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I For Drug Legalization

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1 The Meaning of Drug Decriminalization

PHILOSOPHERS are good at clarifying issues. The initial issue I propose to debate is whether drugs should be *criminalized* or *decriminalized*. This issue needs to be clarified. In principle, the ideas of drug criminalization and drug decriminalization are straightforward. Anyone who proposes that a given drug should be *criminalized* means simply that *the use of that drug should be a criminal offense*. By contrast, those who favor *decriminalization* mean simply that *the use of that drug should not be a criminal offense*.

As the issue is so defined, it is fairly easy to understand why some citizens are *for* drug decriminalization and others are *against* it. What is harder to fathom is why the idea of decriminalization itself is so difficult to grasp. Admittedly, commentators on both sides of this debate have contributed to the confusion by using terms like *criminalize* and *decriminalize* in different and inconsistent ways.¹ Sometimes, they have used the term *decriminalize* interchangeably with *legalize*. Of course, people are free to use these words however they like, as long as they are careful to explain what they mean. Here, I use the term *drug legalization* to refer to a system in which the *production* and *sale* of drugs are not criminal offenses. In my judgment, decriminalization is a much more basic issue than legalization. We should not try to decide what the law

1 Decriminalization is sometimes defined to include a *reduction* in the severity of criminal punishments. See, for example, Robert J. MacCoun and Peter Reuter, *Drug War Heresies* (Cambridge: Cambridge University Press, 2001), p. 40. As the term is so defined, finding a commentator who does not endorse drug decriminalization is nearly impossible.

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should say about drug production and sale unless we are clear about what the law should say about drug use. Thus I propose to begin with a discussion of decriminalization and not proceed to an examination of legalization until Chapter 5.

In this first of five chapters, I will try to clarify the meaning of drug decriminalization. I anticipate that readers who are already reasonably knowledgeable about the topic will be eager to move directly to the arguments that constitute the bulk of my half of this volume. In the following chapters – and in Chapters 3 and 4 in particular – I will attempt to persuade readers to endorse my proposal to decriminalize drugs. But we must be patient. I am confident that a great ideal of resistance to my position rests on a misunderstanding of exactly what I am (and am not) proposing. If I am correct, this preliminary chapter is absolutely crucial if we want to ensure that we are all talking about the same thing when we debate whether or not to decriminalize drugs.

This chapter consists of three sections, each of which addresses confusions about the meaning of drug decriminalization. The first section focuses on the meaning of *decriminalization*; the second discusses what is meant when a substance is said to be a *drug*; and the third examines whether proposals to criminalize or decriminalize a particular drug must be sensitive to the *purpose* for which that drug is used. Each of these matters turns out to be surprisingly complex.

Decriminalization

Let us begin by asking exactly what is meant when we say that the use of a drug is (or is not) a criminal offense. Conduct (such as the use of a drug) is made a criminal offense when legislators *prohibit* that conduct by enacting a statute that subjects persons who engage in it to *punishment*. In other words, the use of a given drug is criminalized if and only if people become eligible for punishment for using that drug. Of course, to say that people become *subject* to or *eligible* for punishment does not imply that they *will* be punished. Most people who break criminal laws are never caught, arrested, prosecuted, convicted, or punished. But

this fact is beside the point I am making here, which is about the *meaning* of criminal offense. The state cannot punish people unless they have committed a crime – a criminal offense. Anyone who proposes that a given drug should be *decriminalized* means that *the state should not punish people simply for using that drug*.

Unfortunately, what I have said thus far only begins to clarify the issue, since confusion about the meaning of decriminalization simply reappears at a new and deeper level. Suppose legislatures enact statutes that allow the state to respond to drug users in various ways. If we are uncertain about whether any of these state responses is a kind of *punishment*, we will be uncertain about whether drug use has been criminalized or decriminalized. In most cases, we are not at all confused about this matter. If legislators draft statutes that allow the state to sentence persons who use a drug to prison, we have no doubt that the use of that drug has been made a crime. Sometimes, however, we *are* uncertain about whether state responses are a kind of punishment. When we are unclear about this, we should also be unclear about whether what that person has done is or is not a crime.

I mention our uncertainty about whether some kinds of state responses amount to kinds of punishments because it complicates our understanding of the meaning of decriminalization generally, and of drug decriminalization in particular. Drug decriminalization, as I define it here, means that drug use is not a crime. If drug use is not a crime, people cannot be punished for using drugs. But what kinds of state responses to drug users are kinds of punishments, and therefore ruled out by decriminalization? Suppose, for example, that the police write tickets to people they detect using a drug such as marijuana. These tickets, let us further suppose, are paid by a monetary fine, much as parking tickets are. Those who are ticketed have the option to plead guilty and pay their fine through the mail or contest the charge and go to trial. If they go to trial and lose, their fine will almost always be greater than what they would have paid if they had pled guilty. If they fail to pay this fine, they will be sentenced to jail. Does the system I have just described amount to the decriminalization of marijuana? The answer is unclear, and I will not attempt to

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resolve it here. The important point is that if this system *punishes* users of marijuana, then marijuana has *not* been decriminalized. But if this system does *not* punish users of marijuana, then marijuana *has* been decriminalized.

This debate about what kinds of state responses to drug users are kinds of punishments is important when well-intentioned reformers, dissatisfied with our current policy, propose that drug users should be required to undergo *treatment* instead of being sent to jail. The movement to treat rather than to imprison drug users continues to gain momentum. Consider, for example, Proposition 36, approved by a 3 to 2 margin by California voters in 2000. This proposition requires many individuals caught using illicit drugs to subject themselves to treatment. Failure to undergo treatment, or to undergo treatment successfully, subjects the drug user to jail. The trend toward treating drug users instead of imprisoning them is not peculiar to California. Throughout the United States today, somewhere between 1 million and 1.5 million Americans are coerced into 12-step alcohol and drug treatment programs each year, often because they “choose” to participate rather than endure some other hardship.² Treatment is an option some states offer as a way to avoid imprisonment for, say, drunk driving. Such proposals are generally regarded as humane and cost-effective alternatives to punishment. Sponsors of Proposition 36 argued that 36,000 fewer people would be imprisoned each year simply for possessing illicit drugs.

Do these proposals amount to drug decriminalization? The answer is not obvious. I am inclined to believe that mandatory treatment is *not* an alternative to punishment; it is simply a different *kind* of punishment. If I am correct, support for decriminalization is incompatible with support for treatment as a forced alternative to jail. No one who favors decriminalization can approve of mandatory drug treatment, unless he or she believes that coerced treatment is not a kind of punishment. Decriminalization does not allow the state to sentence drug users to treatment any more than

2 See Stanton Peele and Charles Bufe with Archie Brodsky, *Resisting 12-Step Coercion* (Tucson, AZ: Sharp Press, 2000).

it allows the state to sentence drug users to jail. I have little doubt that treatment is preferable to incarceration if we must choose between the two. But we need not make this choice. We need not assume that drug users must be either bad – and deserve punishment – or sick – and in need of treatment whether they like it or not. We have a third option. Our criminal justice system might leave people alone when they merely use a drug. If we choose this latter option, we might say that the state allows people to be *free* to use drugs. If people are truly free to use drugs, there can be no doubt that the state has decriminalized drug use.

Uncertainties about whether an activity has been criminalized can be drawn from familiar examples in which activities are licensed. Is it a crime to drive a car or to practice medicine? The answer, of course, is that these activities are crimes unless persons have a license. Suppose we decided to license drug users. Would such a system amount to decriminalization? It is hard to say. Perhaps our answer should depend on how difficult it is to obtain a license. Suppose we implement a system of “heroin maintenance,” which allows users to take heroin without fear of criminal penalties at licensed facilities. Would this system amount to decriminalization? At some point, we should recognize that the contrast between criminalization and decriminalization is simplistic, obscuring the full range of alternatives that are available to regulate drug use.

Confusion about whether a proposal is a form of criminalization or decriminalization is rampant. Frequently, reformers are deliberately evasive about this issue. Sometimes officials talk about such concepts as “bans” or “prohibitions” without being clear about whether they are talking about criminal laws that subject people to punishments. In 2003, for example, Surgeon General Richard Carmona explicitly expressed his support for the banning of tobacco products – the first time a surgeon general had made such a recommendation. When testifying before a House Energy and Commerce subcommittee, Carmona affirmed that he would “support the abolition of all tobacco products.” He declined to say whether he favored a specific law to ban tobacco, indicating that “legislation is not my field.” He did, however,

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affirm that he “would support banning or abolishing tobacco products.”

How should we understand Carmona’s proposal? It is hard to see how tobacco products could be “abolished.” What *could* be done, however, is to *criminalize* tobacco use – to make smoking (or otherwise using) tobacco products a criminal offense. This proposal threatens to punish the tens of millions of Americans who currently smoke tobacco. I do not believe for a moment that this would be a good idea, but that is not my point. My point is that we need to be clear about exactly *what* is being proposed. If Carmona’s plea to “ban” or “abolish” tobacco products involves subjecting smokers to punishments, it is reasonable to expect him to say so.

Confusion about the meaning of proposals to decriminalize some illicit drugs such as marijuana is prominent as well. Between 1973 and 1978, 11 states are said to have “decriminalized” the possession of small amounts of marijuana: Alaska, California, Colorado, Maine, Minnesota, Mississippi, Nebraska, New York, North Carolina, Ohio, and Oregon. Alaska has since tried to re-criminalize, and Oregon has decriminalized after recriminalizing. Several cities and counties also passed laws that were said to amount to decriminalization. But these states and cities respond to drug users in very different ways, making it unclear what “decriminalization” really means. In some of these places, possession results in the loss of a driver’s license for 90 days. If this response amounts to a kind of punishment, we should not conclude that these jurisdictions have implemented a policy of marijuana decriminalization as I define it here.

Proposals in neighboring countries are no more clear. In 2002, the Canadian Senate issued a voluminous report that urged Parliament to “legalize” marijuana. In response, the Chretien government introduced a bill to “decriminalize” the possession of a half-ounce. The amount to be decriminalized was reduced from a full ounce after Attorney General John Ashcroft and the drug czar, John Walters, made threats to slow traffic at the Canadian border. Some newspaper editorials characterized this plan to “decriminalize” marijuana as a “one-word lie.” The proposed policy

would allow the police to give tickets to citizens caught with half an ounce. The bill would not grant Canadians the freedom to use marijuana. Only the mode of punishment would be changed.

Despite these uncertainties, I regard confusion about whether drug users may be given tickets or required to undergo treatment as relatively minor details that should not obscure what is crystal clear about decriminalization. What is beyond controversy is that a sentence of jail for drug use is a punishment for a crime. Therefore, no one can endorse decriminalization unless he or she agrees that drug users should not be sent to jail or prison. This is the core idea of decriminalization I will presuppose throughout the remainder of this book. But confusion about the meaning of decriminalization persists, even if we stick to this core idea. In what follows, I will describe several things that drug decriminalization is *not*. We can better appreciate what decriminalization means when we avoid the various ways it is misunderstood.

In the first place, decriminalization only pertains to punitive state policies toward drug *users*. It is noncommittal about how illicit drugs should be produced or sold. Those who support decriminalization may believe that no one should be allowed to manufacture or distribute illicit drugs. Most defenders of decriminalization would probably be unhappy about a policy that punished producers or distributors of drugs. I will return to this important topic of legalization in Chapter 5. But decriminalization *itself* implies no position on these issues. Decriminalization says only that users themselves should not be punished. What happens to *other* participants in the drug trade remains an open question, to be decided only after we are clear what the criminal justice system should do about users.

Because decriminalization itself says nothing about producers or sellers of drugs, we should not regard decriminalization as a comprehensive drug policy. In other words, those who favor decriminalization should not be understood to offer a “solution” to our country’s “drug problem.” Those who advocate decriminalization may propose any number of imaginative solutions or believe that the problem has no solution at all. They may (and do) differ greatly among themselves about what an “ideal drug

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policy” would look like. Their only point of agreement is that punishing drug users should not be an acceptable part of that policy.

In addition, those who favor decriminalization need not believe that drug use should be approved or condoned by the state. The contrary supposition has been a major obstacle to understanding decriminalization. Many people reject decriminalization because they fear it “sends the wrong message” about drug use. According to this train of thought, decriminalization sends the message that drug use is permissible; that drug use is not wrong. But decriminalization itself takes no position on whether drug use is wrong. Many activities that should not be subjected to punishment are wrong. We can all describe any number of activities – such as breaking our promises or lying to our friends – that no one proposes to criminalize, even though almost everyone agrees that they are wrong. Similarly, decriminalization does not imply that we condone or approve of drug use. In no other context do we think that the failure to punish people indicates that we condone or approve of what they do. To be antiprohibition is not to be pro-drug.

In case there is doubt, notice that support for decriminalization is consistent with any number of state strategies designed to discourage drug use – as long as these strategies are not kinds of punishments. The state may try to influence behavior through taxation and education. We can produce less of whatever behavior we do not want by taxing it heavily or by educating people about its dangers. Schools might test students for illicit drugs and sanction them in various ways if their test results are positive. Possible sanctions might include not allowing drug users to participate in extracurricular activities – a sanction allowed by the Supreme Court in 2003. A host of additional strategies to shape behavior are available to the state as well. The Office of National Drug Control Policy has encouraged major movie studios to promote antidrug messages in their films. The office has made agreements with Internet search engine companies so that antidrug advertisements automatically appear on the computer screens of persons who search for such terms as *pot* and *weed*. Drug reform

ads, including those favoring medical marijuana, might be prohibited as well. As long as these kinds of efforts are made, no one should be tempted to think that the state condones or approves of drug use, even if it does not resort to punishments.

A variety of responses by the private sector might be extraordinarily effective in discouraging the use of illicit drugs and are compatible with decriminalization. Let me mention a few. I do not endorse any of these ideas as desirable; my only point is that they are not ruled out by decriminalization as I define it here. Private employers might test employees for drugs, and even fire those who fail the tests. Landlords might be allowed to require tenants to abstain from given drugs specified in a lease and to evict those who violate their agreements. Clubs like the Kiwanis Club and organizations like the Girl Scouts need not implement a policy of nondiscrimination against drug users. Needless to say, these examples are not imaginary; 196 of the Fortune 200 companies require preemployment or random drug tests. Of course, all of these sanctions are precluded by decriminalization if they are modes of state punishment. But I do not believe that people are punished by the state when they are barred from private clubs, fired from their jobs, or evicted from their apartments. These consequences are hardships or deprivations – sometimes more severe than the effects of being thrown into jail – but I do not regard them as kinds of punishments. If I am correct, these kinds of responses to drug use are compatible with decriminalization as I understand it here.

In addition, it is crucial to realize that decriminalization allows the state to criminalize drug use in specific contexts in which it is especially dangerous. Although a state that has decriminalized drugs may not punish drug use per se, it may punish persons who increase various tangible risks by using drugs. The clearest example is driving under the influence of drugs that impair judgment or performance. All states prohibit drunk driving, even though no state criminalizes alcohol use itself. In order to be punished, persons must combine drug use with some other activity that is particularly risky. The criminal offense, then, is not drug use per se, but drug use while performing the risky activity. Of course,