

# LIBERAL MORALITY AND THE MYTHS OF DRUG CRIMINALIZATION



*Current Canadian drug laws may need minor amendment but they should not be abandoned. The rate of incarceration for drug offences is not high; the costs of the “war on drugs” are minimal; and many of the shortcomings of prohibition would not be greatly reduced in a successor regime of regulation. Drug use is an activity that should invite government intervention through legal sanctions. Law has normative, and not merely utilitarian, ends. It serves a moral education function that contributes to character formation, and this is an essential task of governing. Principle and prudence limit what governments can do to accomplish this task, but they do not eliminate it altogether.*

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*La législation canadienne sur l’usage des stupéfiants nécessite sans doute de légères modifications, mais elle doit être maintenue. Les incarcérations pour infractions liées à cet usage restent peu nombreuses, les coûts de la « guerre à la drogue » sont minimes, et l’on ne réduirait que faiblement les dépenses liées à la prohibition en remplaçant la réglementation actuelle. La consommation de drogue réclame des gouvernements une intervention fondée sur des sanctions judiciaires, la loi ayant des fins normatives et non simplement utilitaires. Elle contribue à la formation des caractères en jouant un rôle d’éducation morale, aspect essentiel de la tâche de gouverner. Les principes et la prudence réduisent la latitude des gouvernements dans l’exécution de cette tâche, mais ils n’en suppriment pas la nécessité.*

In July 2001, Statistics Canada reported that drug offences increased by nine per cent in 2000, despite the ninth consecutive year of an overall decline in crime rates. With the exception of heroin offences, which dropped by eight per cent, there was an increase in most drug categories, including a six per cent increase in the rate of cocaine offences. However, because cannabis possession accounts for approximately half of all drug-related incidents reported by police, and because cannabis apparently has medical benefits and arguably causes relatively little harm, marijuana decriminalization has moved dramatically up the national policy agenda. Serious and plausible arguments maintain that removing a prohibition that is, in any event, widely ignored will free law-enforcement resources to concentrate on real crime without undermining public order. Indeed, removing this particular prohibition may in fact promote respect for the rule of law by legalizing an activity that many Canadians do not consider wrong.

The debate about marijuana provides an opportune moment to reflect more generally on Canadian policy toward those drugs that are now classified as illegal. Are we

engaged in a costly, overly punitive, and ultimately useless “war on drugs”? Is drug use a socially harmful activity that invites government intervention, or is it a purely private activity toward which governments should be indifferent? These are not new questions, either for professional policy analysts or Canadian policy-makers. Yet they remain the questions whose answers determine the content of our policy toward drugs, and it is appropriate to raise them anew from time to time.

Let me state my position at the outset. First, Canada’s implementation of existing criminal prohibitions on drug use is not particularly severe. Arguments to the contrary, I would suggest, rely on three myths about criminalization, which I call the imprisonment myth, the spending myth and the cost-avoidance myth. Second, drug use is an activity that should invite government intervention through legal sanctions. Law has normative, and not merely utilitarian, ends. It serves a moral education function that contributes to character formation, and this is an essential task of governing. Principle and prudence limit what governments can do to accomplish this task, but they do not eliminate it altogether.

One argument against Canada's use of criminal justice policy to discourage the use of certain drugs is that it is filling already overcrowded prisons with not particularly dangerous individuals. A second argument is that criminal justice-related spending is too high, and that much of this spending can be attributed to an oppressive "war on drugs." Finally, critics of existing policy argue that decriminalization, and perhaps even legalization, will allow Canada to avoid a wide array of costs associated with the improper and ultimately futile attempt to suppress drug use. Let's examine each of these arguments in turn.

Close examination of data compiled by the Canadian Centre for Justice Statistics certainly raises serious questions about the first two arguments. For example, according to these data the average daily inmate population of federal and provincial correctional institutions is approximately 33,000, with fewer than 10 per cent of these inmates incarcerated for drug-related crimes (i.e., possession or trafficking). Simple possession offences, which arguably cause less social harm, only rarely result in imprisonment (only about 13 per cent of the time, to be exact). The most common sentence for possession, given to 63 per cent of those convicted, is a fine whose median value is \$200. Even when imprisonment results, the median sentence is just one to two months. Trafficking offences are certainly more likely to result in imprisonment—66 per cent of convictions do—but even in these cases the median sentence is relatively short (at four months). To be sure, a criminal conviction has long-term consequences for the individual who receives it, but nothing in these data suggest that Canada is harshly punitive with respect to drug offences.

Nor are Canadian governments spending wildly or even disproportionately on justice-related items. Total justice spending by all governments in Canada, which includes police, courts, prosecutions, legal aid, youth and adult corrections, amounts to approximately \$10 billion annually (or about \$300 per capita). It is true that the federal government's drug prosecution costs increased by about 20 per cent, from \$17 to \$20 million, in fiscal year 2000-2001, but these costs should be put in perspective. For example, over the past two years the Ottawa has paid over \$9 million to several US law firms to fund its fraud suit against tobacco smuggling. More generally, in 1999-2000 Canadian governments spent approximately \$56 billion on health and \$38 bil-

lion on education. The administration of justice is obviously costly, but it does not appear to come at the detriment of spending in other important policy areas.

But the costs of criminalization go beyond the obvious enforcement costs. As American political scientists James Q. Wilson and John Dilulio pointed out over a decade ago, these other costs include: the peripheral crime that accompanies illegal drug use, the corruption of officials that the illegal drug trade spawns, and the reduction in liberty associated with the extensive and intrusive police activity necessary to enforce drug laws. Moreover, since no one argues that drug use disappears with criminalization, the welfare and moral costs generated by this activity remain significant. These include treatment and prevention costs, poorer health and increased health care costs, higher unemployment, personal degradation and family breakdown.

The key issue, of course, is whether decriminalization will lower these costs. It would certainly reduce enforcement costs, but such costs would not disappear entirely. Decriminalization without regulation—probably strict regulation—is inconceivable, and there would be regulatory enforcement costs just as there are with the legal production, distribution and consumption of alcohol and tobacco. Moreover, the legal market in tobacco and alcohol has not eliminated the black market in those substances, and so there would still be costs associated with illegal activity on the periphery of the legal market.

The impact of decriminalization on welfare and moral costs depends on its effect on drug use. About eight per cent of the Canadian population over the age of 15 admits to using any of five illegal drugs (cannabis, cocaine, LSD, speed and heroin). It is difficult to believe that this proportion would not increase with decriminalization. Everyone agrees that, even with heavy taxation, the free-market price of drugs would fall drastically with decriminalization. Indeed, one of the arguments for decriminalization is precisely that this price fall will reduce the criminal activity often generated by the need to pay high black-market prices. Moreover, the non-monetary costs of acquisition—essentially the cost of engaging in an illegal activity—should also decline. Wilson and Dilulio argue persuasively that the combined effect of lower market and transaction costs on the consumption of widely desired, pleasure-inducing substances would

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likely be dramatic. Consequently, even if enforcement costs were to decline under decriminalization, the other costs of drug consumption could be expected to rise. Drug abusers will not become more employable, healthier or better parents simply because their activity has become legal. It may arguably be easier to direct them into programs to ameliorate the negative consequences of drug use once the stigma of criminalization is removed, but these programs are costly as well. It is difficult to determine whether, on balance, the legal or illegal scenario is more expensive, but it is clear that decriminalization is not a panacea for whatever problems exist with current policy.

Leaving aside cost-benefit considerations, however, it remains an important question whether criminal prohibition is an appropriate government response to an activity whose direct social harm may be minimal. After all, the liberal “harm principle,” articulated by John Stuart Mill in *On Liberty*, prohibits government regulation of individual conduct except where that conduct poses “a definite damage, or a definite risk of damage, either to an individual or to the public.” Can governments prohibit drug use simply because it harms the user, especially when the consumption of other addictive and potentially harmful substances (e.g., caffeine, tobacco and alcohol) is legal? The answer to this question lies in a more nuanced consideration of what liberalism means.

How far governments should go in regulating private conduct is a complicated question in a modern liberal democracy. Nevertheless, even John Stuart Mill recognized that “the virtue and intelligence of the human beings composing the community” is the “first element of good government.” He thus argued that the qualities of good government are directly dependent on “the qualities of the human beings composing the society over which the government is exercised.” To this end, Mill advocated the establishment of universal public education, as well as the celebration of acts of “morality and good conscience,” to “educate the moral sentiments of the community.” Writing in the 1970s, John Rawls argued in *A Theory of Justice* that “a just constitution must rely to some extent on citizens and legislators adopting a wider view and exercising good judgment in applying the principles of justice.” As he put it, “moral sentiments are necessary to insure that the basic structure is stable with respect to justice.” To

borrow again from James Q. Wilson, a self-governing “society cannot exist if it is composed of self-destructive and self-centered people.” In the final analysis, he argues, “governing is about character formation.”

The recognition that even in liberal democracies citizens must possess an “effective sense of justice,” leads to the conclusion that liberal democratic regimes must be concerned with cultivating what de Tocqueville called a “civilized and knowledgeable society.” Liberal democracy requires the development of civic virtue in order to prevent self-government from degenerating into selfish, or self-centered, government. More precisely, liberal self-government functions properly only if the selves who govern exercise moderation in their private conduct and public demands. The criminal law plays a role in this process, not only by serving utilitarian, crime reduction purposes like deterrence, incapacitation and rehabilitation, but also by performing a crucial moral norm-setting function. To be sure, the criminal law identifies harmful conduct, but it also serves to define and promote the character necessary to sustain a free and democratic society.

This relationship among governing, character formation and the law has its origins in Aristotle’s ancient teaching that “moral virtue comes about as a result of habit,” and that “legislators make the citizens good by forming habits in them.” Virtue, he argues, is a “state of character concerned with choice,” and one purpose of law is to distinguish between virtuous and non-virtuous choices.”

But what is the character that liberal democratic regimes must cultivate in order to ensure their preservation? In general terms, these regimes need their citizens to be other-regarding and future-oriented, which means that liberal democracies must cultivate both empathy and self-control among their citizens. (Empathy Wilson defines as a “willingness to take importantly into account the rights, needs, and feelings of others. Self-control refers to a willingness to take importantly into account the more distant consequences of present actions.” See his *On Character*, 1991.) These traits are important, Rawls argues, for two reasons. First, participation in self-governing societies requires that citizens weigh interests other than their own when deliberating on public issues. Second, citizens must be guided in those deliberations by conceptions of justice and the common good rather than by immediate self-interest. Apart from conduct that directly violates one or both of these principles

(such as crimes against persons or property, which clearly demonstrate a lack of concern with others), the decision to criminalize other behaviour depends on the degree to which it affects citizens' capacity to be other-regarding and self-controlling. Obviously, this is to a large degree an empirical judgment, but it is one that is within the legitimate normative boundaries of a liberal regime.

The criminal prohibition against certain drugs is therefore consistent with liberal principles, and the decision of precisely *what* to prohibit is largely a prudential question that has, and will, vary from generation to generation. As many have pointed out, criminal prohibitions against many drugs are of relatively recent origin, but policy evolution of this sort is hardly unique. Tobacco use was also once largely uncontrolled, but is now heavily regulated for public health reasons. Caffeine has largely escaped any type of regulation (though the *Food and Drug Act* does set maximum levels of caffeine in cola products, as well as the maximum level of caffeine for "decaffeinated" coffee and tea.) It is certainly important

to examine these decisions from time to time, and to consider whether the habits instilled by criminalization promote or undermine the character essential to properly functioning liberal democracies. However, one should not expect more from decriminalization than it can deliver.

Decriminalization may reduce, but will not eliminate enforcement costs. It could reduce, but will not eliminate welfare costs. We certainly don't know its effect on the moral costs of drug use. Yet it is both legitimate and important to enquire about this last cost. It is also important not to define the debate as a choice between, on the one hand, complete legalization and, on the other, a full-scale "war on drugs"—which is about as likely to succeed as a government-sponsored "war on poverty." Intelligent enforcement of existing laws, and serious consideration of what should be included in the category of illegal substances, may be the best—if not the boldest—course of action.

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**What's next** We have made significant downward revisions to short-term economic performance, but have come to the conclusion that the effects of the attack are primarily to impose a sharp "V" downturn/upturn on the short term. This "V" is overlaid upon an more gradual "U" decline and recovery resulting from a combination of investment/inventory cycle and monetary braking/accelerating. The net result is weakness through the remainder of 2001 and the first quarter of 2002, followed by growth acceleration to a pace well above potential as the rest of 2002 unfolds... We assume no further important disruptions, physical or psychological, from either terrorist attacks or the countermeasures now emerging. Armed conflict is assumed to be confined to Afghanistan and nearby regions, having no significant effect on world trade or the supply of important commodities—especially petroleum.

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The key issue is whether the downturn in economic activity will be brief and shallow, or deep and protracted. In our view, a recession comparable to the sharp downturns experienced in 1990-1 and 1981-2 is not the most likely outcome. While it is undeniable that the Canadian and US economies will go through a rough spell over the next couple

of quarters, the downturn will be noticeably less severe than in the early part of the two previous decades, and by early next year, the economies on both sides of the border should be on the road to recovery. At the same time, however, recovery is likely to be sluggish and hesitant—nothing close to the V-shaped snap-back that has characterized some previous cycles.

TD Economics

If a tighter customs and immigration system were established around the Canada/US perimeter permitting the Canada/US border crossing to be eliminated, it would seem that the citizens, as well as the businesses of both countries would be better off. While there are obviously serious administrative, operational as well as political problems in this change, if Canada is faced with being inside or outside of "fortress America" on net, inside has strong economic advantages. Under this arrangement the same procedures for visitors would apply whether you were entering Canada or the US. Tourists and truckers would travel as freely between Ontario and Michigan as they do between Ontario and Manitoba. Canada would retain its immigration policy.

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