# THE DEBATE ON DRUG LAW REFORM

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*Everything that emancipates the spirit without giving us control over ourselves is harmful*
Johan Wolfgang von Goethe, 1749-1832, *Proverbs in Prose*

## INTRODUCTION

Most people have been affected at some level by drug abuse. Many have close family members, relatives, friends or acquaintances who struggle with an addiction. Those with the addiction can cause a lot of grief to others but are nevertheless loved. They are often charming, sensitive, intelligent, complex individuals who can also behave appallingly. Those who love them are often placed in a terrible predicament. How to work for the best for someone who seems to be self-destructing? It cannot be good to abandon someone to their addiction, but neither is it good to harshly punish them or magnify their struggle. Paths to recovery are often slow, complicated by a range of deep psychological and perhaps physical issues, and require a commitment to what is genuinely in the person's best interests. There are no easy answers, just the reality of messy human behavior, messy relationships, all interwoven with joy and sorrow.

Sensible policies about mind-altering substances must start with a realistic account of the reasons why and how people use them and how that fits with human dignity and flourishing. Naturally following from this will be an honest account of any putative contribution to human fulfillment and an equally honest account of *all* of the potential harms that might result from their use in any given manner. And this must include harm to individuals who use as well as to the whole community.

At root these are ethical questions as much as practical ones.

The recent attempt by the *Australia21* group to reignite debate about public policy on illicit drugs exhibits a curious dichotomy regarding the place of ethics. The authors are critical that,

> The principle arguments used against changing current policy settings tend to be moral rather than scientific.[1]

Yet on the other hand, John Stuart Mill is recruited to argue that there are,

> … firm moral, ideological and rights arguments that mean that vigorous drug law reform could have broad political appeal.[2]

The authors also think that,

> … over the years drug policies and patterns of drug law enforcement have eroded the basic rights of many drug users, such as the right to life and to receive health care of a standard as high as that received by other people.[3]

Indeed, it is not only *Australia21*, but also other drug law reform groups that are now focusing more closely on human rights. Part of the reason for this is that the three international conventions on illicit

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[1] Douglas B & McDonald D, *The Prohibition of Illicit Drugs is Killing and Criminalising our Children and we are all letting it happen.* Australia21 report of a high level roundtable held at the University of Sydney on Tuesday 31st January 2012, p14

[2] *Ibid.,* p21

[3] Douglas B, Wodak A & McDonald D, *Alternatives to Prohibition. Illicit Drugs: How We Can Stop Killing and Criminalising Young Australians.* Report of the second Australia21 Roundtable on Illicit Drugs held at the University of Melbourne on 6 July 2012, p9

drugs are clearly barriers to states liberalising their drug laws.[4] Hence these groups are increasingly targeting them for change.

The question of rights is brought into sharper focus by considering the primary reasons for use. Setting aside for the moment reasons that are essentially feeding an established addiction – and they shouldn't be set aside for long as they are central to this whole debate – reasons for use may be experimental, driven by peer pressure, boredom, or 'self-medication'. They might also be for 'consciousness expansion' or simply pleasure.

In his recent book *Romancing Opiates*, English writer and retired physician Theodore Dalrymple charges Samuel Taylor Coleridge and Thomas De Quincey, amongst others, with producing,

> Romantic claptrap [that] invests intoxication by opiates with a philosophical significance beyond mere indulgence.[5]

In a chapter appropriately titled, *The literature of exaggeration and self-dramatisation*, Dalrymple ruthlessly exposes Coleridge and De Quincey for their self-indulgent and dishonest accounts of their supposed mind and consciousness expansion whilst under the influence.

> Gosh! Opium not only calms you down while sharpening your faculties and honing your intelligence, but makes you a better, kinder person. No pharmaceutical purveyor of an antidepressant ever bid up his product higher than that. Take but a little heroin, therefore, and your intellect will be majestic. Your thoughts will be coherent, your powers of mental synthesis unparalleled. You will recover the pristine, pre-social beauty of the human character of which Rousseau speaks so eloquently. A drunk is a drunk, but a heroin addict is a philosopher.[6]

This 'wisdom of intoxication' was taken up by 60's gurus like Timothy O'Leary to the detriment of a generation, and in Dalrymple's opinion remains, along with boredom and meaninglessness, the root causes of modern society's problem with drug addiction.

Apart from the deceit of consciousness expansion, the appeal of pleasure in its various forms remains a key factor in drug use. In a recent article, Cameron Duff chides policy makers for ignoring this primary purpose of drug taking, enlisting the work of Michel Foucault on ethics and the use of pleasure.

> Indeed, Foucault's work on ethics and the use of pleasure gives rise to a series of critiques of contemporary drug policy and the ways in which it tends to privilege the 'problem' of harms whilst eliding the consideration of pleasure[7].

Julian Savulescu appears to go one step further by arguing that in fact,

> The right to pursue pleasure gives us reason to legalise drugs, while addiction and self-harm fail to give us good reason to prohibit them.[8]

It is not only an ethicist like Savulescu who invokes rights language in the drug legalisation debate. Those who enjoy their drug of choice similarly use rights as an argument.

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[4] There are three UN conventions on drugs: the *Single Convention on Narcotic Drugs of 1961*; the *Convention on Psychotropic Substances of 1971*; and the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988*. Each of these conventions maintains a strict ban on the currently illicit drugs of dependence. There is a very high level of international support for these conventions. A recent declaration upholding the conventions makes the following political statement: "Drugs destroy lives and communities, undermine sustainable human development and generate crime. Drugs affect all sectors of society in all countries; in particular, drug abuse affects the freedom and development of young people, the world's most valuable asset. Drugs are a grave threat to the health and well-being of all mankind, the independence of States, democracy, the stability of nations, the structure of all societies, and the dignity and hope of millions of people and their families." See http://www.un.org/ga/20special/poldecla.htm

[5] Theodore Dalrymple, *Romancing Opiates: Pharmacological Lies and the Addiction Bureaucracy*, Encounter, New York, 2006, 61

[6] *Ibid*., 65

[7] Cameron Duff, Drug use as a 'practice of the self': is there any place for an 'ethics of moderation' in contemporary drug policy? *The International Journal of Drug Policy*, 15:385-393, 2004

[8] Savulescu, J & Foddy, B *A moral argument against the war on drugs*. See http://theconversation.edu.au/a-moral-argument-against-the-war-on-drugs-6304

> I believe it is my human right to use opiates or any other drug I feel like using, for whatever reasons I may have. I feel my life has been enriched by the use of heroin, marijuana, speed, acid and other drugs. I believe that drugs should all be legally available, and I will continue to use these drugs, if I so desire, for the rest of my life.[9]

This would not be the first time that rights were used to justify license. Rights are grounded in human goods. So what goods are really being served? Perhaps Stafford's statement is an example of the pursuit of pleasure extracted from its context in serving the good, or perhaps of pleasure divorced from reason.

One potential good served by mind-altering substances is medicinal, and each substance must be considered carefully and independently of others. Heroin for example is clearly a good pain killer (as well as being just a killer). It is not used for this purpose because there are adequate alternatives and it has a high abuse potential. Likewise, cannabis has some modest medicinal properties that are currently being explored, but the exploration is confounded by the desire for 'recreational' use.

The point is, use and abuse are two separate things, an issue well recognised by health professionals with many currently abused legally available pharmaceuticals; for example, benzodiazepines like Xanax, opiates like Morphine and Oxycodone, antipsychotics like Seroquel, and amphetamines like Ritalin and Adderall.

The abuse of these substances is not only problematic because it flies in the face of the in principle belief that their legitimate role is in healing, but also because the harm associated with their abuse is manifold. Moreover, because of the phenomenon of addiction, the game changes considerably. Addiction creates a drive that compromises free choices.

## UNDERSTANDING ADDICTION

Human beings place a high value on freedom. To be free to act as an autonomous agent, to make real choices about how to live one's life, is universally valued and desired. The essence of addiction is the loss of freedom, the substantial impairment of voluntary control over one's behaviour. And while there are differences between addictions depending upon what the addictive practice is, and differences in the depth of the addiction, the common characteristics include compulsivity, excess, tolerance, withdrawal, relapse, and measurable neurological changes.[10]

Addiction causes serious harm to individuals as well as to their friends, relatives and the community. It is the type of problem that varies not only in degree but also with considerable individual distinctiveness. It can be an intensely personal inner struggle that remains private, or a painfully public and alienating experience.

Debate about the nature of addiction has been ongoing for decades. The primary schools of thought are that addiction is a moral pathological problem, a brain disease or some combination of the two. Where the emphasis lies informs the question of personal responsibility and also has significant implications for treatment as well as for public policy. It is also fair to say that cultural context, social mores, financial resources, primary relationships and circumstance all play a part in the development and progress of addiction.

A disease model of addiction (medicalisation) may decrease the stigmatisation of addicted individuals and encourage access to treatment. On the other hand the medicalisation of addiction has the potential to encourage fatalism and the avoidance of responsibility leading to a lack of commitment to recovery. In this sense medicalisation has a potentially disempowering effect. The mechanism for this may be that since a disease is often considered as something that someone catches through no fault of their own, for some, such a conception may lead to a victim mentality that robs them of the drive to take charge of their own recovery. Even so, some treatments such as 12-step programmes rely upon the idea of addiction as a disease, yet demand responsibility that is believed to empower the person. In such programmes, clients

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[9] Nick Stafford, originally posted on the Drugaid website (www.drugaid.com.au), cited 2001.

[10] For example, the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV) defines substance dependence as a maladaptive pattern of use that leads to impairment or distress in three or more of the following features: tolerance (the need for more of the substance to gain the same effect); withdrawal symptoms (significantly distressful symptoms upon reduction or cessation of use); heavy use beyond what was initially intended; unsuccessful efforts to stop or reduce use; large amounts of time spent obtaining, using and recovering from use; giving up other activities to use; and, continued use in the face of negative consequences. There are similarities here with gambling and other behavioural addictions.

are encouraged to completely abstain because their condition is considered permanent and any contact with the addicting substance will lead to a return to the full expression of addiction.

Aspects of addiction appear to be similar to diseases in that there are known risk factors, a relatively predictable course – withdrawal and relapse, identifiable changes in the brain, and a role for genes in susceptibility. However, even in the deepest state of addiction, pursuing the addicting substance or behaviour requires voluntary control that involves planning and flexibility in response to changing circumstances, rather than simple robotic behaviour. Moreover, voluntary choices are made without compulsion to pursue the addicting substance or behaviour in the first place, prior to the development of addiction. In addition, severely addicted individuals can completely recover from addiction with assistance and without it, so voluntary control, though compromised, is still present.

Even if addiction might be viewed primarily as voluntary and a sign of moral failure, Madueme warns that our common humanity instead suggests we all share this vulnerability and perhaps addiction ought to be viewed in a more universal sense than it currently is.

> … it is crucial to avoid judgmental attitudes that dismiss addicts as culpably mired in moral failure. But permissive attitudes are no good either, and may augur, ironically, an incipient dehumanization. A more nuanced moral psychology suggests that so-called addicts are similar, in many respects, to so-called non-addicts. Both commit voluntary and less voluntary acts of immoral behavior. This construal steals the grist for the mill of moral judgmentalism. We are not so different from one another. Addiction thus becomes a poignant, even tragic, metaphor for the general human condition – as well as being a more severe instantiation of the same.[11]

People not only become addicted to substances, but also to behaviours like gambling. Perhaps if one were to assemble all the addictions, few would be entirely free of some compulsivity in some aspect of life at some time.

Another approach to understanding why addiction develops is to consider the notion ‘shifting the burden’; that is to say, when someone finds a life issue too painful or difficult, the burden is shifted to something easier.

> Some people ‘shift the burden’ of their problem to other solutions - well intentioned, easy fixes which seem extremely efficient. Unfortunately, the easier "solutions" only ameliorate the symptoms; they leave the underlying problem unaltered. The underlying problem grows worse, unnoticed because the symptoms apparently clear up, and the system loses whatever abilities it had to solve the underlying problem.[12]

This issue has real traction when it comes to treatment paradigms, because treatment that does not attempt to deal with the real underlying causes that drive addiction, though sometimes providing symptomatic relief, will always leave people searching for answers to their addictive drives and just continuing the battle.

Yet another angle on understanding addiction is that given the natural human desire and need for relationships, addiction serves as a type of counterfeit relationship with *things* at the expense of people. Attachment to a person’s drug of choice can take on characteristics that start to look quite personal and substitute for real human relationships, which then suffer as a consequence. A ‘relationship’ with a drug is certainly simpler and less demanding than one with another human being, so in a sense addiction as attachment to things is similar to shifting the burden. However, the drug then starts to make demands of its own, making the ‘easier’ attachment in reality appear like just mean trickery.

> Heroin is an intensely singular and personal drug, a drug of the self. Its experience is all about listening down into the body, as well as being one that is led by the body’s demands. Ultimately though, it is a dehumanising one, in that you become the drug. Little or no ‘human’ concerns break into the heroin oeuvre - no orgasms, no tears, no shit, no pain (as long as you’re stoned). You are no longer flesh and blood but a pillar, if not of salt, at least of dia-morphine. Heroin overturns the body’s normal priorities and preoccupations and subverts them to ones that are very much its own.

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[11] Hans Madueme, Addiction as an Amoral Condition? The Case Remains Unproven, *Am J Bioethics* 7(10):25-27, 2007

[12] Senger, PM, The fifth discipline. New York, Doubleday/Currency, 1990, 104

The King is dead, long live the King.[13]

There is another aspect of addiction that underscores the role of relationships, and this is revealed in phenomena like social epidemics of addictive behaviour. Given a particular context, the human propensity to influence and mimic one another, and high availability, there have been times when a sudden rise in addiction to a particular substance occurs. There appears to be no way to predict the occurrence of a social epidemic, but it can be deadly when it happens. This aspect of drug abuse and addiction can also confound comparisons between different communities, because a drug culture of a specific sort can develop in one place and not another despite similarities in regulatory regimes.

A rough guide to the extent of problems associated with the various addictions can be found in relation to two key factors. First, the ease of access to a substance, that is, its availability; and second, the perceived acceptability of its use. The acceptability of the activity depends upon community values as well as what sanctions might apply. Clearly, the two are interwoven, for something considered acceptable will likely entail relatively easy access to it, even though some behaviours, like petrol sniffing, are socially unacceptable yet involve a highly available substance.

Despite the similarities in addiction to different substances, there are also notable differences. For example, addiction to alcohol and/or heroin has well understood physical characteristics of withdrawal, whereas addiction to cocaine, whilst considered an extremely tenacious addiction, does not. Addictive substances like amphetamine, cocaine and heroin produce powerful altered states of consciousness, whereas nicotine, likewise addictive, does not.

Finally, the complex nature of addiction makes it difficult to categorise individuals as *simply* being addicted or not. To a certain extent, addiction occurs on a continuum and harm can increase along a sliding scale. Some harm can nevertheless occur prior to the full-blown characteristics of an addiction.[14]

## WHAT IS MEANT BY DRUG LAW REFORM?

Drug law reform can mean many and varied things, and any particular change is usually described as being more or less restrictive or permissive. However, given the fact that globally the prevailing position is one where access to most mind-altering drugs is restricted, usually through the criminal law, 'drug law reform' has typically come to mean a more permissive approach that moves away from use of the criminal law.

At a fairly crude level the more permissive end of the spectrum has been simply described as 'legalisation'. What this really means in actual practice is not always clear; however, it would probably mean that the authorities control drug production and find an appropriate means of regulating distribution, perhaps similar to alcohol and tobacco. Even though there has been critique of the current legal regime, detailed models of what legal access would really look like are thin on the ground. While some of the members of the *Australia21* roundtables are well known for their support of legal access to all currently illegal drugs, given the direct harm from drugs like cocaine and heroin, it seems unlikely that access as unrestricted as that to say alcohol could really be seriously sought. The recent publication[15] by the *Global Commission on Drug Policy*[16], upon which the Australia21 reports seem to rely to some extent, argues for 'legal regulation' but offers little constructive detail.

There is no description of how legalization would be structured nor an analysis of

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[13] Jason van den Boogert, Mutiny in Heaven. In: *Heroin Crisis*. Bookman Press, Melbourne, 1999, 15.

[14] For example, someone might spend a few hundred dollars per week of their limited family resources and not consider themselves addicted, but might find it difficult to lessen the time and money spent on their habit and feel agitated if restrained from conducting their usual activity. Furthermore, the impact upon their overall mental well-being may be noticeable and their use of limited financial resources may directly impact their capacity to adequately provide for their children's well-being. Likewise, someone who uses amphetamines or heroin on a limited number of occasions would probably not consider themselves addicted nor necessarily fit the DSM criteria for addiction, yet may be placing themselves and others at serious risk of harm during a few episodes of abuse.

[15] War on Drugs, Report of the Global Commission on Drug Policy, June 2011

[16] Key figures of the Global Commission include former UN Secretary Kofi Annan, entrepreneur Richard Branson, former US Secretary of State, George Shultz and former presidents of several nations. Advisors include Alex Wodak of the Australian Drug Law Reform Foundation, Ethan Nadelmann of the Drug Policy Alliance and Mike Trace of the International Drug Policy Consortium. Amongst others, support is provided through the Open Society Institute of billionaire financier George Soros.

> legalization proposals. The report does not even attempt to answer questions such as: Which drugs would be legalized? Would there be any limits to legalization, or would the gates permitting use be thrown wide open? Who could buy drugs? Would the use by children and adolescents be prohibited, as is currently the policy for alcohol and tobacco products? If so, how would diversion to youth be prevented? Is it important to protect young developing brains from currently illegal drugs? Would drug production, regulation, chain of custody and taxation be regulated as are other consumer products? Could drugs be mixed with other products (e.g. marijuana in brownies, amphetamines in breakfast cereal, etc.)? Would these drugs be legal only if produced by legitimate facilities, or would anyone be permitted to produce them at home? What would the policy response be to newly emerging drugs with significant psychiatric or health consequences, such as "Krokodile", mephedrone, methylenedioxypyrovalerone (MDVP) or naphyrone? The Global Commission offers no thoughtful answers to such questions, recklessly proposing that countries turn themselves into guinea pigs for "experimentation" with legalization.[17]

Support for legal access also means support for measures that are in general more permissive. It is hard to imagine support for legal access not also entailing support for decriminalisation, heroin trials, or medically supervised injecting centres for example. How much this works in the other direction is unclear. That is, do advocates of decriminalisation, heroin trials, or medically supervised injecting centres, also support legalisation, and are they prepared to say so publically if arguing for these measures?

The majority of the remainder of this paper will consider the key arguments used for legalisation, noting that variations of them are also used in one form or another in favour of any more liberal measure.

The key arguments for legalisation are premised by the declaration, 'The War on Drugs is Lost'. This refers specifically to a statement made in 1971 by Richard Nixon when he announced war on drugs. However, US drug czar at the time Robert DuPont argues that in fact the term was popularised by drug legalisation advocates[18], and the current US drug czar Gil Kerlikowske describes the term 'War on Drugs' as counterproductive.[19]

## IS THERE A WAR ON DRUGS AND HAS IT FAILED?

The central idea behind a phrase like 'The War on Drugs' is that drug abuse is so damaging that every reasonable effort must be made to stop it. One might not agree with all of the strategies used, or with the use of the particular phrase itself, but it is hard not to agree with that idea. Declaring that the war on drugs has failed is strange in that it implies simply giving in to something we must then accept as a normal part of human behavior and experience. To lose a war is to be taken over.

Theodore Dalrymple is blunt when he says 'The War on Drugs is Lost' is an:

> … unimaginative and fundamentally stupid …metaphor [which] exerts a baleful effect on proper thought … If the war against drugs is lost, then so are the wars against theft, speeding, incest, fraud, rape, murder, arson, and illegal parking. Few, if any, such wars are winnable.[20]

The metaphor may be stupid, but is there any truth in the notion that the community, by its current regime, is wasting its time trying to control the drug problem?

Before attempting to answer that question it is worth considering whether there is actually anything that might look like a 'War on Drugs' in Australia? Some might argue that a war exists simply because drugs are illegal. However, in reality, on the world stage, Australia's approach is by no means the most restrictive.[21] For example, in some states, cannabis possession is not a criminal offence, and even in those

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[17] Robert L DuPont, Global Commission on Drug Policy offer reckless vague drug legalization proposal. *Institute for Behaviour and Health, Inc*., July 12, 2011.

[18] Robert L DuPont, *Op. Cit.*, 2011.

[19] Gary Fields, White House Czar Calls for End to "War on Drugs", *Wall Street Journal*, May 14, 2009

[20] Theodore Dalrymple, *Op. Cit*., 2006

[21] For example, Singapore has a far more restrictive regime including the death penalty for drug traffickers. It provides rehabilitation and no criminal record as an incentive to recovery for users. Use rates in Singapore are about one hundredth for opiates and approximately one thousandth for other illicit drugs, when compared with Australia.

where it is, policing is arguably lax and it is rare for prosecutions to occur. Even for harder drugs, policing could not be said to resemble anything looking like a war. Neither does our policing against suppliers look anything like what happens in other countries, for example, Mexico. Furthermore, 'safe responsible use' has often been an element of the educational message about drugs in Australia, and this idea is conveyed by a strong commitment to harm minimisation as currently understood in this country.

There is no war on drugs in Australia, so declaring that the war on drugs is lost holds little real meaning.

To return to the question about whether we are wasting our time with the current regime of illegality, a good place to start will be to have a realistic look at current levels of drug use, and how they have been trending over time.

Regular users of illegal substances represent a relatively small fraction of the Australian community. In the previous 12 months 0.2% had used heroin, 2.1% methamphetamine, 2.1% cocaine, 3.0% ecstasy and 10.3% marijuana.[22] These figures include those who tried a substance just once or a handful of times in a year. This can be compared with 80.5% for alcohol and 18.1% for tobacco. It may appear as if 10.3% for marijuana is actually quite high when compared with 18.1% for tobacco. However, much use of marijuana is occasional, whereas most tobacco smokers use every day. A more meaningful statistic is that 15.1% of the Australian community smoke tobacco daily, whereas only 1.3% smoke marijuana daily.[23] Another way of saying this is that whereas 83% of those who smoked tobacco in the past 12 months did so daily, only 13% of those who smoked cannabis in the past 12 months did so daily. Moreover the manner of use is different as are the effects. The take away message is that regular cannabis use is a minority pastime, and using other drugs far less common. Even so, the fact that 1.3% of the Australian community (approximately 290,000 people) smoke cannabis daily is a serious concern, especially given the increasing body of research showing harm, in particular to mental health.

It has been stated publically that there are 'soon going to be more people in Australia who smoke cannabis than smoke cigarettes'.[24] But that is an un-nuanced statement that fails to accurately portray reality and could be easily misinterpreted and used to drive an argument for equivalence between how tobacco and cannabis should be regulated. It could also fuel an illusion that illicit drug use is common and relatively normal, that the law is futile, thereby confirming that the 'war on drugs is lost' and we *must* do something. But that is not an accurate picture.

Regarding trends in drug use in Australia, from 1998 to 2010, use in the past 12 months changed as follows: cannabis down from 17.9% to 10.3%; ecstasy up from 2.4% to 3.0%; meth/amphetamines down from 3.7% to 2.1%; cocaine up from 1.4% to 2.1%; hallucinogens down from 3.0% to 1.4%; and, heroin down from 0.8% to 0.2%. It is worth noting that use for all drugs increased from 1993 (the first year of the household surveys) to 1998.

Globally, drug use has been relatively stable over the past 10 years, with approximately 0.6% of the population using daily and about 5% having used in the past year.[25] The recent prominent report by the *Global Commission on Drug Policy* referred to earlier relied strongly for its argument that the 'war on drugs has failed' on figures it cited showing that for the 10 year period from 1998 to 2008, opiate consumption had increased by 34.5%, cocaine by 27% and cannabis by 8.5%. However, a simple methodological error is behind this apparent increase. In fact, and confirmed by the *United Nations Office on Drugs and Crime* (UNODC), whose data was said to be used for the Commission's calculation, when correctly taking the increase in world population into account, consumption is stable, and may even have declined for cannabis.[26]

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[22] Australian Government, Australian Institute of Health and Welfare 2010 National Drug Strategy Household Survey Report, Drug Statistics Series Number 25, July 2011, Table 12.2, p157

[23] *Ibid.*

[24] Statement by Alex Wodak at the Nimbin MardiGrass Festival, 2008.
See http://www.youtube.com/watch?v=NeZQ4cOXpQw

[25] Antonio Maria Costa, Legalise drugs and a worldwide epidemic of addiction will follow. *The Observer,* 5 Sep 2010.

[26] Jon Wilson, The real drug use is in the detail: why a report by the Global Commission on Drug Policy was misleading. The Commentator 21 Sep 2011. See http://www.thecommentator.com/article/454/the_real_drug_use_is_in_the_detail_why_a_report_by_the_global_commission_on_drug_policy_was_misleading Original source Kathy Gyngell, Misleading and irresponsible drug prevalence statistics. Centre for Policy Studies factsheet. See http://www.cps.org.uk/publications/factsheets/global-commission-on-drug-policy-statistics-wrong-and-misleading

Undoubtedly, the illegal status of drugs like heroin, cocaine and amphetamine is behind their relatively low use when compared with the legal drugs tobacco and alcohol, and there are good reasons to expect that a loosening of legal restraint would lead to increases in use.

## WOULD LEGALISATION INCREASE DRUG USE?

This the key question that must be addressed, for if legal access to drugs increases use, then the resulting increases in direct and indirect harm could have a potentially devastating effect on the community. If use of the currently illegal drugs approached anything like the use of tobacco or alcohol, the cost to the community could be extreme.

At an intuitive level it seems obvious that making drugs legally available would increase use, because availability and acceptability would increase, which are both key determinants of use. But this needs some unpackaging.

It is a common observation that price is a key determinant for the use of any commodity, and this is no less true of substances. As prices decline the level of use climbs. Obviously, with limited financial resources, people purchase what they can afford, and addictive substances make for lucrative markets because people keep coming back for more.

In the late nineties, heroin in Australia was cheap and this coincided with the highest overdose rate, and hence death rate, we have ever had. More than 1000 people died from opiate overdose in 1999. But when the heroin drought hit in 2001 and the street price increased, the overdose rate declined and opiate deaths dropped by 65%. In a startling graphic produced by the *Drug Policy Modelling Program*, the curve through time for heroin overdoses is virtually the mirror image of the price of heroin.[27] Cheap heroin means more overdoses, and expensive heroin mean less. We also know this from tobacco prices, which have been effectively used by governments to reduce the level of consumption.

If drugs were made legal, they would need to also become cheaper, otherwise a black market would continue to exist and thrive in competition. There is not much point in providing legal drugs that are more expensive than what can be obtained illegally unless or course the legal ones are so 'good' that people would be prepared to purchase them in lesser amounts. But herein lies the real problem – drugs are addictive, and when addicted, people's compulsion drives their demand. They are not like consumers of other products who generally are limited in what they can afford and make more rational decisions. It is also likely that low drug prices would encourage experimentation, and given the large pool of individuals who may be vulnerable to addiction, a certain proportion of experimenters then become addicted. One thing is certain; drug legalisation would not create a 'free' market.

The currently illegal status of drugs is an inhibitor that deters people from participating. While there will be some who are enticed by the illegality, most people do not like engagement with criminal behavior or with criminal distribution networks. A 2001 study of 18-29 year olds by the *NSW Bureau of Crime Statistics and Research* revealed that 29% of those who had never used cannabis cited its illegality as the reason. Furthermore, 91% of those currently using cannabis weekly or more said they would consider using more if it were legal.[28]

While there are not many actual examples which can be found which reveal what might happen with legal access, there is some evidence which might give us a clue as to what happens when legal restraint is lessened. While there is some value in comparing different countries with different legal regimes, looking at what happens longitudinally in a particular context may be more revealing because of the inbuilt control for complex variations in culture from one country to another.

Two cases will be briefly cited here. Cannabis decriminalisation is South Australia (SA), and legal access to cannabis in Holland. The special case of decriminalisation of drug possession and use in Portugal, which has received much media attention, will be addressed separately below.

In April 1987, SA legislators decriminalised cannabis so that individuals could grow up to 10 plants for 'personal use', and if caught, only be subject to a cannabis expiation notice (CEN) resulting in a $150 fine

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[27] Moore, *et al.,* Illicit drugs in Australia: what do we know about the role of price? Drug Policy Modelling Program. Bulletin No. 6, 2005.
See http://www.dpmp.unsw.edu.au/DPMPWeb.nsf/resources/BULLETIN2/$file/DPMP+Bulletin+6.pdf

[28] Weatherburn D & Jones C, Does prohibition deter cannabis use? *Contemporary Issues in Crime and Justice* 58, August 2001

and confiscation of materials and equipment. Besides the fact that there was a rapid increase in the numbers of hydroponic shops – 49 per million versus 11 and 19, respectively, for Sydney and Melbourne – there were other indicators of increased use to confirm what seemed anecdotally obvious.

The number of offences for possession and use following decriminalisation in April 1987 dramatically increased from 5,657 in 1985/86 and 6,231 in 1987/88 to a peak of 17,425 in 1993/94[29]. Furthermore, the adjusted prevalence rate in SA for ever having tried cannabis rose from 26% to 38% between 1988 and 1993. It is notable, however that the adjusted rate of weekly cannabis use more than doubled from 3% in 1988 to 7% in 1991.[30] While there were similar increases in the ACT and Tasmania, which had not decriminalised cannabis use, because SA had effectively become the supply state for the rest of the country, the increase in other states likely resulted from the perceived 'permission' to cultivate cannabis in SA, and the ease of transport across state boundaries.[31]

Some had attributed the large increase in cannabis offences to a 'net-widening' effect because 'more operational police are available for this work, and the work involved in issuing a CEN will be much less than that required under a prohibition model'[32]. This implied a change in police practice for which there was no evidence. In reality, police may have been *less* likely to issue a CEN, because while the CEN scheme was intended to achieve a reduction in court cases, it turned out that the huge increase in CENs compared with offences under the old system resulted in an *increase* in court cases due to a 55% default rate on payment of fines which then required a subsequent court appearance. The law in SA has subsequently been changed to criminalise hydroponic production as well as growing more than one plant for 'personal use'.

The Dutch experiment with attempting to separate the 'soft' drug market from the 'hard' was implemented through permitting the establishment of licensed cannabis 'coffee houses'. The once relatively conservative Dutch now openly smoke marijuana legally in these establishments – along with large numbers of tourists, although recently there have been attempts to restrict foreigners from accessing the venues. What then happened to use rates? Cannabis use in Amsterdam increased from 15% in 1984 to 44% in 1996 among 18-20 year-olds and from 5% to over 30% amongst 16-17 year-olds.[33] It is likely that the commercialisation of production is the main reason for the increase rather than decriminalisation alone.[34]

There appear to be other undesirable spin-offs from the Dutch policy.

> "Holland has become the place for drug traffickers to work," states a senior officer at Her Majesty's Customs and Excise. "It's central. You've got guys there who have access to any kind of drug you want, smugglers who can deliver it for you to Liverpool or London. And it's an environment which is relatively trouble-free from a criminal's point of view. It's ideal, and it has become a magnet for our criminal types. As a senior French narcotics officer puts it, "Holland is Europe's drug supermarket. Drugs of all kinds are freely available there. The price is cheap. Your chances of getting caught with them are minimal, and you can carry them home across our customs-free borders without a care."[35]

## PORTUGAL'S DECRIMINALISATION EXPERIMENT

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[29] *Annual Report of the Commissioner of Police*, and Ali *et al*., 1998, The Social Impacts of the Cannabis Expiation Notice Scheme in South Australia, National Drug Strategy Committee.

[30] Donnelly *et al*., The effects of partial decriminalisation on cannabis use in South Australia, 1985 to 1993, *Aust. J. Public Health* 19(3): 281-287, 1995

[31] Phil Warrick, SA Police Drug Task Force, personal communication

[32] Ali *et al,* 1998, The Social Impacts of the Cannabis Expiation Notice Scheme in South Australia, National Drug Strategy Committee.

[33] MacCoun, RJ & Reuter, P. Interpreting Dutch cannabis policy: Reasoning by analogy in the legalization debate. *Science*, 278, 47-52, 1997

[34] MacCoun, RJ & Reuter, P. Evaluating alternative cannabis regimes. *British Journal of Psychiatry* 178:123-128, 2001

[35] Collins L, Holland's Half-baked Drug Experiment. Council on Foreign Relations Inc., 78(3), 1999. See http://www.mapinc.org/drugnews/v99.n444.a01.html

In 2001, Portugal passed legislation to decriminalise personal purchase, possession and use of all psychotropic drugs including heroin and cocaine. The change meant that various administrative sanctions apply instead of criminal ones. The change in Portugal is not legalisation, or in fact anywhere near it as manufacture and supply is still a criminal offence. Notably, at the time the legislation was passed, Portugal instituted a new drug strategy that included measures designed to direct drug users into treatment. If someone is caught using drugs, they are referred by police to a panel consisting of lawyers, social workers and medical professionals. Sanctions can be applied including fines, community service, suspensions of professional licenses and bans on attending certain places, but the primary purpose is to discourage drug use and direct into treatment. It is arguable whether this arrangement ends up being more or less of a deterrent for users than the previous system of criminal sanction. This would depend to some extent upon how policing was managed and court judgments made under the old system.

Since the changes, several reports have emerged, some with diametrically opposite interpretations of the data. For example, Glenn Greenwald of the Cato Institute describes the change as a 'resounding success'[36], whilst Manuel Pinto Coelho, President of the *Association for a Drug Free Portugal*, describes the policy as 'a failure'.[37] In general, media reporting has aligned itself with Greenwald's view. The US *Office of National Drug Control Policy* (ONDCP) took Greenwald's piece to task and concluded that "Claims by drug legalisation advocates regarding the impact of Portugal's drug policy exceed the existing scientific basis".[38] Moreover, in a letter to a member of the *International Task Force on Strategic Drug Policy*, Director of the ONDCP, Gil Kerlikowske wrote:

> … a careful review of all available data on this subject as you can see in the enclosed working paper, our analysts found that claims that decriminalization has reduced drug use and had no detrimental impact in Portugal significantly exceed the existing scientific basis. Because this conclusion largely contradicts prevailing media coverage and several policy analyses in Portugal and the United States, my staff has heavily documented the sources of the data and information contained in this working paper. Please feel free to use this document in part or in whole to help strengthen your own efforts to advance a more honest discussion of decriminalization in Portugal and of the drug policy choices [with] which nations are grappling today.[39]

There are two primary questions that need to be addressed. First, what are the key measures that need to be considered in assessing the impact of such a policy change and how have they fared? And second, how much can be attributed to decriminalisation alone rather than other measures implemented at the same time, or indeed to other cultural changes[40]?

The key measures used include drug related deaths, use rates, infectious disease rates, property crime, drug-related homicides, trafficking, and drug seizures. Harder to measure consequences might be entry to treatment, family and relationship issues, corruption, respect for the law, and impact upon individual lifestyle.

The measurement of drug-related deaths is not an exact science and variations in how determinations are made could have a significant impact upon final figures. Nevertheless, within country reporting is likely to be most stable and data from the *European Monitoring Centre for Drugs and Drug Addiction* (EMCDDA) for Portugal reveals an increase from 240 in 1996 to a peak of 368 in 1999, declining to 152 in 2004 before steadily climbing to 338 in 2008.[41] As the policy change was implemented in 2001 during

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[36] Greenwald G, Drug Decriminalisation in Portugal: Lessons for Creating Fair and Successful Drug Policies. *Cato Institute*, 2009

[37] Manuel Pinto Coelho, Drugs: The Portuguese Fallacy and the Absurd Medicalisation of Europe. 2010 See http://www.drugfree.org.au/fileadmin/library/Policies__Legislation_and_law/ThePortugueseDrugFallacyReport.pdf

[38] Drug Decriminalization in Portugal: Challenges and Limitations, Fact Sheet of the US Office of National Drug Control Policy, August 2010.
See http://www.whitehouse.gov/sites/default/files/ondcp/Fact_Sheets/portugal_fact_sheet_8-25-10.pdf

[39] Personal letter cited in Manuel Pinto Coelho, *Op. Cit.*, 2010

[40] Cultural factors can be hard to identify but may include fatigue with the level of drug harm being experienced, changes in how drug abuse is perceived by young people, economic conditions, employment levels, general societal optimism or pessimism, and so on.

[41] Cited in Hughes CE & Stevens A, What can we learn from the Portuguese decriminalization of illicit drugs? *British Journal of Criminology* 50:999-1022, 2010.
See also http://www.emcdda.europa.eu/html.cfm/index191616EN.html

a declining death rate, it is difficult to ascertain its impact. However, the steadily increasing rate from 2004 to 2008, depending upon what other factors might be involved, suggest careful evaluation about the possible contribution by the policy change is needed. Some commentators have argued that direct drug-induced death by intoxication is a more accurate measure than drug-related death for informing policy.[42] But this is questionable because accidental death under the influence of drugs, for example, is also a useful indictor of the extent of a 'drug problem' and a necessary piece of information to inform debate.

Use rates are often complicated by the different measures used for different drugs as well as the different age groups tested. Typical measures include lifetime prevalence, use in the past 12 months, use in the past month, week or daily. Lifetime prevalence has increased for all drugs from 2001 to 2007, but without a quality baseline from prior to the year of the policy change, *viz.* 2001, the data is difficult to interpret. Smaller increases occurred in other measures like annual prevalence. Whilst there has not been any dramatic change in drug usage rates since 2007, with the exception of a doubling in use of cocaine in certain age groups and a fourfold increase in amphetamine use in some age groups, overall the upward trend is indicative of a worsening problem. It has been claimed that problematic drug use, in part defined as injecting drug use, has declined.[43] However, for the three drugs most often injected, *viz.,* heroin, amphetamine and cocaine, use amongst 15-64 year olds in the past 12 months has increased from 2001 to 2007 as follows: heroin 0.2% to 0.3%; amphetamine 0.1% to 0.2%; and, cocaine 0.3% to 0.6%.[44]

While there is no definitive data on drug-related homicides, the fact that between 2001 and 2006 all homicides increased in Portugal by 41%[45] against a declining trend in most other European nations warrants a detailed examination of how many of these may have been related to drugs, if any.

With regard to trafficking, the number of offences seems to have remained unchanged.[46] However, police argue that it has become more difficult to apprehend dealers because at any one time they now only carry small amounts of drugs within the legal limit, thereby masquerading as users.[47] It is worth noting in general that there is no sharp demarcation between users and dealers. Many who use drugs are drawn in at one or another level to dealing. In fact, given the need to raise funds for addiction, dealing is one of several means of fundraising. Between 2001 and 2006, cocaine seizures have increased sevenfold, but this type of trend also occurred across Europe.[48]

Infectious diseases such as HIV/AIDS and Hepatitis C can be consequences of injecting drug use. The proportion of HIV cases that are drug related has been in decline in Portugal since 1993, that is, well prior to the policy change in 2001.[49] HIV incidence has also been in decline since 2000. However, without baseline data for a significant time period prior to the policy change, little can be concluded about the relationship between the current continuing decline in HIV incidence and the policy change. Implying that the policy change has caused a decline in HIV incidence is unjustified.[50] Other factors like opioid substitution may have the most significant impact. The overall prevalence of HIV among injecting drug users in Portugal remains much higher than the rest of Europe.[51]

In summary, decriminalisation in Portugal means drug users no longer face the risk of criminal sanctions; however, significant sanctions still apply. Any changes in key indicators cannot yet be attributed to

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[42] Hughes CE & Wodak A, Addressing the question: What can Australia learn from different approaches to drugs in Europe including especially Portugal, Switzerland, the Netherlands and Sweden?" *A Background Paper for an Australia21 Roundtable*, Melbourne, Friday 6th July 2012.

[43] Hughes and Wodak, *Op.Cit.*, 2012

[44] EMCDDA 2011 National Report (2010 data) to the EMCDDA by the Reitox National Focal Point. Portugal: New developments, trends and in-depth information on selected issues. p21

[45] See http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-08-019/EN/KS-SF-08-019-EN.PDF

[46] Hughes and Wodak, *Op.Cit.*, 2012

[47] See http://www.sbs.com.au/dateline/story/watch/id/601381/n/Portugal-s-Fix

[48] World Drug Report 1008, p 74

[49] EMCDDA 2011 National Report (2010 data) to the EMCDDA by the Reitox National Focal Point. Portugal: New developments, trends and in-depth information on selected issues.

[50] Hughes & Wodak, *Op. Cit.* 2012

[51] EMCDDA. The State of the Drugs Problem in Europe. 2012 p79

decriminalisation *per se* one way or the other. It will always be an awkward juxtaposition to have products that are illegal to manufacture and distribute with serious penalties yet citizens feel relatively free to use.

## WHAT DOES THE AUSTRALIAN PUBLIC THINK ABOUT DRUGS?

The Australian Institute of Health and Welfare conducts regular household interviews that include questions about illicit drugs. The following is a brief snapshot of attitudes.

In general, Australians have a low approval of the use of illicit substances. Licit substances are included for comparison. Percentage approval rates for 2010 of the regular use of a drug were: tobacco 15.3, alcohol 45.1, cannabis 8.1, ecstasy 2.3, meth/amphetamines 1.2, cocaine 1.7, hallucinogens 2.4, inhalants 1.0, heroin 1.2.[52] There has mostly been a small increase in approval across the board compared with 2007.

Even recent users of drugs themselves do not necessarily approve of regular use. Percentage approval (2010) is as follows: cannabis 41.2, ecstasy 23.7, meth/amphetamine 9.7, cocaine 14.1, hallucinogens 35.8, inhalants 3.2, heroin 15.5.[53]

Across the board the majority of Australians do not support the legalisation of currently illicit drugs. Percentage support is as follows: cannabis 24.8, heroin 6.0, meth/amphetamines 5.0, cocaine 6.3, and ecstasy 6.8.[54]

There is majority support for increasing the penalties for the sale or supply of drugs. Percentage support is as follows: cannabis 60.5, heroin 85.2, meth/amphetamines 84.9, cocaine 83.0, ecstasy 81.9.[55] It is uncertain whether the public are aware of the crossover between dealers and users, and that therefore support for harsher penalties for dealers could also apply to some users.

When asked about what action should be taken against people found in possession of drugs, while there was significant variation depending upon drug type, majority support was for referral to treatment or an education program. Support for fines ranged from 16.2% to 24.8%, and for a prison sentence from 6.1% for cannabis to 25.7% for heroin.

Most drug policies worldwide are three-pronged and entail commitment to education, treatment, and law enforcement. When asked about their preferred distribution of a hypothetical $100 to reduce drug use, Australians respond as follows: education $33.80, treatment $25.70, law enforcement $40.50.[56]

In summary, Australians in general disapprove strongly of the regular use of illicit drugs, do not support legalisation, support stronger penalties for sale and supply, prefer treatment and education rather than fines or jail for users, but endorse the need for law enforcement to reduce drug use.

## DIRECT AND INDIRECT HARM

The question of harm is central to any debate about drugs and policies, and while there is surely a broad commitment to the ideal that harm should be as low as it can be, it is imperative that *all* harm be properly considered. This is not the place for a discussion of the meaning or implementation of harm minimisation, at least as understood in Australia, but suffice to say that the words taken at face value imply the actual minimisation of *all* harm.[57]

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[52] Australian Government, Australian Institute of Health and Welfare 2010 National Drug Strategy Household Survey Report, Drug Statistics Series Number 25, July 2011, Table 12.2, p157

[53] *Ibid.*, Figure 12.1, p160

[54] *Ibid.*, Table 13.13, p180

[55] *Ibid.*, Table 13.15, p182

[56] *Ibid.*, Table 13.18, p186

[57] One of the inherent problems with harm minimisation lies with the process of measuring harms and attempting to weigh one against another. What weight should be applied to each? This risks trivialising some very real harms whilst building up others.

What would legalisation do to the overall level of harm? To begin to answer this question requires identification of the harms themselves, and one approach is to consider harms as direct, that is, due to the direct effects of a drug; or indirect, that is a consequence of a drug using lifestyle. Part of the difficulty here is that not only do drugs themselves differ in their effects, but the patterns of drug use vary widely. Hence there is an enormous difference between potential harm to someone using say cannabis once a month and someone addicted to heroin and using high doses 3 times a day.

With respect to direct harms, there is an extensive and growing body of literature on the adverse effects of illicit drugs and in particular the adverse effects when used to feed addiction. The effects are too many and varied to detail here; however, using cannabis as an example, it would be fair to say that the adverse effects are becoming more rather than less apparent. Moreover, given the illegal status of drugs and the time frame necessary to ascertain long-term effects, much more research is still necessary. It is worth noting that it took some 60 years of research for the adverse effects of tobacco, a legal drug, to be as well accepted as they now are.

The indirect harm is more difficult to measure, let alone find agreement upon.

As noted, addictive potential is a defining feature of psychotropic drugs. The question of whether addiction *per se* is harmful has been addressed to some extent above. In some respects it may not even be a fair question given how hard it is to isolate addiction out for consideration apart from the other effects. Perhaps at its core, obsessive focus upon a thing that then becomes master to the exclusion of other human goods is the harm.

> The consumption of drugs has the effect of reducing [people's] freedom by circumscribing the range of their interests. It impairs their ability to pursue more important human aims, such as raising a family and fulfilling civic obligations. Very often it impairs their ability to pursue gainful employment and promotes parasitism. Moreover, far from being expanders of consciousness, most drugs severely limit it. One of the most striking characteristics of drug takers is their intense and tedious self-absorption; and their journeys into inner space are generally forays into inner vacuums.[58]

Addiction can highjack a person's life. It is unsurprising that it has been described as having a monkey on the back.

Indirect harms include involvement with criminals, participation in criminal behavior, risk of infectious disease, poor living conditions, poor employment prospects, prostitution, relational conflict with friends and family and co-workers, vulnerability to accidents and assault when intoxicated, receiving a more dangerous or stronger drug than anticipated, suicide risk, child neglect and abuse, and risk to the unborn child. In some countries, another harm can come to innocent bystanders who become caught up in drug turf wars, for example in Mexico and some Latin American countries.

The impact of legalisation on direct harm is dependent upon changes to the number of users and the amount any individual might use. As noted, there are sound reasons for believing both of these could climb significantly, especially given lowered prices. Antonio Maria Costa, former executive director of the UNODC, believes that a 'worldwide epidemic of addiction' would follow drug legalisation, primarily in developing nations.[59]

The impact upon indirect harm would vary significantly. Under a legal regime users would no longer need to purchase drugs illegally, they would be assured of exactly what they are receiving, and they would not risk criminal sanction and the potential consequences that come from a criminal record. Innocent bystanders may not get caught up in turf wars, but only if the black market disappears entirely, an unlikely prospect. However, they would still need to purchase drugs, and for those with addictions, will likely still resort to some of their current methods, *viz*., property crime, prostitution and small-scale dealing.

What would happen to their risk of infectious disease is hard to predict as current attempts to deal with this issue such as maintenance therapy, clean needles, and education on 'safe' practices are already in place. Given the likely increase in overall use, the risk following legalisation could increase.

How the remaining indirect harms might change under any more permissive scheme has been given insufficient consideration. However, for any individual currently addicted, issues like poor living conditions, poor employment prospects, relational conflict with friends and family and co-workers,

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[58] Theodore Dalrymple, *Op. Cit.*, 2006

[59] Antonio Maria Costa, Legalise drugs and a worldwide epidemic of addiction will follow. *The Observer,* 5 Sep 2010.

vulnerability to accidents and assault when intoxicated, suicide risk, child neglect and abuse, and risk to the unborn child, are all likely to remain if not increase as cheaper drugs increase personal use.

We live in a complex web of social interactions, and no one is an island. Any increase in drug use, however small, will contribute to the already high toll on relationship breakdown and fractured families. Legalisation will not reduce this and will almost certainly increase it. When a family member becomes addicted to a psychotropic drug, the destructive impact on the immediate and wider family is often profound, and while under legalisation there may be some comfort that known drugs in known quantities are being used and no criminal contact is necessary, all of the destructive relational issues like deceit, theft, erratic and damaging behavior, outbursts, violence, and so on, will remain, if not worsen. Any family who has been through this would never wish it on their worst enemy.

Moreover, there is an inextricable link between substance abuse and child abuse. In the US, between one-third and two-thirds of child abuse cases involve substance abuse[60], and 75% of children in foster care are there because their parents use drugs.[61] There is also a link in the opposite direction, that is to say, adults who were abused as children are disproportionately represented among the addiction population, making substance abuse self-generating. These costs in human pain also extract a high financial cost from the community. By legalising drugs, not only will the damage increase, but governments will be accepting that these costs are just part of the price to pay for the freedom given to a rather small section of the community to use drugs.

There is another aspect to the question of harm that is one of justice. Costa makes the point that whereas first world nations have reasonable resources to at least make some effort to deal with prevention as well as addiction and all its negative consequences, third world nations do not.

> The privileged rich can afford expensive treatment while poor people are condemned to a life of dependence. Now extrapolate the problem on to a global scale and imagine the impact of unregulated drug use in developing countries, with no prevention or treatment available. Legalised drugs would unleash an epidemic of addiction in the developing world.[62]

Even within a wealthy nation such as Australia, easy access to drugs would mean two quite different things depending upon the socioeconomic circumstances of the person involved. Perhaps some who are better situated, including intellectual elites, would relish the opportunity to freely use their pharmaceutical grade drug of choice without criminal sanction, all the time either blissfully unaware of the consequences for those at the lower end of town, or simply indifferent. They can basically manage a habit with far lower levels of harm because of their higher educational status, financial position, social resources or possibly lack of psychological vulnerability. Vulnerable people at the bottom of the socioeconomic ladder, or those who are particularly at risk of addiction because of genetic factors or childhood trauma, are the ones who would be far more adversely affected by easier access to cheaper drugs.

## DRUGS AND CRIME

It is often claimed that addiction is a health issue not a criminal one, and should be treated as such. This claim is central to the argument for legalisation as much as for other liberal measures. In Russell Brand's recent documentary *From Addiction to Recovery* the point is driven home with force. It is repeatedly stated that addiction is a disease like any other and those addicted should be treated like patients, not like criminals. Much is made of research that shows measurable changes to the brain in addiction. Also in the program, a methadone prescribing doctor describes the provision of methadone as like 'insulin for diabetes' even though there is no parallel well-understood underlying physiological defect that methadone treats. Incidentally, Brand himself strongly disagrees with methadone maintenance as he is committed to abstinence therapy. The point is, addiction is not like any other disease. What disease is there that can be cured by an act of the will as often occurs in many abstinence based programmes? This is not to discount the difficulty or the need for help, but just to recognise that addiction is a category of problem without a known organic cause.

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[60] Parental Substance Use and the Child Welfare System, Child Welfare Information Gateway, Jan 2009 See http://www.childwelfare.gov/pubs/factsheets/parentalsubabuse.pdf

[61] The Impact of Substance Abuse on Foster Care, SparkAction, Feb 1999.
See http://sparkaction.org/content/impact-substance-abuse-foster-care

[62] Antonio Maria Costa, *Op. Cit.*, 2010

The relationship between drugs and crime has several aspects that would be influenced if legalisation were to occur. First, because manufacture and supply is a criminal offence, significant policing resources are spent shutting down manufacture and intercepting supply. Second, users become involved with crime, because they must deal with criminals to obtain drugs, may act criminally to obtain finances for drug purchases, or may act criminally under the influence of drugs due to weakening of the normal rational thinking that underlies moral restraint.

Organised crime in general costs the community dearly. Therefore measures to limit it are to be welcomed. At face value the most compelling element of the legalisation argument is that criminals will no longer be the manufacturers and suppliers of drugs – that is, they will be out of business. There will be no more turf wars and cartels killing each other and innocent bystanders, no more criminals running dangerous enterprises that risk the safety of users and no more police corrupted by participation in drug related activities. It is an appealing picture. However, even taken on its own and apart from the other seriously damaging negative outcomes, whether the above scenario would eventuate needs careful thought. There are several sobering realities.

*All* drugs would need to be legalised to drive away a criminal black market. This means not only the sedatives like heroin but also the stimulants like amphetamine and cocaine that can really wind people up. What new systems and structure would governments need to implement to protect the community from those who would now be using legally? Moreover, if the community were prepared to legalise just cannabis and ecstasy, as argued in the *Australia21* report, it is unlikely there would be much loss to criminals who would shift their efforts to the other drugs. There are also new drugs arriving on the street like mephedrone and naphyrone[63], which have already proved to be very dangerous; and new, more powerful, deadly and addictive drugs will doubtless emerge in the future. Would they also be legalised? And if not, would not the black market focus their efforts on them? Even legalisation of the currently illicit drugs would surely mean restriction of access to those under 18, in which case the black market would redouble its focus on marketing to younger and younger potential clients, as is already happening.

It is also noteworthy that criminal infiltration often occurs into legal industries like tobacco, gambling, alcohol, the sex industry where it is legal, and even the labour market. For example, in Australia it is estimated that the illegal tobacco market is 13.4% of the legal market.[64] Interestingly, at a global level tobacco companies themselves have been implicated in smuggling.

> Documents uncovered during recent lawsuits confirm that the tobacco industry itself is responsible or involved in many large-scale cigarette smuggling operations worldwide … Tobacco companies smuggle cigarettes to launch new brands, enter new markets, and fight price wars with competitors … [65]

It is naïve to assume that by legalising drugs those involved would simply pack up their bags and go home.

> Having met large numbers of drug dealers in prison, I doubt that they would return to respectable life if the principle article of their commerce were to be legalized. Far from evincing a desire to be reincorporated into the world of regular work, they express a deep contempt for it and regard those who accept the bargain of a fair days work for a fair days pay as cowards and fools. A life of crime has its attractions for many who would otherwise lead a mundane existence. So long as there is the possibility of a lucrative racket or illegal traffic, such people find it and extend its scope.[66]

The other aspect of the relationship between drugs and crime concerns the lives of individual users. As noted above, under a prohibition regime, users obtain drugs criminally, sometimes become involved in crimes like break and enter, prostitution or dealing to finance use, or act criminally because of being under the influence.

What would happen under a legal regime?

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[63] See http://www.bbc.co.uk/health/emotional_health/addictions/mephedrone_naphyrone.shtml

[64] Illicit trade of tobacco in Australia: Report for 2011. Deloitte, May 2012

[65] Drug Free America, personal communication

[66] Theodore Dalrymple, *Op. Cit.,* 2006

More than likely, the majority would obtain legal drugs, although as noted some would still procure them illegally depending on price or other restriction. For those addicted, crimes to gain funds for use would still occur and possibly increase, and crimes committed while under the influence would still occur and likely increase.

The point is sometimes made that it is unjust for someone to acquire a criminal record for simply using a banned substance and even more unjust that they should go to jail. To a certain extent that can be agreed with. However, this needs qualification. First, in Australia people rarely if ever go to jail for simple possession and use.[67] Where convictions or jail sentences do occur they are for significant dealing and/or when other crimes like assault, break and enter, and fraud co-occur with drug possession and use. This point underscores the fact that a simple assertion that addiction is a medical problem and not a criminal one is a simplistic and unrealistic dichotomy. If those with addictions commit serious offences, as does happen, the criminal law cannot simply turn a blind eye. The community still needs to be protected. Where communities have enacted harsh penalties, especially when addiction is a mitigating factor and no attempt made at rehabilitation, that is unjust and represents a missed opportunity to assist someone recover. This is especially pertinent when by far the majority of those with addiction would rather be free.

Legal access to cheap drugs may mean less crime committed by any given individual, but the overall level of crime in the community may not decrease or may even increase as use rates and addiction rates climb.

## RIGHTS OF THE CHILD

As noted earlier, arguments for drug law reform are increasingly using the language of human rights. Anyone who abuses drugs, whether illegal ones or legal ones must be afforded all of the human rights articulated in the major international instruments, and in particular those relating to proper health care. This is particularly pertinent when it comes to human dignity, as there are more than enough examples of drug addicts being treated poorly because of perceptions about their addiction.

However, there is also a sense, evident in the documents by *Australia21* and the *Global Commission on Drug Policy*, but also in other pro-legalisation literature, that drug use *per se* is some sort of right and that criminalising the use of particular mind-altering drugs is somehow an affront to that right. The report of the first *Australia21* roundtable reiterates a recommendation of the *Global Commission on Drug Policy* as follows:

> That policies must be based on human rights and public health principles. That the stigmatization and marginalization of people who use certain drugs should cease and that those involved in the lower levels of cultivation, production and distribution should be treated as patients, and not criminals.[68]

Whilst not a statement that argues directly for a right to use, when coupled with attempts to change the current international drugs conventions, the recommendation implies that if people choose to use a particular drug for 'recreational' reasons, that should be viewed as relatively normal and a legitimate choice that the community should tolerate, if not embrace. However, rights must accord with those things that enable human beings to flourish, and in fact the international community has clearly articulated the view that there is no right to use a psychotropic substance. That is the agreed position. It is nearly universally accepted by states parties and is unlikely to be overturned in the foreseeable future.

One of the obvious difficulties with any liberalisation of drug policy is that increased availability and acceptability will inevitably lead to increased access by children. This has been painfully experienced with alcohol and tobacco, and however hard the community tries (very poorly at times it seems), children have very easy access to both substances, and for some, initiation into a lifelong damaging addiction starts very early. It might be argued that access to illicit drugs is easy right now, but there can be little doubt that legal access, cheaper prices, and implicit social acceptance will further increase access by children. We already know that induction into use of psychotropic drugs starts at an early age, making children a crucial target for those who want to protect them as well as those who want to entrap them.

The problem with liberal drug policies like legalisation is that they centre upon the rights of the *user*, at the expense of the most vulnerable party in the community, the *child*. Children surely have a 'right to abstinence'.

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[67] Craig Thompson, former NSW magistrate, personal communication.

[68] Douglas B & McDonald D, *Op. Cit.*, 2012

What do the human rights instruments have to say about psychotropic substances and children?

The *Convention on the Rights of the Child* is the most widely accepted human rights treaty in history.

Article 33 of the *Convention on the Rights of the Child* reads as follows:

> States Parties shall take all appropriate measures, including legislative, administrative, and educational measures to protect children from the illicit use of narcotic drugs and psychotropic substances, as defined in relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

This is conditioned by Article 3, which makes it clear that the best interests of the child shall be a primary consideration.

To quote Stephan Dahlgren:

> This means that human rights law is requesting from all states that the protection of the child from ever getting in contact with drugs shall be the prism through which national and international drug policy shall be crafted.[69]

A policy like legalisation, or even some forms of decriminalisation, would permit wider access to drugs that will *inevitably* filter to children, which is to act in violation of human rights. States must do all they can to keep drugs away from children.

## CONCLUSION

Most of the discussion in this paper has been about drug law reform that is seeking legalisation, noting that variants of many of the arguments are also used for liberalising policies in general. However, it is important to note that any specific measure must be carefully considered apart from any generalised opposition to change or to what looks like it may be 'more or less liberal or restrictive'. By the same token, wisdom is also required to be aware of where any one change may lead next, potentially leading to undesirable outcomes in the longer term. This is why it is important that there be honesty in public debate about what is really being sought. It is also why the public needs to be aware that there is a well-funded international movement to legalise drugs that has been active for decades and which for example, supports issues like medical marijuana to advance the case for legal cannabis for 'recreational use'. That movement is extremely well resourced by certain wealthy benefactors and is committed to the eventual goal of the removal of 'prohibition'.

This paper also started out with reference to human dignity. Human dignity is upheld when each and every member of the human family is treated as inherently valuable and just as deserving of the protections afforded by genuine human rights as anyone else. Those who have loved ones who are hurt by drug abuse want to see humane treatment that is not harsh but compassionate. At the same time parents want sensible restrictions in place to keep drugs away from their children. Overall drug policy should focus on prevention through supply and demand reduction, as well as treatment that is directed to the good of the person. It is arguable whether that is currently the case, even in wealthy nations with good resources.

This is an age of considerable advance in neuroscience and the development of neuroactive substances. The challenges are considerable and will become more acute as new substances keep arriving. The use of substances for non-medical purposes has been a part of human societies for a long time, but the *in principle* questions about altering the human mind, either in the short term or long term, have probably not yet received the attention they should.

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[69] Dahlgren S & Stere R, The Protection of Children from Illicit drugs – a Minimum Human Rights Standard. A Child-Centred vs. a User-Centred Drug Policy. Vitt Grafiska AB 2012. See http://www.dontdecriminalize.org/files/images/pages/Protectionfromdrugs2012.pdf