*659 THE IMPORTANCE OF BEING MORE THAN EARNEST: WHY THE CASE FOR DRUG LEGALIZATION REMAINS UNPROVEN

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LADY BRACKNELL: Ahem! Mr. Worthing, after careful consideration I have decided entirely to overlook my nephew's conduct to you.

JACK: That is very generous of you, Lady Bracknell. [FN1]

Part, no doubt, of the appeal of arguments for legalizing recreational drugs is the generous spirit in which they are usually advanced. Some, like Mayor Kurt Schmoke, have risked their entire political careers to advocate decriminalization. [FN2] Others show generosity not so much in the risks they take as in the fundamental character of their rationale for change.

This latter group includes Professor Steven Duke, who, both in his recent book with Albert Gross [FN3] and in his lead commentary [FN4] here, displays an unremitting commitment to redefining the debate on drugs. He powerfully catalogues how possibly cynical legislators have turned drug-prohibition statutes into dangerous instruments permitting use of the death penalty and other "savage" criminal punishments against politically powerless targets [FN5]-while civil forfeiture statutes threaten unwitting *660 members of the middle class, guilty and innocent alike. [FN6] His approach, far from rigidly academic in character, attempts to assess realistically what occurs in the poorest neighborhoods in this country as a result of the prohibition of heroin, marijuana, and cocaine. [FN7] He argues fervently for greater respect for the "Judgment of Individuals" and "the Right to Choose How to Live One's Life." [FN8]

Duke's frank avowal of these libertarian sentiments-combined with his balanced willingness to consider reforms short of outright legalization of all recreational drugs, [FN9] and his plea that "we should try to help any drug abuser who wants help" [FN10]-gives his approach serious weight and charm.

Nevertheless, after ten years of working with homeless street kids, [FN11] I have reached settled views in opposition to legalisation, at *661 least legalization of hard drugs such as cocaine and heroin. [FN12] For if Duke has succeeded in exposing many of the excesses of the war on drugs, he has failed to address a variety of serious questions about the consequences of wholesale retreat. In this response it is not possible to undertake a full assessment of his case for legalization, much less to consider fully the state of the debate over drug legalization that has raged for at least a decade, [FN13] but some of the questions about ending prohibition deserve at least to be posed.

First, I will consider key components of Duke's arguments about the nexus between drugs and crime, both historically and in the present, and thus offer at least a limited critique of his approach to a "cost-benefit" analysis in
this area. Second, I will return to questions I have asked in the past about the effect of drug legalization on children to see whether Duke provides any salient answers. Finally, I will briefly respond to the moral arguments sounding in "individual rights" that Duke advances.

I. DRUGS AND CRIME

Reducing crime, for most Americans, is a matter of the highest priority. Duke's case for legalization shrewdly presents itself as a response to that concern with a series of empirical assertions that all carry at least a scent of plausibility: (1) that crime has "nearly doubled" since Richard Nixon declared the war on drugs in 1973; (2) that "simultaneous ascents in drug war budgets and crime rates are not coincidental," because the "drug war causes crime"; (3) that because drugs are illegal, they cost more to buy, and the "motivation to steal and rob" leads to a vast increase in theft and other "acquisitive crimes" in order to "feed drug consumers' habits"; and (4) that "Systemic Violence" and "Proliferation of Deadly Weapons" are also caused, not cured, by our prohibition regime. Furthermore, Duke declares the fear that ingestion of heroin, marijuana, or cocaine causes crime to be greatly exaggerated, with "very little crime ... generated by the mere use of these drugs"-though Duke does acknowledge that cocaine "occasionally triggers violence." He argues that none of these illicit drugs are as criminogenic as alcohol and that the prohibition of the former leads to increased consumption of the latter, thus generating, on balance, more crime. Above all, he urges that we should have learned our lesson about the inevitable increase in crime and violence resulting from criminal anti-drug strategies from the "unprecedented" increase in crime that marked our experiment with alcohol prohibition from 1920 to the end of 1933.

Before assessing any of these arguments, of course, it is important to acknowledge, as Duke appears only somewhat grudgingly to do, that assertions about causation of crime are notoriously difficult: for example, the debate over heredity versus environment as the primary "cause" of crime remains highly inconclusive. Likewise, human aggression has been blamed on gender, racism, erotica, drugs, and violent programming on television, while crime rates in general are hostage to simple fluctuations in the percentage of adolescents in the population along with unemployment and breakdowns in family life. In asserting that drug prohibition caused the crime which followed it, Duke risks, although pardonably, falling into a classic post hoc propter hoc fallacy. Occasionally it will be worth returning to the problem of rival causal factors, but for the sake of argument it is certainly worth examining our experience with prohibition of alcohol and other drugs to see whether it supports Duke's assertions.

A. Alcohol Prohibition and the Lessons of the 1920s

Central to Duke's historical account of drug prohibition is his characterization of the 1920s as a decade racked with violence and social disintegration, with the adoption of the Twenty-First Amendment bringing substantial benefits. Even more importantly, he uses the failure of the prohibition "experiment" as support for his analysis of the effects of prohibition of marijuana, heroin, and cocaine.

Yet the evidence of a crime epidemic fairly attributable to Prohibition is far weaker than Duke would have us suppose. It rests heavily on the assertion of James Ostrowski that "the murder rate rose with the start of Prohibition,... then declined for eleven consecutive years when Prohibition ended." Yet that statement, while literally true, tells, as Ostrowski himself glancingly acknowledges, only a highly misleading part of the story of murder rates during this century. A careful look at the same historical statistics used by Ostrowski suggests a remarkably different historical account of Prohibition's effects.

*664 Figure 1

Annual homicide rates for the United States from 1900 to 1970 are shown in Figure 1. As Ostrowski claims, the rate of both murders and assaults by firearm climbed during the period of Prohibition (from 1920 to 1933), with a 35
percent increase in the murder rate from the level of 1919. [FN35] Yet compare those figures to the same ones for
the decade immediately prior: in 1919 the murder rate stood 56 percent above the murder rate in 1910 and 500
percent higher than the rate in 1900. [FN36] If Ostrowski and Duke wish to infer anything from these trends in
homicide rates, then they should conclude that Prohibition dramatically slowed a radically increasing homicide rate
in the early part of the century. Indeed, other scholars of the era have concluded simply that *665 "t here is no
convincing evidence that Prohibition brought on a crime wave." [FN37]

Duke's analysis is all the more unpersuasive because of its failure to take into account two enormously important
historical events that could easily explain changing crime rates. First, he neglects to mention that more than half of
the increase in crime between 1919 and 1933 occurred in the years 1930 through 1933, [FN38] during the deepest
depths of the Great Depression. Perhaps even more important—because more relevant to crime rates throughout the
entire first half of the century—he fails to consider the impact of the adoption of America's first highly restrictive laws
on immigration in the early 1920s, and their final effectiveness in the 1930s. Thus the immigration rates (per 1000
residents) were 10.4 for the decade from 1901 to 1910, 5.7 from 1911 to 1920, 3.5 from 1921 to 1930, and only 0.4
for 1931 to 1940. [FN39] This slowing rate of immigration coincides far better with changes in homicide rates than
does adoption of Prohibition. Additionally, this suggests the danger of ignoring rival causal factors. It could be that
changing crime rates in the first four decades of this century were attributable to enormous social changes—in
particular, tumultuous economic fluctuations combined with record numbers of often destitute immigrants.

Even if we concede, however, that Prohibition "caused" an increase in crime, what exactly would it prove?
Perhaps, as Duke implies, it shows that all government prohibition of any recreational drug is doomed. Or perhaps it
suggests, as the Panel on Alternative Policies Affecting the Prevention of Alcohol Abuse and Alcoholism concluded
in its 1981 report, that "[d]rinking customs in the United States are strongly held and resistant to frontal assault." [FN40]
If that is true, our nation's negative experience with alcohol control points to two possible conclusions very
different from Duke's. First, even if history shows alcohol to be, as Duke repeatedly asserts, the worst of the popular
recreational drugs, [FN41] it has such a unique place in our national history *666 and psyche that our experience
with it provides little guide to current policymaking on other drugs. [FN42] Alternatively, alcohol's stubborn
presence may simply suggest that we must, if at all possible, avoid having the use of any other recreational drugs
become so customary that direct controls on their distribution and abuse will become impossible.

B. The "War on Drugs" and Crime

If Duke's account of Prohibition as a "cause" of crime is unpersuasive for the 1920s, his argument becomes wholly
insupportable in our own era. For once we have accepted his view that "benign neglect" of illicit drug use prevailed
until 1973, when the war on drugs began in earnest, [FN43] the kind of empirical evidence on which he relies points
overwhelmingly in a direction he would likely find quite surprising-toward, if anything, the conclusion that the war
on drugs has suppressed crime.

For example, the homicide-rate trends that Duke favors for judging the 1920s suggest a rather favorable view of
recent drug policy. From 1960 to 1972, the last years prior to the drug war, murder and non-negligent manslaughter
rates climbed 76 percent, including a 55 percent increase for the years 1965 to 1970 alone. [FN44] By contrast, from
1972 to 1980, homicide rates rose only 13 percent and from 1980 to 1992, they declined 9 percent, to a level
equivalent to that of 1972. [FN45] Far from suggesting that the war on drugs was responsible for greater violence in
*667 our society, these rates whisper that such violence is a legacy of the "benign neglect" of drugs that occurred in
the late 1960s. [FN46]

Moreover, Duke's thesis does not appear to fare well when glancing at the evidence that he presents. Duke's
assertion that "violent crime rates have nearly doubled" in the period since President Nixon declared the "war on
drugs" in 1973 [FN47] relies wholly on F.B.I. data that reports "offenses known to police" [FN48]—data which, of
course, is subject to a variety of confounding variables, in particular the willingness of the public to report crimes,
which may in turn be a function of the number of police and other criminal justice system employees available to
take their reports. [FN49] Worse, his evidence neglects the fact that this data shows a 150 percent increase in violent
crime for the ten year period from 1963 to 1973. Duke never bothers to explain how such crime could increase more
during the last ten years of "benign neglect" than it did in the twenty years thereafter. [FN50] Finally, the F.B.I.'s
"Total *668 Crime Index" has actually shown a significant decrease since 1980, [FN51] which, as I will shortly
argue, [FN52] is a better year for dating the beginning of the war on drugs.

Since 1973, happily, a better tool than the reported-to-police figures has been available: the annual National Crime Victimization Survey conducted by the Department of Justice. [FN53] These annual surveys can hardly be considered definitive measures of crime; [FN54] nevertheless, they do not suffer from the same reporting and resource limitations as the previously available statistics. [FN55] A quick glance at the trends they reflect reveals how far Duke and other proponents of legalization must travel before their more-crime-because-of-drug-prohibition contentions can be supportable.

Again, it is important to recognize the extreme difficulty of correctly inferring anything about crime "causation" from broad statistical measures, but given Duke's reliance on those measures, it seems fair to examine them for whatever they might reveal about his thesis.

By the constant measure of victimization displayed in Figure 2, crime victimization has decreased across the board since the late 1970s. [FN57] During the same period, the rate of removal of cocaine and heroin by law enforcement from the domestic market, also shown in *670 Figure 2, indicates that the beginning of a "war" on illicit drugs only began in earnest in the early 1980s, [FN58] at about the same time victimization rates began to fall rapidly. Most significantly, victimization of Americans by theft—the crime most commonly related (because of drug consumers' obvious need for cash under the prohibition regime) to the drug "war" [FN59]—declined more than 35 percent from 1979 to 1992. [FN60] Victimization by violent crime fell nearly 7 percent during this same period [FN61]—paralleling the fall in homicide rates. [FN62] Overall, the risk of being victimized by any kind of personal crime fell nearly 28 percent from 1979 to 1992. [FN63]

*669 Figure 2 [FN56]

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Figure 3 [FN64]

*671 From Figure 3, detailing the reported figures for drug arrest rates, it is possible to put Duke's contention that vigorous enforcement of drug statutes causes an increase in crime to some crude but revealing tests. Figure 3 charts the total crime victimization rate for each year since 1973 against the respective arrest rates for drug abuse violations for adults over age 18 for those years. As the scatter-plot graph indicates, there is a significant linear relationship between victimization and drug arrest rates—with the former decreasing as the latter increases. [FN65]

Figure 4 [FN66]

Figure 4, likewise, charts victimization by theft against those same arrest rates, with virtually identical results. [FN67] Over the past two decades, the fewer people the police have arrested in a given year for drug violations, the higher the proportion of Americans who have had *672 property stolen in that year. Correlational analysis cannot prove cause and effect, but it can be useful in suggesting that a cause-and-effect relationship does not exist between two variables. At the very least, then, the strong inverse relationship between the level of drug enforcement activity and the level of personal crime seriously calls into question Duke's claim that drug prohibition has caused more crime.
With respect to one specific subset of recent crime data, youth homicide, Duke's claim for a cause-and-effect relationship between crime and drug prohibition is less clearly spurious. As Figure 5 illustrates, the rate of homicide offenses committed by teenagers and the rate at which teenagers are victimized by homicide, have increased remarkably in recent years.

Yet, for several reasons, even these figures are only ambiguous support for an indictment of the war on drugs. First, the timing of the *673 increases in youth homicide and victimization, which only began at the end of the 1980s, after a long period of stability and even decline, does not fit with the advent of the war on drugs, either in 1973 or in the early 1980s. Second, the increasing rates of homicide for this age group were accompanied, as Figure 5 also depicts, by roughly contemporary decreases in drug-abuse-arrest rates for that age group, thus suggesting the possibility that lax enforcement of drug laws for this group, as compared with adults, is partially responsible for the increase in homicide. [FN69] Finally, recent studies of urban homicide have found that illicit drugs are associated with only one-fifth of youth homicides and less than one-third of all homicides [FN70]-not the one-half suggested by Duke. [FN71] Moreover, these studies have not supported the widely held belief that drug-related homicide is associated with either gang violence [FN72] or firearms. [FN73]

Other data also lends support to continued concerns about the danger of crime increases should enforcement of current drug prohibition end or be seriously diminished. According to one recent study of state prison inmates, a full 31 percent were "under the influence of drugs at the time of [their] offense," including 28 percent of those imprisoned for homicide and 25 percent of those jailed for rape. [FN74] However, only 17 percent of the inmates (including 5 percent of those imprisoned for homicide and 4 percent of those imprisoned for rape) committed their offense "for money to buy drugs." [FN75] Thus, eliminating drug prohibition *674 might create a cruel trade-off, all at once engendering fewer offenses against property owners by drug users, [FN76] but substantially more violent crime committed under the influence of drugs. [FN77]

C. The Special Problem of Cocaine

Duke consistently rejects or minimizes evidence showing links between illicit drug use and violent behavior, except insofar as that violence is connected to the need for obtaining drug money. His treatment of cocaine is particularly disturbing in this respect, especially since it is currently the second most widely used illegal drug-far behind marijuana, but far ahead of other rivals such as heroin. [FN78] In slighting the growing weight of scholarship linking the use of cocaine to aggression and crime, Duke seriously damages the credibility of his advocacy for legalization. He and Gross do concede, almost as an aside, that the drug "sometimes leads to violence against others," but declare (with extraordinarily thin supporting authority) that it is "unclear" and "doubtful" that cocaine increases by any "substantial" amount the risk that a consumer will commit a crime. [FN79] Yet a significant number of careful experiments have shown that regular administration of cocaine to normal human volunteers can produce otherwise unexplainable paranoid psychotic behavior, [FN80] while others, including one in 1993 by researchers at the University of Virginia, have demonstrated a causal connection between ingestion of high doses of cocaine and increased *675 aggression. [FN81] Moreover, the clinical evidence is in accord: as one recent, comprehensive review concluded, there "are several lines of evidence that support a psychopharmacologic basis for cocaine-induced violent behavior in humans." [FN82] The American Psychiatric Association now recognizes Cocaine-Induced Psychotic Disorder (with either delusions or hallucinations) as a well-defined reality of clinical practice. [FN83] So much a reality, in fact, that one recent study advised: "Given ... cocaine's profound association with extreme anger, irritability, agitation, and aggressive behavior, cocaine intoxication must be suspected for any patient who comes for treatment with such symptoms." [FN84] Indeed, of homicide victims testing positive for recent cocaine use, a study by the Los Angeles County Medical Examiner found that "20% ... were found to have been acting violently themselves at the time of death," [FN85] and a similar study in New York found that cocaine-using "homicide victims may have provoked violence through irritability, paranoid thinking, or verbal or physical aggression, which are known to be pharmacologic effects of cocaine." [FN86] In failing to confront *676 fully and
fairly the evidence of cocaine use and the danger it poses in the event of legalization, Duke does the debate over drug prohibition a disservice. [FN87]

Furthermore, Duke does not grapple fully with the other highly dangerous feature of cocaine that links it intimately with the commission of crime: its addictive properties. Duke cites studies from the early 1980s, [FN88] a period when cocaine was characterized by many as a "safe, nonaddicting euphoriant agent," for the propositions that there is little or no development of tolerance for cocaine, and no clear evidence of withdrawal symptoms. [FN89] Oddly, those assertions are in direct conflict with the settled views both of the American Psychiatric Association [FN90] and of academic physicians. [FN91] Worse, according to Dr. Herbert Kleber, a national authority on substance abuse, "cocaine is a much more addictive drug than alcohol," and its legalization might lead to a nine-fold increase in the number of compulsive cocaine users. [FN92]

That Duke downplays the evidence of cocaine's aggression-producing and addictive properties is not wholly surprising, for they seriously compromise the ability of legalization proponents to promise benefits from the end of prohibition. [FN93] How do we balance a promised reduction in drug-distribution-related violence against the potential for substantial increases in aggressive behavior by legions of new compulsive cocaine users? What difference in drug-related theft will reducing the $677 price for cocaine make if cocaine addicts will spend whatever money they have for the drug, even to the neglect of food and shelter? [FN94] Duke refreshingly declares that "any analysis of drug consumption that disregards the differences between various drugs, and treats all drug consumption as equivalent, makes no sense outside the realm of theology," [FN95] but in the case of cocaine he and other advocates of legalization seem to substitute faith for hard analysis. [FN96]

D. Drug Law Enforcement and Racism

One problem Duke does attack with some success is the disparate impact of enforcement of drug laws on racial minorities. He argues that minority youths are at special risk of extraordinarily severe penalties for becoming involved in a drug culture that is an all too attractive alternative to the dreariness and squalor of urban ghettos. [FN97] Surely it is plausible, as he asserts, that the presence of drug-enforcement efforts in the inner city will subject minorities to disproportionately higher rates of arrest and incarceration than those suffered by whites.

Nevertheless, Duke's assertion is not true. If Duke's thesis were correct, we would expect that from 1973 to 1992 (using his dates for the drug war), the overall arrest rate for blacks would have grown at a rate wholly disproportionate to that of whites, thereby causing the ratio of black arrest rates to white arrest rates to climb substantially. In fact, that ratio actually decreased significantly both for adults and juveniles. In 1973, blacks over the age of 18 were, relative to population, arrested at a ratio of 5.69 times that of whites and by 1992, that ratio had declined to 4.96. [FN98] The comparable black-white arrest ratio for persons under 18 was 2.93 in 1973; by 1992, it had fallen to 2.34. [FN99]

Thus, while it is true that, considering arrest rates for drugs only, blacks have suffered disproportionately from the war on drugs compared to whites, [FN100] their overall risk of arrest has declined relative to whites during that period. This may explain, in part, why, as Duke himself admits, inner-city residents typically complain not about drug prohibition itself but rather about the lack of adequate drug-law enforcement. These inner-city communities may also be more willing than Duke to recognize how a drug like cocaine can itself impel consumers toward aggression and the reckless disregard of others' rights. [FN101] In 1993, public opinion surveys found that blacks were substantially more likely, when compared to whites, to see the "influence of drugs" as a "critical" cause of crime, [FN102] and more likely as well to oppose the legalization of marijuana. [FN103]

Yet surely Duke is correct in calling attention to the sometimes gross disparities in the way enforcement of drug laws affect different ethnic and racial communities. [FN104] A government imposing prohibition must address those disparities or ultimately risk losing the confidence of citizens whose support is most critical if drugs like cocaine are to be driven out of mainstream society. What he fails fully to recognize is that racial bias in the criminal justice system has roots far more ancient than the war on drugs. His seemingly balanced concession to proponents of prohibition that "gross disparities in criminal law enforcement are not necessarily racist" [FN105] is dangerously blind. Of course the gross disparities in criminal law enforcement reflect racism. But is this racism inherent in drug prohibition? Or, rather, is it the racism that between 1930 and 1967 executed 405 blacks for rape, as opposed to 48
whites; \[FN106\] the racism that led one scholar to conclude in 1973, before the war on drugs, that "Americans are far more likely to tolerate the incarceration of blacks for prolonged periods under inhuman conditions than they would be to tolerate similar indignities visited on whites?" \[FN107\] There is nothing in Duke's analysis to demonstrate that prohibition must be tainted with racial bias and unequal enforcement, and he fails to show why we should, in the name of racial justice, discard a policy that appears to enjoy broad support among all racial groups and among citizens at every economic level. \[FN108\]

E. Drugs and Crime-Toward Reasoned Debate

The case for legalization of drugs, especially cocaine, as a remedy for crime and violence is unsustainable, at least on present evidence. Neither the history of alcohol prohibition in the 1920s nor the (far better documented) experience of the war on drugs since 1973 lend support to a characterization of drug prohibition as a "cause" of increased crime. If anything, the strong efforts of the federal and state governments to battle the onslaught of cocaine since the mid 1970s appear to have been successful in preventing an upsurge in violence and theft.

This success should not, however, be a warrant for outrageous excess in racially discriminatory enforcement practices or in long jail terms for the casual possession or purchase of illicit drugs. \[FN109\] Just as it is wrong for proponents of legalization to avoid facing the special dangers of cocaine, it is unfair for opponents to remain impassive in the face of explosive increases in the number of prisoners incarcerated for drug abuse. Duke does us a great favor in demanding that we see *680 the families, friends, and faces of these prisoners, and of all those caught in the crossfire of a continuing war against drugs.

II. DRUG LEGALIZATION AND CHILDREN

In return, though, we have the right to demand that Duke and other advocates for drug legalization look carefully at the likely victims of legalization. In a 1990 article focusing on cocaine, Dr. James Kennedy and I addressed the problems faced by one particular group of victims, children and adolescents, \[FN110\] and reached three conclusions: (1) that cocaine abuse causes devastating harm to the young, whether through perinatal exposure, parental neglect, or direct, addictive consumption as adolescents; \[FN111\] (2) that greater availability of hard drugs following legalization would lead to substantially greater exposure of the young to those drugs; \[FN112\] and (3) that no adequate strategy has been developed to prevent that exposure upon legalization. \[FN113\] Ultimately we proposed that discussion of drug legalization for adults be tabled until both proponents and opponents of legalization commit themselves to developing a strategy which would radically reduce cigarette and alcohol use by the young. \[FN114\] Such a strategy could be used as a case study for possible drug legalization.

While not directly addressing our analysis or commenting on our proposal, Duke does make a brief effort to confront the problem that drug legalization poses to children. With respect to the harms that hard drugs could cause to children, he does acknowledge that "distribution of drugs to children [is] ... child abuse," \[FN115\] thereby appearing to concede to our first point. However, Duke's discussion minimizes, or barely acknowledges, many of the worst harms that drugs threaten to inflict on children. \[FN116\] As for the danger of increased drug use and exposure among the young after legalization, and the difficulty of devising legal barriers to such exposure, Duke is dismissive. Indeed, he advances the remarkable claim that we could be "far more successful" in protecting our children from drug use if drugs were legal for adults. \[FN117\] The result is a blind alley, but one worth strolling down briefly.

*681 A. Dangers to Children Resulting From Legalization

Whether or not children obtain easier access to drugs after the repeal of prohibition, many children will suffer the consequences of substance abuse through their parents' increased drug use. For example, it is well documented that drug use during pregnancy substantially increases the risk that a child will be born with a low birthweight and a small head circumference, which, along with other factors, increases the infant mortality risk by a factor of three. \[FN118\] Although some of the suffering endured by drug-exposed newborns may, as Duke notes, be attributed to their mothers' lifestyle, as opposed to the chemical effects of the drugs, \[FN119\] much of it cannot. Duke's analysis neglects to mention, for example, that children born of mothers regularly using heroin must go through a full "abstinence syndrome" (i.e. withdrawal), which encompasses the certainty of enormous pain and the potential for
death. [FN120] Without even advocating a full-scale research effort to rule out heroin, cocaine, and marijuana use as major risks for children in utero, Duke simply proposes legalization followed by an unspecified "comprehensive policy" for "dealing with" substance-abusing pregnant women. [FN121]

Beyond the womb, sadly, Duke does not appear to recognize any further risks to children from their parents' use of now-illicit drugs. He ignores substantial evidence that prenatal and postnatal drug exposure *682 causes enormous damage to children for years after birth. In the words of one recent journal article, prenatal and postnatal exposure leaves children vulnerable to "a variety of physical, cognitive, emotional, motor, and social developmental difficulties." [FN122] Perhaps more tellingly-because this extends to drug abuse by adults outside the context of pregnancy-Duke and other proponents of drug legalization consistently fail to reckon the consequences of drug dependence for the quality of parenting that children receive. As Dr. Judy Howard, professor of pediatrics at U.C.L.A. and a clinician who works with children in drug-abusing households, recently put it: "When a parent is chemically dependent, ... the pediatrician cannot be confident that parenting functions are not compromised." [FN123] Chronic drug use can so "impair and distort a parent's thoughts and perceptions" that she will have "difficulty remembering her own children's birthdates;" [FN124] worse, the child faces a substantially elevated risk of abuse and neglect. [FN125]

Most damaging of all, though, is the failure of legalization proponents to face up to the dangers of greater drug abuse by children. Duke ignores altogether the strong association between substance abuse and homelessness among adolescents, which leads thousands of kids every year into a desperately destructive life "on the street." [FN126] Likewise, drug use has been shown to be strongly related to suicidal behaviors among high school students, [FN127] as well as HIV-related sexual behaviors [FN128]-facts not explicitly counted in Duke's cost-benefit analysis.

The most surprising omission from Duke's analysis, considering how heavily it focuses on the nexus between drugs and crime, is any discussion of the literature exploring the links between drugs and delinquency.*683 in particular, evidence that substance abuse leads to delinquency. [FN129] Indeed, the most substantial longitudinal study of at-risk youths ever conducted recently presented strong evidence that, "if substance use by the adolescents studied increased in seriousness this was accompanied by an increase in delinquency seriousness," [FN130] but that increases in delinquency did not much affect substance abuse. [FN131] This pattern tends to contradict the picture presented by Duke of youths becoming involved in the violent drug culture because it offers the chance for high illicit earnings under prohibition. Moreover, the drug that currently leads youths most directly toward delinquency is alcohol, [FN132] which of course offers no black market reward for traffickers. If other now-illicit drugs became legal, and as readily available to teenagers as alcohol is, we should expect crime rates for that age group to rise, not fall, along with all the suffering that increased drug use can cause youths.

B. Preventing Youth Access

Why worry about harm to children when, as Duke declares, we can "treat the distribution of drugs to children like the child abuse that it is and put flagrant violators in prison for it," and when "adults who encourage children to engage in such 'adult' activities can[] be condemned"? [FN133] At first these words seem strong, but then doubts creep in. Do the quotation marks around "adult" betray a recognition that it is adolescence, not comfortable middle age, when the urge to experiment with drugs is at its peak? And does that adjective "flagrant" inadvertently reveal just how little a post-prohibition state is likely to invest in nabbing casual, non-"flagrant" distributors of hard drugs who now give *684 kids alcohol?

As Dr. Kennedy and I have argued, the experience of our attempt to regulate alcohol and cigarette distribution to children while keeping it legal for adults has been profoundly ineffective. [FN134] By contrast, the war on drugs has been a resounding success. Figure 6 illustrates this point: for twelfth graders, marijuana use and use of other illicit drugs has plummeted since 1981, while alcohol is still used with regularity by a majority of twelfth graders, and regular cigarette use has declined only barely.

Figure 6 [FN135]
TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE
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How do we persuade young people to avoid substances that we adults embrace?  [FN136] And how do we expect the same drug traffickers who *685 survive the war on drugs to neglect the only black market remaining to them once drugs are legal for adults? [FN137]

Duke's answer, incredibly, appears to be that we can protect the young from drugs in the same way we have "severely condemned" sex between adults and children. [FN138] No doubt sexual abuse is universally condemned, but it is nevertheless epidemic. [FN139] The recent National Health and Social Life Survey, which comprehensively studied the sex life of Americans, found that 17 percent of women reported having been sexually touched before the age of 14, usually involving genital contact by men over the age of 18. [FN140] And at least one study has found an association between drug abuse by a parent and sexual abuse of a child: the authors of the study conclude that this "suggests that ... the parents' chemical dependence rendered them inadequate protectors of their daughters." [FN141] What kind of child protectors will we be if we adopt legalization?

C. Drug Substitution

Even if no effective barriers can be raised to prevent juvenile access to drugs, Duke has one last line of defense for drug legalization. He asserts that any increase in juvenile use of marijuana, heroin, or cocaine might well be matched by a corresponding decrease in the use of alcohol, cigarettes, or inhalants, all of which he believes to be more dangerous. The assumption that cocaine, in particular, is a more benign substance than any of these drugs is highly questionable [FN142]-especially *686 given the limited knowledge we have regarding successful cocaine treatment. [FN143] Nevertheless, it is worth lingering briefly to consider the claimed negative relationship between licit and illicit drug use.

On its face, this claim seems improbable and careful inspection does not improve its plausibility. For example, cigarettes are highly addictive, and as one recent longitudinal study found, "students who smoke are increasingly unlikely to quit as they get older." [FN144] Even adolescents enrolled in model drug-prevention programs cannot be easily weaned from tobacco. [FN145] So why would we expect kids to substitute cocaine and heroin for cigarettes, as opposed simply to adding them? As for inhalants, Duke is wrong to paint them either as "popular" or as an increasing threat to kids. Less than three percent of twelfth graders use inhalants regularly, and from 1976 to 1992 fluctuations in this rate have been statistically insignificant. [FN146] And again, what, other than speculation, supports Duke's view that adolescents would be better off smoking crack than sniffing glue, or indeed would not do both together if given the chance.

Alcohol presents a more intriguing problem, for it is used more than any other drug by adolescents; at the same time, the percentage of young people who use it has tended to vary more than other "licit" drugs. As a result, it is possible to put Duke's substitution theory to a rough test. For if adolescents who use marijuana or cocaine do so instead of using alcohol, we would expect that in years with a higher *687 percentage of students using those illicit drugs we would find a lower percentage of alcohol users. However, as Figures 7 and 8 indicate, there is a strong positive correlation between rates of marijuana and cocaine use and rates of alcohol use. [FN147] That is, in years when more kids use marijuana or cocaine, we can expect that more kids will also be using alcohol. Such correlations do not show that one kind of substance abuse causes another, but it does indicate the improbability of Duke's theory. Furthermore, these correlations must cause a small shiver of fear that drug legalization would make under-age abuse of alcohol even worse.

*688 Figure 7 [FN148]

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE
TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE
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Figure 8 [FN149]

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE
TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

*689 III. BENEFITS, COSTS, AND IRREDUCIBLE VALUES

Because Duke and other proponents of drug legalization fail to take seriously the extremely knotty problem of protecting children from parental substance abuse and personal addiction, they cannot present us with a realistic estimate of the costs of legalization. And because their promise of less crime upon repeal of prohibition seems unlikely, the principle benefit they hold out is questionable. But one final aspect of their case against prohibition-the offense to fundamental notions of personal autonomy-is not lightly dismissed. Although this aspect of the debate is not the focus of Duke's commentary here, it merits at least brief consideration in conclusion.

Placed in a "rights" framework, the legalization debate can become uncomfortable for those defending prohibition. How is it, exactly, that a person wishing simply to enhance her private feelings in her own home can be punished by the state for doing so in the absence of a demonstrated harm to another? [FN150] Why, as Duke asks, should we not ban swimming, motorcycles, and obesity, all of which put our lives and health at risk? [FN151] Is not drug prohibition, as he calls it, a "'gross usurpation' of Mill's concept of liberty"? [FN152]

Those of us who remain skeptical of legalization must, of course, quickly take refuge in Mill's famous proviso that "[a]cts injurious to others require a totally different treatment." [FN153] We can return to the vulnerabilities of children and the problems this poses for drug legalization. We can point out how incapable the young are of defending themselves against the ravages of a drug culture or of making rational choices about drug use. We can argue that widespread drug use will increase the risks everyone faces while driving their cars [FN154] or out in *690 public. [FN155] We can maintain that simply because we tolerate some risks, and some risky behavior (such as alcohol consumption), we do not have to tolerate all risks and any behavior. And even if the attack on prohibition has answers for these arguments, we still may view the legalization alternative, when dressed in the garb of "rights," as fundamentally incoherent, proving too little and too much all at once.

The case for legalization proves too little in failing to give clear shape to its agenda. [FN156] Thus, Duke is wholly unwilling to follow a "rights" perspective to its logical conclusion and propose the elimination of all controls on drugs-he would retain prohibition against highly dangerous and unpopular drugs. [FN157] While certainly an understandable qualification, this seemingly minor reservation is a gaping hole in the "liberty" rationale for legalization. Are only unpopular rights the ones to be suppressed? If so, what is the point, in a democracy anyway, of having "rights" at all? Likewise, what is the moral basis in "liberty" for Duke's generous, but undeveloped, dictum that "w e should make treatment available at no cost to any abuser who wants it"? [FN158]

That last question perhaps points most properly to a sense in which the libertarian underpinnings of the case for legalization prove too much. For why should taxpayers, and not the person who has exercised her privacy right to choose drug abuse, pay for any necessary treatment? Fear of just this kind of question caused advocates for the homeless to suppress for years any suggestion that many of their clients might be chemically dependent. [FN159] Indeed, why should the government ever intervene against any personal choice, whether it is to buy uninspected meat, spoiled cheese, or unsafe medicines? Specifically, how is it that Duke wants the Food and Drug Administration to continue to exist and yet have no authority over recreational drugs? [FN160]

*691 More insidiously, though, the case for legalization, in seeking to rehabilitate "popular" illicit drugs through a narrow libertarianism yoked to a myopic cost-benefit analysis, seems to be "proving" a new corollary to Mill's harm principle. It will now read: I cannot exercise my liberty in a way that will cause you serious harm, unless I do so with so determinedly malevolent an intent and so viciously efficient a means that I make life cheap, neighborhoods ugly, children expendable. [FN161] and law enforcement all but impossible. Then you will see that your "costs" of denying my "right" are simply too high and the "benefits" of generous surrender will be great, indeed. [FN162] But this generosity-slavish to miscreants, blind to victims, just, ultimately, only to the unjust-is generosity misplaced.

[FN1]. Associate Professor, Quinnipiac College School of Law; J.D., Harvard Law School 1977. I am indebted to Robert Farrell and Linda Meyer for their helpful comments, but the responsibility for any errors is my own.


[FN4]. Id. at 594-95. Of course, given the Supreme Court's prior holding in Coker v. Georgia, 433 U.S. 584 (1977), that capital punishment may not, under the Eighth Amendment, be imposed for rape, it is at least highly doubtful that a death penalty for trafficking in drugs that does not also involve homicide could ever be upheld. See infra note 96 (discussing Harmelin v. Michigan).

AMERICA'S LONGEST WAR, supra note 3, at 135-43; Duke, supra note 4, at [24]. Duke and Gross's claim that "[i]t is hard to see any ending point" in the "forfeiture frolic," AMERICA'S LONGEST WAR, supra note 3, at 135-37, has been weakened, it should be noted, by a series of recent U.S. Supreme Court decisions that sharply curtail the scope of forfeiture power. See United States v. James Daniel Good Real Property, 114 S. Ct. 492 (1993) (Due Process Clause requires pre-seizure hearing in drug forfeitures absent exigent circumstances); Austin v. United States, 113 S. Ct. 2801 (1993) (Eighth Amendment excessive fines clause applies to drug forfeitures); United States v. 92 Buena Vista Avenue, 113 S. Ct. 1126 (1993) (expanding scope of "innocent owner" defense to forfeiture beyond bona fide purchasers of property).

AMERICA'S LONGEST WAR, supra note 3, at 160-80. Duke and Gross argue in particular that drug prohibition has given rise to enormous racial tensions as a result of different consumption patterns among the races, id. at 160-62, and unequal enforcement of criminal drug statutes, id. at 169-71. These arguments are considered briefly below. See infra text accompanying notes 97-108.


AMERICA'S LONGEST WAR, supra note 3, at 254-74. Duke argues most strenuously for "selectively" legalizing marijuana, id. at 254; Duke, supra note 4, at [53-54], but appears also to favor legalizing heroin and cocaine (including "crack") as well. AMERICA'S LONGEST WAR, supra note 3, at 255.

Duke, supra note 4, at 597.


With respect to marijuana, the case for limited decriminalization seems to me to be far stronger, but not fully clinched as of yet. Because of the nature of this forum and the need for reasonable brevity, this response limits itself primarily to considering the case for legalizing hard drugs.

See SZASZ, supra note 8.

Loken & Kennedy, supra note 11.

[FN16]. Duke, supra note 4, at 575.

[FN17]. Id.

[FN18]. Id. at 576. "Crimes to Get Drug Money" are part of the "Second Crime Wave" caused by drug prohibition, discussed more fully in AMERICA'S LONGEST WAR, supra note 3, at 108-10.


[FN20]. Duke, supra note 4, at 575; see AMERICA'S LONGEST WAR, supra note 3, at 43-77.

[FN21]. Duke, supra note 4, at 575.

[FN22]. Id.

[FN23]. Id. at 586.

[FN24]. Id. at 571-73; AMERICA'S LONGEST WAR, supra note 3, at 74-94.


[FN26]. See, for example, the collection of studies in AGGRESSION: THEORETICAL AND EMPIRICAL REVIEWS (Russell G. Geen & Edward I. Donnerstein eds., 1983). In addition, reported crime rates are affected by how well police departments are staffed, organized, and linked in effective communication. See infra text accompanying note 49.


[FN28]. All historians, to take but one discipline, are left with no opportunity to do the kind of rigorous experimental or prospective research that is the sine qua non of confident assertions of "causation."

[FN29]. This fallacy looms whenever a prior event (e.g. prohibition) is assumed to be a cause of a subsequent event (e.g. higher murder rates), accompanied by a failure to exclude "rival causal factors" that "could conceivably explain away the original relationships ... claimed." FRANK HAGAN, RESEARCH METHODS IN CRIMINAL JUSTICE AND CRIMINOLOGY 19-20 (1982).

[FN30]. Duke, supra note 4, at 572 ("Hardly anyone considers the repeal of alcohol prohibition to have been a mistake. Why, then, did we not repeal the Harrison Act at the same time? Why don't we repeal its modern sequela?").

[FN31]. Ostrowski, supra note 8, at 641.

[FN32]. Id. at 641 n.157.


[FN34]. The data depicted in this graph are taken from HISTORICAL STATISTICS, supra note 33, at 414.
[FN35]. Id. For assaults with firearms, also cited by Ostrowski, supra note 8, at 641 n.157, the increase was 85 percent. HISTORICAL STATISTICS, supra note 33, at 414. Even if we take the passage of the Harrison Act in 1914 as the real advent of Prohibition, as Duke somewhat confusingly suggests we do, his argument is not helped: murder rates climbed 34 percent from 1910 to 1914 and only 16 percent from 1914 to 1919. Id.

[FN36]. Id. For assaults with firearms, the rate increased by 188 percent during the decade 1910 through 1919. Id.


[FN38]. The homicide rate for 1919 was 7.2, for 1929 8.4, and for 1933 9.7, all per 100,000 resident population. HISTORICAL STATISTICS, supra note 33, at 414.


[FN40]. 1981 ALCOHOL PANEL, supra note 37, at 63.

[FN41]. Demonizing alcohol, whether on traditional "temperance" grounds or to promote tolerance of other drugs, is a dubious practice in view of alcohol's demonstrable potential to reduce coronary artery disease, the nation's leading killer. See Stanton Peele, The Conflict Between Public Health Goals and the Temperance Mentality, 83 AM. J. PUB. HEALTH 805 (1993).

[FN42]. One scholar has recently demonstrated this special place of alcohol in American life by focusing on the extraordinary efforts of scientists during and after Prohibition to "normalize drinking" by discounting its adverse effects. Philip J. Pauly, Is Liquor Intoxicating? Scientists, Prohibition, and the Normalization of Drinking, 84 AM. J. PUB. HEALTH 305 (1994). Dr. Pauly concludes that "the behavior of experts in normalizing drinking calls into question the degree to which the end of Prohibition provides a model for future dealings with other recreational euphorics." Id. at 312.

[FN43]. Duke, supra note 4, at 574.

[FN44]. See 1993 SOURCEBOOK, supra note 15, at 352. In fairness, it should be noted that "the big increase in the crime rate beginning in the mid-sixties and through the seventies was in part explained by better communications, more professional police departments, and better recording and reporting of crimes." HAGAN, supra note 29, at 52.

[FN45]. See 1993 SOURCEBOOK, supra note 15, at 352. The "Total Crime Index" of "offenses known to the police" follows a broadly similar pattern, with a 110 percent increase from 1960 to 1972, a 50 percent increase from 1972 to 1980, and a five percent decrease from 1980 to 1992. Id.

[FN46]. We could, of course, draw parallel conclusions about the enormous growth in homicide rates prior to 1914, when Professor Duke tells us the halcyon days of tolerance toward recreational drugs came to an end. See supra notes 31-39 and accompanying text. In either case, it is far more likely that other, essentially unrelated forces were at work. Thus might we not hypothesize that the enormous increase in crime in the late 1960s was due in part to social unrest (including major riots in many cities) related to lingering race discrimination and urban decay, in part to the cynicism toward authority engendered by the Vietnam War, and in part to the unprecedented numbers and cultural influence of Baby Boom adolescents? And perhaps later increases in crime might have similar exo-drug-prohibition provenances?

[FN47]. Duke, supra note 4, at 575.

[FN48]. See 1993 SOURCEBOOK, supra note 15, at 352 (emphasis added). From 1972 to 1992, the "total crime index" of the F.B.I. increased by 43 percent, while the violent crime rate increased 89 percent. Id.

Thus, employment of local governments for police protection grew 18 percent from 1971 to 1979, and their total employment in the criminal justice system increased 30 percent. U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1981 27 (1982). That was, perhaps not coincidentally, the very period in which virtually all the increase in reported crime since 1972 occurred. See supra note 45. For a complete discussion of the weaknesses of police-report-based national statistics, see HAGAN, supra note 29, at 47-54.

In 1963, the "violent crime" rate stood at 168.2 (per 100,000 inhabitants), in 1973 at 417.4, and in 1992 at 757.5. 1993 SOURCEBOOK, supra note 15, at 352. This represents an average (compounded) rate increase of 9.5 percent for 1963 to 1973 and only 3.1 percent for the following 19 years. The F.B.I.'s "total crime index," likewise stood in 1963 at 2,180.3 (per 100,000 inhabitants), in 1972 at 3,961.4, and in 1992 at 5,660.2, or 159 percent higher than in 1963. Id. This represents an average compounded increase of 6.1 percent for the first ten years, followed by only a 1.9 percent increase on average over the next twenty years.

Perhaps even more awkward for Duke is the fact that reported rates of forcible rape, perhaps the one major crime not plausibly associated with the need to buy drugs, have increased 355 percent since 1963, but only 90 percent since 1972. Id. If reporting biases skew these figures, they only illustrate the problems with the kinds of crime data on which Duke consistently relies. If, on the other hand, they are relatively accurate, they strongly suggest forces other than drug prohibition as driving crime increases.

In 1980, the F.B.I. reported a "Total Crime Index" of 5950.0 (per 100,000 inhabitants); in 1992, the rate had fallen 4.9 percent to 5660.2. See 1993 SOURCEBOOK, supra note 15, at 352. By contrast, the F.B.I.'s "violent crime index" rose by 27 percent during the 12 years from 1980 to 1992. Id. Still, that rise pales next to the 43 percent increase in the index during the seven years from 1973 to 1980, id., and the explosive increase from 1963 to 1973. See supra note 50.

See infra note 58 and accompanying text.

See, e.g., U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 1992 (1994). The results of these annual surveys are reported in the 1993 SOURCEBOOK, supra note 15, at 247-69.

In particular, victimization surveys do a poor job of measuring highly serious, relatively rare crimes such as homicide. HAGAN, supra note 29, at 325.

For a discussion of the genesis, methodology, strengths, and weaknesses of the national victimization survey, see HAGAN, supra note 29, at 323-42.

The values reflected in this figure are drawn from the 1993 SOURCEBOOK, supra note 15, at 247 (crime victimization), and 466-67 (cocaine seizures, in pounds).

See also Clifford Krauss, Urban Crime Rates Falling This Year, N.Y. TIMES, Nov. 8, 1994, at A14 (murder, robbery, and assault "declined in almost all the nation's largest cities" during the first half of 1994).

That crime may have remained stable or actually have gone down over the past two decades may strike many Americans as absurd, and it is worth considering briefly how this can be so even as the newspaper each day seems ever more crowded with stories of murder and mayhem. It is true, of course, that more murders in fact did occur in this country in 1992 than in 1980, but the population of the country increased at an even greater rate, creating a decline in the risk, for any given American, of being murdered. 1993 SOURCEBOOK, supra note 15, at 352. Yet because the newspaper is still published only once a day, the increased absolute number of homicides means that each American is at greater risk of reading about a murder every day. The public is thus vulnerable to manipulative claims of rampant rises in crime both from those seeking to impose greater governmental controls and from those arguing that previously imposed controls are hopelessly ineffective.

The clearest indication of the real beginning of the phases of the war on drugs can be found in figures for arrest rates for drug abuse. Between 1970 and 1980 those rates for adults over age 18 increased only 20 percent, but

[FN59]. See AMERICA'S LONGEST WAR, supra note 3, at 108-09.

[FN60]. See 1993 SOURCEBOOK, supra note 15, at 247 (Table 3.2) (91.9 crimes of theft per 1,000 persons in 1979 declined to 59.2 crimes of theft per 1,000 persons by 1992).

[FN61]. Id.

[FN62]. See supra text accompanying notes 45-46.

[FN63]. See 1993 SOURCEBOOK, supra note 15, at 248 (Table 3.3).

[FN64]. The data for this chart were taken from 1993 SOURCEBOOK, supra note 15, at 247, 457 (Tables 3.2 and 4.33). Victimization rates are per 1,000 persons 12 years of age and older; drug-abuse arrest rates are per 100,000 inhabitants 18 years of age and older.

[FN65]. r = -.79; F = 31.1; Victimization Rate = -.11 (Drug Arrest Rate) + 158.7; p < .01.

[FN66]. The data reflected in this figure were taken from the 1993 SOURCEBOOK, supra note 15, at 247, 457 (Tables 3.2 and 4.33). Rates for victimization are per 1,000 persons 12 and older; drug-abuse arrest rates are per 100,000 inhabitants 18 years of age and older.

[FN67]. r = -.77; F = 26.9; Theft Victimization Rate = -.09 (Drug Arrest Rate) + 120.7; p < .01.

[FN68]. The data reflected in this figure are taken from 1993 SOURCEBOOK, supra note 15, at 385 (Table 3.130) (victimization), 389 (Table 1.136) (offenders), and 457 (Table 4.33) (drug-abuse-arrest rates).

[FN69]. There is, indeed, a statistically non-significant, but still suggestive, inverse relationship between the homicide-victimization rates for this age group and drug-abuse-arrest rates. (r = -.38; F = 2.60; Victimization Rate = -.019 (Drug Arrest Rate) + 9.547; p < .10). (For homicide offenses by juveniles and drug-abuse-arrest rates the relationship is less linear but still somewhat suggestive: r = -.39; F = 0.57; Student's t = 1.63; p < .10). Such a relationship would, of course, be consistent with the previous relationships found between overall personal crime victimization and drug-abuse-arrest rates. See supra notes 64-67.

[FN70]. Kenneth Tardiff et al., Homicide in New York City: Cocaine Use and Firearms, 272 JAMA 43, 45 (1994) (21.5 percent of homicide victims aged 15-24 tested positive for cocaine); Patrick J. Meehan & Patrick W. O'Carroll, Gangs, Drugs, and Homicide in Los Angeles, 146 AM. J. DISEASES IN CHILDREN 683, 686 (12 percent of homicides with victims aged 10-24 were "narcotics-motivated"; 18 percent of homicide victims in that age group had cocaine present in their blood).

[FN71]. Duke, supra note 4, at 581.

[FN72]. Meehan & O'Carroll, supra note 70, at 686.

[FN73]. Tardiff, supra note 70, at 46.

[FN74]. See 1993 SOURCEBOOK, supra note 15, at 620 (Table 6.55) (reporting results of 1993 study by U.S. Dep't of Justice). Duke and Gross rely on a similar Department of Justice study in arguing that prohibition causes property crime to increase. AMERICA'S LONGEST WAR, supra note 3, at 110, 315 n.17.

[FN75]. 1993 SOURCEBOOK, supra note 15, at 620 (Table 6.55).

[FN76]. But see supra notes 66-67 and accompanying text.

Thus, if we fear that for those prisoners who committed crimes "under the influence of" drugs, the substances were a causal agent in their crimes, the risks of ending prohibition seem rather stark. A mere 20 percent increase in consumption of these substances followed by a corresponding 20 percent increase in crimes other than those now committed to obtain money for drugs would cancel the crime reduction initially achieved by prohibition. Worse, though, the amount, both proportionately and in absolute terms, of highly violent crime would substantially increase.

The National Household Survey on Drug Use found in 1992 that the "most recent use within last year" of illegal drugs among all Americans aged 12 and over were as follows: marijuana, 8.5%; cocaine, 2.4% (crack, 0.4%); heroin, 0.9%; inhalants, 1.0%; PCP, 0.2%. See 1993 SOURCEBOOK, supra note 15, at 335-37 (Tables 3.87-3.90).

AMERICA'S LONGEST WAR, supra note 3, at 73-74. Duke and Gross cite only two sources for their view, one a 1988 study limited to crack and homicide in New York City, the other a general treatise on violence. Id. at 312 n.102.


Steven L. Brody, Violence Associated with Acute Cocaine Use in Patients Admitted to a Medical Emergency Department, in DRUGS AND VIOLENCE: CAUSES, CORRELATES, AND CONSEQUENCES 44, 51 (Mario De La Rosa et al. eds., 1990) (NIDA Research Monograph No. 103); see Gawin & Ellinwood, supra note 81, at 1173, 1175 (acute cocaine intoxication results in "dissipation, impaired judgment, grandiosity, impulsiveness, hypersexuality, hypervigilance, compulsively repeated actions, and extreme psychomotor activation" that can produce "illegal acts" and "in extreme cases, homicide").

AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 222, 310 (1994) [hereinafter STATISTICAL MANUAL]; see also Charles Wetli, The Pathology of Cocaine: Perspectives from the Autopsy Table, in ACUTE COCAINE INTOXICATION: CURRENT METHODS OF TREATMENT 172, 177-78 (Heinz Sorer ed., 1992) (NIDA Research Monograph No. 123) (describing "excited delirium" as the "most serious psychiatric sequelae of cocaine abuse," which can result in "bizarre and violent activity" accompanied by an "apparent increase in strength" and an invulnerability to electrical stun gun devices).

Stuart C. Yudofsky et al., Cocaine and Aggressive Behavior: Neurobiological and Clinical Perspectives, 57 BULL. MENNINGER CLINIC 218, 222 (1993); see also Miller, supra note 81, at 1086.


Tardiff, supra note 70, at 45. This study may be seen as giving partial support to Duke's views, however, it also concludes that "homicide may have been part of the business of dealing cocaine." Id. Thus, it is surprising that Duke ignored it in favor of an older, less rigorous study. Duke, supra note 4, at [ ] n.31 (citing Paul Goldstein et al., Crack and Homicide in New York City, 1988: A Conceptually Based Event Analysis, 16 CONTEMP. DRUG PROBLEMS 651 (1989)).

See Duke, supra note 4, at 598 ("the numbers of users of illicit drugs are almost surely reduced somewhat
by prohibition").

[FN88]. AMERICA'S LONGEST WAR, supra note 3, at 70 & 312 n.91.

[FN89]. Gawin & Ellinwood, supra note 81, at 1173 (reviewing previous studies).

[FN90]. STATISTICAL MANUAL, supra note 83, at 222 ("Regardless of the route of administration [of cocaine],
tolerance occurs with repeated use. Withdrawal symptoms ... can be seen, but are usually transitory and associated
with high-dose use.").

[FN91]. See, e.g., Gawin & Ellinwood, supra note 81, at 1176-78 (reviewing studies showing existence of both
withdrawal symptoms and pathophysiologic mechanisms for development of tolerance).

[FN92]. Herbert D. Kleber, Our Current Approach to Drug Abuse-Progress, Problems, Proposals, 330 NEW ENG.
J. MED. 361, 362 (1994); see also Loken & Kennedy, supra note 11, at 594 (analysis of drug-survey data projecting
that, if cocaine were freely available, the percentage of high school seniors using it annually would increase several
times). But see Lester Grinspoon & James B. Bakalar, The War on Drugs-A Peace Proposal, 330 NEW ENG. J.
MED. 357, 358 (1994) (admitting that cocaine is "far more dangerous than marijuana, but even its addictive
potential ... [is] often overstated").

[FN93]. See Kleber, supra note 92, at 362 ("Cocaine is the bete noir of the legalization movement.").

[FN94]. See Loken & Kennedy, supra note 11, at 589-90 (and studies cited therein).

[FN95]. Duke, supra note 4, at 599. Western theology, it should be noted, has long distinguished one recreational
drug, alcohol, from all others and given it a central place in worship.

[FN96]. This imprecision of analysis regarding cocaine extends even to his description of Harmelin v. Michigan,
501 U.S. 957 (1991), as holding "that mandatory life without possibility of parole for mere possession of cocaine
did not violate the United States Constitution." Duke, supra note 4, at [ ] n.96. Instead, Harmelin held that the mere
possession of 672 grams of cocaine, the amount Harmelin was carrying, could be punished by life imprisonment
with no possibility of parole. Harmelin, 501 U.S. at 961. In his concurring, plurality opinion, Justice Kennedy
undertook a careful proportionality review of the sentence, id. at 1001-04, and was at pains to explain how "[t]his
amount of pure cocaine has a potential yield of between 32,500 and 65,000 doses," enough to "threaten[] to cause
grave harm" to other individuals and society. Id. at 1002. This was hardly a "mere possession" case.


[FN98]. In 1973, the arrest rate (per 100,000 inhabitants) for whites over the age of 18 was 506.1; for blacks it was
2,878.8. In 1992, the respective rates were 792.6 and 3,929.4. 1993 SOURCEBOOK, supra note 15, at 422 (Table
4.5).

[FN99]. Id. In 1973, the under-age-18 white arrest rate was 1,017.3; for blacks it was 2,979.1. In 1992, the
respective rates were 1,095.0 and 2,565.8.

[FN100]. In 1973, the arrest rate for whites over age 18 (per 100,000 inhabitants) for drug abuse violations was
312.4; for blacks it was 805.4, for a ratio of 2.58. 1993 SOURCEBOOK, supra note 15, at 457 (Table 4.33). By
1992, those rates had climbed, respectively, to 381.3 and 1,999.9, for a ratio of 5.25. Id. Of course, if, as Duke
somewhat awkwardly asserts, blacks are "more drug-dependent than whites," Duke, supra note 4, at [38], the
changing ratio of drug-abuse arrests may to some degree accurately reflect a real change over the last two decades in
the relative involvement of the races in substance abuse.

[FN101]. See supra notes 80-92 and accompanying text. Duke's discussion of the "conspiracy theory" illustrates
how minorities continue to view drugs as a plague. Duke, supra note 4, at [38-43]. Thus, the poll he cites shows a
substantial number of blacks believing that "the government deliberately makes sure that drugs are easily available

in poor black neighborhoods in order to harm black people." Id. at [39-40] (emphasis added).

[FN102]. See 1993 SOURCEBOOK, supra note 15, at 172 (Table 2.24) (Gallup survey showing 73 percent of blacks as compared to 62 percent of whites citing drugs as "critical" cause of crime).

[FN103]. Id. at 214 (Table 2.71) (Roper survey showing that 75 percent of blacks and 73 percent of whites in 1993 opposed the legalization of marijuana). That same survey shows similarly broad support for continued prohibition across economic, regional, educational, and religious lines. Id.


[FN105]. Duke, supra note 4, at 594.


[FN108]. See supra note 103.

[FN109]. See Kleber, supra note 92, at 363-64.

[FN110]. Loken & Kennedy, supra note 11.

[FN111]. Id. at 579-87.

[FN112]. Id. at 587-96.

[FN113]. Id. at 595-603.

[FN114]. Id. at 601-03.

[FN115]. Duke, supra note 4, at 611.

[FN116]. Id.

[FN117]. Id. at [80]; accord AMERICA'S LONGEST WAR, supra note 3, at 248- 49.


[FN120]. Kandall & Chavkin, supra note 118, at 635. Cocaine, too, appears to have lethal potential for children exposed in the womb. See id. at 636-37 ("Cocaine use during pregnancy is associated with a number of effects, including an increase in early pregnancy loss, premature placental separation, preterm labor, an increased stillbirth rate, and reductions in birthweight and head circumference, all of which are consistent with cocaine's constrictive action on blood vessels . . . . Additionally, concern has been raised about an apparent increased incidence of SIDS [Sudden Infant Death Syndrome] in cocaine-exposed infants."); U.S. DEPT OF HEALTH AND HUMAN SERVICES, EPIDEMIOLOGIC TRENDS IN DRUG ABUSE: COMMUNITY EPIDEMIOLOGY WORK GROUP, DECEMBER 1991 (1992) (16 infants died of maternal cocaine exposure in Miami during the first quarter
[FN121]. Duke, supra note 4, at 609. What that policy would embrace he does not say. Will it effectively cure all the "lifestyle" problems of poor pregnant women that accompany cocaine and heroin use? Will it be coercive? Will others be coerced into paying for it?


[FN123]. Howard, supra note 122, at 658.

[FN124]. Judy Howard, The Development of Young Children of Substance-Abusing Parents: Insights from Seven Years of Intervention and Research, 9 ZERO TO THREE 8, 8-9 (1989).


[FN129]. See, e.g., DELBERT S. ELLIOTT ET AL., EXPLAINING DELINQUENCY AND DRUG USE 117 (1985) (prior drug use by adolescents had effect on subsequent delinquency rates, and vice versa); Rolf Loeber et al., The Crime-Substance Abuse Nexus in Young People, in URBAN DELINQUENCY AND SUBSTANCE ABUSE: TECHNICAL REPORT 5-1 (David Huizinga et al. eds., 1993) (Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice); Welmoet B. Van Kammen et al., Substance Use and its Relationship to Conduct Problems and Delinquency in Young Boys, 20 J. YOUTH & ADOLESCENCE 399, 411 (1991) ("advances in the progression of substance use were associated with disinhibition resulting in delinquent acts").

[FN130]. Loeber, supra note 129, at 5-22.

[FN131]. Id. at 5-23.

[FN132]. Id. at 5-1; Van Kammen, supra note 129, at 410; see also Denise Kandel & Kazuo Yamaguchi, From Beer to Crack: Developmental Patterns of Drug Involvement, 83 AM. J. PUB. HEALTH 851 (1993).

[FN133]. Duke, supra note 4, at 611.

[FN134]. Loken & Kennedy, supra note 11, at 596-99.

[FN135]. The data for this figure are taken from LLOYD JOHNSTON ET AL., NATIONAL SURVEY RESULTS ON DRUG USE FROM MONITORING THE FUTURE STUDY, 1975-1992 77 (1993) (Table 13) [hereinafter NATIONAL YOUTH DRUG SURVEY]. All figures represent the percent of twelfth graders who report having used the substance during the previous 30 days.

[FN136]. In AMERICA'S LONGEST WAR, supra note 3, at 261, Duke and Gross declare that one of the "improvements" of legalization could be the banning of the sale of cigarettes through vending machines and
enforcing bans on the sale of cigarettes and illegal drugs to children. But is that strategy—using a criminal prohibition model—really consistent with a legalization framework? And why cannot such improved enforcement of juvenile-access bans occur under prohibition?

[FN137]. See id. at 260 (discussing the massive efforts of the tobacco industry to sell cigarettes to minors and the enormous profits thereby reaped).

[FN138]. Duke, supra note 4, at 611; AMERICA'S LONGEST WAR, supra note 3, at 249.

[FN139]. See David J. Finkelhor et al., Sexual Abuse in a National Survey of Adult Men and Women: Prevalence, Characteristics, and Risk Factors, 14 CHILD ABUSE & NEGLECT 19 (1990) (the best studies suggest that 20% of women and five to ten percent of men experienced some form of sexual abuse as children); DOUGLAS J. BESHAROV, RECOGNIZING CHILD ABUSE: A GUIDE FOR THE CONCERNED 86 (1990) ("For too long, revulsion toward acts of sexual abuse prevented adults from seeing what was happening to tens of thousands of innocent children.").

[FN140]. EDWARD O. LAUMANN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES 340-41 (1994). Vaginal intercourse was involved in 30 percent of such cases. Id. See also ROBERT COLES & GEOFFREY STOKES, SEX AND THE AMERICAN TEENAGER 111 (1985) (of 13-year-old nonvirgin girls surveyed, 41% had had their first intercourse with a partner aged 17 to 19, 8% with a partner over age 20).

[FN141]. Chavkin, supra note 125, at 317-18.

[FN142]. Thus almost as many 16 infants died of perinatal cocaine exposure in one city, Miami, in one three-month period, see supra note 120, as the 22 children Duke cites as having died nationally in the last five years from inhalants. Duke, supra note 4, at [78]. Professor Duke's confidence that he can successfully rank cocaine lower on a scale of danger is remarkable in the face of anguished cries of researchers that the "acute and chronic toxicity of cocaine is not fully understood." Jeffrey M. Witkin & Jonathan L. Katz, Preclinical Assessment of Cocaine Toxicity: Mechanisms and Pharmacotherapy, in ACUTE COCAINE INTOXICATION: CURRENT METHODS OF TREATMENT 44, 64 (Heinz Sorer ed., 1992) (NIDA Research Monograph No. 123).


[FN146]. See NATIONAL YOUTH DRUG SURVEY, supra note 135, at 77 (Table 13) (use of inhalants within the past 30 days by twelfth graders varied between 0.9 percent in 1976 and 2.8 percent in 1987); id. at 31-32, 38 (95-percent-confidence limits for measuring prevalence rates generally average 1%). If the "true" prevalence of inhalant "30-day" use was 1.8 ae throughout the period of the survey, then, the range of expected random fluctuation in annual measurements would be 0.8 ae to 2.8 ae.

[FN147]. For alcohol and marijuana: r = .92; F = 117.1; Alcohol Use = .717 (Marijuana Use) + 47.5; p < .01. For alcohol and cocaine: r = .60; F = 9.0; Alcohol Use = .701 (Cocaine Use) + 57.5; p < .01. These figures are cross-sectional—that is, they reflect percentages of use among different groups of youths in different years—so they should be treated with particular caution.

[FN148]. The data for this figure are taken from NATIONAL YOUTH DRUG SURVEY, supra note 135, at 77 (Table 13).
[FN149]. Id. at 77 (Table 13).


[FN151]. AMERICA'S LONGEST WAR, supra note 3, at 147.

[FN152]. Id. at 149.

[FN153]. John Stuart Mill, On Liberty, in THREE ESSAYS 5, 96 (Richard Wollheim ed., 1975) [hereinafter On Liberty]; see JOHN RAWLS, A THEORY OF JUSTICE 244-45 (1971) ("liberty can be restricted only for the sake of liberty itself," including cases involving "injustice ... in the conduct of individuals").

[FN154]. See Daniel Brookoff et al., Testing Reckless Drivers for Cocaine and Marijuana, 331 NEW ENG. J. MED. 518 (1994) (finding that half of reckless drivers not intoxicated with alcohol were intoxicated with other drugs). Duke and Gross dismiss this problem by saying simply that impaired driving be "punished". AMERICA'S LONGEST WAR, supra note 3, at 248.

[FN155]. See supra text accompanying notes 80-92.


[FN158]. Id. at 597; Loken & Kennedy, supra note 11, at 603-06 (claiming that "liberty" arguments for legalization threaten the very underpinnings of the welfare state and specifically undermine the authority of the state to assist the chemically dependent).

[FN159]. See Melanie Abbott, Homelessness and Substance Abuse: Is Mandatory Treatment the Solution?, 22 FORDHAM URB. L.J. 1 (1994); see also CHRISTOPHER JENCKS, THE HOMELESS 48 (1994) ("Homelessness spread during the 1980s partly because criminal entrepreneurs made cocaine available in smaller doses at lower cost. They clearly deserve lots of blame. Those who succumbed to this new form of temptation must also take responsibility for what crack did to them.").

[FN160]. See AMERICA'S LONGEST WAR, supra note 3, at 267-68 (favoring retention of FDA but exempting "recreational drugs" from its jurisdiction).

[FN161]. Where harm to others is de minimis-only, say, to their "feelings"- Mill believed that individual liberty of action should prevail, at least apart from liability to "moral disapprobation." On Liberty, supra note 153, at 100. Duke and other proponents seem to turn that proposition on its head, urging us to grant free scope to actions which harm society so much that its very capacity to preserve order is deeply compromised.

[FN162]. Lady Bracknell indulged in this kind of cost-benefit analysis when, upon hearing Jack's litany of her nephew Algernon's crimes-how he had lied his way into Jack's house, drunk Jack's Perrier-Jouet Brut '89, alienated the affections of his ward, Cicely, and, worst of all, "devoured every single muffin" set out for afternoon tea-she promptly decided to "overlook" everything. The reason? Cicely, whose heart Algernon had earlier won, would bring into the family 130,000 pounds ("And in the Funds!"), making her a young lady with "qualities that last, and improve with time." But Jack refused-how many of us in such straits would not?-to give a proxy for the exercise of his own forgiveness. Being Earnest, supra note 1, at 373-74.

Those of us who from a distance calculate the empirical advantages and disadvantages of legalization should likewise be careful to avoid preempting the apparent determination of those most affected by drugs-poor and minority citizens-not to overlook the problems created by drugs in their families and neighborhoods. See supra text
accompanying note 102.

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