RE-EVALUATING AMERICA’S DRUG CONTROL LAWS: A LEGAL, PHILOSOPHICAL, AND ECONOMIC PROPOSAL

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ABSTRACT

We abhor the use of addictive drugs. We believe they are personally and professionally destructive. We publish these views of ours in opposition to the use of such substances at the commencement of this article to invalidate the often encountered criticism that persons who oppose drug forfeiture and the so-called “war on drugs” thereby advocate their use. Nothing could be further from the truth.

In sections I and II of this article we express strong opposition to the current drug forfeiture laws that give some predatory law enforcement officials a financial motive to seek forfeiture rather than justice. We all owe them a great debt. This article explores the issues that arise in drug forfeiture situations in particular, and from the war on drugs generally. We discuss asset forfeiture, the source of the government’s demand for forfeited property, whether the recent Civil Asset Reform Act\(^1\) is really a reform of the drug forfeiture process or more like a sham, the recent case involving evictions of grandparents for the drug-related sins of their grandchildren, the congressionally mandated and High Court approved requirement that some sick people die in pain, and finally, the Court sanctioned requirement that children who dare to participate in dangerous activities like choir singing must urinate in the presence of

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their teachers, all in the name of the war on drugs. We suggest a better way to reduce the drug problems of our society.

In section III we note that the United States Government has spent billions of dollars fighting the war on drugs. Despite the best efforts of everyone involved, drug use continues. The argument presented in this article explores the many facets of the issue of the decriminalization of drugs. Under a system of decriminalization, drug usage could be monitored, drugs would be less likely to contain unknown adulterants, crime would be greatly reduced, and the incidences of overdose would decline.

In section IV we discuss the moral questions that arise concerning the decriminalization of drugs.

I. INTRODUCTION: WELCOME TO THE WAR

Imagine you are boarding a plane with $6,000.00 in cash to purchase goods for your legitimate landscaping business. Or perhaps you loaned your car to a friend who was arrested for smoking pot in the vehicle. Maybe you are a grandmother living in public housing with a grandchild who, without your knowledge, unwisely sold drugs several blocks from your apartment. You might be suffering from cancer and desire to use marijuana to alleviate your pain. You might be a sixteen-year-old kid who dreams of singing in the school choir. In any of these seemingly innocent circumstances, would you expect your precious property interests protected by the Constitution to be subject to forfeiture by the government? Not in this country! Not in America where we are all protected by the presumption of innocence, the Fifth and Fourteenth Amendment Due Process Clauses, and the Eighth Amendment Excessive Fines provision. Well, as we shall see, you are very wrong!

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2. Daily Congress is demanding accountability for failed corporate executives in the private sector. Where is the demand for accountability for the managers of failed government agencies like, we contend, the Drug Enforcement Administration? The media gleefully identifies chief executives of failing private corporations. Everyone has heard of Kenneth Lay of Enron. Who among us has heard of the government officials responsible for failed agencies such as the Immigration and Naturalization Service, The Department of Transportation's Security Program, The Bureau of Indian Affairs, and the State Department and its incompetent visa officials? We contend that the public interest demands that the administrators of government agencies be held accountable. We trust that this article will advance that public interest.
II. FORFEITING PROPERTY

A. The Thing is Guilty

The linchpin of government drug forfeiture is the legal fiction that civil asset forfeiture is an in rem action by the sovereign against the thing. To illustrate this ancient approach, consider Calero-Toledo v. Pearson Yacht Leasing Company. In March 1971, a yacht company leased a pleasure craft to two residents of Puerto Rico. In May 1972, a single marijuana cigarette was discovered on board. In July 1972, Puerto Rican authorities seized the craft pursuant to the Puerto Rican Controlled Substances Act. On appeal, the Supreme Court was faced with the issue of whether the lessor’s yacht could be constitutionally forfeited without notice and hearing when the lessor was neither involved in or knew of the illegal act. In affirming the forfeiture, Justice Brennan wrote that,

First, seizure under the Puerto Rican statutes serves significant governmental purposes: [s]eizure permits Puerto Rico to assert in rem jurisdiction over the property in order to conduct forfeiture proceedings, thereby fostering the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions. Second, pre-seizure notice and hearing might frustrate the interests served by the statutes, since the property seized—as here, a yacht—will often be of a sort that could be removed to

3. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (citing The Palmyra, 25 U.S. (12 Wheat.) 1, 14-15 (1827)). In Calero-Toledo, the Court quoted The Pamyra as stating, “The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing . . . . [T]he proceeding in rem stands independent of, and wholly unaffected by any criminal proceeding in personam . . . .” Id. at 683-84 (emphasis added).
5. Id. at 665.
6. Id.
7. Id. at 665 n.1. See 24 P.R. LAWS ANN. § 2512 (2000), which provides,
The following shall be subject to forfeiture to the Commonwealth of Puerto Rico . . . [a]ll conveyances, including aircraft, vehicles, mounts, or vessels, which are used, or intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in clauses (1) and (2) of this subsection.

Id. §§ 2512(a)(4), (b).
another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given. And finally . . . seizure is not initiated by self-interested private parties; rather, Commonwealth officials determine whether seizure is appropriate under the Puerto Rican statutes.9

Note the Court’s handy reliance on characterizing the action as in rem to avoid the constitutional issues that arise when the action is in personam. Finally, the Court seemed to place great reliance on the fact that the forfeiture was initiated by disinterested government officials. But are those officials really disinterested when the forfeited property inures to their benefit?10 Also consider that the rule is based on a custom established to deal with problems of the eighteenth century.11 The wonder is that it has survived to imperil our times. On this haunting thought Oliver Wendell Holmes said:

The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career.12

A troubling illustration of the highest Court in America’s application of the Holmes comment to the primitive law of forfeiture is found in a case involving an innocent wife wronged by a straying husband. In Bennis v. Michigan,13 the High Court came face to face with a situation involving the forfeiture of a fancy new car owned by an innocent

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9. **Id.** at 679.
spouse. The straying husband drove the marital car to a seedy part of town where he solicited a willing prostitute to engage in intimacy in the front seat. Sadly, this voluntary but illegal act of commerce was observed by a police officer, who arrested the husband. In due course the county prosecutor seized the car and filed a complaint alleging that the vehicle was a public nuisance. Mrs. Bennis provided undisputed testimony that the car was jointly owned and that she had neither knowledge of, nor had she consented to, the illegal use of the automobile. At this point, one would think that the twice wronged Mrs. Bennis would get her car back. Not if she lives in Michigan.

In Michigan ex rel. Wayne County Prosecutor v. Bennis, the Michigan Supreme Court affirmed the trial judge’s determination that the vehicle was a nuisance and upheld his order of forfeiture. The already wronged wife argued that her interest should not be twice harmed, which would be the case if the forfeiture was upheld, because forfeiture of her interest in the car violated due process since the state had no legitimate interest in punishing an innocent person. In response, the Michigan High Court quoted the age old legal fiction that “[t]he thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing . . . .” The court rejected the innocent wife’s contention that the Fourteenth Amendment prevented forfeiture of her interest in the car. Interestingly, the court also considered that she had no cause to complain because she either explicitly or implicitly entrusted her husband with use of the car. We can be sure that she did not explicitly entrust the car to the straying husband for the use to which it was put. The now twice wronged wife chose to seek a more rational form of justice from the United States Supreme Court with some hope of

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14. Id. at 443.
15. Id.
16. Id.
17. Id. at 444 n.2 (quoting Michigan law, which provides, “Any building, vehicle, boat, aircraft, or place used for the purpose of . . . prostitution . . . is declared a nuisance. . . and all . . . nuisances shall be enjoined and abated . . . .” Mich. Comp. Laws Ann. § 600.3801 (West 2002)).
20. Id. at 486.
21. Id. at 494 n.32 (quoting The Palmyra, 25 U.S. (12 Wheat.) 14 (1827)).
22. “. . . nor shall any state deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV.
success because the High Court had previously suggested in dictum that some culpability or negligence in allowing the property to be misused must be present for forfeiture.24

Mrs. Bennis was again disappointed. Writing for the majority, Chief Justice Rehnquist accepted Michigan’s theory that the innocent wife had no protection from forfeiture.25 The majority relied on a variety of nineteenth and early twentieth century cases that allowed forfeiture of ships used for piracy,26 equipment used for bootlegging,27 and vessels used to run illegal liquor.28 All of the cited cases used the primitive legal fiction that the in rem forfeiture was of the “guilty” property and that the innocence of the owner was irrelevant. The majority, quoting Van Oster v. Kansas, wrote that “[i]t is not unknown, or indeed uncommon, for the law to visit upon the owner of property the unpleasant consequences of the unauthorized action of one to whom he has intrusted it.”29 The Court concluded that this “long and unbroken line of cases holds that an owner’s interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use.”30 The majority then found a way to reconcile the ancient rule of the Palmyra with today’s modern world by writing that this line of cases is “too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced.”31

Concurring in the result, Justice Thomas expressed considerable concern with what he regarded as the “unfair” and “intensely undesirable” result.32 He admitted that “one unaware of the history of

24. See Austin v. United States, 509 U.S. 602, 619 (1993). The Court said that holding an owner accountable for another’s activities rests “on the notion that the owner has been negligent in allowing his property to be misused and that he is properly punished for that negligence.” Id. In Colero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 63, 689-90 (1974), the Court suggested that the owner might be protected if he took “reasonable steps” to prevent wrongful use of the property.
26. Id. (citing The Palmyra, 25 U.S. (12 Wheat.) 1 (1827)).
27. Bennis, 516 U.S. at 447 (citing Dobbin’s Distillery v. United States, 96 U.S. 395 (1878)).
28. Bennis, 516 U.S. at 447 (citing Harmony v. United States, 43 U.S. 210 (1844)).
29. Bennis 516 U.S. at 448 (quoting Von Oster v. Kansas, 272 U.S. 465, 467-68 (1926)). Here, the case concerned an innocent buyer whose seller retained possession of the car long enough to use it to transport illegal liquor before turning it over to the buyer. The innocent buyer lost the car to forfeiture.
30. Bennis, 516 U.S. at 446.
31. Id. at 448 (quoting J.W. Goldsmith, Jr. Great Co. v. United States, 254 U.S. 505, 511 (1921)).
32. Bennis, 516 U.S. at 454.
forfeiture laws and 200 years of this Court’s precedent regarding such laws might well assume that such a scheme is lawless—a violation of due process.”33 He decided, however, that “the Federal Constitution does not prohibit everything that is intensely undesirable.”34 And he cautioned, or perhaps foresaw that

[i]mproperly used, forfeiture could become more like a roulette wheel employed to raise revenue from innocent but hapless owners whose property is unforeseeably misused, or a tool wielded to punish those who associate with criminals, than a component of a system of justice. When the property sought to be forfeited has been entrusted by its owner to one who uses it for a crime, however, the Constitution apparently assigns to the States and to the political branches of the Federal Government the primary responsibility for avoiding the result.35

Despite Justice Thomas’s belated concern, the much-wronged Mrs. Bennis still lost her car. But at least the decision compelled a heated dissent. The dissenters were concerned with the absurd results that might arise from the decision. Justice Stevens wrote that “[w]ithout some form of exception for innocent owners, the potential breath of forfeiture actions . . . would have catastrophic effects for the Nation’s economy.”36

B. Satisfying the Demand for Forfeited Property

We all wish to believe that our supposedly over-worked, often under-funded, and truly under-appreciated public defenders against crime are solely motivated by a constitutionally mandated desire to see to our general welfare. One of the truly unfortunate by-products of the war on drugs is a nagging concern that a stronger motivation might be raising money for their own purposes. This concern dates from the day that the drug laws were amended to provide law enforcement personnel an economic stake in forfeiture law.37 This “economic stake” arose from

33. Id.
34. Id. at 454.
35. Id. at 457.
36. Id. at 459 n.1.
37. For a compelling, and sometimes troubling discussion of law enforcement’s “economic stake” in forfeiture law see generally Eric Blumenson & Eva Nilsen, Policing for Profit: The Drug War’s Hidden Economic Agenda, 65 U. Chi. L. Rev. 35 (1998). See also 21 U.S.C. § 853(p) (1994), which allows the forfeiture of substitute property if the assets subject to seizure are no longer available. Now almost any property is fair game
legislation that allowed federal law enforcement officials to keep the proceeds from drug forfeitures rather than placing the proceeds in the general treasury. Then, to enhance the “economic stake,” state and local police were allowed to keep a large share of the forfeiture proceeds. The proceeds from drug forfeitures may be used for several purposes, including paying informants and the salaries of local police. There is always a demand for more money in law enforcement. Now the forfeiture laws have created a ready supply: just go out and find some property to seize.

Some civil libertarians might question whether raising money is compatible with the administration of justice. So far, the question has not much concerned the courts in drug cases. The Supreme Court has expressed the opinion that “the Government has a pecuniary interest in forfeiture that goes beyond merely separating a criminal from his ill-gotten gains . . . the sums of money . . . are substantial, and the Government’s interest in using the profits of crime to fund these activities should not be discounted.” But, alas, the rewards of forfeiture might in some, perhaps even isolated instances, be too tempting for police who consider themselves under-paid. A commander of a task force in Oakland, California, is said to have told his officers that “a lot of ‘dirty’ drug money would be passing through their hands, and it would not really matter if they kept some of it for themselves . . . [because] [t]he suspects . . . [are] in no position to complain.” And he is, of course, correct. So-called reverse stings have become a major tactic to raise funds for law enforcement. These stings involve police officers

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39. The federal government may share forfeited property with any state or local law enforcement agency that participated in any act leading to forfeiture of property authorized by 46 U.S.C. § 981(e)(2) (repealed).


41. As there is in virtually all other fields of endeavor known to man.

42. Some have argued that the courts have adopted a premise that drugs are so bad for society that “almost any law or law enforcement measure is validated.” Steven Wisotsky, Not Thinking Like a Lawyer: The Case of Drugs in the Courts, 5 Notre Dame J.L. Ethics & Pub. Pol’y 651, 658 (1991).


44. United States v. Reese, 2 F.3d 870, 874 (9th Cir. 1993).
posing as drug dealers and selling to unwitting buyers. The benefit to the police is that they can then seize and forfeit the hapless buyers’ cash.\textsuperscript{45} Often the police prefer to arrest buyers with lots of cash rather than the dealers with the drugs.\textsuperscript{46} This approach clearly does little to get the drugs off the street. One police officer is quoted as saying that forfeiture laws give law enforcement a powerful financial incentive to “allow the drug market to continue.”\textsuperscript{47} The motive of financial gain is again found in the policy of the Washington, D.C. police, who set up roadblocks to seize cash from people coming into the city to buy drugs.\textsuperscript{48}

There are many horrifying examples of drug raids going bad and resulting in the death or maiming of innocent citizens, which were motivated, at least in part, by a financial interest in the seizure of property. There is even a website devoted to the subject.\textsuperscript{49} Perhaps the most frightening example to ordinary citizens concerns Donald Scott, a then sixty-one-year-old resident of the exclusive community of Malibu, California. Scott’s ranch of over 200 acres in a wealthy community attracted the attention of law enforcement when an informant reported marijuana plants on the property. The information was not properly corroborated, nor was there any indication that Scott was a dangerous person.\textsuperscript{50} On October 2, 1992, at least thirty officers executed a search warrant by kicking in the door and running through the Scott home.\textsuperscript{51} Mrs. Scott’s screams led Mr. Scott to pick up a pistol in her defense.\textsuperscript{52} The masked intruders, in front of his wife, shot Mr. Scott dead.\textsuperscript{53} Oh yes, a minor point, a search of the house and the surrounding 200 acres

\textsuperscript{46} Id. at 325.
\textsuperscript{47} Id. at 333.
\textsuperscript{48} This policy was followed because police have a “financial incentive to impose roadblocks on the southbound lanes of I-95, which carry cash to make drug buys, rather than the northbound lanes, which carry the drugs. After all, seized cash will end up forfeited to the police department, while seized drugs can only be destroyed.” Richard Miniter, Ill-Gotten Gains, 25 REASON 32, 34 (Aug./Sept. 1993) (quoting Patrick Murphy, former Police Commissioner of New York City).
\textsuperscript{49} See http://home.earthlink.net/~ynot/victims.html (last visited Nov. 16, 2003).
\textsuperscript{50} Report on the Death of Donald Scott, (Office of District Attorney, Ventura County, California) (Mar. 30, 1993), available at http://www.fear.org/chron/scott.txt). The Border Patrol had conducted two ground reconnaissance trips into the property and found no marijuana plants.
\textsuperscript{51} Id. at 2, 43.
\textsuperscript{52} Id. at 18-19.
\textsuperscript{53} Id.
revealed zero, not one, marijuana plant. The District Attorney’s investigative report found that much of the information used to obtain the warrant was false. Was this an honest mistake that could be marked down as an aggressive law enforcement plan to stamp out dangerous drugs? Shockingly, no! The District Attorney concluded that a motivation behind the operation, at least in part, was to obtain the proceeds from the forfeiture of Scott’s five million dollar ranch.

How can these writ of assistance compatibility problems be solved? Clearly, the best way is to eliminate law enforcement’s need for forfeited property. This might best be accomplished by entirely suspending forfeiture. We recognize that it is politically unlikely that Congress and law enforcement officials, having tasted the sweet nectar of drug forfeitures, can never be completely weaned. However, our goal is to change that which is now politically possible, not to bend our viewpoint to its dictates. One final note on this—the parallels between the war on drugs and the failed prohibition of alcohol are striking. The more aggressive law enforcement becomes with programs like forfeiture, the more profit the dealer makes because he can mark-up the price of his goods to cover the risk. This makes drug dealing even more profitable every time the government introduces a new weapon in the war on drugs.

C. Is the Reform Act Really a Reform?

A casual observer might say to the authors, “stop whining! Congress has already taken steps to reform the abuses of which you complain. Can’t we just move on?” It is true that Congress has passed, and the President has signed the Civil Asset Reform Act of 2000 (Act). The Act: (1) purports to shift the burden of proof from the respondent to the government—the government now must show by a preponderance of the evidence that the property is subject to forfeiture; (2) requires a

54. Id. at 37-41.
55. The supporting affidavit falsely stated that ground surveillance had confirmed the presence of marijuana plants. Id. at 41-42.
56. Id. at 54.
57. See Holmes, supra note 12.
60. Id. § 983(c)(1).
"substantial connection" between the property and the offense;\(^61\) (3) provides for appointment of counsel for indigents in certain narrow circumstances;\(^62\) (4) offers an "innocent owner" defense in some instances;\(^63\) (5) contains a "hardship" provision allowing return of the seized property to the claimant pending a hearing;\(^64\) (6) allows for compensation when the property is damaged or destroyed by the government;\(^65\) (7) eliminates the requirement for the claimant to post bond to maintain his claim;\(^66\) and (8) mandates notice of the seizure to the owner within sixty days.\(^67\) This sounds like a useful enactment for the forfeiture claimant seeking to regain or protect his property, does it not?

But there are serious drawbacks to this so-called "reform." At first glance, shifting the burden of proof from the claimant to the government seems to be a wholesome change. But the new burden of proof, preponderance of the evidence, has little potential to thwart abuse. The Act still allows the seizing law enforcement agency to have a financial interest in the booty received from the forfeiture.\(^68\) The new burden is unlikely to cause law enforcement to drop its interest in obtaining needed funding. As we have suggested, the real reform will occur when law enforcement's claim to forfeited funds is outlawed. An issue of concern is that the Act also requires the government to show a "substantial connection between the property and the offense."\(^69\) But, sadly, the statute does not define "substantial connection." What does "substantial connection" mean and how closely connected must the property be to the offense? Will it protect you if you allow someone to borrow your car who then drives it to a bar where he smokes marijuana? This test is unclear at best. Finally, how many people will really benefit from the Act by challenging forfeitures? Few, we think, because most forfeiture actions are never contested.\(^70\)

\(^61\) Ilid. § 983(c)(3).
\(^62\) Ilid. § 983(b)(1)(A).
\(^63\) Ilid. § 983(d).
\(^64\) Ilid. § 983(f)(1)(D).
\(^65\) Ilid. § 983(d)(5)(B).
\(^66\) Ilid. § 983(a)(2)(E).
\(^67\) Ilid. § 983(a).
\(^68\) It is reported that an attempt by Congressman Henry Hyde to rectify the troubling problems of asset distribution, conflicts of interest, and accountability were thwarted largely by the vigorous opposition of the law enforcement community. See Blumenson & Nilsen, supra note 37, at 107-08.
\(^69\) 18 U.S.C. § 983(c)(1).
\(^70\) One study shows that eighty-nine percent of all forfeitures were uncontested and
The Act limits government appointed counsel to those individuals who already benefit from this accommodation “in connection with a related criminal case.” The exception is larger than the grant. The Act provides no appointed counsel rights in civil cases unless a home is involved. The Act will thus encourage law enforcement officials focused on forfeiture to pursue civil, rather than criminal sanctions to avoid dealing with pesky appointed counsel.

It is indeed praiseworthy that the Act provides an innocent owner defense in all federal civil forfeiture cases. An innocent owner is one who “did not know of the conduct giving rise to the forfeiture”; or, when he discovered the illegal conduct, “did all that reasonably could be expected under the circumstances to terminate such use of the property.” To be protected under the Act, the owner must make good faith efforts to stop the illegal use of the property or notify law enforcement authorities. The Act also is commendable in that it contains language protecting a person who was, at the time the property was acquired, “a bona fide purchaser or seller for value . . . and did not know . . . the property was subject to forfeiture.”

Finally, there arises the most troubling question about the effectiveness of the Act. The Act says a claim to protect the property from forfeiture will not be denied when (1) the property is the claimant’s primary residence, (2) the claimant has no reasonable alternative means of shelter, and (3) “the property is not, and is not traceable to, the proceeds of any criminal offense.” The Act’s protection of bona fide purchasers sounds good until the vague term “is not traceable to the proceeds of any criminal offense” is considered. The real effect of the provision is to negate all that was said before and impose strict liability on persons who either did not know, or had no reason to be aware of the proceeds of a criminal offense. It sounds exactly like the strict liability

that eighty percent of all forfeitures occur administratively. See Blumenson & Nilsen, supra note 37 at 50 n.61. Further, the Supreme Court recently told us that prisoners are not even entitled to actual notice of the forfeiture of drug-tainted property. Due process only requires notice reasonably calculated to apprise the prisoner of the forfeiture proceedings. See Dusenberry v. United States, 534 U.S. 161 (2002). One can only speculate on how many prisoners ever receive notice.

72. Id. § 983(b)(2).
73. Id. § 983(d)(2)(A)(i) & (ii).
74. Id.
75. Id.
76. Id. § 983(d)(3)(A).
77. Id. § 983(d)(3)(B) (emphasis added).
imposed on aged tenants for the unknown acts of their grandchildren in a
recent Housing and Urban Development (HUD) case. What public
policy interest is served by depriving innocent family members of an
abode to shield them from the elements when the criminal no longer has
an interest in the residence? Sadly, as we have demonstrated, the Act
will not be as effective in dealing with past abuse of drug forfeiture as
widely advertised. There are still substantial unresolved questions
concerning the true purpose and fairness of drug related forfeitures. The
profit motive for law enforcement is still all too present. Sadly, the Act
has by no reasonable measure cured the wrongs of which we complain.
And that is largely because government agencies still have a financial
interest in drug forfeitures, justice be damned.

D. Eviction for the Unknown Sins of Grandchildren

In order to combat drug use in public and other low-income housing,
Congress passed the Anti-Drug Abuse Act of 1988. The amended
Anti-Drug Abuse Act says that each public housing agency shall utilize
leases that provide that any criminal, drug-related activity on or off the
premises, engaged in by a tenant, any (emphasis added) member of the
tenant’s household, or any guest or other person under the tenant’s
control, shall be cause for eviction. The Department of Housing and
Urban Development read the statute to require lease terms that permitted
eviction of a tenant anytime a member of a tenant’s household or guest
engaged in drug related criminal activity, regardless of whether the
tenant knew, or had reason to know of it. In Department of Housing
and Urban Development v. Rucker, the Supreme Court faced two
issues. First, whether the statute required lease terms authorizing the
eviction of innocent tenants for drug related acts of others, and if so,
whether the statute was constitutional under the Due Process Clause of

79. In this and subsequent discussion of HUD and public sector housing, we abstract
from the problems, moral and economic, which emanate from this policy. On this see
William Tucker, THE EXCLUDED AMERICANS: HOMELESSNESS AND HOUSING POLICY
(Regnery Publ’g. 1990); Jane Jacobs, THE DEATH AND LIFE OF GREAT AMERICAN CITIES
81. See id. § 1437d(4)(d) (1994).
82. See 56 Fed. Reg. 51560, 51567 (1991). The strict liability regulation says there is
authority to evict when the tenant did not know, could not foresee, or could not control
the other occupants.
the Fourteenth Amendment.\textsuperscript{84}

The grandsons of seventy-one-year-old William Lee and sixty-three-year-old Barbara Hill were apprehended in the apartment parking lot smoking marijuana, and the mentally retarded daughter of sixty-four-year-old Pearl Rucker, who lived with Ms. Rucker, was discovered with cocaine and a crack pipe three blocks from the apartment, and three times within a three month period, seventy-six-year-old, semi-paralyzed, Herman Walker's caregiver and two others were found with cocaine in his apartment.\textsuperscript{85} On these facts the Ninth Circuit, sitting en banc, decided that HUD's interpretation allowing the eviction of "innocent tenants" was inconsistent with congressional intent.\textsuperscript{86} The en banc court believed that the statute did not address the level of personal knowledge or fault required for eviction.\textsuperscript{87} The appellate court was also concerned with questions about the Fourteenth Amendment because HUD's interpretation would allow tenants to be deprived of a property interest without any relationship to individual wrongdoing.\textsuperscript{88}

Chief Justice Rehnquist, writing for the High Court, said the statute "unambiguously requires lease terms . . . with the discretion to evict tenants for drug-related activity of household members and guests whether or not the tenant knew, or should have known, about the activity."\textsuperscript{89} The word "any" as used in the controlling statute has an expansive meaning and included the tenants in this case. According to Justice Rehnquist "any drug-related activity engaged in by the specified persons is grounds for termination, not just drug-related activity that the tenant knew, or should have known, about."\textsuperscript{90} The decision is troubling because what can aged grandparents do to control their grandchildren? One wonders if the Court considered what their own grandparents knew of their long-past teenage follies? Do they have any idea what their own grandchildren are doing tonight? Strict liability for the elderly means that the government and the courts do not care what they knew or did not know. How can you control behavior when you are unaware of it? Where is Pearl Rucker supposed to take her mentally retarded daughter?

\textsuperscript{84} \textit{Id.}
\textsuperscript{85} \textit{Id.} See generally Charles Lane, \textit{Supreme Court Upholds Public Housing Drug Law}, \textit{Washington Post}, Mar. 27, 2002, at AO4, for the ages and physical capacity of the tenants.
\textsuperscript{86} Rucker v. Davis, 237 F.3d 1113 (2001).
\textsuperscript{87} \textit{Id.} at 1120.
\textsuperscript{88} \textit{id.}
\textsuperscript{89} Dep't. of Hous. and Urban Dev. v. Rucker, 535 U.S. at 125, 130 (2002).
\textsuperscript{90} \textit{Id.} (citing United States v. Gonzales, 520 U.S. 1, 5 (1997)).
The Hilton? More likely she will reside on the street. Just mark them down as another casualty of the paternalistic war on drugs.

The Court next turned to the tenant’s due process claim and pointed out that the cases cited by the court of appeals, *Scales v. United States* and *Southwestern Telegraph & Telephone v. Danaher*, both dealt with the acts of the government as a sovereign either criminally punishing or civilly regulating the behavior of the general population.91 Here, said the Court, the Fourteenth Amendment is not implicated because the government is not attempting to criminally punish or civilly regulate the tenants as members of the general populace. Said the Court, “[i]t is instead acting as a landlord of property that it owns, invoking a clause in a lease to which respondents have agreed and which Congress has expressly required.”92 The Court apparently believed that because HUD cloaked itself in the guise of a private landlord, the Constitution did not apply. But whatever cloak it wears, the government is acting as a sovereign and is bound by the Constitution. Is not eviction of elderly tenants such as these a civil regulation of the behavior of a member of the general population? Is regulating an elderly person to a life on the street not government action? This case is another indication that the courts are so concerned with the problems concerning illegal drugs that they turn a blind eye to the abuses flowing from the war on drugs.93

E. The Legislative Mandated Necessity to Die in Pain

The state of California recently passed an initiative called the Compassionate Use Act of 1996.94 The Compassionate Use Act was designed to allow seriously ill citizens to use marijuana for medical purposes and created an exception to the state law prohibiting the possession and growing of this substance.95 The state prohibitions against marijuana would no longer apply to an ill patient or the caregiver


95. *Id.*
who obtained the approval of a medical doctor. Given that there is a ready market for such services for patients, several groups opened dispensaries to dispense marijuana to meet the needs of the patients. The United States quickly sued in federal district court to enjoin these activities as a violation of the Controlled Substances Act. The Controlled Substances Act contains no "medical necessity" exception. The sole exception is for government approved research projects.

The Oakland Cannabis Buyer’s Cooperative argued that the language of the Controlled Substances Act is subject to additional implied exceptions, including the common law exception of medical necessity. The Ninth Circuit Court of Appeals decided that the medical necessity defense was cognizable and remanded the case to the district court. On *certiorari*, the Supreme Court did not bother to trouble itself with the medical necessity defense. Justice Thomas said "to resolve the question presented, we need only recognize that a medical necessity exception . . . is at odds with the terms of the Controlled Substances Act. The statute, to be sure, does not explicitly abrogate the defense. But its provisions leave no doubt that the defense is unavailable." He continued, "[u]nder any conception of legal necessity, one principle is clear: [t]he defense cannot succeed when the legislature itself has made a ‘determination of values.’"

The Court was convinced that by listing government approved research projects as the sole exception to the Controlled Substances Act, Congress had determined that marijuana had no medical benefits worthy of exemption. There was, however, credible evidence presented to the court of appeals that some people have medical conditions for which the use of marijuana is necessary to treat or alleviate pain and other symptoms. The High Court’s response was that because Congress had

96. Id.
98. Id. 21 U.S.C. § 841(a) (2000) (specifically prohibiting the distribution, manufacturing, and possessing with the intent to distribute a controlled substance).
99. Id. § 823(f).
101. Id. at 483 (instructing the lower court to consider the criteria for a medical necessity exception to the Controlled Substances Act).
102. Id. at 491.
103. Id.
104. Id. at 493.
already spoken through statute stating that there was no basis for a medical necessity exception, it was an error for the court of appeals to even consider such evidence.\textsuperscript{106} But, by analogy, Congress has determined that age discrimination in employment and discrimination against the disabled is contrary to our values. However, the Supreme Court has stated that states cannot be sued for violation of some of these federal statutes based on their sovereign immunity.\textsuperscript{107} Why is allowing for a medical necessity any different?

It is clear that Asa Hutchinson, the Drug Enforcement Administration (DEA) Chief, has no intention of ending this War. On February 13, 2002, according to press reports, he was loudly jeered by city of San Francisco leaders while making a speech at the Commonwealth Club.\textsuperscript{108} They shouted “liar” when he said “science has told us so far there is no medical benefit for smoking marijuana.”\textsuperscript{109} The audience was unhappy because hours before the speech federal agents raided the Harm Reduction Center that provided marijuana treatment to 200 patients a day referred by doctors for pain reduction treatment.\textsuperscript{110} The timing raises interesting moral questions about the DEA’s enforcement decisions. A recent editorial entitled “Disinformation” was sharply critical of the DEA ads recently used during the Super Bowl and the NCAA Final Four claiming that drug users are supporting terrorists.\textsuperscript{111} The editorial suggested instead that the government’s war on drugs is responsible for inflating the price of drugs thereby “funneling huge profits to terrorist organizations.”\textsuperscript{112} The editorial suggested that the ad should say of Asa Hutchinson, “I arranged for someone’s terminally ill mother to experience excruciating pain until she dies.”\textsuperscript{113}

F. “Special Needs” For a War on Choir Singing

Recently, the Supreme Court dealt with the question of whether school districts may constitutionally conduct warrantless searches of all

\begin{thebibliography}{99}
\bibitem{Oakland} \textit{Oakland}, 532 U.S. at 490.
\bibitem{Id.} \textit{Id.}
\bibitem{Id.} \textit{Id.}
\bibitem{Id.} \textit{Id.}
\bibitem{Id.} \textit{Id.}
\end{thebibliography}
public school children participating in extracurricular activities. The Tenth Circuit had decided that the school’s testing program violated the Fourth Amendment because a school “must demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to testing, such that testing that group of students will actually redress its drug problem.” In Earls v. Board of Education, the High Court’s majority reversed the Tenth Circuit holding that school districts may conduct such suspicionless searches based on a “special needs” exception to the requirement that the government must have probable cause. What makes the decision most troubling for privacy advocates is that the so-called “special needs” exception had generally been reserved for suspicionless drug testing of people who are performing jobs that have the potential to do great harm to the public—such as airline pilots, railroad engineers, DEA agents, and others involved in regulated industries.

We think the decision also reflects the Court’s attitude, previously discussed, that drugs are bad and we have to do something, anything, about them. Justice Thomas’s decision clearly denies any notion that children have an expectation of privacy in school. The kids in the choir obviously do not have to shower and change clothes together like the ballplayers in Vernonia School District 49J v. Acton. But he said they “are routinely required to submit to physical examinations and vaccinations against disease,” and “some of these clubs and activities require occasional off-campus travel and communal undress.”

116. See Earls, 536 U.S. at 822.
118. See supra note 42 and accompanying text.
119. Even Justice Breyer (concurring) says “I cannot know whether the school’s drug testing program will work.” Earls, 536 U.S. at 842. This is but another relevant indication of the Court’s “we don’t know what to do but we have got to do something, even if its wrong,” approach.
120. 515 U.S. 646, 657 (1995). The majority goes to great length to describe the expectation of nudity and lack of privacy in the football team’s dressing room. They say an “element of ‘communal undress’ is inherent in athletic competition.” *Id.* Apparently, the purpose is to argue that nudity is common to and accepted by teenagers. But is it amongst the shy and modest in the choir and computer club? The Court has been watching too many Britney Spears videos.
122. *Id.*
those minimal exposures hardly rise to the level of the exposure found in
the typical football dressing room. The good Justice then made perhaps
the most outlandish claim of all, that having to urinate in a cup with a
faculty member listening, only constitutes a "negligible" intrusion.\textsuperscript{123}
Even Justice Breyer in his concurring opinion said that there was no
agreement that urine sampling is a "negligible" infringement of
privacy.\textsuperscript{124} Forget the embarrassment of the targeted kid for a moment,
what about the intrusion on the sensibilities of the teacher. Who in their
right mind (except some fetish monger) wants to listen to fifty kids
urinate in cups? To the majority, however, urine tests are no different
than math tests. Finally, subjecting the shy and the modest, the choir
member or computer club nerd, to the same privacy infringements as the
well-built, aggressive football player\textsuperscript{125} is just silly and can be harmful.\textsuperscript{126}

In \textit{Chandler v. Miller},\textsuperscript{127} a case involving the drug testing of political
candidates, Justice Ginsburg said of the "special needs" exception, "[t]he
proffered special need for drug testing must be substantial."\textsuperscript{128} The
majority in that case decided that Georgia had not demonstrated a
substantial problem of drug use by its elected officials.\textsuperscript{129} It is puzzling
therefore, as to where the majority found substantial state interest in
\textit{Earls}. Only three of 797 students in the rural Oklahoma school tested
positive for drug use.\textsuperscript{130} The school board president said that some
people called him to discuss the drug problem.\textsuperscript{131} Where was the
objective evidence of the problem? Even the school superintendent
repeatedly described the drug use situation as not "major."\textsuperscript{132} The
argument that there was a compelling state interest greater than that in
\textit{Chandler} is difficult to support when there is no smoke of battle present.
The majority appears to have gutted \textit{Chandler}'s balancing test in favor of

\textsuperscript{123} \textit{Id.} at 832. After having admitted that "[u]rination is an excretory function
traditionally shielded by great privacy." \textit{Id.} Now, apparently everywhere but public
schools.

\textsuperscript{124} \textit{Id.} at 841.

\textsuperscript{125} "School sports are not for the bashful." Vernonia Sch. Dist. 49J v. Acton, 515
U.S. 656, 657 (1995). But the choir, sewing, or computer club might be. The majority is
mixing the well-known apples and oranges.

\textsuperscript{126} Justice Ginsburg (dissenting) makes this point citing a brief by the American

\textsuperscript{127} \textit{Id.} at 305 (1997).

\textsuperscript{128} \textit{Id.} at 321.

\textsuperscript{129} \textit{See id.}

\textsuperscript{130} \textit{Earls}, 536 U.S. at 835.

\textsuperscript{131} \textit{See generally id.} at 822.

\textsuperscript{132} \textit{Id.} at 843.
making the government interest in forbidding drug use (as slight as it is here) the only relevant "special needs" factor.

But Justice Thomas was not much deterred by the lack of evidence of a real drug problem. Not in the least. He apparently believes that even if there is no current problem, there might be a future one to be deterred. He said, "[i]ndeed, it would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program designed to deter drug[s]." 133 This is an additional clue that the balancing test of Chandler and Vernonia has been scrapped in favor of considering only the hysterical government interest in stamping out drug use.

And for good measure, the majority cut the head off the public safety requirement that formally governed many of the "special needs" exceptions. Students, said the majority, are a danger to themselves because of their tendency to use drugs. 134 And that self danger is enough to support suspicionless drug testing. The decision is troubling because it suspends the Fourth Amendment requirements in favor of a "we got to do something" attitude toward drug use. Again, the remedy is worse than the bite. Finally, is this an appropriate way to educate kids? Should we not teach them to respect the Constitution and value liberty? To make a kid urinate in a cup just to sing in the choir is silly, offensive, and everyone, including the kid, knows it. As Justice Breyer said, one of the tasks of schools is to teach the habits and manners of civility. 135 This is hardly accomplished by treating schools as prisons and kids as prisoners.

III. A CASE FOR THE LEGALIZATION OF DRUGS

The war on drugs in the United States has been an abject failure. The government spends billions of dollars in an attempt to stop the smuggling of drugs across the border, to stop the sale of these substances within the country, and to warn teens of the dangerous side effects. According to the budget of the United States Government, the 2001

133. Id.
134. Id. "[T]he need to prevent and deter the substantial harm of childhood drug use provides the necessary immediacy for the school testing policy." Id. So a problem is not needed? It is enough that some other school, somewhere, has a problem like that of the out of control student use found in Vernonia. See Vernonia Sch. Dist. 49J v. Acton, 515 U.S. 656, 648 (1995).
135. Earls, 536 U.S. at 840 (Breyer, J. concurring) (citing CHARLES A. BEARD & MARY R. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)).
proposal for drug control programs is approximately 19.2 billion dollars.\textsuperscript{136} The use of illegal substances continues, however, and reports suggest that children are likely to try drugs for the first time with their parents.\textsuperscript{137} In fact, “one in five people in treatment for substance abuse say they took drugs with their parents.”\textsuperscript{138}

The war on drugs is a costly project, and the results of the current efforts have not been promising. Both citizens and the government should ask whether society would be better off if drugs were legal. Under a system of legalization, usage could be monitored; drugs would become safer; crime would decrease; and the risk of overdose would be greatly reduced. Studies also suggest that in addition to providing these benefits to society, any difference in health care costs would be minor, and may be negative.\textsuperscript{139}

In order to present a comprehensive argument for the legalization of drugs, the issue needs to be approached from several points of view. The discussion will begin with an examination of whether or not the prohibition of these substances infringes on the liberty of the person. From there, this article will proceed with arguments from a sociological and psychological perspective. The effect of legal drugs on a first time user and an addict will then be addressed. Finally, the issue of legalization will be examined from an economic point of view, which will provide a valid, rational, and objective argument for the legalization of drugs.

In order to focus this topic more narrowly, cocaine and crack will be used as representative drugs. These substances are purely recreational and therefore all of the arguments for marijuana that revolve around medicinal uses will be avoided. Also, the two drugs are different versions of the same chemical. Economic analysis can predict their relative consumption based on the strength of each substance, the high that each creates, and the legal penalties for possession.

Crack is a form of cocaine that can be smoked. It is relatively easy to manufacture, without requiring expensive equipment. Powdered cocaine hydrochloride is mixed with baking soda to form a paste, which

\textsuperscript{137} Adam Marcus, \textit{Drug Use a Family Affair: Mom and Dad are drug partners for 1 in 5 addicts, says study}, \textit{available at} http://webtalk.subportal.com/health/Drugs_Alcohol_Tobacco/Drugs_and_Kids/101667.html (Aug. 24, 2002).
\textsuperscript{138} \textit{Id.}
is then heated until it is dry.\textsuperscript{140} This process of heating the mixture removes the hydrochloride salt, leaving the crack in a rock-like form.\textsuperscript{141} In contrast to cocaine, which is either snorted or injected, crack is smoked in a marijuana or tobacco cigarette or a small glass pipe. Cocaine and crack have the same effect on the brain since both cause an increase in the level of dopamine, but crack smoke is quickly absorbed in the lining of the lungs and enters the brain in larger doses than cocaine.\textsuperscript{142} This creates an intense high that lasts for approximately fifteen minutes, followed by a "crash" in which the user experiences depression and an intense drive to smoke more crack.\textsuperscript{143} While early street reports indicated that crack was ninety percent pure cocaine, research has determined that crack still contains high levels of adulterants, making it only five to forty percent pure cocaine.\textsuperscript{144} Cocaine abuse causes several symptoms including severe weight loss, insomnia, and psychosis.\textsuperscript{145} "Overdose reactions, more common with intravenous abuse, are marked by tremors, delirium, and convulsions. Fatalities do occur after either acute respiratory failure or circulatory collapse."

According to the Statistical Abstract of the United States, in 2000, 0.5\% of the population, aged twelve and older, reported that they were current cocaine users and 0.1\% of the same age group reported that they currently used crack.\textsuperscript{146} In the same year, the Sourcebook of Criminal Justice Statistics reported that across forty-one cities in the United States, thirty-one percent of arrested males and thirty-three percent of arrested females tested positive for cocaine use.\textsuperscript{147} One might wonder why the numbers of cocaine users are much higher for arrestees than for the general population. One reason might be that the data from the Statistical Abstract of the United States came from a computer-assisted interview.\textsuperscript{148} It is likely that many people were afraid of honestly

\textsuperscript{140} Steven R. Belenko, Crack and the Evolution of Anti-Drug Policy 3 (Greenwood Press 1993).
\textsuperscript{141} Id.
\textsuperscript{142} Id. at 4.
\textsuperscript{143} Id.
\textsuperscript{144} Id. at 6.
\textsuperscript{145} George Beschner & Alfred S. Friedman, Teen Drug Use 55 (Lexington Books 1986).
\textsuperscript{146} Id.
\textsuperscript{149} Statistical Abstract, supra note 147.
disclosing their cocaine or crack use. When the prisoners were arrested, they were given drug tests which are much more accurate than self-reported data.\textsuperscript{150} Another possibility may be that people with a history of crime, who are less afraid of imprisonment, are more likely to engage in other illegal behaviors. A law-abiding citizen, who would be deterred by the threat of jail time, might be less likely to use illegal drugs. Alternatively, it is possible that people who use cocaine and crack are more violent, and therefore commit more crimes. When discussing the effect of a system of legalization, the statistics regarding these drugs and crime must be examined in further detail.

Let us begin by examining whether the prohibition of cocaine and crack infringes on the liberty of the person. Two arguments must be addressed: 1) whether the government has the right to infringe on your liberty if you are engaging in a behavior that is harmful to yourself, and 2) whether you are really at liberty to make a rational choice for yourself when you are already addicted to cocaine or crack. In his work, \textit{On Liberty}, John Stuart Mill examined the effect of laws against the sale of poisons, which is equally applicable to the sale of drugs, and thus the terms will be used interchangeably.\textsuperscript{151} He specifically stated that these laws infringe upon the liberty of the person wishing to purchase the drugs.\textsuperscript{152} One might object by saying that it is the government's duty to protect people from accidentally injuring or killing themselves. To this, Mill replies that "when there is not a certainty, but only a danger of mischief, no one but the person himself can judge of the sufficiency of the motive of which may prompt him to incur the risk."\textsuperscript{153} Mill suggested that labeling drugs would be a convenient way of informing the person of possible dangers without infringing on the person's liberty.\textsuperscript{154} Mill also stated that by requiring the seller to enter into a register the name of the buyer, the amount of the sale, the quality of the goods, etc., that the sale of the drugs could be monitored.\textsuperscript{155} This would not hinder the legal sale of drugs, but would make improper use of these substances more difficult.\textsuperscript{156}

\begin{flushleft}
\textsuperscript{150} U.S. Dept. of Justice, supra note 148.
\textsuperscript{151} JOHNSTUART MILL, ON LIBERTY (W. W. Norton & Company 1975).
\textsuperscript{152} See id. at 88.
\textsuperscript{153} Id. at 89.
\textsuperscript{154} Id. at 89-90.
\textsuperscript{155} Id. at 90.
\textsuperscript{156} Mill, supra note 153, at 90.
\end{flushleft}
If one agrees that in general the government should not infringe on the right to engage in recreational activities, should the government be allowed to step in if the activity is potentially harmful to yourself? Walter Block compares the use of drugs to the issue of wearing a seat belt.\textsuperscript{157} Is the infringement on human freedom small enough and the social good large enough to warrant government intrusion? Block argues that you cannot quantify these variables and that they involve interpersonal utility comparisons.\textsuperscript{158} Moreover, Block notes that there are many things, besides drugs and driving without seat belts, that are harmful—including chocolate, hang gliding, boxing, and automobile racing.\textsuperscript{159} If the government is allowed to prevent you from harming yourself, these activities would also have to be outlawed.\textsuperscript{160}

In the previous discussion, we assumed the individual knows that the action in which he is engaging is harmful, even potentially deadly. People can choose whether they would enjoy the benefits of hang gliding more than the risks, and the government should not prevent them from engaging in this activity. The question arises as to whether cocaine or crack addicts know that what they are doing is harmful. At the point that the person becomes addicted, is he at liberty to choose to no longer engage in this harmful behavior? Is he, in a sense, forced to continue the behavior? From an economic point of view, if you are forced to trade, you cannot gain from the exchange. Block finds this problematic because even under the threat of "your money or your life," you still have the opportunity to gain.\textsuperscript{161}

If you value your life over your money, you are better off if you are allowed to choose life over money. Consider an addict offered one ounce of his favorite narcotic for $100. Are we to

\textsuperscript{158} \textit{Id.}
\textsuperscript{159} \textit{Id.}
\textsuperscript{161} Block, \textit{supra} note 157, at 435.
say that he would be better off, from his own perspective, if he could not make this choice? If the person in danger of being murdered is made better off by being given a choice, why does this not apply to the addict?¹⁶²

In this sense, the addict is not genuinely forced, and therefore is seen to be at liberty to make the decision for himself.

Legalizing cocaine and crack would have significant sociological and psychological effects on society. Lawrence Kohlberg identified common stages of moral development for people.¹⁶³ Not everyone reaches all of the stages; many people stop at stage four, which Kohlberg defines as the law-and-order-maintaining stage.¹⁶⁴ Justice at this stage is defined “in terms of a system, a social order of roles and rules that are shared and accepted by the entire community and that constitute the community.”¹⁶⁵ People obey the law for the sake of maintaining social order, and they believe that “if one person starts breaking the law, everyone will, and chaos will result.”¹⁶⁶ People in this stage are not interested in rationally creating laws; they are simply interested in maintaining the current system of rules.¹⁶⁷ Under this theory, one might argue that many people have not tried drugs simply because they are illegal. Even if cocaine and crack were completely safe, individuals who have reached the law-and-order stage would still not try these substances as long as they remained illegal. If cocaine and crack were legalized, people would be more inclined to try them. The overall usage in the country would, therefore, increase.

An interesting psychological aspect of legal drug use is the “gateway effect.” Individuals, it is argued, begin using drugs that are legal, and these substances are a “gateway” to illegal drug use.¹⁶⁸ A person might begin using cigarettes, which are legal, accessible, and inexpensive. He may find that he likes the stimulant aspect of nicotine and begin abusing other tobacco products. Ultimately, he may begin using illegal stimulants, such as speed, to get the same high. If cocaine or crack were legalized, individuals may begin using these substances and progress to

¹⁶²  Id.
¹⁶⁴  Id. at 151.
¹⁶⁵  Id. at 150.
¹⁶⁶  Id. at 151, 153.
¹⁶⁷  Id. at 153.
products, such as heroin, that might remain illegal. This scenario, accompanied with Kohlberg’s theory on the law-and-order stage, would seem to suggest that cocaine and crack should remain illegal. Economic analysis, however, offers an alternative point of view.

In order to effectively present this argument from an economic perspective, some basic microeconomic concepts are required. In economics, demand refers to the quantity of a good that a buyer is willing and able to buy at various prices. Supply refers to the amount of the good that a seller is willing and able to sell at various prices. An inverse relationship exists between price and quantity demanded—as the price of the good increases, buyers are willing and able to buy less of the good. Buyers are less willing to purchase more units of the good at a higher price because as they purchase additional units of the good, the buyer begins to experience diminishing marginal utility from the good. The additional units only have enough value for the buyer at a lower price. Conversely, a positive relationship exists between price and the quantity of the good that suppliers are willing and able to supply. A particular supplier may only be willing to supply ten units of a good at a certain price, but if the price increases, his incentive to supply more of the good increases. Ultimately, the main point to understand is that at a low price, buyers are willing and able to buy more while sellers are willing and able to sell less. On the other hand, at a high price, buyers are willing and able to buy less and sellers are willing and able to sell more. This model works for any good, including cocaine. This basic economic analysis will be useful in observing the effects of various laws (or lack of laws) on the price of cocaine or crack, and understanding what effect changes in price will have on consumption and production patterns.

Having established the economic laws of supply and demand, these laws can be applied to the market for cocaine and crack. Economic analysis can be used to compare the price, demand, and supply in the illegal markets as well as in an expected legal market. It is important to

169. GENE CALLAHAN, ECONOMICS FOR REAL PEOPLE: AN INTRODUCTION TO THE AUSTRIAN SCHOOL 11, 67 (Ludwig Von Mises Inst. 2002).
170. Id. at 77-80.
171. Id.
172. Id. at 68-70.
173. Id. at 91-92.
174. Id.
175. MURRAY N. ROTHBARD, MAN, ECONOMY AND STATE 124-26 (Ludwig Von Mises Inst.1993).
understand how sellers set the prices for their drugs. First, in the sale of any good, the seller has to consider the costs of production. These may include costs for equipment, inputs, or labor. For a good such as cocaine or crack, however, these production costs are quite low. Production of crack does not require any special equipment and can be produced in a short period of time by one person. For cocaine, "of uncertain quality that now sells on the street for ten dollars, the cost of production is five to ten cents." The major costs in selling an illegal good such as cocaine include the threat of discovery, risk of seizure, and risk of punishment that may include fines and jail time. These are all costs to the seller that are taken into account in setting the price for illegal substances. Clearly, if cocaine and crack were legalized, these costs would disappear, and the costs of these substances would likely greatly decrease.

In the illegal market for cocaine and crack, buyers also face costs that exceed the dollar value of the good. First, there are costs associated with finding someone willing to sell you an illegal substance. These costs include the risk of assault and arrest. If a user is imprisoned, he will not earn an income for that period of time. The total monetary penalty for someone earning a higher income is therefore greater than for someone earning a lower income. The foregone wages and other foregone uses of one's time can be seen as a cost to the person who is imprisoned. "Second, the costs of use include the risks of drugs of uncertain potency, adulterants, and of some use techniques." Because cocaine and crack are illegal, it is more difficult to obtain information about the drug which is being purchased. They are not controlled by government standards, and suppliers are not required to disclose the strength of the drug or the quantities of adulterants. "Cutting agents can turn out to be any of various sugars, local anesthetics, or amphetamines; on occasion, rat poison has been used." Buyers who purchase these

177. BELENKO, supra note 140, at 3.
178. Niskanen, supra note 139, at 233.
181. Niskanen, supra note 139, at 234.
182. MILLER, supra note 179, at 37.
substances risk being poisoned by the adulterants and are left with no legal recourse to sue the seller.

Under a legal market, brand names would likely appear, and sellers would be led by market forces to label their product with a list of the ingredients and the potency. A recommended dosage could be set for cocaine and crack, similar to the way dosages are determined for cold medicines. Warnings could also be placed on the containers to inform users of the side effects of the substance, both in the short and long term. All of these measures would reduce the costs to buyers of cocaine and crack. By eliminating the risks associated with finding the product, and decreasing the risk associated with the chemical composition of the substance, the cost of taking the drug would decrease for the buyer.\textsuperscript{183}

One might argue that as the price of drugs falls, the quantity demanded of these substances will be greater. Remember that as price falls, the amount of a good that buyers are willing and able to buy will increase. An economic rebuttal to this argument is that to an addict drugs are a necessity, not a luxury. Therefore, drugs have a low price elasticity of demand (change in consumption relative to change in price) for the addict.\textsuperscript{184} Whether the price is increased or decreased, the addict is not likely to change his consumption by much. The price of cocaine or crack in a legal market, \textit{ceterus paribus}, would fall since these goods currently include a premium for the dealer to compensate him for the risk involved in supplying the product. By one estimate, legalization would lead to a sixty percent reduction in retail drug prices.\textsuperscript{185} With this fall in price, the sellers would be willing to sell less and buyers would, theoretically, become willing to buy more.\textsuperscript{186}

The cost for current addicts is based on the costs associated with finding a dealer in an illegal market, threat of arrest, and the danger of taking substances of unknown purity.\textsuperscript{187} Under a legal system, these costs to buyers would be reduced or eliminated. From the buyer’s point of view, the cost of the drug would decrease, and they would be willing and able to purchase more of the good at each price. In fact, consumption of drugs may double under a system of legalization.\textsuperscript{188} Estimates by other economists, however, indicate that the consumption

\begin{footnotesize}
\begin{enumerate}
\item 183. Niskanen, supra note 139, at 233-34.
\item 184. Block, supra note 157, at 435.
\item 185. \textsc{Henry Saffer & Frank J. Chaloupka}, \textsc{The Demand for Illicit Drugs}, (National Bureau of Economic Research Working Paper Series 1995)
\item 186. Callahan, supra note 169, at 77-80, 319-20.
\item 187. Niskanen, supra note 139, at 233-34.
\item 188. Id. at 241.
\end{enumerate}
\end{footnotesize}
of cocaine would increase only about fifty percent. As stated earlier, the change in demand for addicts may not change much with a change in price, but new users are likely to enter the market. Occasional users may also increase their consumption to be more frequent users.

If the taint of illegality is removed, demand would likely increase. Supply, however, would likely increase at a much faster rate due to the significant reduction in costs to suppliers as a result of the elimination of the risk of being apprehended, convicted, and punished. In Figure 1, D₁ and S₁ represent the market demand and supply before legalization, and the market-clearing price is P₁. After legalization, demand and supply would shift to D₂ and S₂, and the market-clearing price would decrease to P₂, which is significantly lower than P₁.

189. Saffer & Chaloupka, supra note 185.
191. Miller et. al., supra note 179, at 32-34. Most law enforcement efforts have targeted the suppliers of drugs, and the law typically creates greater penalties for selling a drug than for merely using it. Id. The reduction in the costs, therefore, is more significant for suppliers than for users.
192. The market clearing (or equilibrium) price is defined as the “price that clears the market when there is no excess quantity demanded or supplied; the price at which the demand curve intersects the supply curve.” Miller, supra note 179, at 215.
Figure 1

[Graph showing supply and demand curves with price points P1 and P2, and quantity points Q1 and Q2.]

S1
S2

Price

P1
P2

Quantity

D1
D2

Q1
Q2
The idea of increased consumption is enough for many people to argue that drugs should remain illegal. After all, Americans have invested a great deal of money and effort in the war on drugs with the goal of reducing consumption. The positive benefits of a legal drug system, however, should be considered. First, use of these substances could be carefully monitored. Currently, many countries are unable to monitor illegal drug deals even in their prisons. In 1994, the United Kingdom reported that forty-five percent of its inmates were using drugs in prison.\footnote{Drugs in Prisons: A Shock to the System, 340 THE ECONOMIST 54 (1996).} Canadian prisons experienced similar problems, noting that drugs sold for 500% of their street value behind bars, and many prisoners reported that their consumption actually increased while they were incarcerated.\footnote{Kevin Marron, High Times Doing Hard Times: Packed with Dealers and Substance Abusers, Canada's Prisons Have Become a Lucrative Market for the Drug Trade, 109 MACLEAN'S 13, 50 (1996).} One would imagine that prisoners' actions could be constantly monitored, and yet, illegal substance use is quite prevalent. Under a legal system, however, use of cocaine and crack could be monitored and recorded. As John Stuart Mill suggested, sellers could be required to document the specific details of their exchanges.\footnote{Mill, supra note 151, at 90.} This would not hinder the legal sale, but would make improper use of these substances more difficult.\footnote{Id.}

It is particularly important to note that monitoring the sales of legal cocaine and crack would also mean that the quality or purity would be controlled and subject to certain standards. The marketplace would prevent sellers from placing dangerous adulterants of unknown quantities into their products.\footnote{Cussen and Block, supra note 160.} Labeling the substances would also warn users of the possible dangers and side effects, and recommended dosages would likely mean fewer accidental overdoses.\footnote{Id.} Users would purchase their drugs from authorized dealers because of the security of knowing that the cocaine and crack are high quality.\footnote{Id.}

Even if consumption were to double, society might not experience any change in health care costs or accidental deaths, and any difference would likely be negligible. “A careful review of the available studies indicates that many of the adverse health effects of current drug use, maybe most of these effects, are due to the side effects of prohibition of
these drugs—overdose, adulterants, more risky use techniques, and a reluctance to seek early medical treatment.) This is not meant to suggest that there are no health risks associated with using cocaine and crack. In fact, the side effects of these substances, even when they are of known purity and consumed in small quantities, can be great. There is every reason to believe, however, that the major risks associated with consuming these substances, as stated earlier, would be reduced under a system of legalization. Even if the number of cocaine and crack users increased, "the potential net effects appear to be small, and may be negative."

Another common concern with legalized drug use is that productivity of individuals would decrease. Unfortunately, few studies have been done on this issue, and clearly, more research should be conducted. One small study concluded that "drug use (at least once in the prior year) appears to increase wages about 7 percent and that hard drug use may increase wages as much as 20 percent." Although this single study does not provide sufficient evidence to conclude that drug use has a positive effect on wages, it does indicate that it may not cause the sort of economic problems that individuals fear.

A major benefit to consider is that under a system of legalized crack and cocaine, crime would decrease. There are three types of crime associated with cocaine and crack use: systemic crime, psychopharmacologically driven crime, and economically compulsive crime. Systemic crime arises out of the process of drug distribution. It includes turf wars between dealers, "homicides committed within dealing hierarchies as a means of enforcing normative codes, robberies of drug dealers and the usually violent retaliation by the dealers or their bosses." This is the most common type of crime associated with drug use, and "has been referred to as a means to achieve ‘economic regulation and control’ in an illicit market." A study in New York in

201. Id. at 243.
202. Id. at 237.
203. Id.
205. Id. at 95
206. Id.
207. Id.
1988 found that “of 118 crack-related homicides that were studied, 85 percent were systemic in nature.” If cocaine and crack were legal, sellers and buyers could take their grievances to court, and disputes could be resolved by a judge. By legalizing these substances, systemic crime would be reduced, or possibly eliminated.

The second type of crime associated with cocaine and crack use is psychopharmacologically driven crime. This type of crime occurs when the behavior of a person is significantly altered, by becoming violent or irrational due to effect of the stimulant. Current data suggest that this is the least common type of crime associated with cocaine and crack. The same New York study found that “only three of the 118 exclusively crack-related homicides in the study were psychopharmacological in nature, and in two of these three cases the victim precipitated the crime.” By minimizing the harmful effects of cocaine and crack by using market standards and mandatory labels, the risk of violent behavior associated with these drugs might be reduced.

The final type of crime associated with cocaine and crack use is economically driven crime. When individuals commit crimes to obtain money to pay for their habit they are said to have committed an economically driven crime. Although this occurs on a small scale, a study found that most street users “reported that some of their living expenses and over 90 percent of their drug use were financed by crime, suggesting that street users rely on frequent, relatively small drug sales to support their crack cocaine habit.” Under a system of legalization, the price of drugs would decrease, due to the elimination of risk to sellers, and the need to commit crime to pay for cocaine and crack would be greatly reduced. If cocaine and crack were legalized, therefore, all three types of crime associated with this drug use would be reduced or eliminated.

The sellers in a legal cocaine or crack market will likely be different from those who currently deal in the illegal market. In any market, the sellers will be those with a competitive advantage over their competitors. In an illegal market, those who already have prison records or who have nothing to lose by going to jail will have a competitive advantage over

208. Id.
209. Id. at 98.
210. Id. at 99.
211. Id.
212. Id.
213. Id.
people who might sell, but who would be seriously hurt by the legal punishment. In a legal market, the sellers with the competitive advantage might be the pharmaceutical companies, the tobacco companies, and the pharmacies. These companies have economies of scale since they already have the machinery and labor to manufacture products in large quantities. The company would also be allowed to place its particular brand name on the cocaine or crack produced, and its reputation for quality would be carried over to this new drug.

Tobacco companies may compete with the pharmaceutical companies to produce these substances. Tobacco companies may be likely producers of cocaine and crack since they already have the experience of producing an addictive substance. They may start to advertise, as they now do with cigarettes, that their cocaine or crack contains no additives. Tobacco companies also have an advantage in producing cigarettes with low tar or low levels of nicotine as well as cigarettes which contain much higher levels. These companies may begin to manufacture cocaine and crack with different potencies and market one version as being safer.

Pharmacies are also currently in the business of dispensing drugs. Again, their reputation would be important when a buyer is choosing to purchase a drug. Many pharmacies advertise that they provide full product information about possible side effects and drug interactions. People purchasing products like cocaine and crack would want to know this information, and only a pharmacist would know if their other prescription medicines will react negatively with these substances.

After examining the issue of the legalization of drugs from several points of view, one can draw the conclusion that the current policy is ineffective and in need of reform. Given that the government spends billions of dollars on a program that is largely failing, individuals and society need to consider legalizing addictive substances like cocaine and crack. Under a system of legalization, usage could be monitored, drugs would become safer, crime would decrease, and the risk of overdose would be greatly reduced. Studies also suggest that in addition to providing these positive benefits to society, the health problems of the country would not noticeably increase, and the productivity of the country may not suffer if drugs were legalized.

215. Stigler, supra note 190, at 112, 123.
Social influence through television advertising and warning labels have been effective in reducing consumption of cigarettes and alcohol, particularly among pregnant women. There is no reason to believe that this same social influence would not apply to the consumption of drugs. No one denies that drugs are harmful. The case presented here, however, argues that while cocaine and crack may be harmful, they should not be illegal.

IV. AN OBJECTION

Let us consider an objection to the foregoing made by Alan Keyes, candidate for president on the Republican ticket for the 2000 election. In his “Drug war threatens U.S.,”218 Keyes set forth his views on this public policy. His perspective is particularly germane to our interests since of all the former presidential candidates, Keyes was by far the most outspoken advocate of individual responsibility; and this, in turn, might be considered an argument in favor of legalization. After all, prohibition is at bottom a paternalistic law, implying that the people cannot be trusted to look after themselves. However, even though Keyes acknowledged that legalization would appear to stem from his own philosophical premises,219 he did not at all conclude that addictive substances should be made legal. He started off by conceding that the “war on drugs” was out of hand and has led to many abuses: “In its current form, then, the war on drugs is indeed a threat to our liberty.”220 But this does not logically imply, he contended, that it ought to be repealed.221 Rather, borrowing a leaf from former President Clinton’s view on affirmative action, Keyes advocated

219. Id. He states, In fact, many people expect me to agree with the moral case against drug laws because I believe that respect by government for the moral capacity of free citizens is so central to the preservation of our way of life. I am indeed a moral libertarian—and I think America is founded on moral libertarian principles. But this does not mean that I believe our drug laws must be repealed on moral libertarian grounds.

220. Id.
221. Id.
the position that this war ought to be "mended, not ended." Keyes stated,

Does this mean that we should adopt the position that drug laws, and their reasonable and constitutional enforcement, are threats to our liberty? I don't think so. Rather, it means that we must insist that the drug enforcement effort cease violating the constitutional rights of citizens. There is no reason that the pursuit, apprehension, prosecution and punishment of drug traffickers need be any less solicitous of the constitutional rights of the suspected criminals than are the corresponding actions directed against suspected murderers and embezzlers.

But there are problems here. First of all, mere "insistence" will not do. There are good and sufficient reasons why the drug war has resulted in unwarranted seizures of property, rampant violation of privacy, and other violations of liberty. Keyes seems to think that these results of the war are incidental, not necessary. He is mistaken. The reason for the escalation is that the war has within it the seeds of its own destruction. Every time the DEA interdicts a shipment of contraband material, it drives up its price. But with the higher price, the criminal classes are given even greater impetus and incentives to pursue their activities.

Of course, this will lead to an exacerbation of hostilities, from both sides. The drug runners will escalate their weaponry, and bribery, and the police charged with eradicating them will have no choice but to step up their efforts as well. It is no wonder that under these circumstances the niceties of our constitutional protections will take a back seat. It is all well and good for Keyes to regret these excesses, and even to call for their removal, but a moment's reflection on the underlying causes of these abuses indicates that this is just so much idle chatter. It is akin to decrying man's inhumanity to man, or drunkenness, or jealousy, with a resolution that things be put right. These things, too, have strong causal antecedents, and all the protestations in the world will not put them right.

Secondly, his analogy between addictive substances on the one hand, and murderers and embezzlers on the other cannot be maintained. When the police capture either of the latter types of criminals, there is simply no impetus automatically created that promotes these activities. Indeed,

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the very opposite is the case. That is, the power of the police is demonstrated, and would-be malefactors are in effect given a warning to cease or desist, or face the penalties attached to capture.

Why the difference? In the case of addictive drugs, there is a vast market of people who demand these products. With less offered due to a capture, basic supply and demand analysis implies a higher price, attendant higher profits, and hence more incentive to continue in, and even expand the scope of business. But who demands embezzlement? Apart from Murder Inc., for which there is a demand, the same considerations do not apply to such capital crimes. Further, not only does killing for hire account for a very small proportion of all murders, but the masses of people—in contrast to addictive drugs—are strongly opposed to such acts. That is, far more people engage in the recreational use of drugs than commit murder or embezzlement. These are powerful disanalogies.

A more powerful argument for opposing drug legalization, in the view of Keyes, has to do with morality. To summarize: liberty is a most important goal for society, but it cannot be achieved or maintained without a core of morality underlying it. However, addictive drugs corrode morality, and hence liberty, at one remove. So, therefore, there is a logical contradiction in urging drug legalization on grounds of liberty, when to do so undermines the very liberty we are relying upon in the argument. But let us put this in Keyes’s own words, lest we be accused of misunderstanding or improperly characterizing his perspective. He stated,

There can be no liberty unless the moral foundation of liberty is safeguarded . . . .

. . . .

There was a time when we could avoid this negative effect of drug laws by doing without them—because the foundations of moral education made them unnecessary. There was a time when the great and decisive majority of young Americans were raised in morally upright families, God-fearing

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223. Keyes, supra note 218.
224. Id.
225. Id.
226. Id.
churches and sound schools, through which they were formed in moral precepts that led them to have contempt for the abuse of conscience and liberty that drugs represent. As long as these institutions were permitted to do their proper work, the rising generations simply did not have the problems of character that make young people vulnerable to the abuse of drugs. Because this was the condition of society for much of our history, the proliferation of drug laws in America did not occur until the latter half of the 20th century.

When a society begins to generate new laws, it is almost always a sign that it has previously begun to generate new evils. The rise of American drug laws has been a response to the rise of the new problem of drug abuse. This problem, in turn, arose because of our diminished national willingness to attend to the moral elements of education and child rearing.

This is why the undeniably negative implication of the drug laws cannot be escaped by simply repealing them. We have placed ourselves in this position by decades of moral laxity. The root of the drug problem was our excessive permissiveness in the moral formation of our children. But having allowed this to happen, we have limited the choices open to us now. A repeal of the drug laws will inevitably be interpreted as a further grant of permission for this kind of behavior. Whatever rhetoric of confidence in the moral capacity of our people cloaks such a repeal, it will in fact reinforce the moral destruction we are suffering. Accordingly, because we are not in the innocent condition that preceded the need for drug laws, but are rather in the morally compromised condition that continues to demand a collective response to the moral damage we have permitted, it is essential that we maintain the laws.\footnote{227}{Id.}

What we have here, then, in microcosm, is a debate between those who advocate the supremacy of liberty vis-à-vis virtue (e.g., libertarians) and those who see virtue as the mother, not the daughter, of liberty (e.g., conservatives).\footnote{228}{For an extended discussion of this issue, see George W. Carey, \textit{Freedom and Virtue: The Conservative / Libertarian Debate} (Intercollegiate Studies Institute 1998) (1984).}
There are several grave drawbacks to the Keyes’ conservative position.

1. Overgeneralization. If addictive substances are immoral and will lead to a weakening of the social will to maintain liberty, there are many more instances of this abuse than drugs. Cigarettes, alcohol, fatty foods, chess, sports, hang gliding, gambling, and sex can all be addictive, at least for some persons. Logical consistency dictates that Keyes must favor prohibiting all of these goods or activities. He cannot pick and choose; all must go by the boards. But if so, what of people’s liberty to do as they please, as long as they do not violate the rights of others?\footnote{229}

2. Pessimism. Keyes is far too pessimistic. He believes we will lose our liberties if drugs are legal because so many people will come under their influence, and zombies cannot be counted upon to uphold our rule of law. One problem with this is that there are already many addicts of heroin, cocaine and other such substances, and, while there are always risks to liberty, they do not seem to be emanating from this quarter. Rather, the greatest dangers to our freedom now that the risk of thermonuclear war has receded, stem from excessive regulation, high taxes, and political correctness. But drug legalization is part and parcel of too much government control. Keyes’ position is part of the problem in this regard, not part of the solution.

3. Alcohol. Why the radical difference in the position of conservatives such as Keyes on drugs and alcohol? Both are addictive. Both tend to deflect the attention of users from the niceties of protecting liberty. Both have all sorts of negative social, economic, and political repercussions. If our moral fiber is so greatly attenuated that society’s investment in liberty cannot afford to legalize drugs, why not go back to the prohibitionism of alcohol? That these two products would be treated so differently is either evidence of failure to carry a chain of thinking to its logical conclusion, enslavement to the status quo, or hypocrisy.

According to Keyes,

[drug abuse, and the public response to it, raises a similar challenge. Because freedom doesn’t just require that we refrain from assaulting each other. It also requires that we acknowledge our duty to participate as rational agents in the great project of

\footnote{229. See MILL, supra note 151.}
self-government. That means that one of the requirements of freedom is a clear head.\textsuperscript{230}

Clear head? But alcohol certainly addles the brain, as much or more than, say, marijuana. Have we learned nothing from our disastrous experience with prohibition?

4. History. As a matter of historical fact, our drug laws were enacted not in order to safeguard freedom, but as a racist, anti-oriental measure.\textsuperscript{231} The prime target of this legislation were Chinese opium dens.\textsuperscript{232}

5. Imprimatur. Keyes has also stated,

A repeal of the drug laws will inevitably be interpreted as a further grant of permission for this kind of behavior. Whatever rhetoric of confidence in the moral capacity of our people cloaks such a repeal, it will in fact reinforce the moral destruction we are suffering. Accordingly, because we are not in the innocent condition that preceded the need for drug laws, but are rather in the morally compromised condition that continues to demand a collective response to the moral damage we have permitted, it is essential that we maintain the laws.\textsuperscript{233}

The idea, here, is that man-made law puts some sort of societal imprimatur on behavior. If legal, it is approved; if illegal, disapproved. Since reasonable men can disapprove of addictive drugs, it is only responsible to ban them by law.

But if the law ought to prohibit everything of which moral men disapprove, again, there will be a very long list of proscribed activities and products. Further, if the law has such a powerful effect on moral behavior, and moral behavior is the bed rock of liberty, then not only should the law prohibit that which is bad, it ought also to compel what is good. For example, we ought to have compulsory prayers, religion, teeth brushing, milk drinking, etc. But if we do this, we will have gone a long way from promoting liberty, presumably the point of the entire exercise.

\textsuperscript{230} Keyes, supra note 218 (emphasis added).


\textsuperscript{232} \textit{Id.}

\textsuperscript{233} Keyes, supra note 218.
6. Licentiousness. Keyes accuses the legalization argument with a "confusion of liberty with licentiousness." He stated,

Liberty is not an abstract right to do whatever we feel like without regard to the consequences. It especially does not mean this in those areas where the consequence of abuse is to destroy liberty. If we want to hold on to liberty, then we must limit those abuses that will destroy it. We can't have it both ways. This means that at some level, in the laws of a free society, limits must be set which respect the requirements of freedom.\(^{234}\)

On the contrary, there is no "confusion of liberty with licentiousness" in the libertarian position.\(^{235}\) Rather, in this perspective, liberty exists not only to protect non-debatable activities (such as, brushing teeth, eating apples, and tying shoelaces), but also "licentious" ones, such as engaging in what might be considered immoral victimless crimes, such as the use of addictive drugs, alcohol, pornography, prostitution, gambling, etc. If liberty can only protect us when we engage in the former set of acts, but not the latter, then what good is it? It is simply not liberty at all.

But it is a straw man argument to interpret this view as supporting the doing of "whatever we feel like without regard to the consequences." There is no such thing as liberty, for instance, to engage in murder, rape, theft, or arson, for to do these things is to violate the rights of others to be free from aggression and invasive violence.\(^{236}\) In our view, decriminalization of voluntary drug use will enhance liberty for all. It is time to approach the drug war from a philosophical and economic perspective and to disarm the drug warriors and abate their violence to liberty.

\(^{234}\) Id.