James Ostrowski revealed that when marijuana use was legalized in Alaska, use by high school seniors declined to 4 percent compared to a 6.3 percent rate in other states where such drug use was illegal (and punishable by up to life in prison without parole).⁵² According to William Chambliss' monumental study of drug laws in the United States, "Use of marijuana actually declines after legalization."⁵³

Opponents of legalization rarely consider the possibility that drug use might actually decline as a result of decriminalization. Often, no amount of data, studies, or experience from other countries can convince the proponents of legalization otherwise. The theory, of course, is that the lure of drugs is so overwhelming that if they were legalized, citizens from all walks of life who never before used drugs would leap at the chance. Various reasons explain why this does not occur, not the least of which is simple common sense. Indeed, as discussed in chapter 3 of this book, drug use in the United States became a serious problem only when it was criminalized, just as abortion in Romania became pandemic when so brutally suppressed by Ceausescu.

It is true that some surveys reveal a possible small degree of curiosity usage immediately after decriminalization, which almost certainly would not exist had the drug not been previously criminalized. A study conducted by the National Commission on Marijuana and Drug Abuse in 1972 revealed that 3 percent of adults who did not use drugs indicated that they might try the drug if it were decriminalized.⁵⁴ Another study revealed that 4 percent might try cocaine.⁵⁵ If one were to assume the worst possible scenario, that 4 percent of Americans would try and become addicted to drugs if legalized, this would increase annual drug-use deaths to 3,703, still less than 1 percent of the 550,000 deaths caused by alcohol and tobacco use. However, this figure would be curtailed by the thousands of lives saved by the availability of uncontaminated supplies, clean needles, and fewer drug-related crimes and murders. Nevertheless,

Proponents of continued enforcement of the harshest drug laws propound that even an extreme 1 percent increase in addicts is hardly an indication of the national disaster that would result from decriminalization. Yet, studies conducted in countries with legalized drugs reveal that legalization is much more likely to result in lower levels of drug use and far lower levels of drug abuse.

Milton Friedman, winner of the Nobel Prize in economics, has explained why legalization often results in reduced usage. As his study on the question reveals, the very fact that a drug is illegal makes it attractive as a "forbidden fruit."⁵⁶ This alone might explain why marijuana usage among high school students in Alaska was so much lower than in other states where marijuana was illegal.

A study by Walter Block has offered a similar explanation as to why drug use declines after a drug is legalized. According to his study, the very illegality of a drug "increases its attractions to so many people. If taking heroin were perceived merely to be stupid...instead of dangerous, because illegal, fewer would take it."⁵⁷ He concludes that criminalization only plays into the hands of the criminal element: "Better to ruin their business by deflating the profit balloon than by acting in a way (prohibition) which only supports them."⁵⁸ Other explanations, however, carry equal importance.

A perverse effect of U.S. drug enforcement policies is that even modest enforcement victories serve to intensify the drug problem. For example, after spending billions of dollars on the drug war, federal enforcement agencies claimed as the fruits of victory that up to 5 percent of drug imports had been intercepted. What those enforcers did not realize, however, was even this small "victory" did nothing except raise the price of the prohibited drugs, increase the profit margin for drug dealers, and send an economic signal to drug producers to increase production (which, of course, is exactly what happened). As Walter Block has observed, "Every time a battle is won in the [drug war], paradoxically, the enemy is strengthened, not weakened. [Interdiction] only succeeds in raising the profit motives attendant upon production. Thus, the more vigorous and successful the activities of the Drug Enforcement Administration, the greater the strength of the illicit drug industry."⁵⁹

A study by Steven Wisotsky has revealed the relationship between the illegality of a drug and its price.⁶⁰ The study cites the price in 1981 for an ounce of pharmaceutical cocaine hydrochloride produced by a major U.S. pharmaceutical company as being about \$1.80 per gram.⁶¹ That same year, the Drug Enforcement Administration estimated a street price for cocaine of more than \$55,000 per kilogram. Taking into account differences in purity, the study concluded that the criminal law had succeeded in "taxing cocaine about \$800 per gram, or about \$22,350 per ounce...thereby making the illegal [production of cocaine] extraordinarily profitable." "It

has been estimated that the total premium over actual cost of production exceeds \$72 billion annually—almost all of which goes to support and promote criminal activity instead of to education and drug treatment programs."⁶²

Higher prices also have another effect—on the user. Instead of only having to burglarize two homes a week to earn enough money to support a habit, an addict might have to burglarize six homes a week to earn enough to pay the higher price for the drug. A study by the Drug Abuse Council revealed that for every 10 percent increase in the price of heroin, crime increased by 2.87 percent.⁶³ In Washington, D.C., the murder rate doubled after police began to step up drug law enforcement.⁶⁴ Thus, even a modest "victory" claimed by those conducting the drug war has the direct result of increasing crime—a result felt by every American, rich or poor.

The costly drug enforcement "victory" has four major consequences: (1) it increases profit to the drug dealer and helps support the lavish tax-free lifestyle of the privileged few; (2) it diverts \$72 billion in potential taxes away from the government (which could be used for education and drug treatment programs) to organized crime where it is sure to be used for a variety of criminal purposes; (3) it increases the economic incentives of drug producers to increase drug production; and, (4) it instigates the addict to increase the number of violent and property crimes committed to support a habit. An analysis of Federal Bureau of Investigation statistics reveals that addicts deprived of their drug commit more than four million crimes a year, steal \$7.5 billion in property. They commit 1,600 murders in order to earn the money to pay the high drug prices created by prohibition.⁶⁵

Criminalization apologists prefer to ignore these real and documented consequences. Instead, they seek to justify the billions of dollars spent on the drug war by expressing the forlorn hope that if prices rise, perhaps fewer people will want to use them. The problem with such a simplistic rationale for this wasteful expenditure of taxpayers' billions is that drugs are not toothbrushes. An economist would explain that the demand for drugs is inelastic. People do not go bargain hunting when contemplating drug use. They do not say, "I really want to use drugs, but the price is a little too high today, so I guess I won't." In any case, a first-time user may be offered the drug for free. An addict does not give up the addiction because drug prices increase, but instead will simply commit more crimes to support the habit. In short, the apologist's rationale is either deliberately specious or it reveals a tragic misunderstanding of the true causes of drug addiction.

THE CAUSES OF DRUG ADDICTION

Both advocates and opponents of drug legalization are apt to begin their argument with a statement as to the evils of drug use and the adverse

effects of addictive drugs on the human body. Certainly, the deaths of 3,562 people from drug abuse supports the view that drug abuse is harmful. Opponents rely on the harmful effects of drugs to justify criminalization and enforcement even at extravagant human and social cost. However, many advocates of legalization also rely on the fact that drugs are harmful to justify their view that drugs should be legalized, pointing out that criminalization has historically resulted in higher rates of addiction. It also diverts scarce societal resources away from education and treatment programs, which have proven far more effective than criminalization in reducing rates of addiction. These advocates may also point out the inconsistency in laws that support and even subsidize tobacco and alcohol use, which lead to the deaths of more than 100 times as many people as drugs kill.

Most advocates of legalization, however, have several reasons for not resting their cases primarily on the assumption that legalization will reduce rates of addiction. First, this point fails to persuade opponents of legalization. As has been seen, no amount of data, empirical, historical, or comparative can persuade an opponent who clings to cherished preconceptions about the effects of harsh laws and enforcement on rates of drug use. To be fair to such opponents, it should also be noted that not all studies unambiguously support the view that legalization would result in reduced levels of drug abuse. An example is the study discussed above that suggested at least some curiosity use of drugs after legalization by first-time users.

Most legalization advocates rely primarily on an evaluation of societal priorities. They concede that although illicit drugs are harmful and may cause deaths, tobacco and alcohol are more harmful and cause more deaths and yet are legal. Legalization advocates also point out that the costs of criminalization (increased drug-related crime, diversion of valuable resources to organized crime, monopolization of scarce prison resources and early release of violent offenders, corruption of government) vastly exceed any possible benefit in terms of possibly keeping 3,562 people from voluntarily jeopardizing their health. This is clearly the advocate's strongest argument in favor of decriminalization and will be the primary focus of the remaining chapters in this book.

Advocates of legalization often use less than persuasive arguments, and in fact may undermine the more persuasive line of argument regarding societal priorities. They often argue that such drugs as marijuana, cocaine, and heroin are not in fact harmful. Aside from the fact that such an argument will never persuade opponents of legalization, many of whom believe that private drug use is the moral equivalent of first-degree murder, it detracts from the force of the argument based on societal priorities. Most advocates of drug legalization also favor the continued legalization of tobacco and alcohol and are content to note the much higher number of deaths resulting from tobacco and alcohol use than from drug use. Advo-

cates extrapolate from that glaring discrepancy that drugs should be legalized for the same reasons that tobacco and alcohol are legalized.

Nevertheless, a discussion of the harmful effect of drugs is useful in understanding the causes of addiction (which in turn are relevant to evaluating the effectiveness of enforcement programs) and for that reason are reviewed briefly here.

MARIJUANA

Those who claim that drug use is harmless make their strongest case with marijuana. Andrew Weil, who conducted the first modern studies on marijuana use, states that marijuana is an "active placebo"⁶⁶ that produces "trivial effects."⁶⁷ Other more recent studies have revealed that though it is used for a variety of purposes ranging from stimulation to relaxation, marijuana tends to have "whatever effects a user wants."⁶⁸ A study of the effects of marijuana on driving revealed the commission of the same number of driving errors by those who had heavily smoked marijuana as by those who had not taken the drug. The experimenter who conducted the study remarked that "this result is puzzling because of the elaborate efforts made in this study to maximize marijuana intoxication."⁶⁹

Indeed, the lack of evidence of toxicity has frustrated attempts to calculate a lethal dose. The best that experimenters have managed is to extrapolate from animal experiments that "a person might die after eating 24 ounces all at once."⁷⁰ Unfortunately for advocates of criminalization, however, it appears that more people have died from drinking too many glasses of water at once than from ingesting too much marijuana.⁷¹

The 1986 Drug Abuse Warning Network reported that traces of marijuana were implicated in 12 fatalities.⁷² However, this did not mean that marijuana was responsible for the deaths, but only that traces were found. In any case, aspirin traces were implicated in a greater number of deaths than marijuana. A study conducted by researchers Steven Duke and Albert Gross concluded flatly that "no death from a marijuana overdose has ever been established."⁷³

Such experimental evidence hardly justifies laws imposing life imprisonment on marijuana users, but legalization opponents have attempted to justify criminalization on grounds that it might provide a transition to more harmful drugs. Although no reliable evidence has supported this contention, even if true it would prove little because studies have shown that tobacco and alcohol are the classic gateway drugs to more harmful drugs.⁷⁴ One early study even concluded that coffee drinking leads to opium use,⁷⁵ while another has concluded that tobacco use leads to opium smoking. Whatever the merit of such studies, however, the *Wootton Report* issued by the British government concluded that "marijuana found no progression to heroin in any country."⁷⁶

None of these studies and evidence has had any noticeable effect on governmental authorities. In 1987, more than 400,000 Americans were arrested for possessing marijuana, clogging the court system, causing the release of thousands of violent offenders, and making a virtual mockery of the integrity of the U.S. justice system.

In any case, it has already been noted that alcohol was a major factor in 23,987 traffic deaths (about half the total traffic fatalities), more than half of the murders and rapes, 62 percent of assaults, and 30 percent of suicides. If policymakers can justify life imprisonment without parole for marijuana use, one shudders to think what punishment they would impose were marijuana to prove a factor in as many crimes as alcohol.

COCAINE

Opponents of drug legalization often buttress their arguments by conjuring up the probable national disaster if cocaine were legal. However, we need not speculate as to how the legalization of cocaine would affect society; we have an actual historical comparison available. Before 1914, cocaine and opiates were completely legal in almost all jurisdictions of the United States⁷⁷ and available over the counter at pharmacies, general stores, and grocery stores.⁷⁸ Indeed, it could be ordered through mail-order houses.⁷⁹ Cocaine was widely distributed and consumed in soft drinks, cough syrups, and the like. Indeed, the public attitude toward cocaine resembled that of tobacco today. Although it was recognized that some people might become addicted, people did not lose their jobs or lose their children because they were addicted to cocaine.

Several studies have revealed why cocaine accessibility prior to 1914 did not create societal problems. At low dosages, studies reveal that users cannot tell the difference between cocaine and a placebo.⁸⁰ Another study of typical cocaine users revealed a cocaine user who used cocaine daily for fifty-five years. She would switch to aspirin when her cocaine supply ran short.⁸¹ At consumption levels of two grams per week, one comprehensive study revealed "no organic, mental, or social deterioration," and that "persons can sniff or smoke crack without becoming addicted and without losing social productivity."⁸²

Besides consensus that cocaine addiction is not pharmacological,⁸³ the American Psychiatric Association in 1987 claimed to have found evidence of "cocaine dependence" based on psychological criteria that did not include criteria of physical dependence.⁸⁴ Others have claimed to find a "physiological" dependence on cocaine in the sense that a person becomes temporarily sick when drug use ceases, but recovers when drug use is resumed. As researcher Richard Miller has pointed out, however, "by such a definition a diabetes sufferer is addicted to insulin, an asthma sufferer is addicted to theophylline, (and) a headache sufferer is addicted to aspirin."⁸⁵

It requires a great leap of logic, however, to conclude that a person who needs aspirin to avoid headaches is an "addict," or that such an "aspirin addict" is a threat to society if he doesn't get his "fix." One might, however, argue that a person with a terrible headache might be more likely to perform an antisocial act.

Readers of the Sherlock Holmes mysteries may recall the fabled detective's cocaine use. A study of cocaine users in Canada revealed that the typical cocaine user used the drug in much the same way as Sherlock Holmes. That is, he "rarely kept a supply of the drug, normally bought only 1 to 3 grams in a single purchase, made no more than four purchases per year, and took a dose less than once a month."⁸⁶ A study conducted in the early 1980s at a California clinic gave cocaine to 200 volunteers. Not a single one became an addict.⁸⁷

While it is certainly true that cocaine users can become psychologically addicted, the degree of potential addiction pales when compared to that of cigarettes. While a survey of cocaine users revealed that 3.8 percent had tried to give it up but failed, a survey of tobacco users revealed that 18 percent had tried to quit but failed.

Given the results of such studies on cocaine, it is understandable that cocaine use was not a problem prior to its criminalization in 1914. Criminalization, however, changed everything. One reason for that change can be found in a phenomenon that also occurred during the period of alcohol prohibition.

Prior to alcohol prohibition, most alcohol consumption in the United States was of the milder forms of alcohol, such as beer and wine. After criminalization, however, bootleggers discovered, in comparison to such harder and more concentrated liquors as whiskey and bourbon, that beer and wine were too bulky, difficult to store clandestinely, and transport. Bootlegging wine and beer yielded insufficient profits to justify the risks of illegal distribution. As a result, national alcohol consumption patterns soon shifted to hard liquor. Not surprisingly, alcohol poisoning among consumers also rose dramatically with no government regulatory body to oversee and prevent the abasement and contamination of the hard liquor supply.⁸⁸

A similar phenomenon occurred after the criminalization of cocaine, which had been based less on scientific considerations than on political ones. In considering grounds for criminalization, Congress in 1910 took into account testimony that "colored people seem to have a weakness for [cocaine]. . . . They would just as soon rape a woman as anything else," and that "'Jew peddlers' were exploiting African Americans by selling them cocaine."⁸⁹ Congressman Hamilton Wright urged criminalization of cocaine on the grounds that it turned African Americans into rapists of white women.⁹⁰

Criminalization based on such a rationale inevitably changed the public view of cocaine. As with alcohol under prohibition, cocaine soon became

adulterated and altered into more concentrated and dangerous forms. By the 1980s, such adulterated and concentrated forms as "crack" were finding their way into the inner cities. But it took a much shorter time for criminalization to perform its deadly work of creating a problem where none had existed before. In the 1920s Congressman Richard Hobson declared that "ten years ago, [before criminalization] the narcotic drug addiction problem was a minor medical problem. Today, it is a major national problem, constituting the chief factor menacing public health."⁹¹

While it is true the unregulated abuse of cocaine today results in four deaths per 100,000 users⁹² (compared to 650 per 100,000 tobacco users), the most deadly consequences flow directly from its criminalization. It has already been noted, for example, that more than 4 million crimes a year, including more than 1,600 murders, are committed by drug dealers and users who are denied any legal means of obtaining their drug. But other social consequences of criminalization are equally tragic. At a time when African Americans continue their struggle for economic opportunities, 90 percent of those actually prosecuted for drug-related offenses are African Americans.⁹³ The devastating impact this has on the families, social fabric, and economic opportunities of African Americans is so enormous, it is almost impossible to measure. These tragic consequences of cocaine criminalization provide an excellent reason why even tobacco, which has much higher death and addiction rates than cocaine, should also remain legal.

An interesting case study of the effects of prohibiting tobacco is provided by the experiment of a Vermont prison that in 1992 attempted to prohibit tobacco use by inmates. Prison authorities have more power and control than could ever be exerted over citizens at liberty. Yet, in the prison where cigarette prohibition was introduced, a black market in cigarettes emerged virtually overnight in which the price of a cigarette rose to 2,000 percent of its market value. So desperate were tobacco addicts to get their "fix," that incidents of violence and disruptive behavior skyrocketed, and prisoners began to exchange drugs and sex for tobacco. In November 1992, Vermont wisely rescinded its tobacco prohibition policy.⁹⁴

Similar effects were observed in Europe after World War II. Cigarettes were so scarce that "nicotine addicts reduced themselves to depravity. They became liars and thieves, bargained treasured possessions, traded away food, though they were already underfed, [and]... women smokers resorted to prostitution."⁹⁵

The many cultural changes in society over time make it impossible to form precise comparisons of drug use rates before and after criminalization. One critic perhaps put it best when he observed:

We do not know how many people used drugs in that era; estimates vary wildly. Perhaps the number was small; if so, free access did not lead to widespread use. Perhaps the number was large; if so, the nation nonetheless prospered and normal

family life continued. We do know that no drug houses blighted neighborhoods, no drug gangs had street corner shoot-outs, "drug-related" crime did not exist, and people lived ordinary middle class lives while consuming drugs avidly. We are talking about twentieth-century America, just before World War I, a country with great urban centers suffering from most problems known today and even from some that have since ended. Our own history proves that we have nothing to fear from legalizing drugs, and much to gain.⁹⁶

In short, perhaps no other action by government has had such a devastating effect on its own people than the criminalization of drugs, particularly cocaine.

HEROIN

Like cocaine, opiates were legal in the United States until the early twentieth century. The first anti-opium laws were passed in California as an anti-Chinese measure based on the rationale that such laws were necessary to prevent the seduction of white women in opium dens. Just as the criminalization of liquor during prohibition resulted in increased production and consumption of hard liquor (as a percentage of total consumption), so the criminalization of opium, and the congressional ban on its import in 1909 led to the creation of a domestic heroin industry.⁹⁷ Before the criminalization of opium, hundreds of over-the-counter remedies (such as Mrs. Winslow's Soothing Syrup) contained psychoactive drugs. Many Americans consumed these drugs without apparent disaster to the republic.

The millions of users of mild opiates did so without being associated with the crime, disease, murder, and violence associated with its use since criminalization. Even among those who eventually became dependent on opium, most opium users led normal and productive lives, just as many users of alcohol do today. Indeed, doctors considered alcohol so much more destructive than opium, that they often prescribed opium as treatment for alcoholism.⁹⁸

Although legalization opponents have attempted to resurrect the caricature of dazed and shiftless society dropouts lounging around smoke-filled opium dens, the perception before criminalization was different. Indeed, labor leader Samuel Gompers led the movement toward criminalization on grounds that the use of "opium gave the 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."⁹⁹

By 1906, when doctors began to realize that opium could also be addictive (though not as addictive as tobacco or as destructive as alcohol), they began to moderate the number of prescriptions they wrote for patients. In that same year, the government passed one of the few constructive statutes in the long tragic history of drug control. The Federal Pure Food

and Drug Act required that any over-the-counter drug products disclose how much cocaine and opium they contained. The result was one of the most dramatic reductions in opium and cocaine use in the history of the Republic.¹⁰⁰ Had government at that point continued in the direction of education and treatment rather than criminalization, drug use would almost certainly have diminished, perhaps to the point where only the stupid and foolhardy would have continued to use them. With no attraction for organized crime, the nation's subsequent tragic history of crime, violence, and self-defeating expenditures of the national treasure might have been avoided.

Tobacco provides a useful comparison in assessing the effectiveness of education programs. Prior to 1922, only thirty-four states permitted the smoking of tobacco.¹⁰¹ All the remaining states provided for criminal sanctions for smoking a cigarette. Opponents of legalization of cigarettes argued vigorously (as opponents to drug legalization do today) that legalization might result in more people smoking cigarettes. In the case of tobacco, despite its greater health dangers, states rejected the criminalization approach, and by 1922, all states had legalized the smoking of cigarettes. An education program, begun in earnest in the mid-1960s with the *Surgeon General's Report*, has succeeded in reducing tobacco smoking far more than criminalization has inhibited drug use. Between 1965 and 1987, for example, numbers of male smokers declined 36 percent and adult smoker numbers dropped by 28 percent.¹⁰² Smoking has now been banned on all domestic airline flights and in many public places and provides substantial revenue to the government in the form of taxes.

As with cocaine and marijuana and liquor in prohibition, criminalization of opium served to channel consumption to the more concentrated and virulent derivatives of opium, such as heroin. Even heroin use does not involve physical dependence, but, without heroin, addicts do "get sick but soon get better and recover. Heroin users never have an organic need for the substance; that is why some drug abuse treatments seek abstinence, because heroin users have no physical need for the drug."¹⁰³

Although legalization opponents fear that drug use will increase if drugs are legalized, research reveals that "opiates have less appeal than many antidrug zealots claim. Experimenters who give heroin and morphine injections to subjects report that hardly anyone finds the effects desirable; and almost everyone expresses indifference or dislike."¹⁰⁴ In order to reach a state of physical resonance, many users become nauseated after taking an intoxicating dose. As one observer of addicts observed, "Learning the joys of nausea takes fortitude."¹⁰⁵

One study reported a double-blind test of twenty nonaddicted volunteers. Less than half of volunteers given an opiate experienced any kind of euphoria, and most volunteers reported the experience as distinctly unpleasant. Indeed, the "pleasure score" of those given heroin was lower

than those given a placebo.¹⁰⁶ The great majority of medical students who have tried heroin report that they "found it difficult to understand why anyone would ever become addicted."¹⁰⁷ A study by McAuliffe of 150 postoperative patients given an opiate revealed that only fourteen experienced a euphoric effect, and of these eleven indicated that the "euphoria" came primarily from the relief of postoperative pain.¹⁰⁸

Contrary to the popular notion that heroin addicts are dysfunctional, "British physician addicts have been allowed to continue their medical practices and treat patients."¹⁰⁹ In the United States, a noted doctor was known to have taken opium derivative for sixty-two years without noticeable impairment of physical or mental abilities.

In 1971, the general counsel for the District of Columbia Police Department discovered that more than 100 police officers had been taking heroin for extended periods of time. The officers were discovered, however, not because of poor work performance, but only after urine samples were taken.¹¹⁰ Another study reports the case of an engineer for the New York Central railroad who never missed a run during twenty years of morphine use.¹¹¹

None of these studies suggests that heroin use is desirable, and doctors no longer recommend opium to cure garden-variety physical ailments. Just as a diabetic needs insulin to keep from becoming ill, a heroin addict needs an opiate to avoid sickness. However, like its more destructive alcohol cousin and more addictive tobacco cousin, heroin use is best discouraged thorough a comprehensive education and treatment program. The most effective source of funds for such programs could come from a tax on its use. Under present policy, all such potential revenues are instead channeled toward drug kingpins and organized crime. What funds remain are directed primarily toward the drug war, every victory in which serves to increase the profits flowing to organized crime and drug producers.

DRUG USE IN CONTEMPORARY SOCIETY

Once the effects of drugs are understood, the causes of addiction can also be better understood. The typical heroin user is not a successful doctor, lawyer, or businessperson, but rather one who has no meaningful focus in life. Geoffrey Pearson's study of social deprivation concluded that:

(D) rugs offer to people meaningful structures around which to organize their lives in an eventful and challenging way. In the absence of competing routines and structures of meaning and identity, such as might be supplied by work commitments, we can then say it will not only be more difficult to 'come off' and 'stay off' heroin by breaking out of its routines and replacing them with alternative patterns of daily activity. It will also be more likely that a novice user will estab-