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# The Twenty-First Wisdom

Paul D Carrington\*

John Randolph Tucker was third in a line of five Tuckers who taught law in Virginia.<sup>1</sup> Born in 1823, he was a close contemporary of Thomas Cooley,<sup>2</sup> Theodore Dwight,<sup>3</sup> and Christopher Langdell,<sup>4</sup> three men who played central roles in the development of their law schools at Michigan, Columbia, and Harvard. John Tucker bears a like relationship to the law school at Washington and Lee.

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\* Chadwick Professor of Law, Duke University This Paper was presented as the John Randolph Tucker Lecture at the Washington and Lee University School of Law on September 30, 1994. I am grateful to John N. Jacob of the Washington and Lee University Law Library for assistance in gathering material and to Steven Duke and Madeline Morris for especially helpful suggestions. Claire Fried Drake and Erika King helped with the documentation. I take the occasion as well to salute the memory of my late friend, John Kaplan, who saw these matters clearly long ago.

1. St. George Tucker (1752-1827) was professor of law and police at the College of William and Mary from 1790 to 1804. His sons were Henry St. George Tucker (1780-1848), who was professor of law at the University of Virginia from 1841 to 1845, and Nathaniel Beverley Tucker (1784-1851), who was professor of law at William and Mary from 1834 to 1851. John Randolph Tucker (1823-1897) was the second son of Henry St. George. Henry St. George Tucker II (1853-1932) was his son, who succeeded him at Washington and Lee University in 1897 and served until 1902. In addition, his namesake grandson, John Randolph Tucker II (1879-1954), was a professor of law at the University of Richmond from 1909 to 1925. Their biographies appear in *LEGAL EDUCATION IN VIRGINIA, 1779-1979: A BIOGRAPHICAL APPROACH* 600-86 (W Hamilton Bryson ed., 1982) [hereinafter *EDUCATION IN VIRGINIA*].

2. See 3 *DICTIONARY OF AMERICAN BIOGRAPHY* 392 (Allen Johnson ed., 1929). Thomas Cooley was born near Attica, New York on January 6, 1824 and died at Ann Arbor, Michigan on September 12, 1898. *Id.*

3. See *A HISTORY OF THE SCHOOL OF LAW, COLUMBIA UNIVERSITY* 33-132 (Julius Goebel, Jr. ed., 1955); 5 *DICTIONARY OF AMERICAN BIOGRAPHY* 571 (Allen Johnson & Dumas Malone eds., 1930). Theodore Dwight was born at Catskill, New York on July 18, 1822 and died at Clinton, New York on June 29, 1892. *Id.*

4. See 9 *DICTIONARY OF AMERICAN BIOGRAPHY* 585 (Dumas Malone ed., 1932). Christopher Langdell was born at New Boston, New Hampshire on May 22, 1826 and died on July 6, 1906. *Id.* at 585.

John Tucker first won public acclaim in 1851 with a speech asserting the right of Virginia to withdraw from the federal union.<sup>5</sup> His argument was based partly on the understanding of those who ratified the Constitution in 1789 believing that they could secede if union should prove unsatisfactory. He was surely correct that there would have been no union if it had been initially presented as an indissoluble one.<sup>6</sup>

In making his claim of states' rights, John Tucker drew on the scholarship of his grandfather, St. George Tucker, who in 1803 published an edition of Blackstone's *Commentaries on English Law* that contained a 439-page appendix on American constitutional law.<sup>7</sup> That five-volume work was the standard work on American law for a generation.<sup>8</sup> John Tucker could also cite in support of his position the scholarly work of his father, Henry St. George Tucker, whose *Lectures on Constitutional Law* was published in 1843.<sup>9</sup> His grandfather had been a professor of law at the College of William and Mary,<sup>10</sup> his father at the University of Virginia.<sup>11</sup>

5. William R. Vance, *John Randolph Tucker*, in 7 GREAT AMERICAN LAWYERS 321, 329 (William D. Lewis ed., 1909). Tucker did not advocate the exercise of the right to secede, but asserted that the "manly assertion of the right would save the Union." *Id.* "He alone is the true friend of the Union, who cherishes and upholds the sovereignty of the states." *Id.* at 330.

6. There were disunion movements in Kentucky and western Pennsylvania in the 1790s, and in New England in 1815. There appears to have been little disposition at that time to argue the issue as one of entitlement; few, if any, then denied states the right to secede. The idea of indissolubility was first fully developed by Joseph Story in COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Boston, Little, Brown & Company 1833). It was also expressed by Daniel Webster in his debate with Senator Robert Hayne in 1833. For a brief account of the debate, see MERRILL D. PETERSON, THE GREAT TRIUMVIRATE: WEBSTER, CLAY, AND CALHOUN 170-80 (1987). Those who today invoke the doctrine of "original intent" must of necessity identify with the position of Hayne and young Tucker that the slave states had a right to secede. For discussion and a review of the contemporary literature, see H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV L. REV 885 (1985).

7. See 1 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA app. (St. George Tucker ed., Philadelphia 1803). Tucker categorically states the right of secession. *See id.* app. at 73-74.

8. It was in important measure displaced by James Kent in COMMENTARIES ON AMERICAN LAW (New York, Little, Brown & Company 1826).

9. See HENRY ST. GEORGE TUCKER, LECTURES ON CONSTITUTIONAL LAW (Richmond, Shepherd & Colin 1843).

10. See Charles T. Cullen, *St. George Tucker*, in EDUCATION IN VIRGINIA, *supra* note 1, at 657.

11. See W. Hamilton Bryson & E. W. Marshall Tucker, *Henry St. George Tucker*, in

In 1857, John Tucker entered public service as Attorney General of Virginia. He commenced teaching law at Washington and Lee in 1870, after the turmoil of war.<sup>12</sup> In 1875, he was elected to Congress, but still continued to lecture at Washington and Lee. As a national politician, he played a significant role in healing the wounds of civil war and continued to advocate the decentralization of American law and politics. His position on state-federal relations was reflected in his maiden congressional speech in 1876, when he argued that the Constitution did not authorize the federal government to spend money to celebrate the centennial of the Declaration of Independence, such matters being reserved to the states.<sup>13</sup>

John Tucker won so favorable a reputation in Congress that Yale Law School recognized his merit by awarding him an honorary doctorate in 1887. On that occasion, he spoke of the history of the Constitution in terms glowing with patriotism. While now cheerfully acknowledging the permanence of the Union as a consequence of the ratification of the Fourteenth Amendment, he called on the sons of Connecticut to join him in renewing resistance to the centralizing trends that he and his audience could not fail to observe.<sup>14</sup>

In 1889, John Tucker left Congress to return to full-time teaching at Washington and Lee and commenced work on a treatise on the Constitution. Three years later, he was elected President of the American Bar Association.<sup>15</sup> He died in 1897 before completing his book, but his son, who succeeded him as a professor at Washington and Lee, completed it.<sup>16</sup> As one

EDUCATION IN VIRGINIA, *supra* note 1, at 601; *see also* ROBERT J. BRUGGER, BEVERLEY TUCKER: HEART OVER HEAD IN THE OLD SOUTH (1978).

12. *See* Charles V. Laughlin, *John Randolph Tucker*, in EDUCATION IN VIRGINIA, *supra* note 1, at 625-27.

13. Vance, *supra* note 5, at 337; *see also* JOHN R. TUCKER, THE RELATIONS OF THE UNITED STATES TO EACH OTHER AS MODIFIED BY THE WAR AND THE CONSTITUTIONAL AMENDMENTS (Albany, N.Y., Weed, Parsons & Co. 1877).

14. "Joining hands, and uniting hearts, we henceforth in this federal Union, must labor to save the system in which we are equally interested, from the dangers which surround it." John R. Tucker, *The History of the Federal Convention of 1787 and of its Work: An Address Delivered Before the Graduating Classes on the Sixty Third Anniversary of the Yale Law School* 49 (June 28, 1887) (transcript available in Washington and Lee University Law Library).

15. *See* John R. Tucker, *Address at the Sixteenth Annual Meeting of the American Bar Association* (Aug. 30, 1893), in 16 A.B.A. REP. 159 (1893).

16. *See* JOHN R. TUCKER, THE CONSTITUTION OF THE UNITED STATES: A CRITICAL DISCUSSION OF ITS GENESIS, DEVELOPMENT, AND INTERPRETATION (Henry St. George Tucker ed., Chicago, Callaghan & Co. 1899).

would expect, that work is, among other things, a posthumous expression of the author's views on the appropriate autonomies of state governments.<sup>17</sup>

The Tucker family position on states' rights was of course the conventional position of Virginia's elite. As a group, Tuckers were exceptional in their talents, but seldom exceptional in their tendency to adopt the sentiments prevailing among that class of Virginians who descended from the members of the colonial House of Burgesses. The patriarch of the family was perhaps the most ardent advocate of emancipation in Virginia in the 1790s,<sup>18</sup> but the antislavery views he advanced were not unorthodox for his time. Many of the Virginians who turned a colony into a Commonwealth in 1776, including Thomas Jefferson and James Madison, were committed emancipationists. After 1810, the development of the cotton market undercut the emancipation movement among Virginia's elite, and the antislavery cause did not gain the support of later Tuckers.

Indeed, the states' rights doctrine that the Tuckers espoused increasingly came to be associated with the institution of slavery. After the carnage of the Civil War settled the slavery issue, the states' rights doctrine acquired renewed vitality in the minds of post-War southern leaders such as John Tucker. We cannot know the extent to which his advocacy of states' rights was associated with a sympathy for Jim Crow laws,<sup>19</sup> but, certainly in the mid-twentieth century, his doctrine was associated with racial segregation. For my generation, "states' rights" are indelibly connected with southern governors desperately seeking to hold back the dawn of equal rights for the descendants of slaves and to prevent the ascendance of democratic governance in the South.

I wish nevertheless to pay my respect to the Tuckers by calling attention to the sound principle underlying their cherished doctrine of states' rights, a wisdom pervading our legal traditions and expressed in numerous ways in

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17 See *id.* at 341-48.

18. He published an elaborate plan to achieve emancipation. See ST. GEORGE TUCKER, A DISSERTATION ON SLAVERY: WITH A PROPOSAL FOR THE GRADUAL ABOLITION OF IT, IN THE STATE OF VIRGINIA (Philadelphia 1796) (transcript available in Washington and Lee University Law Library). He identified emancipation of Virginia slaves as his "dearest wish." RICHARD B. DAVIS, INTELLECTUAL LIFE IN JEFFERSON'S VIRGINIA 1790-1830, at 413 (1964).

19 It does seem likely that he favored racial segregation. He defended slavery in John R. Tucker, Address before the Phoenix and Philomathean Societies of William and Mary College (July 3, 1854) (transcript available in Washington and Lee University Law Library). See also John R. Tucker, A Lecture Delivered Before the Young Men's Christian Association of Richmond 10-13 (May 21, 1863) (transcript available in Washington and Lee University Library).

both state and federal constitutions. The wisdom that they expressed, and which I reiterate, is that noncentralization of our law and politics was and is an important aspect of our traditions of self-government and civil liberty

In favoring noncentralization, I hasten to disown its past misuses. I particularly repudiate its misuse to support Jim Crow, his antecedents, and his descendants, institutions that were antidemocratic. But the wisdom of noncentralization should not be forgotten merely because it was misused.

It is said that we live in a global village. Consequences radiate quickly in our world. Accordingly, many public issues must be addressed at the national, or even international, level if they are to be addressed at all. The centralization of our law and politics is therefore compelled in many circumstances. As a result, we must be especially on guard against centralizing matters that our national government has no clearly superior means of handling if we wish to preserve localism as a feature of our politics.

Alas, that seems not to happen. Issues tend to move up the hierarchy of powers from local to state to national governments for no better reason than the tendency of those frustrated in politics (as in law) to appeal to the higher forum until they reach the point of last resort.<sup>20</sup> Often, irresistible political rewards await national officers who respond to whatever concerns their constituents may have, even when the available national remedy is ineffective or improvident.

And our resistance to centralizing impulses seems to be diminishing. Partly because of the historic misuse of the doctrine of states' rights, the constituency for noncentralized law and politics is a weak one. We have come to expect Congress or the federal courts or federal executive officers to address all of our concerns, however local, however intimate, and however ineffective or even harmful the involvement of the national government may be. Thus, an astute observer may now declare that states' rights are dead.<sup>21</sup>

I speak in support of a modest revival, not so much of states' rights as of state and local responsibilities. Democratic law and justice comes from the bottom up, not the top down.<sup>22</sup> Those possessed of centralized power

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20. Thomas M. Cooley, *Changes in the Balance of Governmental Power*, Address Before Law Students of the University of Michigan 20-21 (1878) (transcript available in University of Michigan Library).

21. Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994).

22. Cf. Wallace Matson, *Justice: A Funeral Oration*, 1 SOC. PHIL. & POL'Y 94 (1983).

should therefore be perpetually reminded of the important virtues of localized governance. I list just a few

First, the more we diffuse responsibility for making and enforcing law among citizens, the more they feel personal responsibility for the conduct of the government and mutual responsibility to one another. Localized government and trial by jury are the premier instruments of self-government and the best available sources of dutiful citizenship.

Second, the tradition of self-government is in turn a source of vitality in our civil liberties. Citizens exercising an active role in making and enforcing rights are more prone to insist on their own individual rights. Citizens whose only involvement is casting a quadrennial vote for a remote government are less likely to suppose that they have claims upon its law, that the law is their servant and not their master. Hence, they are less inclined, other things being constant, to require their government to behave respectfully toward themselves and their fellow citizens.

Third, citizens who participate in localized law-making are less likely to experience the despair of powerlessness, the anomie and alienation, that is so superabundant today in our society

Fourth, locally made law is more likely to rest upon accurate factual assumptions about the situations to which it applies. One need not agree with George Wallace that folks who live and work in Washington are all "pointy-headed intellectuals"<sup>23</sup> to suppose that they know less about our affairs than we do.

Fifth, citizens are more likely to obey law that they have had a larger share in making because they are less likely to resent its intrusion. Hence, localized law is more likely to be effective in influencing conduct.

I especially emphasize the importance of such considerations in the formation and enforcement of criminal law. The effectiveness of criminal law depends on the moral support of the community. Centrally created criminal law is less likely to gain that essential moral vitality. It is also less likely to account for the suffering of offenders, as well as their families and friends, that results from punishments imposed on those who are remote and unseen. There may have been a time when our awe of the Federal Bureau of Investigation made the national criminal law especially deterrent. But familiarity, if not breeding contempt, has reduced the federal criminal

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23. Governor Wallace used this term frequently during his 1968 campaign for the presidency. See, e.g., R. W. Apple, Jr., *Dan Quayle Steps Front and (Right of) Center*, N.Y. TIMES, June 14, 1992, § 4, at 1.

law to a pedestrian state. There is no reason to suppose that federal punishment is a more effective deterrent than state punishment.

For such reasons, I urge heightened preference for state and local law-making and law enforcement when the end is criminal punishment or deterrence. There are doubtless special circumstances in which a federal criminal law is indispensable, but these should be the exception. Yet in recent years, we have witnessed a very steep increase in the number and compass of federal crimes<sup>24</sup> and in the size of the federal enforcement machinery for criminal laws. The number of persons convicted of federal crimes was less than 30,000 in 1980. It is now approaching double that number.<sup>25</sup> Not a shred of evidence suggests that this enormous increase has deterred crime. The "Crime Bill" that Congress enacted in 1994 would seem to have little chance of accomplishing any of its objectives.<sup>26</sup>

I dare not try to state limits to a renewed principle of state and local responsibility for punishment and deterrence. I present no new doctrine of constitutional law, for the principle I espouse is already expressed in all our constitutions, state as well as federal.

All I propose to do is offer a single important example of an area of conduct that the federal government has criminalized to a far greater extent than is consistent with the responsibilities of state and local government. I speak of the national laws punishing the sale and use of mind-altering substances.<sup>27</sup> We call these laws our "war on drugs," yet we wage that war not against inanimate substances, but against our fellow Americans and our Constitution.

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24. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended in scattered sections of 21 U.S.C. and 42 U.S.C.) (creating dozens of new federal crimes); see also Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (to be codified in scattered sections of 42 U.S.C.) Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified at 18 U.S.C. § 922 (Supp. V 1993)).

25. The number was 48,059 in 1991 and has continued to rise. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1992, at 486 (Kathleen Maguire et al. eds., 1993).

26. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (to be codified in scattered sections of 42 U.S.C.). The Act's most promising provision is the expenditure of federal money to hire more local police. If assigned to walk beats in high-crime neighborhoods, additional police may deter some violence. See Violent Crime Control and Law Enforcement Act, § 30801, 108 Stat. 1857 (to be codified at 42 U.S.C. § 13811).

27. The position taken here is also advocated by DANIEL K. BENJAMIN & ROGER L. MILLER, UNDOING DRUGS: BEYOND LEGALIZATION (1991) and by Judge Whitman Knapp, *Dethrone the Drug Czar*, N.Y. TIMES, May 9, 1993, at E15.



The number of persons convicted of federal drug offenses more than tripled during the 1980s. Seldom has law enforcement had so little consequence. The sale and use of controlled substances has remained virtually constant. The involvement of the national government in punishing drug criminals can therefore be terminated and the task restored to the agendas of state and local governments with virtually no risk of discernible harm to the public interest.

As recently as 1933, we amended the Constitution to preclude the national government from maintaining a national policy on the sale or use of intoxicating liquors. The Tuckers surely would have approved of the doctrine underlying the Twenty-First Amendment. Section 2 of that Amendment provides that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."<sup>28</sup> Pursuant to that simple text, the federal government retains the power to tax the sale of liquor<sup>29</sup> and has the constitutional duty to assist the states in preventing the smuggling of alcohol into "dry" states and communities.<sup>30</sup> But each state decides for itself what the restraints on individuals should be, and many states have delegated much of that responsibility to counties or communities with local option laws.<sup>31</sup> North Carolina<sup>32</sup> and Virginia,<sup>33</sup> for instance, deal with the problem of alcohol abuse one community at a time.

The effect of the Twenty-First Amendment was benign. The consumption of alcohol by Americans did increase.<sup>34</sup> But a lawless industry that had developed as a result of Prohibition was demolished, bringing down with it a network of relationships between criminals and the police that had corrupted law enforcement from one end of the country to the other. Violent crime connected with that lawless business diminished,<sup>35</sup> law enforcement resources were redirected at the detection and punishment of larceny and homicide, and tax revenues increased.

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28. U.S. CONST. amend. XXI, § 2.

29. *E.g.*, 26 U.S.C. § 5001 (1988 & Supp. V 1993).

30. *E.g.*, 27 U.S.C. § 122 (1988).

31. *E.g.*, VA. CODE ANN. § 4.1-124 (Michie 1993).

32. *See* N.C. GEN. STAT. § 18B-600 (1994).

33. *See* VA. CODE ANN. § 4.1-124 (Michie 1993).

34. *See* STEVEN B. DUKE & ALBERT C. GROSS, *AMERICA'S LONGEST WAR* 89-90 (1993) (reviewing data on consumption of alcohol during Prohibition).

35. James Ostrowski, *The Moral and Practical Case for Drug Legalization*, 18 HOFSTRA L. REV 607, 646-47 (1990).

I now propose to amend the benign text just quoted to make it applicable not only to liquor, but also to "cannabis, coca, coffee, opium, tea or tobacco."<sup>36</sup> In the remainder of this Paper, I will try to suggest succinctly why this amendment should be made.

The six substances that I propose to add contain the five mind-altering substances in addition to alcohol that appear in nature and have for millennia been widely used by men and women to relieve anxiety, to bear frustrations, to initiate themselves to social or religious groups, or merely to break the monotony of their humdrum lives.<sup>37</sup> The mind-altering effect of all of these substances can be derived without the use of any modern technology or process. Until 1914, the use of all of them was lawful in almost every American state.<sup>38</sup>

I do not favor substance abuse, even of these named substances appearing in nature. The use of mind-altering substances, especially by minors, who are most likely to engage in dangerous abuse, should be discouraged and limited if possible. But the most effective method of preventing self-abuse is by no means clear. Any program intended to deter substance abuse by punishments should fully consider the indirect as well as the direct costs of such punishment. No such weighing has occurred in the framing of our national policy.<sup>39</sup> No one in Washington counts the costs of its "war on drugs." In report after report, we receive body counts of enemy dead redolent of those reports coming from Saigon a quarter century ago, but I have been unable to find a document prepared in any branch of the

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36. A revised text might read:

The use and sale of intoxicating liquor or products made of the leaves of cannabis, coca, coffee, tea, tobacco, or the resin of opium poppies shall be exclusively regulated and controlled by the states, or by local governments as authorized by state law. The transportation or importation of such products into any state for delivery or use therein in violation of the laws thereof is prohibited.

37. Peyote and mescal, made from desert vegetation in the Southwest, have also been used for a very long time in some places in America. Mescal is the source of tequila, which is generally treated as alcohol, although it is chemically different. Peyote is generally smoked and is used for religious purposes. *See generally* EDWARD F ANDERSON, PEYOTE: THE DIVINE CACTUS (1980). It would uselessly prolong this Paper to deal with these substances. Also arguably separate is aguardiente, liquor made from sugar cane.

38. Harrison Act, ch. 1, 38 Stat. 785 (1914). For the history of this development, see DAVID F MUSTO, THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL (1973).

39. *See, e.g.*, REPORT OF PRESIDENT GEORGE BUSH, NATIONAL DRUG CONTROL STRATEGY: A NATION RESPONDS TO DRUG USE (1992); Lee P Brown, Remarks at the American Bar Association Summit on Crime and Violence (Jan. 25, 1994), in REPORT ON SUMMIT ON CRIME AND VIOLENCE app. H (1994).

federal government that attempts to identify the many costs of sending an additional 10,000 Americans a year into federal penitentiaries.

My proposal to end this ill-considered war is unlikely to find ready acceptance because we are so conditioned by the unconstrained rhetoric of our drug warriors.<sup>40</sup> But perhaps in honor of the Tuckers, the reader might be willing to suspend judgment and consider the imaginary views of imaginary citizens of an imaginary state who would adopt a policy toward substance abuse that is very different from our present national policy. Finding no appropriate name for my state, I arbitrarily appropriate the name of General Frémont whose name, I believe, was once considered for such use.<sup>41</sup>

Fremonters, the citizens of my imaginary state, favor my proposed revision of the Twenty-First Amendment because it would free them to pursue what they perceive to be a wiser policy. They are not ideologues animated by strict libertarian claims of right to engage in self-abuse,<sup>42</sup> nor are they in thrall to the vast network of drug criminals that now infest our country. They see themselves merely as practical persons trying to protect their youth from substance abuse and themselves from violence and theft and to avoid the waste of precious public resources. My question is whether Fremont should be allowed to "just say no" in words of its own choice, or whether its citizens must surrender their own wisdom to what they see as a national policy driven by hysteria.

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40. As Duke and Gross observe, "[t]he federal government seems incapable of telling the truth about the drugs that it prohibits or about any related issues." DUKE & GROSS, *supra* note 34, at 158. William Bennett deserves to be singled out for his persistent restatement of the falsehood that there is no connection between the war on drugs and the prevalence of black markets and associated violent crime. See, e.g., William J. Bennett, Drug Policy and the Intellectuals, Address at the Kennedy School of Government, Harvard University (Dec. 11, 1989), in DRUG PROHIBITION AND THE CONSCIENCE OF NATIONS (Arnold S. Trebach & Kevin B. Zeese eds., 1990).

41. By using his name, I imply no special admiration for General John Charles Fremont (1813-1890). He hailed himself as the Conqueror of California, a military achievement roughly equivalent to the conquest of Grenada. He was lionized in the West for a time; he was one of the first California senators and ran for the Presidency in 1856, losing to Buchanan. He left some money with a friend to buy land, and the land turned out to be a gold mine, which enabled him to spend his declining years dabbling in railroads. See generally ALLAN NEVINS, FREMONT: PATHMAKER OF THE WEST (1939). Many towns are named for the General.

42. E.g., DOUGLAS N. HUSAK, DRUGS AND RIGHTS (1992); THOMAS SZASZ, OUR RIGHT TO DRUGS: THE CASE FOR A FREE MARKET (1992). I do not dispute Randy Barnett's point that the line between libertarian thought and the pragmatic position I take is not a bright one. See Randy E. Barnett, *Bad Trip: Drug Prohibition and the Weakness of Public Policy*, 103 YALE L.J. 2593, 2629 (1994) (reviewing DUKE & GROSS, *supra* note 34).

The Fremont approach to the problem of drug abuse is different from that of other states because its citizens proceed from different factual premises than those on which the national policy rests. Six of their factual premises pertain to characteristics of the ancient harmful substances. These premises support the sense of Fremonters that there is abroad in the land a mania causing widespread blindness to the facts about opiates and coca or cannabis derivatives. I enumerate these six beliefs about the relative evils of different forms of substance abuse.

First, Fremonters accept the reality that the use and misuse of mind-altering substances occurs everywhere in the world. Intoxicating effects are at different times and in varying degrees attractive not only to most men and women, but also to most animals, including even insects.<sup>43</sup> Such substances have been used for recreational and sometimes religious purposes,<sup>44</sup> and also as a form of self-treatment for unwelcome emotional conditions.<sup>45</sup> Still today, opium<sup>46</sup> and cannabis<sup>47</sup> have properties useful for medicinal purposes. Opium, in the form of morphine, is a cheap, effective analgesic.<sup>48</sup> In its strongest form, heroin, opium was sold in this century as a cough suppressant.<sup>49</sup> Cannabis is a cheap, effective remedy for nausea. Because the human appetite for mind-alteration is wide-spread, in 1994, there must be several billion users of the so-called Protestant drug, caffeine, which is extracted from the tea leaf or the coffee bean.<sup>50</sup> In addition, there may be a billion users of the tobacco leaf,<sup>51</sup> and about the same number of people

43. RONALD K. SIEGEL, *INTOXICATION: LIFE IN PURSUIT OF ARTIFICIAL PARADISE* 104-05 (1989).

44. Wine at communion is the most familiar example. Peyote is primarily used for religious purposes. See ANDERSON, *supra* 37. On the religious use of coca, see Catherine J. Allen, *Coca and Cultural Identity in Andean Communities*, in *COCA AND COCAINE: EFFECTS ON PEOPLE AND POLICY IN LATIN AMERICA* 35, 39-42 (Deborah Pacini & Christine Franquemont eds., 1986).

45. This use is still a practice. See generally Roger D. Weiss & Steven M. Mirm, *Substance Abuse as an Attempt at Self-Medication*, 3 *PSYCHIATRIC MED.* 357 (1987).

46. For a current journalistic account, see Matthew Hoffman, *Living With Pain: Opinions Differ on Whether to Use Medication*, *CHI. SUN-TIMES*, May 8, 1994, (Medlife), at 61.

47. See *Making the Pain Go Away*, *N.Y. TIMES*, Mar. 4, 1994, at A26.

48. See JOHN KAPLAN, *THE HARDEST DRUG: HEROIN AND PUBLIC POLICY* 5-6 (1983).

49. See *id.* at 5.

50. See *New Look at Caffeine Cravings*, 140 *SCI. NEWS* 93, 93 (1991) (stating that caffeine "ranks as the most widely used psychoactive drug in the world").

51. See generally JEROME E. BROOKS, *THE MIGHTY LEAF: TOBACCO THROUGH THE CENTURIES* (1952).

may use alcohol as an intoxicant.<sup>52</sup> Finally, almost everywhere in the world, one can find perhaps hundreds of millions of people who use the leaves of the cannabis or coca plants or the resin surrounding opium poppy seeds. All of these substances, except coffee and tea, can be readily derived from plants that can be cultivated anywhere in a flower box or greenhouse.<sup>53</sup>

Second, Fremonters know that the use of mind-altering substances is prehistoric as well as universal. Wine and strong drink were in use almost everywhere long before any history was recorded; it is said that Noah himself discovered the use of the grape.<sup>54</sup> Cannabis, coca, and opium also have been widely used for thousands of years. Herodotus wrote of the pleasures of marijuana, the Romans ate it for dessert,<sup>55</sup> and *The Book of the Thousand Nights and a Night* tells us of its use by medieval Arabs.<sup>56</sup> Coca was frequently used for diverse purposes among ancient Incas, who shared it with their llamas to give them energy to bear heavy burdens up steep Andes trails.<sup>57</sup> Sigmund Freud was a regular user of cocaine and recommended it to many of his patients.<sup>58</sup> Victorians were not shocked that Sherlock Holmes used it to solve crimes. And, of course, coca was the featured ingredient of the original Coca-Cola.<sup>59</sup> Opium, also prehistoric,<sup>60</sup> was widely used here in America in the nineteenth century. One of the founders of the Johns Hopkins University Medical School used the opiate morphine all of his adult life.<sup>61</sup> Until 1914, many American women

52. See SIEGEL, *supra* note 43, at 102-04.

53. Other natural substances are used for their mind-altering effects in particular cultures or locales, but these natural substances are not in use all over the world as are those enumerated in my list. Notable among these other substances are mescal and peyote. See generally ANDERSON, *supra* note 37. Fremonters are concerned only with those natural substances that are in common use in their state.

54. See SIEGEL, *supra* note 43, at 102.

55. ROGER A. ROFFMAN, MARIJUANA AS MEDICINE 36 (1982).

56. See, e.g., *The Tale of the Hashish Eater*, in 3 THE BOOK OF THE THOUSAND NIGHTS AND A NIGHT 91 (Richard F. Burton trans., 1900).

57. See SIEGEL, *supra* note 43, at 169.

58. See E.M. THORNTON, FREUD AND COCAINE: THE FREUDIAN FALLACY 38-39 (1983).

59. See J.C. LOUIS & HARVEY Z. YAZIJIAN, THE COLA WARS 15-16, 34-35 (1980).

60. See KAPLAN, *supra* note 48, at 5 (noting that opium "has been known for several thousand years as a folk medicine").

61. See EDWARD M. BRECHER, LICIT AND ILLICIT DRUGS 33-35 (1972).

were fond of laudanum, an opiate drink that eased menstrual discomfort and gave babies reason to stop crying.<sup>62</sup>

Tobacco is a relative newcomer to most of the world; it was known only in the Caribbean until the sixteenth century, when it was quickly transplanted and used throughout the world. Tea was brought to Europe from China and coffee was brought to Europe from Arabia during the seventeenth century.<sup>63</sup> Sugar, chocolate, pepper, and other spices began to circulate as well;<sup>64</sup> many of these other substances may also have detectable influences on the human nervous system, and most of them are capable of causing harm to users. Given the universality and timelessness of the use of these substances, Fremonters would impose a heavy burden of persuasion on those people who favor severe punishment of Americans who yield to their temptations.<sup>65</sup>

Third, Fremonters believe that, of the common substances in use everywhere, tobacco is by far the most dangerous substance to the physical health of the user. While measurements are not precise, the best available guess is that in America, among each 100,000 users of tobacco, about 650 die each year of tobacco-related diseases.<sup>66</sup> The comparable number for alcohol is 150; for heroin, 80; and for cocaine, 4.<sup>67</sup> One difference — perhaps it is an advantage — between death by tobacco and death by another substance is that death by tobacco is delayed and slow. Marijuana smokers may experience some of the respiratory harm associated with smoking cigarettes, and caffeine may wear on the central nervous system, but there is no recorded instance of a natural death for which the use of either marijuana or caffeine could be identified as a contributing cause.

Tobacco is also the only substance whose use may adversely affect the health of those around the user.<sup>68</sup> Alcohol poses the greatest threat of

62. *See id.* at 3-5.

63. *See* WOLFGANG SCHIVELBUSCH, *TASTES OF PARADISE: A SOCIAL HISTORY OF SPICES, STIMULANTS, AND INTOXICANTS* 17 (David Jacobson trans., 1992).

64. *See id.* at 6, 14, 17

65. *Cf.* *United States v. Jin Fuey Moy*, 241 U.S. 394, 402 (1916) ("Only words from which there is no escape could warrant the conclusion that Congress meant to strain its powers almost if not quite to the breaking point in order to make the probably very large proportion of citizens who have some preparation of opium in their possession criminal").

66. *See* DUKE & GROSS, *supra* note 34, at 77

67. *See id.*

68. *See generally* SURGEON GENERAL OF THE U.S., U.S. DEP'T OF HEALTH & HUMAN SERVICES, *THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING* (1986).

injury to a fetus; cocaine, tobacco, aspirin, and many other legal drugs also pose such threats.<sup>69</sup>

Fremonters suppose that special health risks are associated with the use of substances purchased illegally. Pure food and drug laws are not observed in outlaw industries. The products of outlaw industries are often impure; heroin, for example, is often blended with the more dangerous quinine. Because illicit drugs are of uneven quality, users are likely to overdose occasionally.<sup>70</sup> Illicit drugs are also distributed in higher-strength forms that can be transported in smaller packages, such as heroin as opposed to morphine, which is essentially half-strength heroin. Also, drug users often inject illegal substances, and injection is the most hazardous method of use. Finally, manufactured substitutes, such as methamphetamine, may be noticeably more dangerous to users than cocaine.

Fourth, Fremonters believe that, of the natural substances, tobacco is the most addictive. Until recently in America, most people who smoked a pack of cigarettes were hooked and smoked daily for decades.<sup>71</sup> Physical suffering from withdrawal is, however, greatest for those who are addicted to alcohol. Withdrawal suffering is also substantial for regular users of opiates, but the record confirms that more users stop using heroin and alcohol than stop using tobacco.<sup>72</sup> Of the many American soldiers who used heroin in Vietnam, few failed to kick the habit when they returned home. Most use of cocaine and marijuana is occasional; many users give up those drugs with little, if any, of the physical suffering that is associated with withdrawal. For most users, therefore, these substances may be less addictive than caffeine.<sup>73</sup> Nevertheless, strong cocaine habits are not unknown.

Fifth, Fremonters believe that alcohol is the only popular mind-altering substance that makes some users more dangerous to others by disinhibiting their violent impulses.<sup>74</sup> Alcohol is also the substance most likely to render

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69. See DUKE & GROSS, *supra* note 34, at 72-73.

70. See, e.g., Joseph B. Treaster, *Police Comb Neighborhood for Source of Fatal Heroin*, N.Y. TIMES, Sept. 1, 1994, at B3 (reporting deaths resulting from distribution of heroin of unusual strength).

71. See Thomas C. Schelling, *Addictive Drugs: The Cigarette Experience*, 255 SCI. 430, 431-32 (1992).

72. About one-half of those who use heroin use it only occasionally. See KAPLAN, *supra* note 48, at 34-35 (discussing continuity of heroin addiction).

73. A few users find cocaine more addictive; this reaction is more likely to occur among those users who smoke it.

74. Much more crime is committed by heroin users, but almost all of the crimes

the user a defenseless victim of the violence of others. It is the one substance likely to impair the user's judgment in such a way that the user will act negligently and cause harm to others. Coca has some of the same tendency to increase violence because it increases irritability and depression — especially during a state of cocaine psychosis, which results from an overdose — but coca is a distant second to alcohol in that regard. Opium and cannabis actually diminish the user's propensity to violence.

Obviously, the chemical effect of these substances in inducing violence should not be confused with the violent crime that is committed to secure illegal substances to satisfy a habit, or the crime that results from the profit motive associated with the outlaw industry that distributes these illegal drugs. These forms of violent conduct are the result of the national policy, not of the drugs themselves.

Sixth, Fremont employers seem to believe that occasional and moderate use of these substances does not disable most users from most work. Many employers provide their workers with caffeine in order to improve their productivity; caffeine is even said to be a part of the protestant work ethic.<sup>75</sup> Of the other substances, the one most feared and mistrusted by Fremont employers is alcohol. Fremonters believe that they have known workers who secretly use cannabis, opium, or coca, yet regularly perform their duties at work and at home without persons close to them knowing of that use.<sup>76</sup> Fremonters have read stories of athletes and artists who perform extremely difficult tasks with superb craft while regularly using cocaine. They suspect that Ulysses S. Grant fought the Civil War under the influence of cocaine.<sup>77</sup>

For the six reasons stated, Fremonters find insufficient cause for the hysteria that seems to animate our national policy toward opiates, cocaine, and marijuana. They nevertheless find sufficient reason for hoping to discourage the use of these mind-altering substances. They suppose that the most effective prevention against abuse of these substances has been enlightened self-interest, which alone ensures that most adults have not been and will not become substance abusers. To reinforce self-interest, Fremonters believe that candid education to disclose accurately and unsensationally the consequences of substance abuse is an effective public

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committed by heroin users are crimes against property

75. See SCHIVELBUSCH, *supra* note 63, at 19-22 (noting that late seventeenth century middle classes admired coffee drinkers for their "good sense and business efficiency").

76. See BRECHER, *supra* note 61, at 38-39.

77. See DUKE & GROSS, *supra* note 34, at 5 (noting that Ulysses S. Grant apparently used morphine and cocaine, in addition to alcohol and tobacco).



service. Most important is the caring moral suasion that no government can provide.

Fremonters doubt that severe punishments for users and distributors can substantially deter substance abuse. They do hope, nevertheless, that modestly proportioned and humane punishment can reinforce private moral suasion provided by friends and family of prospective users. Fremonters therefore would demonstrate public disapproval of the use of harmful substances<sup>78</sup> by modestly punishing use in a public place<sup>79</sup> or at a large gathering where nonusers may be socialized to join in and by punishing more severely the distribution of drugs to minors. Again, there are several beliefs underlying Fremonters' doubts regarding any beneficial results of severe punishments. I will enumerate three.

First, Fremonters believe that the demand for mind-altering substances is inelastic. That is, some people are going to alter their minds one way or another. If the government could foreclose one or many options, there will always be others. Our homes are full of chemicals that can be so used, and designer chemists are capable of producing an infinite variety of others.

Second, Fremonters doubt the efficacy of severe prison sentences to alter personal habits. There were instances in the seventeenth century of very severe punishments, including capital punishment, for smoking tobacco.<sup>80</sup> These punishments did not work.<sup>81</sup> The prohibition of alcohol in America from 1920 to 1933 had little effect on alcohol consumption. Data gathered by our government strongly suggest that twentieth century criminal punishment has had little effect on the use of cannabis, opiates, or coca.<sup>82</sup>

Third, Fremonters also believe that the distribution of illegal substances can only be impeded, not prevented or deterred. It is not possible to destroy the supply of anything as common as poppy resin or coca and cannabis leaves. These plants are not only grown in fields and

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78. The exception for alcohol is, for some who favor temperance, a bow to reality. Alcohol's use is too closely associated with the consumption of food and with conviviality to make deterring the use of alcohol in restaurants and at parties feasible.

79. They would not punish the consumption of alcohol in restaurants.

80. The Ottoman Empire imposed capital punishment on tobacco smokers in 1633. *See* COUNT CORTI, A HISTORY OF SMOKING 137-39 (Paul England trans., 1932).

81. *See id.* at 139 (noting that "the passion for smoking still persisted").

82. *See* DUKE & GROSS, *supra* note 34, at 103-21 (discussing data that indicates failure of criminal punishment to curb illegal drug use).

hothouses in Fremont, but also easily imported into the state by boat or airplane. This will remain so even if the size of the drug law enforcement industry were enlarged manifold. Cocaine and heroin can even be brought in, if need be, by very small pilotless airplanes that cannot be detected by radar. Moreover, even if the natural products could by some unimaginable means be kept out of Fremont, there is no way to prevent the manufacture of the chemicals that are sold as replacements when natural substances are unavailable.

Fremonters also believe that making criminal punishment more severe does not effectively deter distribution and may even encourage it. The heavier the punishment is, the higher the profits obtained by risking it will be. The price of opiates and coca are in some cases a hundred times the price paid to the producer. Because the rewards of illegal distribution are so great, the effect of imprisoning a drug "kingpin" is often merely to save some other criminal the trouble of killing him.

Fremonters perceive that the chief economic effects of higher street prices are to redistribute wealth from users to distributors and to improve the market for the competing substances that are more available. Thus, one important effect of national criminalization has been to stimulate creative chemists to find cheaper substitutes for the desired substance, such as lethal crack as a substitute for cocaine.

For these reasons, Fremonters believe not only that the harms associated with the use of opiates, coca, and especially cannabis, while real, have been substantially exaggerated, but also that efforts to deter drug use by severe punishments are counterproductive. Moreover, Fremonters are generally convinced that the costs associated with this counterproductive program are very large. I next enumerate some of the many costs that our national policy-makers ignore.

First, Fremonters believe that the high profits caused by extreme criminalization sustain an enormous industry of illegal distribution, an industry whose gross receipts in 1994 were at least \$60 billion,<sup>83</sup> on which no taxes were paid. The cash value of the marijuana grown on American farms may exceed that of any other crop.<sup>84</sup>

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83. See DUKE & GROSS, *supra* note 34, at xv1 (estimating that drug users spend \$60 to \$100 billion per year on illicit drugs).

84. See Ralph A. Weisheit, *Domestic Marijuana: A Neglected Industry* 35 (1992). Incidentally, more than a few family farms have been saved from mortgage foreclosures by a timely harvest.

This very large outlaw industry provides high-income, high-risk employment for many Fremont youths, who have poor opportunities for regular employment with prospect of advancement. Many of the young men are faced with a severe choice. One alternative is to be impecunious and work at a minimum wage job; the other alternative is to live an adventurous life in crime that may be short, but affords status and notable wealth while it lasts. Too many of Fremont's youth are thus turned away from honest work and toward crime.

Second, Fremonters believe that the artificially high prices of coca and opium cause an increase in both property crimes and violence associated with property crimes. Indeed, a significant fraction of the \$60 billion received by the illegal substance industry in 1994 was paid with the proceeds of larcenies ranging from armed robbery to embezzlement. A major part of that fraction came from burglaries of property stolen by heroin addicts and sold at a very minor fraction of its worth. For example, 237 heroin addicts in Baltimore were responsible for an astonishing 50,000 larcenies in that city over an eleven-year period.<sup>85</sup> Fremonters fear that if they have not yet been victims of such crime, they are likely to be victims soon. Thus, as crime victims, they will indirectly pay the high price of satisfying some stranger's drug habit.

Third, Fremonters believe that because the opiate and coca delivery industry operates outside the law, disputes arising within this industry are settled by private use of force. The escalation in weaponry that has occurred on American streets in the last decade is driven by the need of illegal merchants to protect their business. Many people acknowledge that if required to carry \$50,000 or \$100,000 in cash or merchandise through the streets of their cities, they, too, would seek to arm themselves more heavily than the pirates whom they would have reason to fear and against whom they would have no public protection. We often hear that when guns are outlawed, only outlaws will have guns; it may be more nearly true that as we outlaw drugs, we assure that outlaws will have both drugs and guns.

Fourth, Fremonters believe that because the illegal substance industry operates outside the law, this industry has no disincentive to sell to children or to involve children in the work of sale and delivery. The outlaw industry does not observe fair labor standards laws. Indeed, to the extent

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85. See John C. Ball et al., *The Criminality of Heroin Addicts: When Addicted and When Off Opiates*, in *THE DRUGS-CRIME CONNECTION* 39, 60 (James A. Inciardi ed., 1981).

that it has an eye to the future, the welfare of the outlaw industry is served by hooking as many children as possible. Juveniles who face shorter prison terms and have lower expectations of compensation often make the best couriers. In this respect, severe criminalization of cannabis, opiates, and coca leave children less protected from vendors of those substances than from the vendors of alcohol and tobacco, most of whom dare not knowingly sell to or through minors.

Fifth, Fremonters also perceive that the outlaw industry that distributes marijuana, opiates, and coca calls into being its opposite, the drug law enforcement industry. The drug law enforcement industry includes police, courts, prisons, lawyers, researchers, and demagogues. It is maintained at public expense, produces no revenue, and uses resources that might otherwise be available for other public programs such as effective education about toxic substances, treatment for those desiring to kick their habit, and technical training to improve the marketable skills of prospective substance abusers. The annual cost to the nation of drug law enforcement now runs about \$50 billion per year,<sup>86</sup> yet there are a thousand other useful programs for which public funds are presently inadequate.

Sixth, Fremonters strongly suspect that because drugs are distributed outside the law, some of the money that the drug industry takes in is paid out to law enforcement officers for corrupt protection. Fremonters have no way of knowing how much money is paid to law enforcement officers, but they know that some judges of repute, as well as many subordinate officers of the law, have been corrupted.<sup>87</sup> The amount of money changing hands is so large that it dwarfs the resources of honest law enforcement officers in Fremont and makes likely the fact that the amount of corruption is considerably greater than that coming to light.

Seventh, Fremonters fear that because much of the distribution and use of drugs is conducted in private and affords no occasion for complaints from other citizens,<sup>88</sup> drug law enforcement entails frequent, sometimes massive, invasions of privacy far beyond those generally associated with enforcement of most other criminal laws, such as those protecting the

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86. See DUKE & GROSS, *supra* note 34, at xvi (estimating that total federal, state, and local expenditures to stop drug problem equal \$50 billion).

87. See *id.* at 113-16 (discussing corruption of criminal justice system).

88. Drug offenses are in this sense "victimless." See Barnett, *supra* note 42, at 2621 (describing drug use as victimless crime "because it is conduct that does not physically interfere with the person or property of another").

personal safety and property of citizens. Violent entries by police into the homes of citizens of Fremont has become a commonplace result of national drug policy. Not unheard of are efforts to get children to report their parents or siblings, in the manner of the Hitler Youth or the Red Guard.<sup>89</sup> Because of the nature of the evidence pertinent to proof of criminal use or sale of a controlled substance, it is easy and, therefore, tempting for the police or other citizens to plant evidence that produces false convictions. The cumulative effect of these features of drug law enforcement is believed to be a serious degradation of the professional standards of Fremont police. Their conduct, some citizens believe, resembles the techniques for which the Spanish Inquisition became rightly known as a time of acute injustice.

Eighth, Fremonters deplore the discernible effects of the campaign to interdict supply in countries to our south; their legal institutions as well as our own have been corrupted. We continue to import their substances while we export the warfare on our streets to theirs. Whole national judiciaries have been kidnapped and murdered in our misbegotten war.<sup>90</sup> Moreover, it has recently come to light that American radar systems have assisted foreign air forces in shooting down unarmed civilian airplanes suspected of carrying illegal drugs. The military personnel engaged in such activity seem to be in clear violation of a federal law for which the punishment specified by Congress is death.<sup>91</sup> That officers of our government have reportedly been induced to commit capital offenses demonstrates how far the national government has departed from a sound appreciation of elemental human rights.

Ninth, Fremonters also deplore the secondary consequences of efforts to suppress the laundering of drug money. Such efforts do not serve to reduce the use of controlled substances; their effect is merely to make criminals of some bankers and lawyers otherwise prone to obey the law.

Tenth, Fremonters know that their own judicial institutions are swamped. Because of the high volume of criminal prosecutions generated

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89. This practice is a special feature of the Drug Abuse Resistance Education (DARE) program, a drug education program conducted in schools by police officers. Joseph Pereira, *The Informants: In a Drug Program, Some Kids Turn in Their Own Parents*, WALL ST. J., Apr. 20, 1992, at A1.

90. See, e.g., *Annual Human Rights Report*, U.S. DEP'T OF STATE DISPATCH, Feb. 11, 1991, at 102, 103 (discussing number of noncombat deaths in Colombia).

91. On July 14, 1994, the Department of Justice released an opinion that such use of American radar is a violation of 18 U.S.C. § 32 (1988). See Memorandum from Walter E. Dellinger, Assistant Attorney General of the United States, to Jamie S. Gorelick, Deputy Attorney General of the United States (July 14, 1994) (on file with author).

by the effort to enforce the laws against the use of the forbidden substances, Fremont courts have unmanageable caseloads. Although Fremonters have been spending billions each year to prosecute and severely punish substance abuse and delivery, it has not been nearly enough to maintain the quality of civil and criminal justice that was expected of Fremont courts two decades ago. Fremont's judiciary is demoralized. Some courts, especially the juvenile courts, have almost ceased to function.

Eleventh, Fremonters believe that too many of their people are in prison. The number of persons now in American prisons is an astonishing 1.4 million.<sup>92</sup> At the present rate of increase, we will have 2 million people in prison by the end of the decade.<sup>93</sup> Half of those people will be in prison because of the criminalization of cannabis, opiates, and coca. In the federal system, partly because of the severe sentencing guidelines,<sup>94</sup> expected prison time is now ten times longer than it was in 1980.<sup>95</sup> This result is owing also to the frustration of drug warriors: The more the national policy fails, the harsher it becomes, but no visible benefits result from the harshness.

Many of the punishments are hugely disproportionate to any harm that can be imagined to result from the forbidden conduct and, thus, constitute substantial violations of basic human rights. Fremonters are not even sure that a federal judge who follows the national sentencing guidelines is entitled to the Nuremberg defense that he or she was following orders in so violating the rights of those guilty of marginally harmful conduct. There are thousands of examples of official brutality. One recent example is Mark Young, who is in a federal prison for life without possibility of parole because he amiably introduced a friend desiring to buy marijuana to another friend able to supply his need.<sup>96</sup> Some state courts, to be sure, are equally brutal. Jim Montgomery, a paraplegic, was sent to a state prison for ten years by an Oklahoma jury because he had two ounces of marijuana in the pouch of his wheelchair.<sup>97</sup>

Twelfth, Fremonters also find that because the drug law enforcement industry itself is quite large, it has acquired the self-protective impulses of

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92. See DUKE & GROSS, *supra* note 34, at 179.

93. See *id.*

94. See generally BARBARA S. VINCENT & PAUL J. HOFER, FEDERAL JUDICIAL CENTER, THE CONSEQUENCES OF MANDATORY MINIMUM PRISON TERMS: A SUMMARY OF RECENT FINDINGS (1994).

95. See DUKE & GROSS, *supra* note 34, at 180.

96. See Eric Schlosser, *Reefer Madness*, ATLANTIC MONTHLY, Aug. 1994, at 45, 45.

97. See *id.* at 55.

other large industries, such as the tobacco and distilling industries. Because drug law enforcement officers are often required to do such distasteful deeds, they tend to rationalize their own conduct with exaggerated beliefs about the horrors of cannabis, opiates, and coca.<sup>98</sup> For these reasons, the enforcement industry is a source of disinformation about drugs that is almost as abundant as the substances themselves and exceeds in its harmful consequences any disinformation that may have been disseminated by the tobacco industry

Thirteenth, Fremonters perceive that the war we are waging on ourselves is undermining democratic government. Compounding the problem of disinformation is the fact that the drug law enforcement industry is inside the government; the disinformation that we are receiving is coming from official sources. Fremonters have acquired a dispiriting mistrust of the many politicians who present themselves as avenging angels who will protect their constituents not only from the exaggerated evils of substance abuse, but also from all of the violence, corruption, and abuse of power associated with the enforcement of criminal laws. Rare has been constituents' experience with politicians who are willing to bring the unwelcome news that not every war can be won and not every evil can be prevented by the enactment of laws and the imposition of even heavier penalties. Most of our contemporary national leaders are viewed by many voters in Fremont as moral cowards so afraid to be the messenger of ill tidings that they cannot speak the truth.

Fremonters believe that these thirteen sizeable costs of severe punishment heavily outweigh the elusive and nondemonstrable benefits optimistically pursued by the present national drug policy. The alternative Fremont policy would begin by limiting criminal punishment to three purposes: (1) to continue to punish use or distribution of mind-altering substances other than those made from the seven natural substances so long and widely used; (2) to continue to deter the use of tobacco, opiates, coca, and cannabis in any public place; and (3) to deter the private distribution, especially to minors, of tobacco, opiates, coca, cannabis, and alcohol. The state's resources for drug law enforcement would be concentrated on those three more nearly attainable aims. Punishments would be reduced to correspond to the social harms realistically associated with the forbidden

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98. This rationalization is a normal human response to morally distasteful work. *See generally* ERVING GOFFMAN, *FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE* (1974).

conduct. Most of the punishments would be limited to mandatory community service and would not entail incarceration.

Fremonters would then devastate the outlaw industry by supplying opiates, coca, and cannabis at public stores<sup>99</sup> to adults who are willing to pay a designated price. Sales would be made at a price just low enough, in quantities just large enough, and in doses just strong enough to make outlaw distribution unprofitable. The program, however, would allow for a local option: Any community would be able to prohibit such sales altogether.

Fremonters anticipate several benefits from their policy I will enumerate nine.

First, Fremonters expect to eliminate any economic incentive on the part of any person in their state to promote the use of opiates, coca, or cannabis. There would be no drug pushers in Fremont, not even a Joe Camel to attract users, and no innuendoes that our sexual appeal or prowess would be enhanced by drug use.

Second, Fremonters expect to reduce the frequency of harm to drug users. The public supply of natural substances would be clean of harmful additives, predictably even in quality to prevent accidental overdose, and sold in forms that minimize hazards to users, such as skin patches instead of injectable solutions. All purchasers would be fully and fairly informed of the risks associated with the use of the substances so provided.

Third, Fremont's program would aim to foreclose thousands of careers in crime by eliminating the high profits associated with high risks.

Fourth, violence associated with the defunct outlaw industry would be eliminated, and, therefore, the need for heavy weaponry would be diminished. Larceny to pay for drug habits would be reduced, but, alas, not eliminated.

Fifth, Fremont's policy would clear the dockets of the courts and reduce by billions the costs of maintaining public prisons.

Sixth, thousands of prisoners who pose no serious threat to others would be released and allowed, if so inclined, to pursue useful lives.

Seventh, most Fremont police would be restored to the honest and vital task of protecting the public safety and would be relieved of the temptations of bribery and the incentives to violate the civil rights of citizens.

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99. Cf. VA. CODE ANN. §§ 4.1-101, -119 (Michie 1993) (creating state liquor stores).



Eighth, Fremont's policy would eliminate the occasion for the program of interdiction of international trade by greatly reducing the outlaw demand.

Ninth, Fremont's program aims to restore public confidence in the intelligence and integrity of their political leadership by aiming at more attainable goals and avoiding needless social and economic costs.

Fremonters concede that these expected benefits may be unduly hopeful, but they contend that their hopes cannot possibly be as unrealistic as the hopes of those who favor the continuation of our present national policy

Of course, no state such as Fremont presently exists. Perhaps one reason is because states are not permitted effectively to control their own destinies in these matters. Citizens are not encouraged to think critically about issues governed from afar as they might if they could test their ideas in their own communities. Should we not, I ask, permit the citizens of some state to come forward with this or another plan for dealing more effectively with substance abuse than the national government has or can? Is it not possible that the people who drafted and ratified the Twenty-First Amendment to the Constitution of the United States had it right, that there is no sufficient national interest to justify engaging the federal government in the preemptive regulation of the private use of toxic substances? Is it not possible that Justice Brandeis was right when he wrote that the states have important utility as experimental laboratories for trying disparate solutions to tough political problems?<sup>100</sup>

Surely, if there is a place where my plea for decentralized criminal law ought be heard, it is here in Virginia where the American idea of self-government was formed. One might reasonably expect those in this precinct to be among the first to agree that local government of grave moral issues is the source of our enduring commitments to democracy and to civil liberties.<sup>101</sup> I therefore summon this audience to the banner of a renewed federalism. Quite possibly I am mistaken, but I think that I hear a small chorus of Tuckers agreeing that the time has come to renew and to apply the wisdom of the Twenty-First Amendment.

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100. See *New State Ice Co. v Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

101. The importance of local government of grave moral issues is a theme of Francis Lieber's *Civil Liberty and Self-Government*. See generally FRANCIS LIEBER, *CIVIL LIBERTY AND SELF-GOVERNMENT* (Theodore D. Woolsey ed., 4th ed. 1901). On Lieber's importance in the nineteenth century, see generally Paul D. Carrington, *The Theme of Early American Law Teaching: The Political Ethics of Francis Lieber*, 42 J. LEGAL EDUC. 339 (1992).

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