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United Nations  
Human Rights Committee

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## **Regarding Drug Law and Human Rights Law; Another Follow-Up.**

Dear Sir/Madam.

I refer to my previous communication, a letter dated December 21, 2012 (see appendix 1) and a supplementary follow-up letter dated May 13, 2013 (appendix 2), whereby I filed a complaint against the states of the world and the U.N. drug control conventions based on our drug policies' incompatibility with human rights law.

Now, more than a year and a half later, I still have not heard from you.

I find this peculiar.

Taking into consideration the evidence presented, the enormous implications of the complaint, and the fact that you are obliged to give me an advice of registration, I expected to hear from you a long time ago. After all, as the subject matter to be reviewed directly concerns the fundamental rights of up to 300 million people<sup>1</sup>, it is arguably the most important complaint you have ever received. And as the evidence presented leaves little doubt that drug prohibition, indeed, as measured against the principles of equality, proportionality, fairness, and justice, violates our catalogue of rights, I am led to believe that the controversial nature of the complaint may have gotten the best of you.

Whether or not this is the case, I write this letter to remind you of the importance that you act on the material provided. The simple reason for this is that, controversial or not, the issue will at some point have to be addressed—and the sooner the better for all parties involved.

As evidenced by the legalization of cannabis in Washington, Colorado, and Uruguay, as well as wheels set in motion elsewhere, fresh winds are blowing through the drug political landscape. According to a Gallup poll, some 60 percent of Americans are now in favor of legalizing marijuana<sup>2</sup>. According to another, 77 percent of British politicians consider current policies unfit for purpose<sup>3</sup>,

and as more and more people wake up to the fact that current policies are a horrendous mess of mismatched means and ends, this trend is expected to continue<sup>4</sup>.

Indeed, it is now not only a matter of time before the prohibitionist house of cards completely collapses, but also before prohibitionists themselves risk being held to account for the grave consequences of their policies.

For too long they have opposed checks and balances that would have interfered with their agenda, but as the failures of prohibition are becoming more evident, people are beginning to demand justice. Hence, as noted by an Australian expert committee: “The move against prohibition is gathering momentum . . . across the ideological spectrum as communities around the world place responsibility for the costs of prohibition where it belongs: with those legislators who continue, by default, to support the international prohibition approach.”<sup>5</sup>

Since I last contacted you, therefore, the pressure for reform has increased exponentially and the international drug control regime can only expect to suffer more blows until it finally crumbles. You are (probably) already aware of the internal dispute on this issue in the UN. From the International drug control system’s inception, the defenders of a law-and-order approach have done their utmost to maintain their fundamentally flawed policies. Even though official studies have argued against prohibitionist drug policies for more than a century<sup>6</sup>, they have ignored all empirical evidence<sup>7</sup>, they have refused to engage civil society, and, rather than listening to the experts<sup>8</sup>, they have blindly supported policies that only well-paid bureaucrats were comfortable with<sup>9</sup>.

The arrogance with which they have kept more humane and evidence-based drug policies at bay leaves little doubt of their inability to rationally defend their policies<sup>10</sup>, and the zeal with which they have denied the evidence in favor of reform is nothing less than criminal. After all, their obligations toward international law is clear, and as the Australian expert group concluded: “By maintaining prohibition and suppressing or avoiding debate about its costs and benefits, it can be argued justifiably that our governments and other community leaders are standing idly by while our children are killed and criminalized.”<sup>11</sup>

While bureaucrats in the INCB, the UNODC and CND will disagree, this is no longer a point of debate. Indeed, Kofi Annan, your former Secretary General, and Louise Arbour, your former High Commissioner for Human Rights, commented thus on policymakers’ denial of reality and the consequences of their negligence:

*“It might have been understandable that the architects of the system would place faith in the concept of eradicating drug production and use (in the light of the limited evidence available at the time). There is no excuse, however, for ignoring the evidence and experience accumulated since then. . . . There is a temptation to avoid the issue. This is an abdication of policy responsibility—for every year we continue with the current approach, billions of dollars are wasted on ineffective programs, millions of citizens are sent to prison unnecessarily, millions more suffer from the drug dependence of loved ones who cannot access health and social care services, and hundreds of thousands of*

*people die from preventable overdoses and diseases contracted through unsafe drug use*<sup>12</sup>.

Further proof of our leaders' criminal negligence is everywhere to be found. For instance, a European panel of experts concluded thus after reviewing the status quo:

*"Despite the primacy of human rights obligations under the UN Charter, the approach of the UN system and the international community to addressing the tensions between drug control and human rights remains marked by an ambiguity that is inexcusable in the face of the egregious human rights abuses perpetrated in the course of enforcing drug prohibition. . . . It is past time for UN, its individual Members, and its organs, as well as civil society organizations, to ensure that the international drug control system works to respect, protect and fulfill the human rights of people who use drugs and affected communities, and to hold the international drug control entities and UN Members to account for human rights abuses committed in the name of drug control."*<sup>13</sup>

This was six years ago. Since then many more billions of dollars have been wasted on counterproductive policies, more than 10 million people have been wrongfully imprisoned<sup>14</sup>, and more than a million have died as a direct consequence of the war on drugs<sup>15</sup>. Two years after the European Coalition for Just and Effective Drug Policies, in a statement to the General Assembly, declared that the harmful "effects of prohibition can no longer be called unintended", we are still waiting for our leaders to honor their obligations to international law; 16 years after 770 scholars—including more than a hundred judges and professors of law—wrote to the UN Secretary General, complaining about human rights violations in the name of the war on drugs, stating that is causing more harm than drug abuse itself, and asking the UN to initiate a truly open and honest dialogue regarding the future of global drug control policies<sup>16</sup>, we are still waiting for it to manifest. *We are still waiting for the day when our officials shall recognize our right to have the relationship between the drug control and the human rights conventions properly reviewed*<sup>17</sup>*—and the longer it takes before this is done, the graver the implications of their negligence will it be.*

Again, prohibitionists will predictably disagree. Nonetheless, the more you know about the history of drug policy, the less controversial this statement becomes. For as professors of criminology and sociology John F. Galliher, David P. Keys and Michael Elsner stated:

*"Since the 1960s, few criminologists or criminal law professors have supported government drug policies. To this day, those setting . . . drug policy continue to ignore expert legal, academic, and medical advice. In the academic community there is now a clear recognition of long-standing patterns of both the ineffectiveness of, and racism inherent in . . . drug law enforcement. Indeed, opposition to contemporary . . . drug control policy has become normative in the academic community."*<sup>18</sup>

The documentation you have already received speaks volumes about this, for at no point in time could the policies of prohibition claim credibility<sup>19</sup>.

Researchers agree that it was brought into being by a corrupt political process<sup>20</sup>; that it, as Judge James P. Gray said, was “motivated by racism, fear, empire building, and ignorance”<sup>21</sup>; that prohibitionists misrepresented or overlooked the available evidence to have their way<sup>22</sup>, and that voices of reason were either subdued<sup>23</sup> or ignored. They concur that it has continued to this day supported by nothing but the empty rhetoric of self-serving bureaucrats<sup>24</sup>, and that an unbiased analysis, whether performed by cost-benefit<sup>25</sup> or human rights/moral criteria<sup>26</sup>, would favor legalization.

Add to this picture that legal scholars for decades have been exposing the drug laws’ unconstitutional nature, and you begin to see the criminal negligence with which prohibitionists have fought their crusade<sup>27</sup>. For instance, academics like Douglas Husak<sup>28</sup>, Steven Wisotsky<sup>29</sup>, Richard Glen Boire<sup>30</sup>, Marc J. Blitz<sup>31</sup>, Roger Pilon<sup>32</sup>, Michelle Alexander<sup>33</sup>, Randy E. Barnett<sup>34</sup>, James Ostrowski<sup>35</sup>, Andrew Koppelman<sup>36</sup>, David A.J. Richards<sup>37</sup>, Doug Bandow<sup>38</sup>, David Bergland<sup>39</sup>, Paul Hager<sup>40</sup>, Allison Brandi Margolin<sup>41</sup>, Michèle Alexandre<sup>42</sup>, Warren Redlich<sup>43</sup>, Merle Anouk de Vries<sup>44</sup>, Erik Luna<sup>45</sup>, Eva Nilsen<sup>46</sup> and Eric Blumenson<sup>47</sup> have written lucidly on the subject and put forth compelling arguments that our right to life, liberty, and the pursuit of happiness is, indeed, violated by the current regime. Politicians<sup>48</sup>, lawyers<sup>49</sup>, judges<sup>50</sup>, cops<sup>51</sup>, even former attorney generals and justice ministers<sup>52</sup> have joined the choir, and together with professors of economics<sup>53</sup>, sociology<sup>54</sup>, criminology<sup>55</sup>, psychology<sup>56</sup>, philosophy<sup>57</sup>, pharmacology<sup>58</sup>, and psychiatry<sup>59</sup>, have called for an end to these destructive policies.

From the beginning it was always clear to the more perceptive players that the premises upon which prohibitionists built their reasoning were a series of falsehoods. With time the devastating consequences of their ill-fated logic have only become more obvious, and today you are hard pressed to find an expert in the field willing to put her neck out in defense of prohibition. John Collins, coordinator of the London School of Economics’ International Drug Policy Project confirms:

*“The empirical data is . . . overwhelming: the system has failed. Worse, it has become increasingly clear that the human costs of pursuing many of its policies renders them unjustifiable. From mass incarceration in the United States and Asia, to the HIV/AIDS epidemic flooding Russia and the waves of violence rippling through Latin America—current global drug policies are worsening current global drug problems. This is no longer a point of controversy, but as Joseph Spillane suggests, is something which ‘no serious scholar questions’.”<sup>60</sup>*

No wonder, then, that more and more public servants think twice about supporting prohibition. Prohibitionists can no longer control the debate by claiming the moral high-ground and refusing to engage civil society, and as the status quo is impossible to defend, voices advocating change are beginning to have an impact. Thus, due to pressure from the Latin American countries, the UN General Assembly shall have a Special Session on drug policy in 2016. And even if prohibitionists are working feverishly behind the scenes to see that no such thing takes place, it is only natural then that the relationship between the UN drug control conventions and human rights conventions is properly reviewed.

The increasing amount of scholarly works which point out the illogicality of the classification system and argue for a reform of the UN drug control conventions<sup>61</sup> is a sure sign of things to come. All UN bodies and member states are, after all, bound by their overarching obligation to promote universal respect for, and observance of, human rights and fundamental freedoms, and the UN apparatus cannot ignore the inconsistencies between the drug control conventions and the human rights conventions without undermining the explicitly stated purpose for its existence.

It is for this simple reason the UN is increasingly divided on this issue. On the one hand you have the bureaucrats whose talk about “social responsibility”, “legal principles” and “human rights law” is no more than empty rhetoric; those who tend to defend the status quo no matter what, and whose only ambition is to follow the path of least resistance, going along with the system’s blind force of inertia wherever it takes them. On the other you have those with enough integrity to stand for something; those who have the courage to act on the evidence provided, and who are willing to follow the data wherever it leads them.

You, the members of the UN Human Rights Committee, must now decide which camp you belong to. You have already received the documentation needed to consider the merits of the argument against prohibition, and the following appendices will provide you with further insight:

- James Ostrowski, *The Moral and Practical Case for Drug Legalization*.
- Warren Redlich, *A Substantive Due Process Challenge to the War on Drugs*.
- David A.J. Richards, *Drug Use and the Rights of the Person*. (chapter 4 of *Sex, Drugs, Death and the Law: An Essay on Human Rights and Overcriminalization*).
- Doug Bandow, *From Fighting the Drug War to Protecting the Right to Use Drugs: Recognizing a Forgotten Liberty*. (Chapter 10 of Fred McMahon (ed.), *Towards a Worldwide Index of Human Freedom*, Fraser Institute 2012)
- Eva Nilsen & Eric Blumenson, *Liberty Lost; the Moral Case for Marijuana Law Reform*.
- Merle Anouk de Vries, *A Human Rights-based Approach to the International Drug Policy*.
- Andrew Koppelman, *Drug Policy and the Liberal Self*.

These are just a handful of the legal scholars who have made the case that our drug policies represent an unconstitutional practice and a violation of human rights law.

The fact that these policies continue unabated is not a result of an inherent flaw in their reasoning. Rather, it is the result of prohibitionists’ love for power, zero-tolerance and ignorance over truth, decency, legal principles and the rule of law<sup>62</sup>, for as Roger Pilon stated 14 years ago:

*“In the realm of ideas, there simply are no credible arguments left for continuing this endless war on drugs. . . . From a consideration of both principle and policy, reason reveals that the war is wrong and counterproductive. It is now the visceral response that has to be confronted, the blind, irrational reaction to calls for ending the war that stop*

*thought when thought is most needed, that ignore inconsistency and hypocrisy that is as plain as day.”<sup>63</sup>*

You, the members of the UNHRC, now have an important job to do in addressing this issue. Failure to attend to the alleged discrepancy between the drug control conventions and human rights conventions entails nothing short of criminal negligence on your part, and so I expect that you honor your commitment to the Covenant and ensure that the rights-oriented argument has its day in court.

I also expect that you do not insult mine or any other legal theorist’s intelligence.

Hence, whether or not you agree with the legal reasoning presented in the appendices, I expect a principled and thoughtful legal analysis from your end. Not only do I expect that you familiarize yourselves with the literature provided and that you take into consideration the unfortunate consequences of current policies, but also that you recognize the influence of the natural rights tradition on the framers of our constitutions and conventions, and that a proper interpretation of the Covenant therefore must take into account the basic precepts of this tradition.

What this means is quite simple. With this complaint you’ve received an argument which on principled grounds makes a case for the legalization of *all* drugs. In order to continue their prohibition, then, there are essentially four questions that the defenders of the status quo must answer to the satisfaction of an independent, impartial, and competent tribunal. These questions are basically the same, and can, using cannabis as an example, be stated like this:

- Whereas all comparisons of the problems associated with marijuana and legal drugs like alcohol and tobacco<sup>64</sup> demonstrate that the legal ones are more harmful to users’ health and more destructive to us as a society: *How will you defend present policies? How can you, without building your drug policy on a discriminatory practice—and thus violate the principle of equality—argue in favor of a health-oriented approach toward alcohol users and a continued criminalization of marijuana users?*
- Whereas there is the same supply and demand factors involved when it comes to marijuana and other drugs like alcohol and tobacco, and whereas the different groups of drugs also have the same varying patterns of use associated with them<sup>65</sup>: *How will you justify the persecution and the demonization of the drug law violators? What sort of crimes against his fellowmen has a marijuana producer, transporter or seller committed that an alcohol producer, transporter or seller has not?*
- Whereas virtually all of the world’s leading drug policy scholars are in agreement that the drug laws have had worse consequences for society in general and users in particular than the drug use itself would have had<sup>66</sup>, and whereas more and more organizations and commissions<sup>67</sup> publish reports that confirm the same: *How will you, from the growing evidence base that suggests the cure (marijuana law) is worse than the disease (marijuana use) defend current policies as measured against the principle of proportionality?*

• Whereas a majority of drug policy experts agree that there was a moral panic behind the outlawing of marijuana<sup>68</sup>; whereas drug policy experts acknowledge that its current classification makes no sense<sup>69</sup>; whereas scholarly works such as James Ostrowski's *Answering the Critics of Drug Legalization*, Douglas Husak's *Drugs and Rights*, and David A.J. Richards' *Sex, Drugs, Death, and the Law* have thoroughly refuted the traditional arguments in favor of criminalization; whereas an independent, impartial, and competent tribunal (the Cannabis-tribunal in the Hague, 2008) has already qualified the prohibitionist argument as "based on fallacies" and "absolutely worthless"<sup>70</sup>, and whereas the drug laws thus seem to build their credibility on a series of faulty premises: Considering the fact that the enemy image of marijuana has proven vastly exaggerated; considering that the separation between the licit and illicit substances has proven an arbitrary divide; considering that the evidence is increasingly clear that the drug laws have failed in reducing their supply and demand<sup>71</sup>; considering that American, as well as European<sup>72</sup> decriminalization experiments have shown a health-oriented approach to be more successful in dealing with the harms caused by drug use<sup>73</sup>; considering that the cure has proven worse than the disease to the degree that the harms caused by prohibition<sup>74</sup> now have become so enormous that they threaten to undermine the very fabric of our society<sup>75</sup>; considering that paternalistic and moralistic arguments have failed, and considering that you can no longer justify prohibition on the basis that (1) it suppresses different types of crime<sup>76</sup>, (2) that it protects our youth<sup>77</sup> and the wellbeing of society<sup>78</sup>, (3) that drug abuse has substantial economic and social costs<sup>79</sup>, (4) that marijuana use is intrinsically immoral and degrading in nature<sup>80</sup>, (5) that its use is self-destructive, dangerous and may cause a variety of harms, including physical injury, addiction and death<sup>81</sup>, (6) that it is a gateway drug<sup>82</sup>, (7) that its use is not a victimless crime since it causes harm to others<sup>83</sup>, and (8) that we do not know the consequences of legalization<sup>84</sup>: *All this considered, what compelling reasons can there be for prohibition, and in what way are its means tailored towards its explicitly stated ends?*

As you can see from the endnotes and appendices, an abundance of legal scholars have pondered these issues and concluded that the government's interests are neither compelling nor the law properly framed<sup>85</sup>.

To my knowledge no one has looked into this matter and concluded otherwise, and as the prohibitionists' credibility rests on their ability to refute such professionals' legal reasoning, I've asked the Norwegian government to provide an answer to these questions.

The drug political reality being what it is—that is, impossible to align with our catalogue of rights—it should come as no surprise that our public officials have responded with a wall of silence.

However, their obligations to international law leave little doubt that they find themselves on thin ice. It is in blatant violation of the principles of good governance and human rights that they have proven their loyalty to an indefensible doctrine, and it is now high time that you remedy this unfortunate situation.

As it stands our country is no longer governed by the rule of law, some 30 percent of the prison population are political prisoners, and roughly 30 million European drug users find themselves outside the protection of the human rights conventions. By any sound measure, it is a situation that you should have responded to with a sense of urgency when you first heard about it. *Now, nearly two years later, the stakes are higher than ever, and if you have any intention of being part of the movement that seeks to promote, protect and secure the progress of human rights law, you must act immediately, contact the State party, and see what can be done about this.*

Be advised that as our public officials hitherto have gone out of their way to prevent an open examination of the facts, I suspect that they will continue to do so. True to their modus operandi they seem to imagine that the status quo can be prolonged indefinitely, and that brute force forever can hold the rights-oriented debate at bay. I therefore expect them to do what they can to impress upon you the idea that everything, somehow, is as it should be with the world, and that there is no need for them to explain anything pertaining to their policies.

If this is the case, you will have to go it alone and see to it that the issue is properly resolved. Indeed, the reputation and the legitimacy of the UN system depends upon you doing so, and if you cannot disprove the concerns raised herein, I expect that you not only conclude that drug prohibition is a violation of our human rights, but that you make recommendations thereon and promote the effective coordination and mainstreaming of human rights within the UN system.

Powerful forces will resist this. Nonetheless it is the only proper way forward, and your goal should be to have the issue put on the agenda of the General Assembly's Special Session on drug policy in 2016. *All else constitutes a failure on your part to take your obligations to the Covenant seriously.* Evidence abounds that current drug policies are incompatible with the standards raised by human rights law, and *only* by responding to the questions above can you assure the world's drug users that their rights are respected.

It's that simple.

To the degree you fail to address this issue, the UN Human Rights Committee will present itself as a part of the problem rather than the solution, and you now need to ask yourselves the very same question that Erik Luna, professor of law at Washington and Lee University, posed to the US president: *"When prohibition ends and the time comes to tally the horrible wages of drug warfare and to name the heroes and heavies, will you have been on the right side of history?"*<sup>86</sup>

Great weight now rests upon your shoulders. Indeed, the legacy of the UN system depends on where we go from here; so does the fate of millions of people, and I look forward to your response.

Yours sincerely,

Roar Mikalsen.



## ENDNOTES

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<sup>1</sup> The Alternative World Drug Report: *Counting the Costs of the War on Drugs* (2012), p. 16.

<sup>2</sup> <http://www.gallup.com/poll/165539/first-time-americans-favor-legalizing-marijuana.aspx>

<sup>3</sup> <http://www.theguardian.com/politics/2012/sep/08/mps-drugs-policies-not-working>

<sup>4</sup> Looking at US statistics (Source: Pew, *Majority Now Supports Legalizing Marijuana*, April 4, 2013), we find that there has been a steady increase in support for cannabis legalization since 1990. Back then a mere 16 percent favored legalization, in 2006 32 percent supported legalization, now 60 percent do so, and as this trend is expected to continue, we can predict that by 2018 roughly 80 percent of the American people will favor legalization.

The history of drug policy shows that where Americans go, the rest of the world will follow. In other words, now that the rights-oriented debate has come to the attention of policymakers, the question is not *if* prohibition will end but *when*, and *to what extent* prohibitionists will sacrifice the rule of law in an attempt to keep their failed policies in place.

This is slowly dawning on the people working in the prohibitionist-machinery. As Gary Hale, a DEA Chief of intelligence noted: "At some point in the not-too-distant future, whether a year or 10 years from now, legalization is going to happen. We need to prepare for that." William Martin, *The War on Drugs Has Failed: Is Legalization the Answer?* Conference Report, James A. Baker institute (March 2012), p. 20.

So far, the prohibitionists have failed to do so. Nevertheless, the pressure for reform is growing stronger day by day, and as further explained by the conclusion of a recent report: "The question appearing on the international policy agenda is now no longer whether or not there is a need to reassess and modernize the UN drug control system, but rather *when and how*. The question is if a mechanism can be found soon enough to deal with the growing tensions and to transform the current system in an orderly fashion into one more adaptable to local concerns and priorities, and one that is more compatible with basic scientific norms and UN standards of today." *The Rise and Decline of Cannabis Prohibition: The History of Cannabis in the UN Drug Control System and Options for Reform*, Transnational Institute/Global Drug Policy Observatory (2014), p. 15.

<sup>5</sup> Douglas & McDonald, *The Prohibition of Illicit Drugs is Killing and Criminalising our Children and We are All Letting it Happen*, Report of a high level Australia 21 Roundtable (2012), p. 6.

<sup>6</sup> Some official enquiries whose conclusions are irreconcilable with the current regime: The Indian Hemp Drugs Commission (1894); the Panama Canal Zone Report (1925); Departmental Committee on Morphine and Heroin Addiction (Rolleston Report) (1926); The Wickersham Commission (USA, 1931); the LaGuardia Report (USA, 1944); Joint Committee of the American Bar Association and the American Medical Association on Narcotic Drugs, *Drug Addiction: Crime or Disease?* (USA, 1961); Interdepartmental Committee, *Drug Addiction* (Brain I, 1961); Interdepartmental Committee, *Drug Addiction* (Brain II, 1965); the Wootton Report (UK, 1968); Canadian Government's Commission of Inquiry, *Non-Medical Use of Drugs* (the LeDain Report) (1970); the Baan Commission (the Netherlands, 1970); the Hulsman Commission (the Netherlands, 1971); National Commission on Marijuana and Drug Abuse, *Marijuana: A Signal of Misunderstanding* (USA, 1972); National Commission on Marijuana and Drug Abuse, *Drug Use in America: Problem in Perspective* (USA, 1973); National Research Council of the National Academy of Sciences, *An Analysis of Marijuana Policy* (1982); the report of the Expert Group on the Effects of Cannabis Use (UK, 1982); Legislative options for cannabis use in Australia, Monograph No. 26 (Australia, 1994); report of the New Zealand Health Committee, *Inquiry into the Mental Health Effects of Cannabis* (1998); the House of Lords Science and Technology Select Committee, Ninth Report, *Cannabis: the Scientific and Medical evidence* (UK, 1998); Swiss Federal Commission for Drug Issues, *Cannabis Report* (1999); report of the National Commission on Ganja (Jamaica, 2001); the UK Report of the Advisory Committee on Drug Dependence (2002); The Senate Special Committee on Illegal Drugs, *Cannabis: our position for a Canadian public policy* (Canada, 2002); the report by the Advisory Committee on Drug Dependence, *The Classification of Cannabis under the Misuse of Drugs Act 1971* (UK, 2002); Rapport de la Commission d'enquête du Sénat français sur la politique nationale de lutte contre les drogues illicites, No. 321 (France, 2003); the report

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by the Advisory Council on the Misuse of Drugs, *Further consideration of the classification of cannabis under the Misuse of Drugs Act 1971* (UK, 2005).

Most of these enquiries have focused on cannabis and despite their differences in scope, methods and conclusions, they reveal interesting common patterns. To put it simply, while they admit that cannabis is not a harmless substance, they are clear that its dangers, in comparison with other controlled substances, have been overstated and that civil sanctions, fines, or health assessments should replace criminal penalties for personal use offences. Some of these commissions have also gone further. For instance, the Indian Hemp Drugs Commission (1894) concluded that cannabis use was relatively unproblematic and that there was no need for the government to restrict its use. Hundred years later, this voice is echoed in enquiries like the Senate Special Committee on Illegal Drugs in Canada (2002) who recommended that the government amend the legislation in order to create a criminal exemption scheme that would allow “for obtaining licences as well as for producing and selling cannabis”. Likewise, the Swiss Federal Commission for Drug Issues (1999) recommended the removal of the prohibition of consumption and possession of cannabis (as well as the possibility for cannabis to be purchased lawfully) and the Australian governments’ *Legislative options for cannabis use in Australia* (1994) advised that that “cannabis law reform is required” and that the reform should be one with “relatively free but regulated availability.”

<sup>7</sup> See *infra* notes 9, 10, 19, 20, 22, 24, 62, 68, 69, 72, and accompanying text. Randy Barnett, a professor of law, commented thus: “It seems that no facts are sufficient to shake the prohibitionists’ faith in this tragic policy. As . . . suggested elsewhere, some persons act as though they are addicted to drug laws, with all the connotations of irrationality that term is meant to convey when applied to drug users. Consequently, they are unlikely to be swayed by the copious facts and arguments presented [by reform activists]. . . . [Nonetheless] the case against prohibition is overwhelming, precisely because so many different types of considerations all point to a single solution: the legalization of illicit drugs.” Randy E. Barnett, *Bad Trip: Drug Prohibition and the Weakness of Public Policy*, 103 *Yale Law Journal* (1994), p. 2598.

<sup>8</sup> Some of the professionals who have critiqued the drug war include: Margaret P. Battin, Erik Luna, Arthur G. Lipman, Paul M. Gahlinger, Douglas E. Rollins, Jeanette C. Roberts, Troy L. Booher (*Drugs and Justice: Seeking a Consistent, Coherent, and Comprehensive View*, 2008), Norval Morris & Gordon Hawkins (*The Honest Politician’s Guide to Crime Control*, 1970), Charles H. Whitebread (*Us and Them and the Nature of Moral Regulation*, *Southern California Law Review* Vol. 74:361), Steven Wisotsky (*A Society of Suspects: the War on Drugs and our Civil Liberties*, 1992), Steven B. Duke (*Drug Prohibition: An Unnatural Disaster*, 1995), Timothy Lynch (*After Prohibition: an Adult Approach to Drug Policies in the 21st Century*, 2000), Andrew Weil & Winnifred Rosen (*From Chocolate to Morphine: Everything You Need to Know about Mind-Altering Drugs*, 2004), Doris Marie Provine (*Unequal under Law: Race in the War on Drugs*, 2007), Steven Wisotsky (*Beyond the War on Drugs: Overcoming a Failed Policy*, 1990), Troy Duster (*Legislation of Morality: Law, Drugs, and Moral Judgment*), Mitch Earleywine (*Pot politics: Marijuana and the costs of prohibition*), Steven B. Duke & Albert C. Gross (*America’s Longest War: Rethinking Our Tragic Crusade Against Drugs*, 1993), Rufus King (*The Drug Hang-up: America’s Fifty-year Folly*), Andrew D. Leipold (*The War on Drugs and the Puzzle of Deterrence*, 2002), Graham Boyd (*Collateral Damage in the War on Drugs*, 2002), Frank Rudy Cooper (*The Un-balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and Arvizu*, 2002), Elliot G. Hicks (*Shooting Ourselves in The Foot in The Drug War*, 1999), John F. Galliher, David P. Keys & Michael Elsner (*Lindesmith v. Anslinger: An Early Government Victory in the Failed War on Drugs*, 1998), Daniel D. Polsby (*Ending The War on Drugs And Children*, 1997), Erik Grant Luna (*Our Vietnam: The Prohibition Apocalypse*, 1997), Steven Jonas (*The Drug War: Myth, Reality And Politics*, 1995), Helen M. Kemp (*Presumed Guilty: When the War on Drugs Becomes a War on The Constitution*, 1994), Doug Bandow (*War on Drugs or War on America?* 1991), David Elkins (*Drug Legalization: Cost Effective and Morally Permissible*, 1991), Robinson & Scherlen (*Lies, Damn Lies, and Drug War Statistics*, 2007), Jeffrey A. Miron (*Drug War Crimes: The Consequences of Prohibition*, 2004), Lester Grinspoon (*Marijuana Reconsidered*, 1977). A great book that includes many expert voices is James A. Inciardi and Karen McElrath (ed.) *The American Drug Scene* (forty-one authors from a wide range of fields), and another book that presents a broad range of experts is Jefferson Fish, *How to Legalize Drugs* (thirty authors, also from many fields).

<sup>9</sup> As stated by the Transform Drug Policy Foundation: “It doesn’t take a rocket scientist to show that criminalising drugs and drug use has directly and indirectly led to a dramatic increase in drug-related harms, and that controlling and regulating the production and distribution of all drugs would go a long way towards reducing those harms. . . . A century of experience with prohibition teaches that it can often be counter-productive; failing to reduce the harms it sets out to address as well as

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creating a raft of catastrophic unintended consequences. The extent of this failure has been chronicled in detail by many hundreds of sober, independent and objective assessments undertaken by government committees, academics, and Non Government Organisations across the world, over many decades.” *After the War on Drugs: Blueprint for Regulation*, Transform Drug Policy Foundation (2009), p. xii,4.

Another knowledgeable scholar, professor of law Charles Whitebread, has this to say: “The lesson is clear. Moral regulation perpetuates fear, not morality. . . . At the core of the effort to regulate morality lies the desire of “us” to regulate “them.” With each prohibition, a socially dominant group burdens a weaker class of citizens with its notion of propriety. And notwithstanding the moral justifications used to support them, moral regulations only succeed in exacerbating existing social rifts. . . . As we enter a new century, it is abundantly clear that it is time to free ourselves from the idea of prohibition. . . . We should understand, like never before, that the idea is inherently flawed.” Charles H. Whitebread, *Us and Them and the Nature of Moral Regulation*, Southern California Law Review Vol. 74:361, pp. 362-63,70.

The UN bureaucrats, however, have so far refused to acknowledge any of this. For more on “the extent to which these hardliners have gone to maintain the status quo through rhetoric, denial, manipulation, selective presentation, misrepresentation and suppression of evidence, selective use of experts, threats to funding, and purging “defeatists” from the UN system”, see Martin Jelsma, *Drugs in the UN System: the Unwritten History of the 1998 United Nations General Assembly Special Session on Drugs*, International Journal of Drug Policy 14 (2003), pp. 181-195, and Francisco Thoumi & Jorrit Kamminga, *The Recent Changes at UNODC and its Role in Advancing and Innovating Anti-Drug Policies: Old Wine in New Cleaner Bottles*. See also *supra* note 7, and *infra* notes 10, 19, 20, 22, 24, 62, 68, 69.

<sup>10</sup>As indicated by the following quote (and my communication with Norwegian authorities) proponents of prohibition have until this day avoided any undertaking which would threaten to reveal the unfortunate nature of their crusade: “In 1988, I wrote to then-Vice President George Bush, the head of the South Florida Drug Task Force, then-Education Secretary William Bennett, Assistant Secretary of State for Drug Policy Ann Wroblewski, White House drug policy adviser Dr. Donald I. McDonald, and the public information directors of the Federal Bureau of Investigation, Drug Enforcement Administration, General Accounting Office, National Institute of Justice, and National Institute on Drug Abuse. None of these officials were able to cite any study that demonstrated the beneficial effects of drug prohibition when weighed against its costs. The leaders of the war on drugs are apparently unable to defend on rational cost-benefit grounds their 70-year-old policy, which costs nearly \$10 billion per year, imprisons nearly 75,000 persons, and fills our cities with violent crime”. James Ostrowski, *The Moral and Practical Case for Drug Legalization*, Hofstra Law Review Vol. 18:607 (1990), pp. 642-43, sources omitted.

The fact that prohibition has never been exposed to meaningful scrutiny was further pointed out in 2001 when the US National Academy of Sciences produced a 200-page report for the White House Office of Drug Control Policy titled *Informing America's Policy on Illegal Drugs: What We Don't Know Keeps Hurting Us*. It concluded that “It is unconscionable for this country to continue to carry out a policy of this magnitude and cost without any way of knowing whether or to what extent it is having the desired effect.”

Still, 13 years later, prohibition remains at large, unchecked and unhindered by any attempt at a rationally-based scrutiny. In fact, when Bob Ainsworth, then British minister and Government drugs spokesperson, was asked in 2002 whether he supported Transform Drug Policy Foundation’s call for an independent audit of the effectiveness of drug law enforcement spending, he answered “why would we want to do that unless we were going to legalize drugs?” As further pointed out by Transform, “The assumption has to be made that he meant an audit would expose the failures of current policy, leading to a logical endpoint of legalization and regulation.” Rolles et al., *After the War on Drugs: Options for Control*, Transform Drug Policy Foundation (2004), p. 23.

For more on their refusal to face reality, see *supra* notes 7, 9, and *infra* notes 19, 20, 22, 24, 62, 68, 69, 72, 73, 74, 79.

<sup>11</sup> Douglas and McDonald, *The Prohibition of Illicit Drugs is Killing and Criminalising our Children and We are All Letting it Happen*, Report of a high level Australia 21 Roundtable (2012), p. 22.

<sup>12</sup> The quote is taken from a report they prepared together with other members of the Global Commission on Drug Policy. For more, see the Global Commission on Drug Policy’s *June 2011 report*, p. 5, 17.

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<sup>13</sup> Barret et al., *Recalibrating the Regime: The Need for a Human Rights-Based Approach to International Drug Policy*, Beckley Foundation (2008), pp. 1-2.

<sup>14</sup> It is estimated that, at any given point in time, some 10 million people around the world are imprisoned for drug-related offenses (See Bryan Stevenson, *Drug Policy, Criminal Justice, and Mass Imprisonment*, Global Commission on Drug Policy working paper, prepared for January 24-25 meeting (2011).

<sup>15</sup> It is estimated that in Latin America alone, some 150 000 people are murdered every year as a result of prohibition (*The Drug Problem in the Americas*, Organization of American States, 2013, p. 76). Add to this the numbers from the rest of the world, as well as the fact that of the estimated 200 000 drug-related deaths worldwide, some 80 percent is assumed to be systemic (i.e. a consequence of prohibition), and you will find that this number is not an exaggeration. For more on this, see *infra* note 74.

<sup>16</sup> See *Public Letter to Kofi Annan*, June 1, 1998 at <http://www.drugpolicy.org/publications-resources/sign-letters/ungass-public-letter-kofi-annan>

<sup>17</sup> Damon Barret and Manfred Nowak speaks to it thus: “for many human rights, public health, HIV and drug policy reform advocates—and for many of those on the front lines of the war on drugs, including indigenous farmers, people who use drugs and service providers—the United Nations drug control system is seen as a significant part of the drug problem, rather than part of the solution.

Despite the documented negative human rights impacts of the current approach to drug policies, human rights have received little more than lip service in the UN drug control system. The international drug control conventions, which form the legal basis for international drug policy, were developed and have been interpreted in a vacuum from human rights law, and the principal organs of drug control have carried out their mandates with little reference to human rights norms, and little regard for their own human rights obligations. Meanwhile, the human rights machinery within the UN has paid scant attention to drug policies. The result is an international environment within which human rights violations connected to drug polices are less likely to be raised and addressed, and within which human rights progress through international drug policy is not pursued. It is a situation that is out of step with the process of UN reform which is bringing human rights ever closer to all aspects of the Organisation’s work. There has been no discussion or analysis at the UN level of what human rights mean for international drug laws and policies.” Barret & Nowak, *The United Nations and Drug Policy: Towards a Human Rights-Based Approach* (August 25, 2009), pp. 1-2.

<sup>18</sup> John F. Galliher, David P. Keys & Michael Elsner, *Lindesmith v. Anslinger: An Early Government Victory in the Failed War on Drugs*, vol. 88 of *Journal of Criminal Law and Criminology* (1998), p. 681.

<sup>19</sup> Former Los Angeles Police Chief August Vollmer, often referred to as the father of modern law enforcement, wrote this in 1936: “Stringent laws, spectacular police drives, vigorous prosecution, and imprisonment of addicts and peddlers have proved not only useless and enormously expensive as means of correcting this evil, but they are also unjustifiably and unbelievably cruel in their application to the unfortunate drug victims. Repression has driven this vice underground and produced the narcotic smugglers and supply agents, who have grown wealthy out of this evil practice and who by devious methods have stimulated traffic in drugs. Drug addiction, like prostitution, and like liquor, is not a police problem; it never has been, and never can be solved by policemen.” Warren Redlich, *A Substantive Due Process Challenge to the War on Drugs*, p. 20.

As time has passed, this has only become more obvious, and as professor of Law Steven B. Duke confirms, it is no longer possible to doubt that “marijuana prohibition was a tragic mistake. No rational analysis of the costs of marijuana prohibition can support its retention.” Steven B. Duke, *The Future of Marijuana in the United States*, Faculty Scholarship Series. Paper 4842 (2013), p. 1302. See also *supra* notes 9, 10.

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<sup>20</sup> In *Sex, Drugs, Death, and the Law*, professor David A.J. Richards points out that “The campaign leading to the passage of the Marihuana Tax Act of 1937. . . included remarkable distortions of the evidence of harm caused by marijuana, ignoring the findings of empirical inquiries.”(p. 164, sources omitted).

For an analysis of the irrationality surrounding marijuana prohibition in the USA, see Bonnie & Whitebread, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*; Lester Grinspoon, *Marihuana Reconsidered* (Harvard University Press 1977), pp. 10-29; or Bonnie & Whitebread, *The Marijuana Conviction: A History of Marijuana Prohibition in the United States* (1974), where they conclude that “logic, science and philosophy have had almost nothing to do with the evolution of drug policy.” (pp. 298-299). See also Jack Herer, *The Emperor Wears No Clothes*; Steven B. Duke & Albert C. Gross, *America’s Longest War: Rethinking Our Tragic Crusade against Drugs*; Roar Mikalsen, *Human Rising*; *supra* notes 7, 9, 10, and *infra* notes 24, 68, 69.

It should also be noted that cannabis entered the international drug control regime on equally dubious grounds. As quoted in *The Rise and Decline of Cannabis Prohibition: The History of Cannabis in the UN Drug Control System and Options for Reform*, Transnational Institute/Global Drug Policy Observatory (2014): “Subsequently, under the United Nations, the decision to place cannabis in Schedules I and IV of the 1961 Single Convention was heavily influenced by a memo expressing the very biased personal opinion of the WHO official Pablo Osvaldo Wolff, and not based on a position taken by the WHO Expert Committee on Drug Dependence (ECDD). Although many delegates misread his paper as the WHO position, in fact the Expert Committee never presented a formal recommendation to the CND about the scheduling of cannabis; not prior to the Single Convention or, indeed, ever. . . . In itself, the absence of a WHO recommendation is sufficient reason to question the legitimacy of the current classification of cannabis on procedural grounds. A group of academic experts, including WHO researchers, recently concluded as much in *Drug and Alcohol Dependence*: “The present situation in which several important substances (e.g., cannabis, cannabis resin, heroin and cocaine) were never evaluated or were evaluated up to eight decades ago seriously under mines and delegitimizes their international control.” (p. 4-5, sources omitted)

<sup>21</sup> James P. Gray, *Why Our Drug Laws Have Failed and What We Can Do About it: A Judicial Indictment of the War on Drugs* (Temple University Press 2001), p. 11.

<sup>22</sup> Examples of responsible studies of marijuana available in the 1930s include the Indian Hemp Drugs Commission of 1893-94, and Siler et al., *Marijuana Smoking in Panama*. The findings of such empirical studies were either ignored or violently attacked by enforcement officials committed to the contrary position. For more on this, see *infra* note 23 or Lester Grinspoon, *Marihuana Reconsidered* (Harvard University Press 1977), pp. 27-29.

<sup>23</sup> In the *Journal of Criminal Law and Criminology* vol. 88 (1998) John F. Galliher, David P. Keys, and Michael Elsner documents in *Lindesmith v. Anslinger: An Early Government Victory in the Failed War on Drugs* how prohibitionists intimidated and fought those who opposed their deceitful propaganda.

<sup>24</sup> See William J. Stuntz, *The Collapse of American Criminal Justice* (Harvard University Press, 2011); William J. Chambliss & Robert B. Seidman, *Law, Order, and Power* (1971); and Robert P. Rhodes, *The Insoluble Problems of Crime* (1977).

In *Rationalizing Drug Policy under Federalism* (pp. 711-21) professors David W. Rasmussen & Bruce L. Benson analyze current policy as a result of bureaucratic self-interest. They conclude: “In a representative democracy there is a tendency to expect that public opinion drives drug policy. This is not the case, as every detailed study of the emergence of legal norms has consistently shown the immense importance of interest-group activity, not the public interest, as the critical variable. Drug war, the excessive application of enforcement that aggravates rather than mitigates the social consequences of drug use, is waged because it is in the interests of particular politically influential groups, including law enforcement bureaucracies and public officials. According to this view, legislators can act as moral entrepreneurs, but they are more generally “middle-men” whose actions are largely determined by interest groups, including those engaged in the law enforcement process—police chiefs, sheriffs, and prosecutors.” (p. 711)

The same conclusion, that the war on drugs persists because of bureaucratic self-interest, is found in Bruce L. Benson, *The War on Drugs: A Public Bad* (2008), pp. 36-50. For more on how prohibitionists, until today, have ignored scientific advice and concealed the facts in order to maintain their flawed policies, see Judge Robert Sweet’s lecture in *Towards a Compassionate and Cost-effective Drug Policy: A Forum on the Impact of Drug Policy on the Justice System and Human*

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*Rights*, Fordham Urban Law Journal Vol. 24, Issue 2 (1996), pp. 319-30; Laurent Laniel, *The Relationship between Research and Drug Policy in the United States*, Management of Social Transformations, Discussion Paper No. 44; Blumenson & Nilsen, *No Rational Basis: The Pragmatic Case for Marijuana Law Reform* (2009), pp. 12-16; and Rolles (ed.), *A Comparison of the Cost-effectiveness of Prohibition and Regulation of Drugs*, Transform Drug Policy Foundation (April 2009), pp.14-15.

<sup>25</sup> For literature calling for the decriminalization of drugs/victimless crimes from a perspective of efficiency-based arguments, see John Kaplan, *Marijuana: The New Prohibition* (1970); Norval Morris & Gordon Hawkins, *The Honest Politician's Guide to Crime Control* (1970); Herbert Packer, *The Limits of the Criminal Sanction* (1968); Kadish, *The Crisis of Overcriminalization*; Steven B. Duke, *The Future of Marijuana in the United States* (2013); Steven B Duke, *Drug Prohibition: An Unnatural Disaster*; Daniel D. Polsby, *Ending the War on Drugs and Children*; John J. Donohue et al., *Rethinking America's Illegal Drug Policy* in Philip J. Cook, Jens Ludwig, and Justin McCrary (ed.), *Controlling Crime: Strategies and Tradeoffs*; Blumenson & Nilsen, *No Rational Basis: The Pragmatic Case for Marijuana Law Reform* (2009); Rasmussen & Benson, *Rationalizing Drug Policy under Federalism*.

For a cost-benefit analysis of prohibition versus legalization, see Rolles (ed.), *A Comparison of the Cost-effectiveness of Prohibition and Regulation of Drugs*, Transform Drug Policy Foundation (April 2009). This approach, however, fails to give adequate weight to the dignity of persons, and for a more comprehensive defense of legalization on both moral and cost-benefit grounds, see James Ostrowski, *The Moral and Practical Case for Drug Legalization*, Hofstra Law Review, Vol. 18:607 (1990).

<sup>26</sup> See for example Samuel Freeman's article *Liberalism, Inalienability, and Rights of Drug Use*, in Pablo De Greiff (ed.), *Drugs and the Limits of Liberalism: Moral and Legal Issues* (1999); Douglas Husak, *Drugs and Rights*; Douglas Husak, *Legalize This: the Case for Decriminalizing Drugs*; Roger Pilon, *The Illegitimate War on Drugs*, in Timothy Lynch (ed.), *After Prohibition: an Adult Approach to Drug Policies in the 21st Century* (2000); Andrew Koppelman, *Drug Policy and the Liberal Self*; David A.J. Richards, *Sex, Drugs, Death, and the Law*; David Bergland, *Libertarianism, Natural Rights and the Constitution: A Commentary on Recent Libertarian Literature*; Warren Redlich, *A Substantive Due Process Challenge to the War on Drugs*; Eva Nilsen & Eric Blumenson, *Liberty Lost: the Moral Case for Marijuana Law Reform*; Thomas Szasz, *Our Right to Drugs*; Walter Block, *Drug Prohibition: A Legal and Economic Analysis* (1993).

<sup>27</sup> I say "Crusade," for as T. Sowell stated: "Policies are judged by their consequences but crusades are judged by how good they make the crusaders feel." In this case, there is no doubt that we are dealing with the latter, and scholars like Thomas Szasz has convincingly argued that the war on drugs is essentially a religious war: a war about ultimate values. For more on this, see Thomas Szasz, *Ceremonial Chemistry*.

<sup>28</sup> Douglas Husak, a professor of law at Rutgers University, has written a book called *Drugs and Rights* and another called *Legalize This: the Case for Decriminalizing Drugs* (You've received the latter as an appendix to my original complaint).

<sup>29</sup> Steven Wisotsky, professor of law at Nova Southeastern University, has written an article called *A Society of Suspects: the War on Drugs and our Civil Liberties* (Cato Institute Policy Analysis No. 180, 1992). He states: "This country's Founders would be disappointed with what we have done to their legacy of liberty: The War on Drugs, by its very nature, is a war on the Bill of Rights. When the Founders rebelled against British tyranny, they grounded their cause in a belief in the natural rights of the individual and the Enlightenment ideas of progress through reason. Understanding the dangers of an excessive concentration of political power, they divided and limited the reach of that power through a federal structure with the states, the separation of powers among the three branches, and the guarantees of personal freedom in the Constitution itself and in the Bill of Rights. With the War on Drugs, however, the wisdom of the Founders has been cast aside. In their shortsighted zeal to create a "Drug-Free America" by 1995, our political leaders—state and federal, elected and appointed—have acted as though the end justifies the means, repudiating our heritage of limited government and individual freedoms while endowing the bureaucratic state with unprecedented powers." (p. 1, sources omitted)

<sup>30</sup> Richard Glen Boire, founder and director of the Center for Cognitive Liberty & Ethics, has a Doctorate in Jurisprudence from Boalt Law School. He has written several papers, among them *Brief in Defense of Cognitive Liberty*; *Draft Outline of Memorandum of Points & Authorities in Support of Cognitive Liberty as a Fundamental Right*; *Of Drug Prohibition as an*

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*Unconstitutional Violation of that Fundamental Right; and Medical Marijuana & Cognitive Liberty: First Amendment Implications of Marijuana Legislation*. As he says in the latter: “At their most fundamental level, laws banning the use of marijuana are indistinguishable from laws or other government actions aimed at banning certain books. Both types of laws place barriers around and within the individual’s mind. Both types of laws are inimical to the fundamental principles that animate democratic society, and both types of laws violate basic notions of individual freedom and self-determination. The government has no authority to outlaw certain knowledge, certain ways of thinking, or certain states of consciousness.” (p. 5)

Margolin summarizes his argument thus: “According to Boire, cognitive liberty, while not explicitly enumerated in the Constitution, is implicit in the spirit of the doctrine. In essence, cognitive liberty is the right upon which all other explicitly enumerated rights are premised. Cognitive liberty is really no more than the freedom to think, i.e., the freedom to stimulate the mind as one chooses. It is the freedom to explore one’s mind, to do something to create a thought that would not otherwise be created without the antecedent action, e.g. taking drugs.

To support his conception of cognitive liberty as a fundamental right, Boire marshals case law to buttress the following points: (1) Cognitive liberty is a fundamental right, and (2) Drug Prohibition violates the Fundamental Right to Cognitive Liberty. As Boire explains, if cognitive liberty can be established as a fundamental right, courts will have to employ the “strict scrutiny” as opposed to the rational basis test. Ultimately, the government will have to prove that (1) the law is justified as supporting a ‘compelling state interest’ and (2) that the law is the ‘least restrict means’ of supporting that compelling state interest. The burden to show (1) and (2) will be on the government because under the strict scrutiny test, once it is shown that a law substantially burdens a fundamental right, the burden shifts to the government.” For more on this, see Allison Brandi Margolin, *On the Right to Get High*.

<sup>31</sup> Marc J. Blitz, a professor at Oklahoma City University School of Law, has written *Freedom of Thought for the Extended Mind: Cognitive Enhancement and the Constitution* (Wisconsin Law Review 2010: 1049). His article further supports Boire’s conception of cognitive liberty as a fundamental right. As Blitz states: “It is an odd and confined notion of freedom of thought that would deny us any right to modify the mental processes and tendencies—often grouped under the heading of “personality”—that shape so much of what we consciously think and feel. Our constitutionally-enshrined freedom of thought should not only leave us free to tinker with the contents of our conscious mind after these contents enter our consciousness. It should also protect our right to alter our thinking at the roots, with the aid of psychotherapy, neurofeedback technology, and (where safe) with cognition- and mood-enhancing drugs.” (p. 1079)

<sup>32</sup> In Timothy Lynch (ed.), *After Prohibition: an Adult Approach to Drug Policies in the 21st Century*, (The Cato Institute, 2000) we find Roger Pilon’s *The Illegitimate War on Drugs*, an excellent article on the legal reasoning behind our constitutions. He states that “despite the intent of the Founders to institute legitimate government—to derive government’s “just powers from the consent of the governed” and to limit the scope of that consent by the rights of individuals to life, liberty, and the pursuit of happiness—governments in America today, especially the federal government, exercise vast powers not remotely grounded in or permitted by the Constitution. In no case is that more true . . . than with the massive war on drugs.” (p.23)

<sup>33</sup> Michelle Alexander, an associate professor of law at The Ohio State University Moritz College of Law, has written *The New Jim Crow: Mass-Incarceration in the Age of Colorblindness* (2010).

<sup>34</sup> Randy E. Barnett, professor of legal theory at Georgetown University Law Center, discusses the unconstitutionality of prohibition in *Bad Trip: Drug Prohibition and the Weakness of Public Policy*, 103 Yale L.J. (1994) pp. 2593-2630, and *The Harmful Side Effects of Drug Prohibition*, Utah Law Review No. 1 (2009) pp. 11-34. For a fuller understanding of his reasoning concerning the constitutional boundary between the state and the individual, see Barnett, *The Proper Scope of the Police Power*, Notre Dame Law Review, Vol. 79 (2004) p. 429.

<sup>35</sup> James Ostrowski, a lawyer and policy analyst of the Cato Institute, has written extensively on drug policy. See for instance, *The Moral and Practical Case for Drug Legalization*, Hofstra Law Review: Vol. 18:607 (1990).

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<sup>36</sup> Andrew Koppelman, professor of law and political science at Northwestern University, has written a paper called *Drug Policy and the Liberal Self*, Northwestern University Law Review Vol. 100, No. 1 (2006).

<sup>37</sup> David A.J. Richards, professor of law at New York University, has written a book called *Sex, Drugs, Death, and the Law*. See also his essay *Human Rights and the Moral Foundations of the Substantive Criminal Law* (Georgia Law Review Vol. 13:1395) and *Unnatural Acts and the Constitutional Right to Privacy: a Moral Theory* (1977) (Available at: <http://ir.lawnet.fordham.edu/flr/vol45/iss7/2>). These papers will provide the reader with an excellent understanding of the issue, and even though the latter focuses on sexual freedom, his argument also applies to drug use.

<sup>38</sup> Doug Bandow is a Senior Fellow at the Cato Institute. Among other things he has written *From Fighting the Drug War to Protecting the Right to Use Drugs: Recognizing a Forgotten Liberty*, in Fred McMahon (ed.), *Towards a Worldwide Index of Human Freedom*, Fraser Institute (2012).

<sup>39</sup> David Bergland, former presidential candidate for the United States Libertarian Party, has authored *Libertarianism, Natural Rights and the Constitution: A Commentary on Recent Libertarian Literature* (available at <http://engagedscholarship.csuohio.edu/clevstlrev/vol44/iss4/6>), a well-written analysis of the moral and intellectual superiority of the natural law tradition as opposed to legal positivism. As he says: "Under positivism, there logically cannot be, should not be, and are, no limits on government because it is the source of rights and the power to protect those rights. Why do I call it a fallacy? For the reason that acceptance of this view deprives us of any effective defense of the ultimate political value: liberty for ourselves as individuals, while leaving the field open to all forms of dictatorship and slavery. Positivism leads to totalitarianism in practice because it recognizes no logical way to argue against any exercise of government power over the individual. It leads to draconian limits on freedom of speech, press or any kind of dissent, to mass murder of dissidents, and to economic and environmental disaster as demonstrated in Nazi Germany, the former Soviet Union and Eastern Europe. The post-World War II War Crimes trials in Nuremberg illuminate the issue. The Nazi defendants claimed they were merely enforcing the law of the State, just following orders issued from the legitimate heads of the German State. That should be a valid defense in a purely positivist regime, but not one where natural rights views predominate. Indeed, the convictions at Nuremberg could only be sustained on the basis that the individual victims had rights superior to what the Nazi government recognized and that those rights had been violated by the defendants while carrying out the State orders to exterminate them. The consequences of consistently applied positivism in practice are anti-liberty, anti-rights, anti-human and anti-life. Anyone who values liberty and the flourishing of individual human beings in conditions of peace and abundance must begin by rejecting the view that it is morally appropriate for government to act in every situation that displeases us."(p. 510)

<sup>40</sup> Paul Hager ([www.paulhager.org](http://www.paulhager.org)) gave a speech at the ICLU Conference concerning the unconstitutionality of the drug laws. It was called *The Drug War and the Constitution* and a transcript can be found at <http://www.druglibrary.org/schaffer/debate/dwarcon1.htm>

<sup>41</sup> Allison Brandi Margolin, a lawyer, has written *On the Right to Get High*. Her paper argues that drug prohibition violates the right to cognitive liberty without a compelling interest on the government's part, that drug prohibition cannot be justified on moral grounds, and that the law outside of the area of drugs supports the notion that the drug prohibition violates the spirit of our legal tradition.

<sup>42</sup> Michèle Alexandre, associate professor of law at the University of Mississippi School of Law, discusses the drug laws' lack of credibility in her *Sex, Drugs, Rock & Roll and Moral Dirgisme: Toward a Reformation of Drug and Prostitution Regulations*, UMKC Law Review, vol. 78:1 (2009).

<sup>43</sup> Warren Redlich, a *cum laude* graduate of Albany Law School, is the principal attorney of the Redlich Law Firm. He has written an excellent paper called *A Substantive Due Process Challenge to the War on Drugs*. Here he states that "Substantive due process doctrine requires that government policy be narrowly tailored to advance compelling governmental interests if fundamental rights are infringed. Freedom from incarceration is a fundamental right. A factual review shows that the drug war's goals are not being achieved. Since governmental interests are not being advanced, the incarceration of drug offenders cannot meet the Court's requirement of narrow tailoring. The problems caused by the drug



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war amount to a genuine parade of horrors, sufficient to overcome the Supreme Court's reluctance to expand the concept of substantive due process." (p. 1)

<sup>44</sup> See Merle Anouk de Vries: *A Human Rights-based Approach to the International Drug Policy* (2008).

<sup>45</sup> Erik Luna, professor of law at Washington and Lee University, has written a paper called the *Overcriminalization Phenomenon*.

<sup>46</sup> Eva Nilsen, a professor at Boston University School of Law has written a paper called *Liberty Lost: the Moral Case for Marijuana Law Reform* (co-authored with Eric Blumenson). In this essay, they argue that "these laws do unjustifiably infringe fundamental moral rights." They present a non-consequentialist, civil libertarian case against marijuana prohibition and criminalization, based on the requirements of liberty and just punishment.

<sup>47</sup> Together with Nilsen (above), Eric Blumenson, a professor of Law at Suffolk University, has written a paper called *Liberty Lost: the Moral Case for Marijuana Law Reform*.

<sup>48</sup> See Rep. Earl Blumenauer & Rep. Jared Polis, *The Path Forward: Rethinking Federal Marijuana Policy* (2013); Mo Mowlan, *Fight Terror, Legalize the Drug Trade: Prohibition only Fuels Criminality, Corruption and Violence*; Joseph L. Galiber, *A Bill to Repeal Criminal Drug Laws: Replacing Prohibition With Regulation*. See also the list of 770 professionals, among them many senators and congressmen, who have written to the UN Secretary General at <http://www.drugpolicy.org/publications-resources/sign-letters/public-letter-kofi-annan/ungass-public-letter-kofi-annan-signato>.

<sup>49</sup> See the Report of The Special Committee on Drugs and the Law of the Association of the Bar of the City of New York, *A Wiser Course: Ending Drug Prohibition* (June 14, 1994) (<http://www.drugtext.org/library/reports/nylawyer/nylawyer.htm>); the Report of the Massachusetts Bar Association Drug Task Force, *The Failure of the War on Drugs: Charting a New Course for the Commonwealth* (2008); and National Lawyers Guild, *War on Drugs, Mass Dissent*, vol. 35 No. 7 (November 2012). See also the list of 770 professionals mentioned *supra* note 48.

<sup>50</sup> James P. Gray, *Why Our Drug Laws Have Failed and What We Can Do About it: A Judicial Indictment of the War on Drugs* (Temple University Press 2001); Margaret P. Battin et al., *Drugs and Justice: Seeking a Consistent, Coherent, and Comprehensive View* (Oxford University Press 2008); Judge Robert Sweet's lecture in *Towards a Compassionate and Cost-effective Drug Policy: A Forum on the Impact of Drug Policy on the Justice System and Human Rights*, Fordham Urban Law Journal Vol. 24, Issue 2 (1996) Article 3, p. 319-30; Juan R. Torruella, *One Judge's Attempt at a Rational Discussion of the So-Called War on Drugs*, 6 B.U. Pub. Int. L.J. 1 (1996). For more judges, see <http://www.vlc.org> and the list of 770 professionals mentioned *supra* note 48.

<sup>51</sup> See Timothy Lynch (ed.), *After Prohibition: an Adult Approach to Drug Policies in the 21st Century*, The Cato Institute (2000), pp. 89-138; John T. Schuler & Arthur McBride, *Notes From the Front: A Dissident Law-Enforcement Perspective on Drug Prohibition*, Hofstra Law Review Vol 18:893; Joseph McNamara, *Gangster Cops: The Hidden Cost of America's War on Drugs* (2000); Richard Brunstrom, *Drugs Policy: A Radical Look Ahead* (2007); Peter Moskos, *Take the Violence out of the Drug Trade*, Baltimore Sun (8-3, 2004), Norm Stamper, *Legalize Drugs—All of Them*, LA Times (12-4, 2005), LEAP & Criminal Justice Policy Foundation, *We Can Do it Again* (2008). For more Law Enforcement officers, see [www.leap.cc](http://www.leap.cc) and the list of 770 professionals mentioned *supra* note 48.

<sup>52</sup> See <http://stoptheviolencebc.org/2012/02/07/former-attorneys-general-endorse-stop-the-violence-bc/> for a letter from four former BC Attorney Generals to Premier Christy Clark, dated February 15, 2012, arguing that "the case demonstrating the failure and harms of marijuana prohibition is airtight", and advocating its repeal. See also the list of 770 professionals mentioned *supra* note 48.

<sup>53</sup> See *Ending the Drug Wars: Report of the LSE Expert Group on the Economics of Drug Policy* (2014); Peter Boettke et al., *Keep Off the Grass: The Economics of Prohibition and U.S. Drug Policy*, Oregon Law Review vol. 91:1069 (2013); Jeffrey A.

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Miron & Jeffrey Zwiebel, *The Economic Case Against Drug Prohibition*, J. Econ. Persp. (1995), p. 175; Chris Paul & Al Wilhite, *On the Economic Case against Drug Prohibition*, J. Econ. Persp. (1996), p. 196; see also David W. Rasmussen, Bruce L. Benson & H. Naci Mocan, *The Economics of Substance Abuse in Context: Can Economics Be Part of an Integrated Theory of Drug Use?*, 28 J. Drug Issues 575 (1998). See also the list of more than 100 professors who have signed a letter advocating the legalization of cannabis at [http://www.huffingtonpost.com/2012/08/28/marijuana-legalization-mo\\_n\\_1837494.html](http://www.huffingtonpost.com/2012/08/28/marijuana-legalization-mo_n_1837494.html) and the list of 770 professionals mentioned *supra* note 48.

<sup>54</sup> See Craig Reinerman, *Policing Pleasure: Food Drugs, and the Politics of Ingestion*, *Gastronomica: The Journal of Food and Culture* 7/3 (2007); Craig Reinerman, *Cannabis Control: Cost Outweigh Benefits*, *British Medical Journal* 324 (2002); and Erich Goode, *Drugs in American Society*. See also the list of more than 100 professors mentioned *supra* note 53 and the list of 770 professionals mentioned *supra* note 48.

<sup>55</sup> See the list of 770 professionals mentioned *supra* note 48, and the list of more than 100 professors *supra* at 53.

<sup>56</sup> See the list of 770 professionals mentioned *supra* note 48 and the list of more than 100 professors *supra* at 53.

<sup>57</sup> Margaret P. Battin et al., *Drugs and Justice: Seeking a Consistent, Coherent, and Comprehensive View* (Oxford University Press 2008).

<sup>58</sup> Margaret P. Battin et al., *Drugs and Justice: Seeking a Consistent, Coherent, and Comprehensive View* (Oxford University Press 2008), see also David Nutt, *Drugs: without the Hot Air* (UIT Cambridge 2012).

<sup>59</sup> Thomas Szasz, *Our Right to Drugs: The Case for a Free Market* (Praeger 1992). See also the list of 770 professionals mentioned *supra* note 48.

<sup>60</sup> *Governing the Global Drug Wars*, London School of Economics (October 2012) p. 4.

<sup>61</sup> Some examples include *Ending the Drug Wars: Report of the LSE Expert Group on the Economics of Drug Policy*, London School of Economics (2014); Steven B. Duke, *The Future of Marijuana in the United States*, Faculty Scholarship Series (2013), paper 4842; *The Rise and Decline of Cannabis Prohibition: The History of Cannabis in the UN Drug Control System and Options for Reform*, Transnational Institute/Global Drug Policy Observatory (2014); *Drugs – facing facts*, The report of the RSA Commission on Illegal Drugs, Communities and Public Policy (March 2007); *A Fresh Approach to Drugs*, The UK Drug Policy Commission (October 2012); *The War on Marijuana in Black and White: Billions of Dollars Wasted on Racially Biased Arrests*, American Civil Liberties Union (June, 2013); The Alternative World Drug Report: *Counting the Costs of the War on Drugs* (2012), The Global Cannabis Commission Report, *Cannabis Policy: Moving Beyond Stalemate*, Beckley Foundation (2008); the Report of the Global Commission on Drug Policy (June 2011); Peter Hakim, *Rethinking US Drug Policy*, Inter-American Dialogue/the Beckley Foundation (2011); *An Exit Strategy for the Failed War on Drugs: A Federal Legislative Guide*, Drug Policy Alliance (2013); *After the War on Drugs: Blueprint for Regulation*, Transform Drug Policy Foundation (2009); *Getting to Tomorrow: A Report on Canadian Drug Policy*, Canadian Drug Policy Coalition (2013); David Bewley-Taylor, *International Drug Control: Consensus Fractured* (Cambridge University Press 2012); Room et al., *Cannabis Policy: Moving Beyond Stalemate* (Oxford University Press 2010); David W. Rasmussen and Bruce L. Benson, *Rationalizing Drug Policy Under Federalism*; Margaret P. Battin et al., *Drugs and Justice: Seeking a Consistent, Coherent, and Comprehensive View* (Oxford University Press 2008); *The 2003 Buitengeweg report*; Rolles et al., *After the War on Drugs: Options for Control*, Transform Drug Policy Foundation (2004); and Merle Anouk de Vries, *A Human Rights-based Approach to the International Drug Policy* (2008). At page 36 she says: “The international drug policy conducted under the three [drug control] Conventions have resulted in a wide range of human right violations in the past and will continue to do so in the future if this policy is not changed. The fact that the drug policy is conducted in a way which seems to be oblivious and completely ignorant of the human rights of those affected, can no longer take place within an organization of which one of the main purposes is the promotion of human rights. It might even be argued that the UN organs administering this drug policy, or the organization as a whole, is complicit in these human rights violations. According to the OHCHR “an organisation may be complicit in violations of human rights if it tolerates, or knowingly ignores those abuses.”

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<sup>62</sup> Until this day prohibitionists have shied away from confronting facts and questions revealing the fallacies upon which their policies are based. This is uncontroversial, for our public officials have never tolerated an open examination of the facts, and every study they've funded has been designed to bolster prohibitionist propaganda. Reform-minded activists are keen to point this out. The Global Drug Policy Commission, for example, has noted that "in spite of the increasing evidence that current policies are not achieving their objectives, most policymaking bodies at the national and international level have tended to avoid open scrutiny or debate on alternatives." Former U.S. Senator Joseph L. Galiber was even blunter when he, in a bill to repeal the drug laws, stated that "criminalization of . . . drugs has fostered—indeed, even required—not enlightenment, but enforced public ignorance of the true nature of the perils of drug use. One of the more conspicuous accoutrements of our futile coercive tactics is what has been euphemistically labeled drug "education." There is nothing remotely educational about the hyperbole publicly expounded about drugs, which is little other than a medieval attempt to suppress, not reveal, knowledge. It is no more educational than Victorian efforts were to educate young males about masturbation. The metaphors have merely changed from impotence, blindness, and hairy palms to fried brains. The design is the same: terror and fright replace information. Our drug educators act as shrill propagandists instead of cultivators of inquisitive minds." Joseph L. Galiber, *A Bill to Repeal the Drug Laws: Replacing Prohibition With Regulation*, p. 14.

Professor of law Randy Barnett commented thus on the prohibitionists' lack of concern for the ill-fated consequences of their policies: "In war, it is said, truth is the first casualty. To be blunt, many committed prohibitionists inside and outside of government who profess to care so much about the morals of others routinely lie or willfully mislead the public about nearly every aspect of both drugs and the policy of prohibition. Our consistent experience with drug prohibition—from marijuana, to heroin, to cocaine—is that when careful empirical studies are eventually performed, they reveal the initial official accounts to be either false or wildly exaggerated. Rarely, if ever, does law enforcement then reverse itself or even moderate its rhetoric." Randy Barnett, *Bad Trip: Drug Prohibition and the Weakness of Public Policy*, p. 2603. See also *supra* notes 7, 9, 10, 19, 20, 24 and *infra* notes 64, 68, 69, 72, 73, 74, 76, 78.

<sup>63</sup> Timothy Lynch (ed.), *After Prohibition: an Adult Approach to Drug Policies in the 21st Century*, Cato Institute (2000), p 39.

<sup>64</sup> For more on the harmfulness of licit and illicit drugs, see for instance Duke and Gross, *America's longest war*. This epic work begins by comparing the harmfulness of tobacco and alcohol with marijuana, heroin, and cocaine. The authors organize their presentation of empirical research on each drug around its physical and psychological effects, its criminogenic effects, and its positive and negative health consequences. The legal ones are shown each in their own way to be worse than the illegal ones. When it comes to marijuana, they conclude that not only alcohol and tobacco, but also obesity are far more damaging to the human body, and on pages 74-77 statistics are presented suggesting that per 100,000 users, the following numbers are killed by their drug of choice every year: tobacco 650; alcohol 150; heroin 80; cocaine 4; marijuana 0.

Similar comparisons revealing the irrational separation between licit and illicit drugs, are found in the Global Cannabis Commission Report, *Cannabis Policy: Moving Beyond Stalemate*, Beckley Foundation (2008), pp. 52-55; James Ostrowski, *The Moral and Practical Case for Drug Legalization*, Hofstra Law Review: Vol. 18:607 (1990), pp. 688-702; and the Journal of the American Medical Association 270 (18) (1993), pp. 2207–12. In the latter, Michael McGinnis and William Foege's article *Actual Causes of Death in the United States*, concludes that Americans are twenty-five times more likely to die from the use of tobacco and alcohol than they are from the use of illicit drugs.

A more recent World Health Organization study adds to this picture. In 2000, it estimated the amount of disease that was caused by a range of major risk factors and concluded that the proportion of the total burden of disease in the Western European region that was attributable to tobacco was 12.2%, alcohol 9.2%, and illicit drugs 1.8%. (Robin Room, *The Public Health Significance of Cannabis in the Spectrum of Psychoactive substances* in EMCDDA, *A Cannabis Reader: Global Issues and Local Experiences*, Monograph series 8, Vol. 2, 2008, p. 147.)

Other articles which compare the harms of licit and illicit drugs include Nutt et al., *Development of a Rational Scale to Assess the Harm of Drugs of Potential Misuse*, *Lancet* 369 (2007), pp. 1047–53; Gable, *Comparison of Acute Lethal Toxicity of Commonly Abused Psychoactive Substances*, *Addiction* 99 (2004), pp. 686–96; the *Lancet* editorial *Dangerous Habits*, the *Lancet* no. 9140 (1998); van Amsterdam, Opperhuizen, Koeter & van den Brink, *Ranking the Harm of Alcohol, Tobacco and Illicit Drugs for the Individual and the Population*, *Eur Addict Res* 16 (2010), pp. 202–27; as well as the discussion paper A

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*Public Health Approach to Drug Control in Canada*, Health Officers Council of British Columbia (October 2005) pp. 6-8. The latter mentions some interesting findings:

“Single et al compared the deaths and diseases caused by alcohol, tobacco and illegal drug use in Canada. They found that alcohol, tobacco, and illegal drugs accounted for 20.0% of all deaths, 22.2% of years of all potential life lost, and 9.4% of all admissions to hospital in Canada in 1995. Of all substances, tobacco was by far the largest contributor to mortality, making up 83% of deaths, while alcohol accounted for 16% and illegal drugs only 2% respectively. The PYLL (potential years of life lost) proportions reflect the younger age profile of deaths due to illegal drugs and to alcohol-related injuries, with alcohol making up 24% of PYLL, illegal drugs 5% and tobacco 71%. By any measure tobacco is the dominant contributor to health related harms.”(p. 6-7, sources omitted)

The report by Single et al. also estimated the costs of substance abuse in Canada. Alcohol accounted for more than \$7.5 billion in costs, representing 40.8% of the total costs of substance abuse, and tobacco accounted for \$9.56 billion in costs. This was more than half (51.8%) of the total substance abuse costs, while the economic costs of illegal drugs were estimated at \$1.37 billion (7.4%). It must be noted that much of these costs must be attributed to prohibition. The costs of enforcement, for instance, totaled some \$400 million, much of the cost attributed to lost productivity was because of people serving jail time, and much of the disease and premature death was due to prohibition-related effects. The discussion paper goes on to note:

“The larger societal economic costs due to alcohol and tobacco have been replicated in recent reviews in other countries. Collins and Lapsley found costs in Australia of \$34.7 Billion (AU) per annum, that were proportionally 61% due to tobacco, 22% due to alcohol, and 17% due to illegal drugs. In France in 1997, proportional costs of 41%, 53% and 6% respectively were found due to tobacco, alcohol and illegal drugs, out of a total societal cost of 218 Billion franc per year. Harwood found in the United States the costs in 1992 were US\$148 Billion related to alcohol, and US\$98 Billion related to illegal drugs. These studies were consistent in that the greater economic losses for alcohol and tobacco were due to lost productivity, whereas for illegal drugs the costs related more to enforcement.”(pp. 7-8, sources omitted)

Another good article which summarizes a great deal of the research on this topic (as of 2008) is Robin Room, *The Public Health Significance of Cannabis in the Spectrum of Psychoactive substances* (see EMCDDA, *A Cannabis Reader: Global Issues and Local Experiences*, Monograph series 8, Vol. 2, 2008, pp. 146-54.). His paper not only shows how the licit drugs are worse than many illicit, but also how the prohibitionists have tried to obscure this fact. As he says: “There is an enormous commitment by many involved in the international control system and equivalent national systems to keeping the status quo, [therefore] comparing degrees of dangerousness is a fraught topic. General comparisons of this type have often faced substantial opposition in the course of publication. The material from the Prime Minister’s Strategy Unit [for instance] was only released on 1 July 2005, 2 years after compilation, in partial compliance with a Freedom of Information request. The report by Hall et al. was eventually published after a media storm over its omission from the [WHO] report for which it was originally commissioned. The Roques report also caused considerable controversy when it appeared. As a French review noted, there were complaints not only about including alcohol among ‘drugs’, but also that the group of experts ‘banalized the danger of cannabis by putting in evidence the weak physical and psychic dependence from this product, compared with those of tobacco and alcohol’.” EMCDDA, *A Cannabis Reader: Global Issues and Local Experiences*, Monograph series 8, Vol. 2, 2008, p. 153,152, Sources omitted.

Still, despite attempts to sabotage the drive towards evidence-based policies, more and more research along these lines is publicized. The most comprehensive study so far was performed by the Independent Scientific Committee on Drugs in 2010 (see Nutt et al., *Drug harms in the UK: a Multicriteria Decision Analysis*, Lancet 2010; 376: pp. 1558–65). This study is further discussed in David Nutt, *Drugs: Without the Hot Air*, a book in which Nutt is careful to note how the social, health, and economic costs associated with licit drugs are far greater than the illicit ones. This book was delivered to the UNHRC along with my original complaint, so I shall not expand here, but the irrationality of the classification system has been pointed out by many other experts, including Margaret P. Battin, Erik Luna, Arthur G. Lipman, Paul M. Gahlinger, Douglas E. Rollins, Jeanette C. Roberts, and Troy L. Booher. In their book *Drugs and Justice: Seeking a Consistent, Coherent, Comprehensive View*, (Oxford University Press 2008), the authors argue that the entire classification system must be revised if our policies shall be evidence-based. As they state:

“The argument that differences in regulatory rationales are designed to track differences in drugs is not supported by pharmacology or actual practice. Such an argument might be plausible if differing types of drugs were classified consistently

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according to an intelligible, well-reasoned, consistent, and coherent schema. Yet much of the current drug classification and thus assignment to a particular agency appears to be the product of politically motivated historical events, rather than by the properties of the drugs themselves or their effects in users.” (p. 88)

“. . . some illegal drugs present little risk of harm to the user or to others, but are nonetheless listed in the Controlled Substances Act. Many, if not most, of these drugs are hallucinogens. LSD, peyote, DMT, psilocybin, mescaline, and marijuana do not present major biological risks of harm to the user, are not physically addictive, and present no evident harm to others when taken in an appropriate setting.” (p.172)

“It would be tempting to say that these misclassifications are at the root of any conceptual and practical trouble over drugs. Indeed, these misclassifications do play a major role, and they are the focal point for much of the contemporary critique of drug policy. Recognizing these misclassifications, based on inappropriate and inadequate rationales for the categorization of specific drugs, presents a major opportunity for reclassification and thus the development of more consistent, coherent, comprehensive drug theory and policy.” (p. 159)

“We must make significant changes, not merely cosmetic prunings, in the way we treat drugs—all drugs. This means scrapping many of the laws now on the books and starting over.” (p. 258)

Also other reports like *A Fresh Approach to Drugs*, UK Drug Policy Commission (October 2012) and the Report of the Global Commission on Drug Policy (June 2011) recommend a total revision of the classification system. See also House of Commons Science and Technology Committee, *Drug classification: Making a Hash of It?* Fifth Report of Session (2005–06), pp. 3-50, for more on its lack of merit.

<sup>65</sup> Research indicates that the vast majority of people who use illegal drugs, (like the vast majority of people who use legal drugs) do so without creating problems for themselves or others. The United Nations, for instance, estimates that there are 250 million drug users worldwide, of which less than 10 percent are considered to be problem drug users. (Report of the Global Commission on Drug Policy (June, 2011), p.13)

The illicit drugs’ addictive/destructive properties, then, is vastly misrepresented, something which Arnold S. Trebach’s, *The Heroin Solution* (Yale University Press, 1982) says more about. Here statistics are presented which indicate that while the U.S. had 500,000 heroin addicts in the late 1970’s, there were 3,500,000 non-addicted occasional users. This suggests a 12.5% addiction rate, which is also confirmed by looking at the numbers in Great Britain. While 0.9 percent of people aged 16-59 had tried opiates, only 0.1 percent reported having used them in the last year. (Peter Reuter & Alex Stevens, *An Analysis of UK Drug Policy: A Monograph Prepared for the UK Drug Policy Commission*, 2007, pp. 20-21)

Last year use, of course, doesn’t necessarily mean that they are problem users, for quite a few of them are able to control their use of heroin, contradicting popular notions that addiction is an inevitable consequence of heroin use. Several studies confirm this. For more information see Warburton et al., *Occasional and controlled heroin use: Not a problem?* York: Joseph Rowntree Foundation (2005) and D. Shewan & P. Dalgarno, *Evidence for controlled heroin use? Low levels of negative health and social outcomes among non-treatment heroin users in Glasgow (Scotland)*, *British Journal of Health Psychology*, 10, (2006), pp. 33–48.

Some laboratory studies show a higher rate but these studies use medical grade, pure heroin. In *Health Consequences of Smoking: Nicotine Addiction* (Surgeon General’s Report, 1988), a comparison is made of the relative addictiveness of smoked tobacco and several other drugs. According to this report alcohol has a 15% addiction rate, while tobacco is credited with an addiction rate of 90%. The Surgeon General’s Report also observes that of the US soldiers who became addicted to heroin in Vietnam, approximately 90% were able to avoid readdiction upon return to the U.S. Another source of statistics is an article entitled *Hooked, not Hooked* by Deborah Franklin (In *Health* magazine Nov/Dec 1990). This article cites addiction experts’ rankings of various legal and illegal drugs as follows: (1) Nicotine, (2) Crack, (3) Valium, (4) Alcohol, (5) Heroin, (6) Cocaine, (7) Caffeine, (8) Marijuana, (9) Ecstasy, (10) Psilocybin Mushrooms and LSD.

In Eric Goode, *Drugs in American Society* (1999) pp. 129-30, it is stated that of people who have taken an alcoholic drink at least once in their lives, 62% have also done so in the past month; the figures for other drugs are cigarettes, 40%; marijuana, 15%; heroin, 9%; cocaine, 8%; stimulants, 9%; and hallucinogens, 7%. In Philip J. Cook, Jens Ludwig, and Justin McCrary (ed.), *Controlling Crime: Strategies and Tradeoffs*, John J. Donohue et al. compare alcohol and cannabis (see *Rethinking America’s Illegal Drug Policy* pp. 244-269) citing reports that deal with addiction rates, harms, and patterns of

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use. Among other things, they cite research mentioned in a N.Y. Times article by Kershaw and Cathcart, suggesting that 10 percent of cannabis users, 15 percent of alcohol users, 15 percent of cocaine users, 25 percent of heroin users, and 33 percent of tobacco smokers will develop addiction.

Speaking of addiction and these drugs' rumored ability to destroy lives, we must also keep in mind that how the drug is experienced depends on psychological, *not* pharmacological properties. For more on this, see Richard G. Schlaadt and Peter T. Shannon, *Drugs: Use, Misuse, and Abuse*. We should also keep in mind that there is no real distinction between drug and nondrug addictions (see for instance Lance Dodes, *The Heart of Addiction*) and that studies in the addictionology literature have found that 9 percent of the entire population will be addicted to something (not only drugs) at some point in their lives. For more on this, see David A. Fishbain, *Chronic Opioid Treatment: Addiction and Pseudo-Addiction in Patients with Chronic Pain*, *Psychiatric Times* (February 2003), found online at <http://www.psychiatrictimes.com/p030225.html>.

For more on patterns of use, see Thomas Nicholson et al., *Is Recreational Drug Use Normal?*; Ethan A. Nadelmann, *Drug Prohibition in the United States: Costs, Consequences, and Alternatives*; M.E. Jarvik, *The Drug Dilemma: Manipulating the Demand*; A. Goldstein, & H. Kalant, *Drug Policy: Striking the Right Balance*; C. Winick, *Social Behavior, Public Policy, and Nonharmful Drug Use*; Steven B Duke, *Drug Prohibition: An Unnatural Disaster* pp. 29-37; and Roar Mikalsen, *Human Rising*, Kolofon (2010) pp. 426-34.

<sup>66</sup> The list of professionals is way too long to elaborate properly on. After all, it includes just about everyone who knows a thing or two about drug policy. However, to give you an idea, a group of 500 luminaries from around the world—including Nobel Laureate Milton Friedman, former Secretary of State George Shultz, and former UN Secretary General Javier Perez de Cueller—have signed an open letter the U.S. President and Congress arguing that the global war on drugs is causing more harm than good and urging that alternatives be considered. Another group of 770 academics wrote to the UN Secretary General in 1998, declaring that “the global war on drugs is now causing more harm than drug abuse itself”, and asking the bureaucrats “to initiate a truly open and honest dialogue regarding the future of global drug control policies; one in which fear, prejudice and punitive prohibitions yield to common sense, science, public health and human rights”. (see <http://www.drugpolicy.org/publications-resources/sign-letters/public-letter-kofi-annan/ungass-public-letter-kofi-annan-signato>)

For other signatory campaigns, see the work of the Global Commission of Drug Policy, a large group of statesmen and academics who say exactly the same. Other examples include Isaac Campos, a drug historian at the University of Cincinnati; Jeffrey Miron, an economist at Harvard University; economists David W. Rasmussen and Bruce L. Benson; Jefferson M. Fish, a professor emeritus of psychology; Thomas Szasz, another distinguished psychiatrist; John J. Donohue III, Steven B. Duke, Albert C. Gross, Harry G. Levine, as well as other professors of law mentioned *supra* notes 28-47. Herbert Packer, a Stanford Law School professor argued likewise already in the 1960's; so did Charles H. Whitebread, a professor of law at the University of Southern California, and Steven Wisotsky also said so in a prepared statement before the Select Committee on Narcotics Abuse and Control, House of Representatives, September 29th, 1988. The list goes on and on...

<sup>67</sup> *Marijuana: A Signal of Misunderstanding*, National Commission on Marihuana and Drug Abuse (1972); *Legislative Options for Cannabis in Australia: Report on the National Task Force on Cannabis*, Australian National Drug Strategy Committee (1994); *Drug Lore: The Questioning of our Current Drug Law*, Australian Drug Law Reform Foundation (1996); *Cannabis: Our Position for a Public Policy*, Canadian Senate Special Committee on Illegal Drugs (Sept. 4, 2002); Rolles et al., *After the War on Drugs: Options for Control*, Transform Drug Policy Foundation (2004); *A Public Health Approach to Drug Control in Canada*, Health Officers Council of British Columbia (October 2005); *The Failure of the War on Drugs: Charting a New Course for the Commonwealth*, Report of the Massachusetts Bar Association Drug Task Force (2008); *After the War on Drugs: Blueprint for Regulation*, Transform Drug Policy Foundation (2009); Werb et al., *Effect of Drug Law Enforcement on Drug-Related Violence: Evidence from a Scientific Review*, International Centre for Science in Drug Policy (2010); *The War on Drugs Has Failed: It is Time for a New Approach*, Global Commission on Drug Policy (17 November 2011); Peter Hakim, *Rethinking US Drug Policy*, Inter-American Dialogue/the Beckley Foundation (2011); Oscapella et al., *Changing the Frame: A New Approach to Drug Policy in Canada*, Canadian Drug Policy Coalition (January 2012); *A Fresh Approach to Drugs*, UK Drug Policy Commission (October 2012); *Drugs and Democracy: Toward a Paradigm Shift*, Statement by the Latin American Commission on Drugs and Democracy; *The Alternative World Drug Report: Counting the Costs of the War on Drugs* (2012);

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*Governing the Global Drug Wars*, London School of Economics (October 2012); Bob Douglas and David McDonald, *The Prohibition of Illicit Drugs is Killing and Criminalising our Children and We are All Letting it Happen*, Report of a high level Australia 21 Roundtable Debate (2012); *An Exit Strategy for the Failed War on Drugs: A Federal Legislative Guide*, Drug Policy Alliance (2013); *Getting to Tomorrow: A Report on Canadian Drug Policy*, Canadian Drug Policy Coalition (2013); *The Drug Problem in the Americas*, Organization of American States (2013); Rep. Earl Blumenauer & Rep. Jared Polis, *The Path Forward: Rethinking Federal Marijuana Policy* (2013); Ilona Szabo de Carvalho, *Latin America Awakes: A Review of the New Drug Policy*, NOREF report (2013); *Blueprint for a Public Health and Safety Approach to Drug Policy*, DPA/NYAM (2013).

<sup>68</sup> See for instance Jacob Sullum, *Saying Yes: In Defense of Drug Use*; David F. Musto, *The American Disease: Origins of Narcotics Control*; James T. Bennett & Thomas J. Dilorenzo, *Official Lies: How Washington Misled Us* (1992) pp. 237-39; Roar Mikalsen, *Human Rising*; Robinson & Scherlen, *Lies, Damn Lies and Drug War Statistics*; Doris Marie Provine, *Unequal Under Law: Race in the War on Drugs*; and Deborah Ahrens, *Drug Panics in The Twenty-First Century; Ecstasy, Prescription Drugs, And The Reframing Of The War On Drugs*. See also *supra* notes 20, 22, 23 and *infra* note 69.

<sup>69</sup> Professors Nilsen and Blumenson confirm: "According to current knowledge, marijuana satisfies none of the three Schedule 1 requirements: it (1) has a low potential for harm and abuse; (2) appears to have therapeutic benefit, as the government itself claimed in its successful patent application; and (3) according to the American College of Physicians, may be used safely under appropriate conditions." Blumenson & Nilsen, *No Rational Basis: The Pragmatic Case for Marijuana Law Reform* (2009), p. 26, sources omitted.

See also the Global Cannabis Commission Report, *Cannabis Policy: Moving Beyond Stalemate*, Beckley Foundation (2008), p. 52-55; Kimani Paul-Emile, *Making Sense of Drug Regulation: A Theory of Law for Drug Control Policy* (Cornell Journal of Law & Public Policy vol. 19:691, 2010), an article that shows how drugs are regulated without relying upon scientific or medical evidence regarding the pharmacological properties of the drugs; and *supra* notes 20, 22, 23, 68.

<sup>70</sup> See Roar Mikalsen, *Human Rising* (2010) p. 393, or <http://www.encode.org/info/THE-CANNABIS-TRIBUNAL-IN-THE-HAGUE.html>

<sup>71</sup> To quote drug researchers Peter Reuter & Alex Stevens: "Overall, the international evidence suggests that drug laws do not have direct effects on the prevalence of drug use." (Reuter & Stevens, *An Analysis of UK Drug Policy: A Monograph Prepared for the UK Drug Policy Commission*, 2007, p. 61)

This is uncontroversial among drug policy experts. As a matter of fact, drugs today are cheaper, of better quality, and more available than ever before, while drug use at the same time is more widespread. In other words, by every measure the data shows that the war on drugs has failed in its stated objectives. For more on this, see the World Drug Report of 2008; EMCDDA, *A Cannabis Reader: Global Issues and Local Experiences*, Monograph series 8, Vol. 1 and 2, European Monitoring Centre for Drugs and Drug Addiction (2008); the Report of the Global Commission on Drug Policy (June 2011) p. 4; Werb et al., *Effect of Drug Law Enforcement on Drug-Related Violence: Evidence from a Scientific Review*, International Centre for Science in Drug Policy (2010), p. 19; Eric Blumenson, *Recovering from Drugs and the Drug War: an Achievable Public Health Alternative* (2003), p. 2; or Warren Redlich, *A Substantive Due Process Challenge to the War on Drugs* (p. 12-15). See also *infra* notes 75, 78.

<sup>72</sup> As the quote by Stevens and Reuter above (note 71) indicates, the available evidence suggests that the degree of criminalization has little effect the prevalence of drug use. Cannabis use among Dutch citizens, for instance, is lower than in many other countries, even though it has been legally available the last four decades. For more on this, see the Global Cannabis Commission Report, *Cannabis Policy: Moving Beyond Stalemate*, Beckley Foundation (2008), p. 60, showing that neighboring countries like France, Germany, and UK have higher prevalence of past year and lifetime marijuana use (this also includes USA, Canada, and Australia), as well as pp. 128-49 summarizing a series of survey findings.

See also EMCDDA, *European Drug Report: Trends and Developments* (2014), p. 77; Robert MacCoun and Peter Reuter, *Assessing Drug Prohibition and Its Alternatives: A Guide for Agnostics*, Annual Review of Law and Social Science, Vol. 7 (2011), pp. 61-78; John J. Donohue et al., *Rethinking America's Illegal Drug Policy* in Philip J. Cook, Jens Ludwig, and Justin

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McCrary (ed.), *Controlling Crime: Strategies and Tradeoffs*, pp. 250-52. The latter also finds that Portugal, more than a decade after decriminalizing the possession of all drugs, continues to have one of Europe's lowest prevalence of Cocaine and Cannabis use (p. 252).

In fact, research across the board suggests that the further we move away from the law-and-order approach, the better off we are. Dr Alex Wodak, president of the Australian Drug Law Reform Foundation and former president of the International Harm Reduction Association mentions one of the studies that confirm this: "The best evidence that the management of heroin dependence with controlled and prescribed heroin availability made a difference, is a study published in the *Lancet* in 2006. This study was based on the city of Zurich. This showed that between 1992 and 2002 the number of new heroin users in Zurich was reduced from 850 in 1990 to 150 in 2002. Corresponding with that was a decrease in drug overdose deaths, a decrease in HIV infections among injecting drug users, a decrease in crime and a decrease in the quantities of heroin seized. Clearly, what was happening was that people were moving from black market heroin to white market methadone and white market heroin. This showed that treatment does work at a population level." Douglas and McDonald, *The Prohibition of Illicit Drugs is Killing and Criminalising our Children and We are All Letting it Happen*, Report of a high level Australia 21 Roundtable (2012), p. 10.

For more on this and other case studies, see the June 2011 report of the Global Commission on Drug Policy, pp. 7, 10-11. For more on the situation in Portugal, ten years after decriminalization of all drugs, see Glenn Greenwald, *Drug Decriminalization in Portugal: Lessons for Creating Fair and Successful Drug Policies*, Cato Institute (2009). For more on the situation in the Netherlands, 40 years after the sale of cannabis products was legalized, see Robert J. MacCoun, *What Can We Learn from the Dutch Cannabis Coffeeshop Experience?*, RAND (2010). For more on the recent trends towards decriminalization worldwide, see Rosmarin & Eastwood, *A Quiet Revolution: Drug Decriminalization Policies in Practice around the Globe*, Release (2012). The latter summarizes some of the available research on decriminalization and demonstrates that the law enforcement model adopted has little impact on drug-prevalence rates within a given society.

For more on why legalization will not turn us into a nation of addicts, see Steven B Duke, *Drug Prohibition: An Unnatural Disaster*, Faculty Scholarship Series, paper 812 (1995) pp. 598-611, and for more on why legalization is a more rational approach, see *supra* notes 7, 9, 10, 19, 22, 62, and *infra* notes 73-78.

<sup>73</sup> Instead of addressing the underlying problems of drug use, prohibition has only worsened the situation drug users find themselves in. As noted by Mike Trace, the former deputy UK Drug Czar: "Whereas much of the work of social affairs and development agencies at the national and international level have focused on improving the living conditions of poor and marginalised groups, and on promoting their social and economical integration in society, many aspects of drug control policies have had the opposite effect. Programmes focusing on widespread arrests and harsh sanctions towards drug users have lead to further marginalisation and stigmatisation, pushing them away from jobs, education and other health and social services, and driving them into more risky behaviours. This process of criminalisation and marginalisation is acknowledged by the United Nations as a major barrier to the global challenges of tackling HIV/AIDS, and of promoting social and economic development." Mike Trace, *Drug Policy: Lessons Learnt, and Options for the Future*, Global Commission on Drug Policies (2011), pp. 7-8.

This, again, is uncontroversial. For example, the authors of *Informing America's Policy on Illegal Drugs: What We Don't Know Keeps Hurting Us*, National Research Council (2001), point out that many of the harms associated with drug use are caused or augmented by prohibition. In his *Drug Prohibition: A Legal and Economic Analysis*, professor Walter Block argues that present drug policies have increased crime, decreased respect for legitimate law, and created great social upheaval; likewise is argued by most of the reports and law reviews mentioned elsewhere, and Professor Andrew Koppelman speaks to it thus: "It is true that many drug abusers in contemporary America are in wretched health, undernourished and sickly, and that many of them are infected with AIDS, often as a result of shared needles for intravenous drug use. Many steal to support their habits, and of course the drug trade produces enormous violence and corruption. These are, however, artifacts of illegality. If drugs were legal and cheap, these people would be able to get their supply with no danger to their health, and needle sharing would disappear. Drug addicts could live more comfortably than they do now." Andrew Koppelman, *Drug Policy and the Liberal Self* (2006), p. 286, sources omitted.

Another scholar, Doug Bandow, elaborates: "Prohibition is advanced as a means to protect users from themselves. . . . However, the illegal marketplace makes drug use more dangerous. Noted economists Daniel K. Benjamin and Roger Leroy



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Miller, "Many of the most visible adverse effects attributed to drug use . . . are due not to drug use per se, but to our current public policy toward drugs". Products are adulterated; users have no means of guaranteeing quality. Given the threat of discovery, dealers prefer to transport and market more potent (and thus both more concealable and valuable) drugs. As a result, the vast majority of "drug-related" deaths are "drug law-related" deaths." Doug Bandow, *From Fighting the Drug War to Protecting the Right to Use Drugs: Recognizing a Forgotten Liberty* (2012), p. 268.

To put the damages caused by prohibition in further perspective, drug analyst James Ostrowski estimates that roughly 80% of the world's 200,000 drug-use-deaths are caused by prohibition, while only 20% by the inherent qualities of the drugs (Ostrowski, *The Moral and Practical Case for Drug Legalization*, p. 654). As he explains: "A given amount of legal drug use would cause much less death and illness than the same quantity of illegal drug use. A realistic estimate is that illegal drug use is five times more dangerous than legal use. This means that even a highly unlikely five-fold increase in drug use under legalization would not increase the current number of drug overdose deaths. That is: the yearly number of heroin and cocaine deaths combined is about 3,000 per year. Of the 3,000 deaths, 80 percent or 2,400 deaths are caused by black market factors, while 20 percent or 600 deaths are caused by the intrinsic effects of the drugs. Thus, if under legalization legal drug use remained at the same level as current illegal use, there would be only 600 deaths each year. Only a five-fold or 500 percent increase in use would match the current black market death toll. Furthermore, it would take a 1,200 percent increase in legal drug use to produce as many deaths as prohibition causes through murder, AIDS, and poisoned drugs. Prohibition now causes 7,925 deaths, while 600 are the result of the drugs themselves. Thus, in order for legalized drug use to match the overall death toll of prohibition, use would have to increase more than thirteen-fold." Ostrowski, *The Moral and Practical Case for Drug Legalization*, Hofstra Law Review: Vol. 18:607, 1990, p. 669-70 (sources omitted).

The same argument (that "even if consumption of legalized drugs increased tenfold under a repeal regime, the physical harms associated with drug use could be less than under prohibition") is presented by Steven Duke in *Drug Prohibition: an Unnatural Disaster*, p. 600. That being said, no serious-minded scholar expects anything near such an increase in drug use. In fact, even a 100 percent increase is considered highly unlikely, for as stated elsewhere (notes 71, 72, 78) there is evidence that prohibition has had little effect on drug use rates.

For more on the harms caused drug users by criminalization, see *The Alternative World Drug Report: Counting the Costs of the War on Drugs* (2012) pp. 61-97; and Warren Redlich, *A Substantive Due Process Challenge to the War on Drugs* p. 15-20.

<sup>74</sup> Every honest student of drug policy knows that the harms caused by prohibition vastly transcend the harms caused by the drugs themselves. See, for instance, Andrew Koppelman, *Drug Policy and the Liberal Self*, p.286; Warren Redlich, *A Substantive Due Process Challenge to the War on Drugs*, pp. 15-16; Ernest Drucker, *Drug prohibition and public health: 25 years of evidence*, Public Health Reports, (January 1, 1999); James Ostrowski, *Thinking about Drug Legalization*, Policy Analysis No. 121, Cato Institute (1989) at notes 47-51 and accompanying text; Daniel Polsby, *Legalization Is the Prudent Thing to Do*, in Timothy Lynch (ed.), *After Prohibition: an Adult Approach to Drug Policies in the 21st Century*, The Cato Institute (2000). As professor Polsby therein states: "Without in any way minimizing the social costs that would undoubtedly flow from legalizing drugs, it is simply incredible to believe that the costs of pursuing the policy of minimizing drug use through the criminal law has not been many, many times more expensive, in treasure, shattered lives, and nasty externalities that have been borne by virtually the entire country." (p. 174.)

We have already presented some of the evidence for this *supra* note 73. However, the damage prohibition does to drug users is not the whole story. Professor of law Randy Barnett elaborates: "When I was a prosecutor, over half of the murders I prosecuted were "drug law related" in the sense that the victim was killed as a result of a drug deal gone bad or a robbery of someone suspected of having either valuable drugs or money from selling drugs." (Barnett, *Bad Trip: Drug Prohibition and the Weakness of Public Policy*, p. 4.) This figure is supported by research mentioned by Ostrowski in *The Moral and Practical Case for Drug Legalization* (pp. 648-50), where he concludes that some 40 percent of US murders are drug-law related. Professor Steven Duke elaborates on similar findings: "In many cities, such as New Haven, Connecticut, at least half of the killings are drug-business related. Nationwide, between 5,000 and 10,000 murders per year are systemic to the drug business. Thus, more people are killed by the prohibition of drugs than by the drugs themselves." Steven B Duke, *Drug Prohibition: an Unnatural Disaster*, Faculty Scholarship Series, paper 812 (1995) p. 577, sources omitted.

Furthermore, in Latin America, the Grupo de Apoyo Mutuo Foundation in Guatemala estimates that 45 percent of all homicides in that country are drug trafficking-related. (Organization of American States, *The Drug Problem in the Americas*

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(2013), p. 76) Other countries in the region are not better off. As mentioned *supra* note 15 it is estimated that 150,000 murders in the Americas are drug war related, and it is a fact that prohibition kills many more than the drugs themselves. As stated by the OAS: “By any standard of comparison, the number of deaths caused by drug use appears minimal when compared with the deaths from criminal actions related to drug trafficking. The government of Mexico estimated that between December 2006 and January 2012, approximately 60,000 people died in that country as a result of executions, clashes between rival groups, and attacks on the authorities by criminal organizations involved in drug trafficking. During that same period, the World Health Organization (WHO) recorded 563 deaths in Mexico from overdoses of controlled drugs.” Organization of American States, *The Drug Problem in the Americas* (2013), p. 84

As a matter of fact, the more repressive the law-and-order approach becomes, the more likely it is to foster crime than increase public safety. This point is no longer controversial. In fact, after taking on a systematic review of all available English language peer-reviewed research on the impact of prohibition on drug market violence, researchers Dan Werb, Greg Rowell, Gordon Guyatt, Thomas Kerr, Julio Montaner and Evan Wood concluded thus: “The available scientific evidence suggests that increasing the intensity of law enforcement interventions to disrupt drug markets is unlikely to reduce drug gang violence. Instead, the existing evidence suggests that drug-related violence and high homicide rates are likely a natural consequence of drug prohibition. . . . In this context, and since drug prohibition has not achieved its stated goal of reducing drug supply, alternative models for drug control may need to be considered if drug supply and drug-related violence are to be meaningfully reduced.” Werb et al., *Effect of Drug Law Enforcement on Drug-Related Violence: Evidence from a Scientific Review*, International Centre for Science in Drug Policy (2010), p. 5-6.

It is facts like these that make knowledgeable scholars so certain that legalization is the only way to go. As Daniel Polsby stated: “Without in any way minimizing the social costs that would undoubtedly flow from legalizing drugs, it is simply incredible to believe that the costs of pursuing the policy of minimizing drug use through the criminal law has not been many, many times more expensive, in treasure, shattered lives, and nasty externalities that have been borne by virtually the entire country.” Daniel Polsby, *Legalization Is the Prudent Thing to Do*, in Timothy Lynch (ed.), *After Prohibition: an Adult Approach to Drug Policies in the 21st Century*, The Cato Institute (2000), p. 174.

For a more elaborate account of the harms caused by prohibition, see The Alternative World Drug Report: *Counting the Costs of the War on Drugs* (2012), pp.15-97; Jeffrey A. Miron, *A Critique of Estimates of the Economic Costs of Drug Abuse*, Drug Policy Alliance (2003), pp. 9-20; James Ostrowski, *The Moral and Practical Case for Drug Legalization*, Hofstra Law Review: Vol. 18:607 (1990), pp. 641-69; Steven B. Duke, *Mass Imprisonment, Crime Rates, and the Drug War: A Penological and Humanitarian Disgrace*, Faculty Scholarship Series Paper 826 (2010), pp. 4-6; Steven B Duke, *Drug Prohibition: An Unnatural Disaster*, Faculty Scholarship Series, paper 812 (1995), pp. 575-98; Randy E. Barnett, *The Harmful Side Effects of Drug Prohibition*, Utah Law Review No. 1 (2009), pp. 11-34. For more on why law enforcement strategies tend to increase drug market-related violence, see the June 2011 report of the Global Commission on Drug Policy, p.15; and McSweeney et al., *Tackling Drug Markets & Distribution Networks in the UK London*, UK Drug Policy Commission (2008).

<sup>75</sup> “The available evidence suggests that in the past two decades, US anti-drug policies—focused on prohibiting drug production, trade, and consumption, and punishing those involved—have done little to diminish the problems they were designed to address. They have neither curbed the supply nor reduced the consumption of illegal substances in the United States. In countries across the globe, drug-related problems, such as organized crime, violence, and corruption have worsened as a result. In some countries these issues threaten the political and social stability of the state.” Peter Hakim, *Rethinking US Drug Policy*, Inter-American Dialogue/the Beckley Foundation (2011), p. 1. See also Werb et al., *Effect of Drug Law Enforcement on Drug-Related Violence: Evidence from a Scientific Review*, International Centre for Science in Drug Policy (2010).

<sup>76</sup> Prohibitionists are fond of arguing that there is a well-established relationship between drug use and criminal behavior. This, however, is wrong. To quote Laurent Laniel: “independent researchers say that the causal relationship between drugs and crime is merely a hypothesis that has not been proven true. Two scholars from the Earl Warren Legal Institute of the University of California at Berkeley, Franklin Zimring and Gordon Hawkins, who have published a highly regarded study of drug control problems in 1995, even contend that it is untrue. Indeed, they argue that while “it is beyond dispute that drug use and crime overlap and interact in a multiplicity of ways”, the higher rate of drug use among offenders could be explained by factors in their personality, such as a higher propensity for taking risks and “a willingness to ignore the threat

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of moral condemnation”, that lead them to both commit crimes and take drugs. In this view, both drugs and crime are simultaneous but independent consequences of other variables; in simple terms: it is not drug use that causes crime but rather other factors that lead the vast majority of those who commit crime to also take drugs.” Laurent Laniel, *The Relationship between Research and Drug Policy in the United States*, Management of Social Transformations, Discussion Paper No. 44, p.17, sources omitted.

Another knowledgeable researcher, Steven Duke, has this to say on the alleged link between drug use and crime: “Contrary to what our government told us when it imposed drug prohibition, most illegal recreational drugs have no pharmacological properties that produce violence or other criminal behavior. Heroin and marijuana diminish rather than increase aggressive behavior. Cocaine—or cocaine withdrawal—occasionally triggers violence but usually does not. Very little crime is generated by the mere use of these drugs, especially in comparison to alcohol, which is causally related to thousands of homicides and hundreds of thousands of assaults annually. The major linkages between illegal drugs and crime must be found elsewhere—in prohibition. . . . [In fact,] the drug war as it is currently being waged probably produces at least half of our serious crime. That is, half of our crime (not counting drug crimes, of course) simply would not occur were we not conducting a drug war. No more damning an indictment of our political leaders can be imagined than that they have affirmatively created half the crime under which we suffer.” Steven B Duke, *Drug Prohibition: an Unnatural Disaster*, Faculty Scholarship Series, paper 812 (1995) p. 575, 581, sources omitted.

While prohibitionists will disagree, the criminogenic effects of prohibition are undisputable. We have already seen (*supra* note 74) that hundreds of thousands of murders are the direct result of prohibition, but it is also the cause of untold suffering and mischief unrelated to death tolls. As Duke alludes to above, the murders, kidnappings and violence are only one aspect of the illegal economy, for the high prices also encourage other criminal activities, like thefts and burglaries. In other words, *it is prohibition, not drug use, that generates crime.*

For an excellent elaboration on how and why prohibition generates crime and other negative externalities, see Bruce L. Benson, *The War on Drugs: A Public Bad* (2008), pp. 4-36; James Ostrowski, *Answering the Critics of Drug Legalization* pp. 12-13; Rasmussen and Benson, *Rationalizing Drug Policy under Federalism*, pp. 685-711; See also *supra* notes 73-74. For more on why prohibition is not justified in order to prevent crime, see Douglas Husak, *Legalize this! The Case for Decriminalizing Drugs* (Verso 2002), pp. 82-93.

<sup>77</sup> For more on why prohibition is not justified in order to protect our children, see Douglas Husak, *Legalize this! The Case for Decriminalizing Drugs* (Verso 2002), pp. 67-82. See also Rolles et al., *After the War on Drugs: Options for Control*, Transform Drug Policy Foundation (2004), pp. 27-28.

<sup>78</sup> Prohibitionists argue that drug use would skyrocket if it weren't for their law-and-order approach. This, however, is wrong, as researchers have shown “that regulating the cannabis market through law enforcement has only a marginal, if any, effect on the level of cannabis consumption.” For more on this, see Dirk Korf, *An Open Front Door: The Coffee Shop Phenomenon in the Netherlands*, in EMCDDA, *A Cannabis Reader: Global Issues and Local Experiences*, Monograph series 8, Volume 1 (2008); Reuband, *Drug use and drug policy in Western Europe: Epidemiological findings in a comparative perspective*, *European Addiction Research* 1 (1–2) (1995), pp. 32–41; and *supra* notes 71, 72, 75. For more on why drug use would not skyrocket, see Ostrowski, *The Moral and Practical Case for Drug Legalization* (1990), pp. 672-75; and Roar Mikalsen, *Human Rising*, Kolofon (2010) pp. 440-42. For case studies documenting that decriminalization have little or no effect on user prevalence, see the June 2011 report of the Global Commission on Drug Policy pp. 10-11 and *A Wiser Path: Ending Prohibition*, The New York Bar Association (1994). For more on the harms caused by prohibition, see *supra* notes 73, 74, 75, 76. For more on why legalization is a more humane approach, see Warren Redlich, *A Substantive Due Process Challenge to the War on Drugs*, pp. 17-20.

All summed up, then, if we exclude the war profiteers and gangsters, it is hard to see any way prohibition benefits society. Steven Duke speaks to it thus: “The costs of drug prohibition are undeniably huge. But what of the benefits? Sadly, there probably are none to the society at large. Drug dealers owe their livelihoods to prohibition, as do thousands of drug warriors. Prison builders benefit, as do politicians who owe their careers to their opposition to demon “drugs.” Inner-city morticians who dress bodies of victims of drug war turf battles, car dealers and jewelers who sell their goods to drug distributors, and other satellite entrepreneurs benefit from drug prohibition, but only those who make money from the drug war benefit from it. Everyone else suffers greatly.” Steven B Duke, *Drug Prohibition: An Unnatural Disaster*, p. 598.

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<sup>79</sup> Many prohibitionists rely on studies of the economic and social costs of drug abuse in order to justify their policies. Despite the enormity of these estimates, however, such studies provide no evidence on the merits of prohibition. These studies document harms that occur under prohibition, but they contain no information on whether prohibition increases or decreases the harms from drug abuse. A valid analysis of prohibition, to quote Miron, “must specify an alternative policy, such as legalization, and compare prohibition to this alternative with respect to each of three issues: (1) The direct costs of enforcing the policies; (2) The auxiliary consequences of the policies; and (3) The effects of the policies on the harms from drug use.” Such analysis is a difficult undertaking. Nevertheless, when all the pros and cons of legalization versus prohibition are considered, it will most definitely not look so good for the prohibitionists. I only know of two works which have attempted this task. One is Rolles (ed.), *A Comparison of the Cost-effectiveness of Prohibition and Regulation of Drugs*, Transform Drug Policy Foundation (April 2009). The other is James Ostrowski, *The Moral and Practical Case for Drug Legalization*, where Ostrowski concludes that 80 percent of all the economic and social costs of drug abuse are attributable to prohibition (p. 662).

For more on why the costs of drug abuse by themselves say nothing about whether prohibition is good policy and what issues a scientific evaluation must address, see Jeffrey A. Miron, *A Critique of Estimates of the Economic Costs of Drug Abuse*, Drug Policy Alliance (2003).

<sup>80</sup> For more on why the moral argument fails, see Douglas Husak, *Legalize this! The Case for Decriminalizing Drugs* (Verso 2002), pp. 109-124; David A. J. Richards, *Sex, Drugs, Death and the Law: An Essay on Human Rights and Overcriminalization* (Rowman & Littlefield 1986), pp. 168-85; Doug Bandow, *From Fighting the Drug War to Protecting the Right to Use Drugs: Recognizing a Forgotten Liberty*, in Fred McMahon (ed.), *Towards a Worldwide Index of Human Freedom*, Fraser Institute (2012), p. 259-64; and Nilsen & Blumenson, *Liberty Lost: the Moral Case for Marijuana Law Reform*, pp. 6-11.

<sup>81</sup> For a critique of such paternalistic arguments, see Nilsen & Blumenson, *Liberty Lost: the Moral Case for Marijuana Law Reform*, p. 11-19; Doug Bandow, *From Fighting the Drug War to Protecting the Right to Use Drugs: Recognizing a Forgotten Liberty*, pp. 258-59; Ostrowski, *The Moral and Practical Case for Drug Legalization*, pp. 632-35; Douglas Husak, *Legalize this! The Case for Decriminalizing Drugs* (Verso 2002), pp. 93-108; Douglas Husak, *Drugs and Rights* (Cambridge University Press 1996), pp. 71-144.

<sup>82</sup> Marijuana is no more a gateway to harder drugs than milk, coffee, beer, or cigarettes. Numerous studies have confirmed this, for instance a study funded by the National Institute of Medicine at the instigation of former Drug Czar Barry McCaffrey (Janet E. Joy, Stanley J. Watson, Jr., and John A. Benson, Jr., *Marijuana and Medicine: Assessing the Science Base*). This study found no causal relationship between marijuana use and use of hard drugs. This should come as no surprise, as it is nothing inherent in marijuana that makes the user crave or desire the kind of drug experience rendered by heroin or cocaine. For more on this, see Erich Goode, *Drugs in American Society* (1993), pp. 203-07; House of Commons Science and Technology Committee, *Drug classification: making a hash of it?* Fifth Report of Session (2005–06), p. 25-26; Jacob Sullum, *Saying Yes: In Defense of Drug Use* (Tarcher/Penguin, 2004), pp.126-30.

<sup>83</sup> For more on this, see Doug Bandow, *From Fighting the Drug War to Protecting the Right to Use Drugs: Recognizing a Forgotten Liberty*, pp. 256-58. He explains: “The criminal law normally applies to direct rather than indirect harm, that is, when individual rights (to be secure in one’s person or property, for instance) are violated. The criminal must cause the harm to others, rather than engage in otherwise legal conduct which causes incidental loss. Moreover, only some drug use some of the time hurts others. Observed Robert J. MacCoun of the University of California (Berkeley) and Peter Reuter of the University of Maryland, “it is likely that many if not most drug users never do wrongful harm to others as a result of their using careers.” (p.257, sources omitted)

Further elaboration is provided in James Ostrowski, *Answering the Critics of Drug Legalization*. As he makes clear: “[Prohibitionists] make the irresistible argument that drug use is not a “victimless crime”. But this is sheer word play. Such an argument involves changing the definition of “victim” without telling the audience. Drug use certainly is a victimless crime if victim is defined in the traditional sense as one who has been subjected to force or fraud by a criminal. Drug offenses are also victimless crimes because one can be convicted of violating them even though no actual harm has been done to anyone. [Prohibitionists], however, uses the term victimless crime in a totally different sense. Drug use is a “victimful” crime because some of the people who use drugs do bad things to others allegedly because of their drug-taking.

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There are numerous problems with this argument. First, it assumes that drug use, as opposed to personality and other factors, is a major cause of harmful conduct. However, it is very difficult to prove this causal relationship. Nevertheless, under legalization, any actual harm a drug user might cause to person or property would be punishable and/or compensable under existing law. Furthermore, greater resources would be available to deal with actual third-party harm from drug use once these resources were no longer devoted to preventing and punishing drug use per se. This solution to the problem is far better than punishing all drug users to prevent some from possibly harming others. The rights of all drug users should not be infringed solely because prohibition might prevent some drug users from causing harm to third parties, when such harm is already unlawful. Besides, outlawing drug use because some users might harm others is self-contradictory since it necessitates harming many drug users who themselves have harmed no one. Finally, any third party harm caused by illegal drug use today is dwarfed by the third party harm caused by illegal drug laws. Ironically, while drug users under legalization would be legally responsible for the harm they cause to third parties, prohibitionists today are not at all responsible for the harm they cause to others. Thus, the moral argument from third-party consequences actually runs in favor of legalization, not against.” James Ostrowski, *Answering the Critics of Drug Legalization*, 5 Notre Dame J.L. Ethics & Pub. Pol’y 823 (1991), pp. 835-36, sources omitted.

For a fuller elaboration on why prohibition cannot be justified on the grounds that drug use harms others, see Douglas Husak, *Drugs and Rights* (Cambridge University Press 1996), pp. 145-208.

<sup>84</sup> Prohibitionists have, when all else fails, tried to argue that any uncertainty favors the status quo. This is false, for they cannot argue for eternal war on the grounds that we do not know the consequences of peace. Quite the contrary, the law is clear and any doubt favors the legalization argument. In *The Moral and Practical Case for Drug Legalization*, Ostrowski not only discusses the burden of proof, but elaborates on the implications of the burden of proof being theirs. In order for prohibition to continue, then, he argues that “supporters of prohibition must demonstrate all of the following: (1) the use of currently illegal drugs is immoral; (2) the state has the right to enforce this moral rule; (3) the state can effectively enforce this moral rule without creating additional problems as serious as drug use itself; that is: (a) that drug use would increase substantially after legalization; (b) that the harm caused by any increased drug use would not be offset by the increased safety of legal drug use; (c) that the harm caused by any increased use would not be offset by a reduction in the use of dangerous drugs that are already legal (e.g., alcohol and tobacco); and (d) that the harm caused by any increased drug use not offset by (b) or (c) would exceed the harm now caused by the side effects of prohibition (e.g., crime and corruption).

In the absence of data supporting these propositions, neither the theoretical danger of illegal drugs nor their actual harmful effects, are a sufficient basis for prohibition. Even if it were proven that drug use would rise if legalized, such proof would be insufficient to support prohibition. Prohibitionists face a daunting task—one that no one has yet accomplished or, apparently, even attempted”.

The case for legalization, however, “is sustained if any of the following propositions is true: (1) regardless of whether the use of currently illegal drugs is immoral, the state has no moral right to enforce this moral prohibition because doing so would violate individual rights; (2) prohibition has no substantial impact on the level of illegal drug use; (3) prohibition increases illegal drug use; (4) prohibition merely redistributes drug use from illegal drugs to harmful legal drugs; (5) even though prohibition might decrease the use of illegal drugs, the negative effects of prohibition outweigh the beneficial effects of reduced illegal drug use.” James Ostrowski, *The Moral and Practical Case for Drug Legalization*, Hofstra Law Review: Vol. 18:607 (1990), pp. 616-17, sources omitted.

<sup>85</sup> “The conclusion must be drawn that when measures fail to achieve their aim, how legitimate this aim may be, and more importantly result in human rights violations the measures in question cannot be considered proportionate. Even in the hypothetical situation that the ‘global prohibition’ on drugs would have had positive results, it is still questionable whether the measures which are currently part of this policy are proportionate. It is hard to imagine that there are not more sustainable and less intrusive ways to achieve the same result.” Merle Anouk de Vries, *A Human Rights-based Approach to the International Drug Policy*, p. 41.

<sup>86</sup> Erik Luna, *Drug Detente*, Federal Sentencing Reporter, vol. 20, no. 5 (June 2008), p. 306.