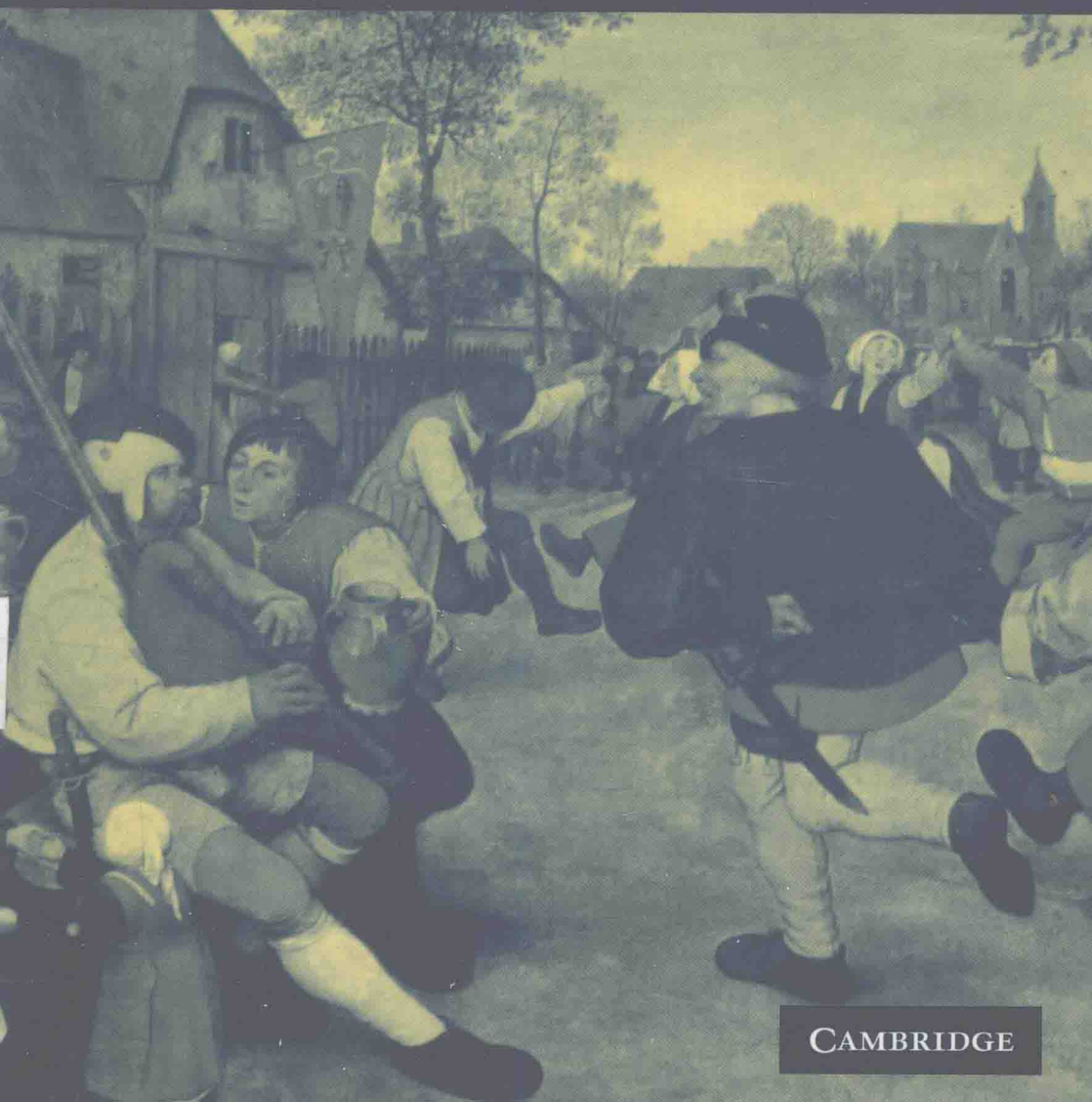


REGULATING VICE

Misguided Prohibitions and Realistic Controls

Jim Leitzel



CAMBRIDGE

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MISGUIDED PROHIBITIONS AND
REALISTIC CONTROLS

JIM LEITZEL

University of Chicago



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REGULATING VICE

Regulating Vice provides a new, interdisciplinary lens for examining vice policy and focuses that lens on traditional vices such as alcohol, nicotine, drugs, gambling, and commercial sex. *Regulating Vice* argues that public policies toward addictive activities should work well across a broad array of circumstances, including situations in which all participants are fully informed and completely rational and other situations in which vice-related choices are marked by self-control lapses or irrationality. This precept rules out prohibitions of most private adult vice and also rules out unfettered access to substances such as alcohol, tobacco, and cocaine. Sin taxes, advertising restrictions, buyer and seller licensing, and treatment subsidies are all potentially legitimate components of balanced vice policies. *Regulating Vice* brings a sophisticated and rigorous analysis to vice-control issues, an analysis that applies to prostitution as well as drugs, to tobacco as well as gambling, while remaining accessible to a broad social science audience.

Jim Leitzel teaches public policy and economics at the University of Chicago. He received his PhD in economics from Duke University; he has taught at Vanderbilt University and Duke University and served as the Academic Coordinator at the New Economic School in Moscow. Jim has been a National Fellow at the Hoover Institution at Stanford University and an Atlantic Fellow in Public Policy based at the Department of Economics of the University of Essex. His previous books include *Russian Economic Reform* and *The Political Economy of Rule Evasion and Policy Reform*. Jim is the founder of Vice Squad (vicesquad.blogspot.com), a blog devoted to vice policy.

To Jed, Mike, Julius, and other friends of long standing

Preface

Craft against vice I must apply.

– Shakespeare, *Measure For Measure*

When I arrived at the University of Chicago in the fall of 1998, I was asked what courses I might like to teach. I suggested Regulation of Vice, and it is to the credit of the university that, without further ado, and without any questioning of my motives, the course duly appeared on the spring schedule. *Regulating Vice* has grown out of that course.

Each spring, during the first class meeting of Regulation of Vice, I provide a few disclaimers, which are appropriate here as well. I am not a lawyer, nor am I a physician, and I often am wrong. (I am not wrong about not being a lawyer or physician, however.) Please do not mistake anything that appears in *Regulating Vice* as legal or medical counsel; it is not. This book is about public policy toward vice, not private policy, and you should beware of basing your personal vice-related choices on anything in these pages. If what you really need is treatment for a vice problem, then please seek help right away. *Regulating Vice*, alas, will not be of assistance.

Calling an activity a vice is not considered to be a form of praise; nor is referring to a person as vicious regarded as a compliment. In this book, however, vice and vicious are used as neutral terms, intended neither to denigrate nor commend. “Vicious” is employed in a manner quite at variance with everyday language, standing in as an unassuming synonym for “vice related.” Vice issues often are highly charged, and hence the choice of terminology can be fraught with implicit associations. An example is “sex worker,” the use of which is sometimes seen to signal an attempt to normalize prostitution as just another profession. These sorts of signals are unintended in my selection of terminology – though I do believe that some forms of adult prostitution should be legal and regulated.

Regulating Vice discusses directly a variety of vicious behaviors, and I like to believe that the ideas pertain to essentially all vices. I also like to believe that my approach to vice applies globally. (Indeed, there seems to be no end to the things I like to believe.) Nevertheless, most of the specific applications and examples are drawn from the United States. My decision to make United States policy

the focus of *Regulating Vice* mainly follows from constraints of time, space, and familiarity. The relative neglect of other countries is most pronounced with respect to the “Vice Verdicts,” summaries of court cases derived almost exclusively from U.S. Supreme Court decisions. These summaries are provided in recognition of the important role that the judiciary plays in developing vice laws. “Vice Verdicts” also illustrate the influence of vice regulation upon public policy more generally, through the determination of the limits of constitutional rights to free speech and freedom from unreasonable search and seizure, for instance.

I am a blogger; surely this is one of the more dispiriting phrases in the language. But it isn’t as bad as it sounds: I am part of a group blog, Vice Squad (vicesquad.blogspot.com), devoted to explorations of vice policy. Many of the topics that are touched upon in *Regulating Vice* have graced the webpages of Vice Squad. Citations to Vice Squad in the footnotes are given with the date on which the relevant posts appeared, but for ease of exposition, the lengthy URLs are not provided. All of these posts can be found by going to vicesquad.blogspot.com and clicking on the appropriate month in the archive listing. Citations to other webpages generally include complete URLs.

My debts are many, and I fear that most of them will go unacknowledged here. But a start can be made by reference to the course from which this book developed. Regulation of Vice initially was modeled after a class that I knew about at Duke University, taught by my friend Phil Cook. Thanks to Phil for the inspiration, as well as for many helpful insights over the years. My teaching assistants for Regulation of Vice – Sheldon Lyke, Nicole Eitmann, Paul Goyette, Petr Barton, and Martina Smith – have been stellar. Chapter 7, on the Internet, grew out of a short handout for class that Sheldon and I jointly prepared years ago. Hundreds of University of Chicago students have improved this book over the years; five who merit special mention are Will Baude, Evan Haglund, Dmitriy Masterov, Jessica Ianotti, and Kathleen Rubenstein.

Comments from Mark Kleiman and Rob MacCoun have refined my thinking. Others who have lent their assistance at various stages include Nicole Eitmann, Michael Alexeev, Mary Ann Case, Phil Cook, and Peter Reuter. John Berger at Cambridge University Press has been supportive and pleasant throughout. I have been blessed with two first-rate research assistants, Ryan Monarch and Alexandra (Ali) Cirone. Ryan delved into many vice topics for me over the years and eventually even joined the Vice Squad team. Ryan also collected the data that, in updated and expanded form, became the statistical appendix. Ali was the first person besides me who read a complete draft, and she regularly provided wise counsel. My Vice Squad partners have been a constant encouragement. Thanks to everyone who helped.

Much of the progress on the manuscript was made during a six-month secondment at the University of Chicago Paris Center. Many thanks to College Dean John Boyer and College Masters John Kelly and Constantin Fasolt, along

with the Center Director Robert Morrissey and the outstanding Center staff, for their assistance in making my Paris stay possible. Richard Taub kindly stepped in to more than fill my shoes back at the Hyde Park campus, with aid from Lee Price. My Paris friends were more helpful than they can know in sustaining the development of *Regulating Vice*.

My family and friends have been supportive beyond measure. It is to old and dear friends whom I dedicate this book, including many who will go unnamed here. Among the named old friends are Jed, Mike, Julius, Janice, Joselyn, Jim, Fallaw, Chris, Shlomo, Geoff, Cliff, Barry, Will, Bob, and Nikkie.

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Introduction

THE VICE CONTRARIAN

Imagine a vice policy contrarian, someone who rather recklessly advocates the wholesale overturning of our current vice regulations. What would such an outspoken contrarian have to say? Perhaps she would start with something along these lines:

Tobacco kills more than 400,000 Americans each year, while we temporize with smoking areas and excise taxes and Surgeon General warnings: ban the sale of cigarettes. Alcohol is responsible for some 75,000 deaths annually in the U.S., and yet we tolerate alcohol, even actively promote it. The manufacture of alcoholic beverages should be immediately banned. Pornography assaults us from every billboard, television, movie screen, Internet connection, and magazine rack. Even supposed “literature,” like D. H. Lawrence’s *Lady Chatterley’s Lover*, is sufficiently sullied with smut to make it unfit for human consumption: we can happily throw such soft-core babies out with the bath water of hard-core porn, by making it illegal to peddle filth. Adultery, premarital sex, sodomy, all sorts of sexual perversions, are not only common, they are celebrated – to the threat of our civilization. Signaling our disapproval through the criminal law would be a better policy than the current anything goes, “if it feels good (or even if it feels bad), do it” approach. Swearing has somehow managed to become *de rigueur* on the street, on the airwaves, and in the theater, immeasurably coarsening our social life. Public profanity could safely be countered with modest fines to encourage civility. Gambling is another vile yet pervasive presence, with state lotteries, Native American casinos, and Internet bookies at every turn, ruining countless lives, and for what gain? To enrich the hucksters who proffer such money-for-nothing schemes? We must take away the legal and societal imprimatur from wagering.

But our imagined policy reformer is a contrarian, not a Puritan. She doesn’t want to prohibit any and all vice: she only wants to ban those vices that are currently legal or tolerated. For forms of vice that are now illegal, she recommends the lifting of controls:

To start with the seemingly most difficult case, heroin should be legal. Heroin is a useful medicine, both as a cough suppressant and pain killer, and when available in known dosages and without adulterants, not much of a threat to health. Yes,

some people might abuse heroin were it legal, but many more people will use heroin responsibly and benefit from it. For similar reasons, cocaine should be legal, too. (The case of marijuana is so obvious that it barely merits mentioning – of course pot should be legal, the threat to health being so small.) In fact, the whole notion that certain drugs should be available only with a prescription is itself wrongheaded. If you are an adult and are facing a severe illness and think you can find some solace in a drug, why do you first have to convince a doctor that your desire for the drug is legitimate? We can keep intact most of the prescription system, but eventually there must be some escape clause, so that a sufficiently motivated adult is able to procure a drug legally without the approval of the officially sanctioned health overlords. Finally, adult heterosexual prostitution should be legal, offering as it does both lucrative employment opportunities and some comfort to the lonely or undesirable.

Our vice policy contrarian certainly is peculiar. But while we are discussing imaginary characters, please meet my friend Mr. Twentieth Century, born on January 1, 1901, and hobbling now a few years past his due date into the twenty-first century. Mr. Twentieth Century has lived all of his life in Chicago. And Mr. Twentieth Century has endured through times when every one of the contrarian's suggested reforms has been the duly constituted Law Of The Land. Tobacco: cigarette sales banned in fifteen states (including, briefly, Illinois) during the early years of the twentieth century, with Kansas being the last state to end the prohibition in 1927. Alcohol: manufacture and sale banned nationally, 1920–1933, some municipal and county-level prohibitions still in force. Distribution of hard-core pornography: vigorously suppressed until the 1960s and not entirely free from control by the criminal law to this day. *Lady Chatterley's Lover* (which contains frank sexual language): completed in 1928 but legally circulated in the United States only after 1959. "Deviant" sex: continues to be illegal in many states, though a 2003 Supreme Court decision effectively legalized adult, consensual, private sodomy, either heterosexual or homosexual, throughout the United States. Cursing: state and municipal laws outlawing cursing and blasphemy remain on the books, though blasphemy prosecutions are probably precluded by a 1952 U.S. Supreme Court decision. Gambling: no state lotteries in the twentieth century until 1964, and casinos legal only in Nevada until 1978; sports betting still illegal in almost all states. Heroin and cocaine: legal until 1914. Marijuana: legal as a matter of federal law until 1937. Prescription drug system: monopoly provision of drugs through "prescription only" established after 1938 for non-narcotics. Prostitution: legal in much of the United States in the first two decades of the century, with brothel prostitution currently legal in some counties in Nevada.

So, on average, centenarians have been vice contrarians: all of the contrarian's proposed reforms have held sway during the previous hundred years in our democracy. The point of this exercise in imaginary characters is to convince you that our current vice policies aren't eternal, fixed in stone. Vice

policies have undergone a revolution in the lifetime of Mr. Twentieth Century, and there is no reason to suspect that they won't do the same thing during the reign of Ms. Twenty-first Century. Future centenarians are likely to be vice contrarians, too.

Why am I trying to so hard to convince you of this? Why risk your wrath by inventing mythical beings simply to indicate the obvious, that vice policies change over time? Because somehow we have a tendency to view our current vice laws perhaps not as immutable, but as more-or-less correct, and no longer susceptible to radical revision. Of course alcohol is legal. Of course heroin is illegal. Of course states conduct lotteries. Of course potent medicines are available only by prescription. We somehow think of our current approaches to vice as natural, not seriously open to question, even though these approaches are relatively recent phenomena. Within twenty or fifty or one hundred years, our vice policies once again could undergo massive upheaval.

Not only could our vice policies in fifty years look much different than they do today, I think that there are good grounds to think that they will indeed be substantially revised. This conclusion can be reached irrespective of the merits of today's policies, for two related reasons. First, the oscillations that centenarians have seen in vice policy are a recurrent and widespread occurrence, long pre-dating the twentieth century. Second, much of the impetus for the historical variation in regulations is that vice itself "implies moral ambivalence, that is conduct that a person may enjoy and deplore at the same time. As a corollary, moral ambivalence generates controversy over public policy concerning certain activities."¹ Unlike attitudes toward consistently reviled crimes such as robbery and murder, then, the stance toward vice is marked by vacillations that induce significant swings in regulations. Of course, bad laws in any policy field will generate incentives to reform, and there is reason to believe that some of our current vice policies are far from optimal. But the properties of vice, as explored next, engender rule changes even when current policies are tolerably designed.

VICE – IT EVEN SOUNDS COOL²

Despite longstanding, widespread, and often deserved condemnation, vice has retained its popularity. A catalogue of today's prevalent vices would include the excessive consumption of alcohol, tobacco, and illicit drugs. Activities such as gambling, prostitution, and viewing pornography would also make the list. Most of these activities were considered to be vicious centuries ago, members of the venerable vice categories of substance abuse, illegitimate sexual

¹ Skolnick (1988, p. 10).

² I borrowed the locution from a t-shirt popular at Duke University circa 1990 that read "Duke – It Even Sounds Cool."

relations, and wagering. Other behaviors that sometimes seek to be designated as vices do not have the same illustrious heritage: shopaholics and chocoholics are recent arrivals to the vice bestiary.

What qualifies as a vice? Certainly perceptions of both pleasure and wickedness are part of the equation.³ But beyond fun and iniquity, vices typically exhibit three characteristics. First, they suggest excess. The consumption of alcohol is not a vice – rather, the excessive or abusive consumption of alcohol constitutes a vice.

The term “vice” as traditionally applied to substance abuse, illegitimate sex, and gambling is not as broad as the classical conception. For Aristotle, vices helped to locate virtue, which “is a mean between two vices, that which depends on excess and that which depends on defect; and again it is a mean because the vices respectively fall short of or exceed what is right in both passions and actions, while virtue both finds and chooses that which is intermediate.”⁴ As Aristotle recognized, for pleasurable activities, where temperate behavior is virtuous, one is more likely to find excessive indulgence rather than deficiency.⁵ So the vice of intemperance implies a surplus, not a shortage, of pleasure seeking. But for Aristotle, too little pleasure seeking, too little hedonism, is just as vicious as too much. For our purposes, however, we look only at the excess, not the deficit side, of the Aristotelean vice ledger.

A second characteristic of a vice, indeed, one that often features in dictionary definitions, is that vice is not a one-time or infrequent indulgence but, rather, represents a pattern of behavior. Vice, according to *The Oxford Universal Dictionary*, is “1. Depravity or corruption of morals; evil, immoral, or wicked habits or conduct; indulgence in degrading pleasures or practices. 2. A habit or practice of an immoral, degrading, or wicked nature.” So someone who every now and then has a bit too much to drink cannot be said to be a creature of vice, by this reckoning, if the indulgence is sufficiently irregular.⁶ Vice is associated with habits, and bad (though pleasurable) habits at that.

A third feature of vice, and one that holds important implications for appropriate regulations, is that the direct ill effects of vice generally are borne by the person who engages in the vice. A person who drinks too much suffers the hangover herself. A person who gambles too much loses money that is his or, at least at the time of the loss, is under his control. This is not to say that the indirect

³ Vice “implies pleasure and popularity, as well as wickedness.” Skolnick (1988, p. 10).

⁴ Aristotle, in *Nicomachean Ethics*, Book II, Chapter VI.

⁵ Aristotle, *Nicomachean Ethics*, Book II, Chapter VII, 1107b. In general, temperance does not mean abstinence, though temperance societies in the United States in the nineteenth century eventually promoted abstinence from alcohol, not temperate consumption, as a goal.

⁶ An alternative approach, suggested by Socrates, is that vice doesn’t imply a bad habit so much as habits themselves generate the conditions of virtue or viciousness: “Then virtue is the health and beauty and well-being of the soul, and vice the disease and weakness and deformity of the same? . . . And do not good practices lead to virtue, and evil practices to vice?” Socrates, as recorded by Plato, in *The Republic*, Book IV.

effects of vice do not exact an enormous price from intimates of alcoholics and pathological gamblers or victims of drunk drivers – clearly their suffering is immense. But the direct effects of using alcohol, like those of using ketchup, are primarily sustained by the consumer him or herself. Further, except for the pleasure of indulging, those direct consequences of vice tend to be negative – an excessive devotion to exercise or Shakespeare generally is not viewed as vicious.

There are common situations in which significant, direct repercussions from vice fall upon someone other than the vice consumer. “Secondhand” smoke from cigarettes might damage the health of proximate nonsmokers, and drug use by pregnant women can harm their fetuses. Nevertheless, for the most part, vice conducted in private is “self-regarding” behavior, to employ the terminology of John Stuart Mill.

An objection might surface at this point: surely alcohol and ketchup differ in ways that carry grave consequences. People are much more likely to become a nuisance, or worse, to others through alcohol abuse than they are through excessive consumption of ketchup. (Has anyone ever ruined his life, and the lives of those around him, from too much ketchup?) But most people who consume alcohol do not ruin their lives with it – that trait it shares with ketchup. And even if all users of alcohol and ketchup did ruin their lives, alcohol and ketchup consumption would still qualify as self-regarding activities, while robbery, for instance, would not. Most of the direct negative effects of robbery are sustained not by the robber but by his victim. So every country outlaws robbery, whereas the regulatory approach taken to alcohol varies considerably across time and place. A vice need not be, and often is not, a crime, though some vice, like heroin addiction in a society where heroin is prohibited and hence expensive, promotes criminal behavior as a secondary effect. When vice is criminalized, it is, to use a once-common phrase that has fallen out of favor, a victimless crime.

The excess, habit, and self-regarding features are not sufficient to distinguish vice from other activities, such as exercise, that usually are not considered to be vicious: vice also suggests that wickedness is mixed with the pleasure. That is, for many people, vice implicates morality, or rather, immorality. Risky, habit-forming, self-regarding recreational activities, such as skiing or scuba diving, are not vicious, because no one views these recreational pursuits as immoral. Drinking, drug-taking, and nonmarital sex often are considered to be immoral, and this consideration has played a central role in the regulation of vice over the years. As with vice policy, however, perceptions of immorality are neither universal nor immutable.

But taking perceptions of immorality as given, a traditional vice exhibits excess, is habitual, and produces direct consequences that fall nearly in their entirety on the person engaging in it. These common traits imply that approaches to regulating vices as disparate as gambling and injecting heroin