

An Ethical Analysis of Marijuana Prohibition

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1 Introduction

The widespread prohibition of most recreational narcotics fuels a difficult and long-standing debate that challenges the libertarian ideals of many Western states. The issue calls to question the extent of government involvement in the lives of its constituency, weighed against the very individual freedoms of these people. Though absolute ideals about freedom help to direct policy goals, implementation is often much too complicated to rely solely on theoretical principles. The arena of the narcotics debate admits a range of attempts to reconcile personal liberty and the interests of society.

To this day, psychoactive drugs are illegal in most nations, but the degree of their regulation varies widely. In chiefly Islamic nations, such as Indonesia, penalties for drug-law infringement include death. In the United Arab Emirates, trace amounts of marijuana on an individual's shoe are grounds for a four-year prison sentence [24]. This is contrasted to the Netherlands, where moderate quantities of drugs for recreational use are *de facto* legal, though they remain illegal on the books [11]. The United Nations' Convention on Psychotropic Substances placed severe limitations on international drug trafficking since 1976 [25]; moreover, it summarizes the world's almost unanimous belief that narcotics, including marijuana, are harmful to society.

The United States, a relative champion of civil liberty, takes a firm stance on drugs, classifying marijuana among the most noxious narcotics of Schedule I of the Controlled Substances Act (CSA) [26]. Current federal policy forbids marijuana use in all forms, including all medical applications of the drug. Other legislation such as the Marijuana Tax Act has placed strict regulations on marijuana in the U.S. since the 1930s, well before the CSA of 1970. The recent Supreme Court case of *Gonzales v. Raich* (2005), in accordance with an abundance of previous district- and federal-level rulings, has upheld the national marijuana ban against more lenient state laws, citing the federal government's ability to legislate in matters that affect interstate commerce [10].

Particularly in the U.S., the debate of marijuana legalization has grown stale with political buzzwords such as the "War on Drugs." The issue is complicated by the role of states' rights, which does not directly involve the ethics of the policy so much as it does the country's federalist structure. The debate has been fought all around the political arena with arguments on both sides relying on economic considerations, medical research, the Constitution, and more. However, these positive analyses will only carry us so far; the rest of the debate must be supported by a normative evaluation that incorporates the findings into an ethically sound policy. The objective here is to remove the political banter from the issue and to consider rigorously the compelling reasons for the prohibition and legalization of marijuana—among other narcotics—separating the often tempting but vacuous pretexts that obscure the discussion.

2 Prohibition and the Interests of Society

Prohibitionists are often vilified by the legalizing camp as closed-minded populists. In fact, much of the anti-prohibitionist materials denigrate the traditional arguments in favor of prohibition as deriving from archaic Judeo-Christian morals [28]. This depiction, however, is both unfairly simplistic and counterproductive to the debate. While the appeal to religious texts such as the Bible and the Quran constitute some of the extreme arguments against marijuana, they belie the wealth of consequentialist objections advanced by the moderates.

On the one hand, the deontological appeal to religion retards the debate by reducing it to one of fundamental values; on the other hand, this ethical wisdom is underlain by consequentialist reasons concerning the legitimate interests of society as deriving from the harm principle. The most convincing reasons for prohibition rely not on the abstract invocation of morality and not necessarily on the harm that is done to the user, but that harm done to society.

Perhaps the most compelling objection to marijuana use is the *direct* noxious effects, as contrasted to the secondary effects, imposed by the drug-user on society. The most salient example is driving under the influence. Few will contend that marijuana impairs judgment and slows reaction time, though the degree to which it does is widely debated [13]. However, a driver under the influence of marijuana imposes a direct cost on society by endangering the lives of his passengers and others on the street.

The legalizing camp is quick to account for this predictable argument by vehemently endorsing laws against driving while under the influence. The crux of this prohibitionist argument, however, is not the specific circumstances of driving. Clearly, the vulnerability of society is most evident in this illustration, but there are surely many other instances in which an individual's impairment could have noticeable and malignant effects on his surroundings. In general, impaired judgment can lead to irresponsible behavior and negligence resulting, for example, in a building fire and causing harm to one's dependents.

Subtler negative externalities arise in the context of healthcare [3]. Even in the most competitive markets, healthcare remains highly regulated and consolidated to reap the full benefits of risk-pooling. Thus, all society bares the costs, in some sense, of an individual's medical needs. As a result, society has a genuine monetary interest in the wellness of an individual.

Marijuana use has an undeniably adverse effect on one's health [14]. Society holds a protectable interest in another's marijuana consumption for the consumer's potential burden when, for example, he undergoes chemotherapy or requires a new lung. Indeed, this effect can be severe when considering that a marijuana user's replacement lung precludes another terminally ill patient from potentially extending his life. Nevertheless, the secondary effects can be difficult to measure, and the force of this argument relies largely on the extent of the negative externalities imposed on society.

Along a similar vein are the slew of secondary social problems that drug use and, specifically, marijuana, can effect [3]. Traditional depictions of broken families with drug-addicted and negligent parents are not without merit, but they may unfairly exaggerate the effect that marijuana, as opposed to heroine, can have on society. An appeal to this abhorrent extreme may pose a tough challenge to the arguments of unconditional legalizers, but it does not defy the movement for legalization of marijuana only.

Archaic propaganda advanced in films such as *Tell Your Children* (or *Reefer Madness*) and *Assassin of Youth* (*Marihuana*) [23, 1] undermine the attempts of serious prohibitionists by depicting situations that have no empirical credibility. These films portray marijuana as a drug that induces homicidal paranoia and unreal decadence [27]. As with much propaganda, however, there exists within the absurdity some element of veracity.

Indeed, though marijuana is not known to have any violent effects, it is well known to dull intelligence (hence its common name "dope") and to deteriorate short-term memory [3, 13]. Prohibitionists invoke the interest of society to remain prosperous, or at least functional. There is no evidence to suggest that legal marijuana will turn the world's population into a stagnant and complacent horde of smokers, but there is a *prima facie* reason to believe that the vast availability of such a drug could have noticeable effects on the productivity of society [3].

This belief is at least partially verified by the fact that many employers require drug screens for new hires [18]. Legalizers may retort by suggesting minimum age limits for legal marijuana use so as to prevent impressionable and inexperienced youth from stunting their own development [4]. This is, however, an imperfect solution as evidenced by the wide availability of both marijuana and other legal substances such as tobacco and alcohol to underage users [6]. It also does not account for the adult population, which is not immune from making decisions that harm productivity and well-being.

Temperance prohibitionists may even suggest that all mind-altering substances should be illegal, including alcohol. Though this extreme position does not reflect the views of most marijuana prohibitionists, it does pose the difficult question of consistency. Certainly, marijuana prohibitionists believe that so-called harder

drugs such as heroine, cocaine, and ecstasy should remain illegal as well. They might argue that the legalization of marijuana is not unique. One might ask, Why not extend the policy of legalization to other drugs?

Though this is not an argument against the legalization of marijuana *per se*, it does challenge the legalizer to either assume the more difficult role of arguing for the legalization of all psychoactive substances or to craft a careful distinction between marijuana and other drugs such that the former would deserve a special treatment. Indeed, this appeal to consistency is compelling, for the legalizer who is an apologist of all drugs must then address the larger set of arguments that condemn more virulent substances, which exceeds the scope of this analysis.

Finally, some prohibitionists rely on the principle of legal moralism and legal paternalism to support a policy of prohibition [28]. These arguments receive less credibility for their reliance on the fundamental belief that an individual's liberty can be trumped by popular conceptions of morality or for the public's conception of the individual's own good. In furthering the discussion about the ethics of marijuana prohibition, it is necessary to establish a mutual framework in which both camps can advance meaningful arguments. In the scope considered here, personal liberty is assumed to be supreme except when others' liberty is at stake. As such, appeals to legal moralism and legal paternalism must be suspended in this discussion. It is within this context that the arguments concerning society's interests above derive their force from the harm principle.

3 Legalization and the Interests of the Individual

The contemporary debate about marijuana legalization is infected with propaganda that entirely disparages the merits of prohibition. This phenomenon is inimical to the intelligent formulation of a modern marijuana policy as many of the marijuana lobbies, especially in the United States, dismiss grounds for prohibition without fully attempting to appreciate the position for the status quo [22].

Traditional clichés discredit prohibition by suggesting that government cannot “legislate morality.” What it means to legislate morality, however, is unclear. If this is an attack on legal moralism, then it leaves unscathed the prohibitionist arguments relying on social harm. If the statement suggests, on the other hand, that prohibition is not practical, then a more detailed discussion is wanting. Nor do *ad hominem* attacks on the policy-makers themselves provide substance [2, 22]. An add campaign by the National Organization for the Reform of Marijuana Laws (NORML) featuring New York's Mayor Michael Bloomberg admitting to marijuana use may expose the mayor's hypocrisy [9], but it entirely misses the ethical question.

Indeed, the foundation of the viable legalization argument stems from the pure libertarian ideals of John Stuart Mill, who maintains that “[o]ver himself, over his own body and mind, the individual is sovereign.” Mill revisits this concept in spirit throughout his treatise *On Liberty*: “When I say only himself, I mean directly, and in the first instance: for whatever affects himself, may affect others *through* himself; and the objection which may be grounded on this contingency will receive [further] consideration” [16]. Thus, Mill recognizes that absolute liberty has its bounds when others are significantly affected, and it is this concession that opens the gates to the wealth of prohibitionist considerations of the harm principle above.

Legalizers maintain, however, that the potential ills that legal marijuana imposes on society (given feasible limitations to legal use) are only indirectly through the individual user such that they are subject to Mill's thesis; that is, the limited societal side-effects are sufficiently small so that they are subordinate to individual liberty. Marijuana use should be subjected to government protection as classifying under Mill's second of three forms of liberty: “liberty of tastes and pursuits” [16], a concept reiterated in Jefferson's Declaration of Independence as the right to “life, liberty, and the pursuit of happiness.” It is, then, the magnitude of the societal side-effects over which the two camps may largely disagree.

This relatively theoretical concept is closely tied to the practical issue of implementing marijuana policy. A significant legalization argument relies not necessarily on the societal harm being small on an absolute scale, as suggested above, but that the alternative of enforcing prohibition imposes an even greater burden on society. Where Mill's views on liberty establish a conceptual underpinning, this practical approach, advanced by outspoken legalizers such as Ethan A. Nadelmann, contributes a complementary pragmatic dimension

[17]. It forces the prohibitionist not only to consider why marijuana is bad for society, but why prohibition is practical and good in implementation as the alternative, a far more difficult task.

A wealth of criticisms on the U.S.'s "War on Drugs" applies to marijuana prohibition. First, the enormous enforcement costs imposed on the police force and the prison system in the United States is measured in billions of dollars [7]. A significant portion of these costs are specifically related to marijuana as opposed to other drugs covered by the CSA [21]. Enforcement costs aside, marijuana prohibition, like alcohol prohibition in its time, has fueled organized crime and illicit international trade, with the United States importing marijuana from Mexico and South America and Europe importing from Morocco. Additional side-effects cited by legalizers include urban crime and drug violence, which, they argue, are not due to the inherent effects of the drugs themselves but rather their prohibition. In fact, the legalizers summarize, it is marijuana prohibition, not marijuana, that is responsible for the harm done to society [17].

Prohibition, in fact, precludes a large taxable revenue base [5]. Estimated annual marijuana imports in the United States and Canada measure again in the billions of dollars [8]. A legitimate domestic industry would allow the government to allocate part of this revenue to offset the negative externalities that form the basis of the societal harm argument. In fact, economists have long known that the inefficiencies of negative externalities, when dollar-measurable, can be corrected by the imposition of taxes to help equate the private return of marijuana use to the social return. Short of implementing a paradoxical tax on an illegal substance, as has been suggested by New York's Governor Eliot Spitzer [19], the best way to tax an industry is to legalize it and regulate it.

Prohibitionists such as Professor James Q. Wilson respond to the practical implementation argument. Specifically, Wilson suggests that the current drug policy is not necessarily the only drug policy, and that stronger emphasis on education and recovery are better policy aims [29].

In recent times, liberalization of marijuana in some U.S. states has given credence to the plant's medical uses. Preliminary research suggests that tetrahydrocannabinol (THC), the psychoactive compound in marijuana, is an effective treatment for glaucoma and for use as a pain-killer [12]. In fact, synthetic forms of THC, which are not explicitly forbidden by the CSA, are available as prescription medication. The classification of marijuana as a Schedule I drug in the United States, furthermore, precludes the use of the drug in scientific studies without having scientists battle through prohibitive channels to obtain approval. If nothing else, more moderate legalizers may say, marijuana should be legalized for medical research in the spirit of Mill's thesis that no idea should be prematurely silenced in order to allow for a progressive dialectic. Unfortunately, that the CSA designates Schedule I drugs as those for which "[t]here is a lack of accepted safety for use ... under medical supervision" and also forbids their use in medical research without difficulty obtained approval precludes the medical development of the drug [15].

Thus, the arguments of the legalizing camp can be broadly classified under two categories: (1) those that positively assert individual freedom, to which belong the arguments derived from Mill, and (2) those that negate the prohibitionist arguments of social harm, to which belong the impracticality of prohibition and the promise for the drug's medical use.

4 Quantification of Social Harm

Which case is more convincing reduces largely to the magnitude of the social harm arguments advanced by both camps. After establishing the premise that individual liberty is valuable and that legal moralism and legal paternalism have little bite, it is left to evaluate the extent of social harm that is brought about by a policy of legalization as compared to the social harm of the best prohibitionist alternative.

Several of the costs of prohibition have been noted in Section 3. Perhaps the most quantifiable of these is the nearly forty billion dollars spent on enforcement of drug prohibition at the federal and state levels with an additional 1.2 billion dollars spent on incarceration of criminals convicted of marijuana-related crimes [21]. Of course, it is often difficult to determine these figures precisely, but even with significant error bars, the U.S. government's expenditures on prohibition are enormous. They are in line, presumably, with the prohibitionists' belief that legalization would entail even greater costs.

Less quantifiable is the opportunity cost of legal marijuana: the added tax revenue and commercial profits that would be captured from a legal marijuana market. Naive legalizers cite studies that place the illegal marijuana trade at billions of dollars [8], but this is not an accurate representation of the size of a fully developed legal marijuana market. There would be, of course, additional government expenditures on regulatory agencies to ensure adherence of marijuana products to some standards, creating a sink for these profits. Without a proper consideration of the counterfactual costs in a legal market, an accurate figure for the social costs of legal marijuana would be hard to define.

The price elasticity of marijuana, however, has been shown to be relatively large such that decreases in marijuana prices would cause large increases in quantity demanded [20]. Few deny that a legal market would cause a drop in marijuana prices, and by its elasticity of demand, the market-clearing quantity would be much larger than the current quantity in the black market. As such, the revenues forgone by prohibition are likely to be much higher than the current estimates of the size of the illegal market at multiple billions of dollars, enough to sustain these regulatory agencies. Combined with the billions saved in enforcement, this opportunity-cost accounting of social harm calls for legalization.

Prohibitionists, however, focus less on the monetary savings possible under legalization to point out the secondary societal erosion considered earlier. Even with proper DUI laws, widespread marijuana use, especially as dictated by the presumably large increase in demand due to its price elasticity, can lead to a higher general level of social impairment. In fact, it is practical to admit that legal marijuana would entail a significant increase in use, contrary to Nadelmann's "forbidden fruit syndrome" hypothesis [17].

The best way to gauge the extent of the impairment caused by this increase, however, is to observe analogies in current policy. There is no reason to believe, for example, that the legalization of marijuana would lead to higher levels of societal impairment than does the current legal status of alcohol or the current *de facto* legal status of marijuana in the Netherlands. Additionally, the fact that marijuana is known to be less addictive than harder drugs (and even alcohol) relieves the fears of the broken family image depicted earlier, in which addicted parents trade welfare checks for drugs. In this sense, marijuana is in fact disparate from harder drugs, and the prohibitionists' call for consistency in Section 2 is answered.

5 Conclusion

The value of prohibitionist arguments, however, cannot be underestimated. Even Mill considers "utility as the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being" [16]. Marijuana legalization, in short, cannot be based solely on the right to self-determination and freedom of tastes and pursuits; the social consequences of the drug are indispensable, and the prohibitionists rightly identify their importance. In the case of marijuana, however, there is a compelling reason to believe that the negative externalities of the legal drug are not as severe as the prohibitionists suggest, perhaps because these effects have been unfairly ascribed to marijuana by its statutory association with harder drugs.

A legal marijuana market would most likely mirror current legal markets for mind-altering substances. There is no doubt, therefore, that the legalization of marijuana should be accompanied by careful restrictions, constant reevaluation, and an overall critical vigilance so that a healthy dialectic persists.

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