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Excerpt

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## Introduction

### THE VICE CONTRARIAN

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

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

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

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

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

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

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

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

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

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

#### VICE – IT EVEN SOUNDS COOL<sup>2</sup>

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

<sup>1</sup> Skolnick (1988, p. 10).

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

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

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

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

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

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

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

<sup>4</sup> Aristotle, in *Nicomachean Ethics*, Book II, Chapter VI.

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

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

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

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

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

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

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

involve a shared set of principles. Within the class of illicit drugs alone there are vast and important variations that influence the appropriateness of alternative regulatory structures; nevertheless, it makes sense to discuss public policy toward alcohol, gambling, prostitution, and so on, within a common framework.

The “habit” and “excess” characteristics of vice might not apply to occasional indulgers such as social drinkers, small-time lottery players, or weekend marijuana smokers. Nonetheless, we will consider the full range of users, light as well as heavy drinkers (and gamblers, and tokers, and so on), when we examine regulations, even though only for the habitual or heavy drinkers does alcohol consumption meet all of the standard markers of vice. The bulk of the ill effects associated with vicious activity tend to derive from a relatively small number of excessive users or addicts. But “the bulk” is not the whole: many of the costs of alcohol use are attributable to those who are occasional drinkers – and similarly with respect to other vices.

Why devote much time or attention to studying vice? First, as its long-term popularity suggests, vice is inherently interesting, it continues to amuse. But concern with vice is stoked by factors beyond curiosity or prurience. Public policy relating to vice is of prime, personal relevance for almost everyone, in ways that housing policy or even national defense policy are not. For many Americans, vice will serve as their unintended introduction to the criminal justice system: drunk driving and possession of illegal drugs are the two most common reasons for arrest.<sup>7</sup> Few families have been untouched by tragedies associated with drug, alcohol, or gambling abuse. Even for those in households not directly connected to vice, if we could find such people, vice nevertheless plays a major role in shaping their constitutional rights. In the United States, the extent to which speech is protected against government control is set, in large measure, by Supreme Court decisions concerning attempts to regulate pornography and erotic dancing. Much of the government’s scope for conducting searches has been mapped out by judicial rulings pertaining to investigations aimed at illegal drugs. Wiretaps were countenanced by the Supreme Court in an alcohol bootlegging case, and later a warrant requirement for electronic bugs was instituted via a Supreme Court decision involving an interstate gambling operation.<sup>8</sup> There is no avoiding it: the policy issues surrounding vice are immense and continual and have implications well beyond vice’s own significant ambit. If that isn’t enough of a reason to concern yourself with the regulation of vice, perhaps you can be persuaded by Milton, poet of paradise, who argued that familiarizing yourself with vice can help you to understand its opposite:

Since therefore the knowledge and survey of vice is in this world so necessary to the constituting of human virtue, and the scanning of error to the confirmation

<sup>7</sup> See the Appendix.

<sup>8</sup> *Olmstead v. United States*, 277 U.S. 438 (1927), and *Katz v. United States*, 389 U.S. 347 (1967).

of truth, how can we more safely, and with less danger, scout into the regions of sin and falsity than by reading all manner of tractates and hearing all manner of reason? And this is the benefit which may be had of books promiscuously read.<sup>9</sup>

Onward then, promiscuously, for what I hope constitutes “knowledge and survey of vice.”

#### ECONOMICS AND VICE, AND MORE ON KETCHUP

Trying to understand vice and its regulation is a hopelessly interdisciplinary undertaking. Medicine, law, psychology, sociology, history, economics, and many other fields of knowledge are implicated in providing insight into vice. Vice isn't brain surgery – rather, it concerns brain surgery and lots of other specialties, too. (Rocket science, by and large, is not one of them.) I am an economist, however, and though I try to do all that becomes an author, I privilege the economics approach.

What advantages, or perhaps I should say features, are offered by an economic approach to vice? Economics is the science of choice and in theory, at least, should be as applicable to choices to grow opium poppies or inject heroin as it is to choices to grow tomatoes or eat ketchup. Indeed, the rational choice framework of economics has proved its worth in a range of applications, including such nontraditional settings as decisions to get married, to have children, or to commit crimes. Nevertheless, it is hard to look at the choices of a homeless heroin addict and to view these choices as being the result of some rational decision calculus – hard, but not impossible, given years of economics training. Even homeless heroin addicts at least seem to conform to the “law of demand,” the notion that if the price exacted to engage in an activity is raised, people will lessen their involvement in the activity. The extent to which an addict can be said to make rational choices, and what difference it makes for policy, will be examined in some detail in Chapter 2.

If addicts are incapable of making decisions that contribute to their well-being, then there is little reason for society to respect those choices, just as society does not respect the choices of those who are adjudged to be insane. Children represent another subset of humanity whose choices are not given full societal warrant.

Most people who choose to engage in vice are neither addicts, insane, nor children, however; hence, the rationality of their choices is generally not suspect. A choice taken rationally has the feature that it provides the decision

<sup>9</sup>Milton, *Areopagitica*. But why turn to Milton when the voice of Fanny Hill, heroine of John Cleland's (1985 [1748/9], pp. 187–8) famous eighteenth-century pornographic novel, *Memoirs of a Woman of Pleasure*, can serve the purpose?: “if I have painted vice all in its gayest colours, if I have deck'd it with flowers, it has been solely in order to make the worthier, the solemn sacrifice of it, to virtue.”



maker with the highest possible “net benefits,” relative to all of the other options available at the time of the choice – where the net benefits are judged from the point of view of the decision maker. Many people consider themselves to be better off by drinking alcohol, or by smoking marijuana, or by going to a casino, or by having sex with a prostitute – just as they view themselves as being better off when they have ketchup on their burger. So a second feature of the economics approach to vice is that vicious activity is viewed as having benefits. The existence of benefits might be obvious, but public debate regarding vice policy is typically conducted as if vices were some sort of mysterious activities that involve only costs. Even supporters of liberalized vice regulations are unlikely to point to the good features of the activities: when is the last time you heard someone argue that there really isn’t enough pornography available or that it would be a welcome change if the extent of prostitution would grow? The policy discussion, rather, is almost always conducted in terms of the lessening of evils, ways to minimize the extent or the harms of vices, as opposed to maximizing their net benefits. Those who take a public health approach to vice, or view addiction as a disease, for instance, frequently ignore potential benefits as they look to ameliorate the medical hardships associated with drinking or drugs.<sup>10</sup> The economics approach employed here instead tries to keep the benefits of vice in mind, too, even when the explicit discussion involves minimizing harms.

If choices are viewed as rational, then to some extent, society can leave adults alone in their vice-related choices, just as society has little interest in my ketchup-related choices. But only to some extent: if the decision maker does not face the full panoply of costs and benefits, then his or her choices, though rational, will be skewed. A burglar might be rational, but in making decisions, he (rationally) ignores the losses his choices directly impose on his victims. If he considered these costs, he probably would not burgle, though he might offer to buy those items he particularly covets. Is a drug user more like a burglar or a ketchup eater?

The point is, for now, that the economics approach views this as a meaningful question. In economics terminology, the issue concerns the extent to which the costs and benefits of a decision are “internal” or “external.” Sometimes economics is viewed as being exclusively about money, but this is far from the case. An economic approach to regulation considers the full range of costs and benefits, those that can be quantified and those that can’t be quantified. If you are unhappy because someone a thousand miles away is smoking a marijuana cigarette in a safe manner without directly or even indirectly harming anyone else (except for your unhappiness), in theory, an economic approach would

<sup>10</sup> Public health researchers tend to use population-level analysis, whereas economists focus on individual choice. Cook and Leitzel (1996) talk about the public health versus economics approach to gun regulations.



take your distress into account in evaluating alternative policy regimes toward cannabis.<sup>11</sup> Economics looks to include all costs and benefits, monetary or not. The key distinction, again, is between those costs and benefits that the decision maker bears and those that are imposed on others. A rational decision maker who takes all costs and benefits into account can safely be left alone – his choices, aimed at his own self-interest, will have the Adam Smith property of simultaneously promoting the welfare of society.<sup>12</sup> But if the decision maker does not face the full range of consequences from his choices, that is, if there are spillovers or “externalities,” then intervention might be required to ensure that social welfare is not sacrificed to the private interests of the decision maker. And so we have laws condemning burglary, but leave adults free to make their own ketchup-related decisions. My earlier contention that engaging in most forms of vice is primarily a “self-regarding” activity implies that, with respect to externalities, a typical drug user is more like a ketchup consumer than a burglar. Indeed, it is the self-regarding nature of vice that generates moral ambiguity. Burglary and murder are not similarly self-regarding, and there is little ambivalence underlying their condemnation and criminalization.

The coincidence between private choices and the public good, however, depends not just on the absence of externalities but also on the rationality of the decision maker. We have already noted that addicts and rationality do not appear to be all that closely paired. But drug use and the consumption of other vices present rationality concerns not just for addicts but also for occasional users. (That is, I am now suspicious of what I claimed, a few paragraphs ago, was not generally suspect: the rationality of vice choices by nonaddicted adults.) Alcohol, drugs, tobacco, and gambling are like ketchup in that they involve primarily self-regarding decisions. But they still differ from ketchup in that people (non-addicted people) are more likely to regret their drug-related decisions than they are their ketchup-related decisions. This is not true of everyone – some people who use illicit drugs, for instance, no doubt are every bit as reasoned in their drug use as in their ketchup consumption, and maybe some otherwise deliberate folks go wacky with the ketchup in ways they later rue. But all in all, vices are particularly susceptible to lead to regrettable individual decision making, even in isolated, acute instances among nonaddicts. (The regret might manifest itself on the “supply” as well as the “demand” side, from part-time strippers and drug

<sup>11</sup> In practice, your unease would get little or no attention, because it is hard to quantify and, more importantly, it is too easy to fake – even people who barely care might claim that they care quite a bit, if by such dissembling they could influence policy outcomes. Choices that are made when your own resources are on the line – as opposed to answers to survey questions about how much you care – are typically given more weight.

<sup>12</sup> To avoid libeling Adam Smith, let me note that (1) there were many areas where he favored some government influence over decisions, and (2) his reference to the invisible hand in *The Wealth of Nations* was specific to a very circumscribed setting; see Grampp (2000). Further, the precise coincidence of individual choices with the social good generally requires such unrealistic conditions as undistorted, competitive market prices.

sellers along with occasional cyberporn consumers or drug users.) We have legitimate reason to worry about whether typical choices with respect to vices serve the interests of the decision maker as well as the interests of the rest of us.

Beyond overarching issues of costs and benefits, externalities, and rationality, economics brings some specific competencies to the study of vice. The basic supply and demand framework applies to vice markets as to other markets, and regulatory policies can usefully be delineated into demand-side (targeting users) or supply-side (targeting producers, traffickers, and sellers) approaches. Economists have learned a good deal about regulation of industries, such as public utilities and airlines, and some of those regulatory lessons apply in vice settings, too. Public finance specialists study taxes, tax evasion, and black markets, and their insights also have relevance for vice. Finally, economists have conducted many quantitative studies that help to answer such questions as how the consumption of cigarettes responds to a higher tax, a ban on advertising, or the provision of antismoking ads.

So economics offers an approach, and it offers some tools to generate information. Nevertheless, an early lesson for anyone who undertakes the “knowledge and survey of vice” is humility, the recognition of how little we know. What is addiction? Are chemical addictions (drugs) like behavioral addictions (viewing Internet pornography, gambling)? How do people substitute among drugs? Will a crackdown on marijuana or Ecstasy lead to more use of alcohol and perhaps more drunk-driving deaths? How will the long-run effects of a drug-control policy differ from the short-run effects? Are regulatory walls stable? For instance, is it possible to shield teens effectively from substances that are legally available to adults? Does tolerance of cannabis make it more problematic to limit the consumption of “hard” drugs like heroin? Do state-operated lotteries generate forces that lead to legalization and commercial promotion of other forms of gambling? Although we are not completely at sea with respect to answers to these questions, we are pretty far from shore. Other questions are perhaps more fundamental and maybe harder still to answer. Should pornography be freely available, and even difficult to avoid? Do we want to respect personal freedom to use drugs, perhaps encouraging habits that will ruin many lives, or do we want to put folks in jail for carrying around a substance that they occasionally like to consume? These broader questions come close to asking, what kind of society do we want to live in? Neither economics nor rocket science is of much help in providing answers to questions like these. But economics can help us to understand, to some extent, the kinds of worlds that will be generated by alternative policies regulating vice.

### THE $3\frac{1}{3}$ STANDARD VICE CONCERNS

(1) Kids; (2) addicts; (3) external harms; ( $3\frac{1}{3}$ ) endangered health and other negative impacts on nonaddicted adult consumers – already mentioned in the