Drug enforcement is unattractive, to put it mildly, particularly in the United States. Few try to defend current U.S. policies, let alone those from before recent reforms.

The Bureau of Justice Statistics’ report Prisoners in 2019 lays bare the toll (Carson 2020a). At the end of 2018, state prisons held 176,300 individuals whose most serious offense was drug-related. That was 14.1% of all state prisoners, slightly more for Whites (16.3%) and less for Blacks (12.7%). For 3.7% of state prisoners, the most serious offense was drug possession.
There were also 76,700 people in federal prison for drug violations in 2018, but more than 99% of them were sentenced for trafficking, not just possession. (Carson 2020b).

Still, it is worth noting how far those numbers have fallen since their peak in 2007 (West and Sabol 2010). Overall, the number of drug offenders in state prison fell by 36% over the 11 years through the end of 2018. For Blacks, the decline (from 124,400 to 52,100) was steeper: 58% in total, and 63% in per capita terms, after factoring in population growth.

National statistics on jail (as opposed to prison) inmates are not generally broken down by charge, so it is not clear how much numbers of drug offenders in jail have fallen over that time period. Oddly, COVID-19 may have helped some this year, inasmuch as total numbers in jail are down sharply, by 22% between March and November in one sample of 574 county jails (Widro 2020).

Still, that too many individuals are incarcerated for minor drug offenses is almost a left-right mantra (Dagan and Teles 2016). The fact that Black and Hispanic populations have disproportionately high incarceration rates for drugs, albeit not quite to the same degree as for other offenses, only adds to the sense of failure.

Earp, Lewis, and Hart (2021) raise ethical issues but emphasize the effect on social wellbeing. “[E]ven if racial discrimination in drug arrests, prosecutions, and sentencing could somehow be eliminated, drug prohibition itself would remain unjust and harmful on balance” (5).

**DECRIMINALIZATION IS WORTH TRYING**

They propose initially decriminalizing simple possession. That would eliminate a great many arrests and the minority of drug-related incarceration that is most egregious, namely that for users. We have little quarrel with that position. Civil not criminal penalties should suffice for drug users, although as per the numbers cited above, it would not make a large dent in total imprisonment.

Decriminalization is also somewhat more complicated than Earp et al. admit. Many arrested for possession are retail sellers who were not observed in the process of making a sale; many convicted for possession pled down from a distribution charge (Caulkins and Sevigny 2005; Sevigny and Caulkins 2004); and many possession arrests are concurrent with other, non-drug offenses. So, it is a mistake to imagine that every possession arrest is of an otherwise innocent user.

The passage of Oregon’s decriminalization referendum Oregon in 2020 provides a welcome opportunity to assess how that reform will play out in a US jurisdiction beyond cannabis. Other countries, such as Italy, Spain and Portugal have already decriminalized, with quite varying outcomes (Laqueur 2015; Quintas and Arana 2017). The deterrent effects of criminal sanctions for possession are probably quite limited, so decriminalization would likely reduce substantially the racial inequities of drug enforcement without much increase in drug-related harms.

**CANNABIS LEGALIZATION EXPANDED ACCESS, LOWERED PRICE AND INCREASED CONSUMPTION**

Earp et al.’s much more troubling recommendation is that supplying drugs be legalized. Carl Hart has argued in his recent book Drug Use for Adults that drug use can enhance the wellbeing of a substantial share of users, even if the drug is the much demonized methamphetamine, about which there is not even a fictional oeuvre suggesting it is attractive. Dr. Hart and his coauthors in the current article do concede some users will become dependent and incur and inflict a variety of harms. They frequently assert that these harms can be controlled through better regulation, while begging off the task of offering details. Whereas Earp et al. are realistic about the barriers to meaningful reform of the criminal justice system, they are extremely optimistic, in our view unrealistic, about how effectively a legal industry could be regulated.

Recent experiences with cannabis and prescription opioids have reinforced the lessons from alcohol and tobacco, namely that legalization creates a monster that can ride roughshod over regulators and public health.

Prescription opioids (PO) amply demonstrate the limits of regulation at controlling harms. PO are regulated more tightly than are most consumer products, and by a health-promoting agency (the U.S. Food and Drug Administration). Nonetheless, PO contribute directly or indirectly to the majority of drug-related deaths that do not pertain to alcohol or tobacco—two other legal, regulated drugs. Although PO are no longer present in the majority of overdose deaths, that is in part because so many people who develop opioid use disorder (OUD) on PO “trade down” to illegal drugs before their fatal overdose (Mars et al. 2014). After the great expansion in PO use, most of those initiating heroin were introduced to opioids through...
prescription drugs (Cicero et al. 2014; Muhuri, Gfroerer, and Davies 2013).

Cannabis amply demonstrates the myth that legalization is same-old, same-old, just without the arrests and incarceration. Permitting production of non-medical cannabis by a for-profit industry, as in many states and Canada, has been accompanied by dramatic shifts in price, potency, and firm size.

The Obama Administration formally indicated its intention not to interfere with state-legal cannabis production in 2009. Over the subsequent 10 years wholesale prices of sinsemilla on the West Coast fell by 70%, in constant dollar terms, from over $4,500 to around $1,400 per pound (Caulkins forthcoming). Over that time, cannabis flower potency rose by about 50% (Caulkins forthcoming; ElSohly et al. 2021). That contradicts the so-called “Iron Law of Prohibition”— which claims that prohibition necessarily leads to greater potency—and means that the price per unit of THC fell still more sharply, by about 80%.

The increase in firm size is even more dramatic. Hawken and Prieger (2013) studied 186 gray market cannabis firms in the period just before state legalization; their average production area was just under 1,000 square feet. A half dozen years later, after Canada legalized cannabis production, it had multiple firms operating 1,000,000 square foot grows (Williams 2018), and achieving economies of scale that drove production costs below $1 CAD per gram. That is about $340 USD per pound, or far below the $1,400 per pound wholesale price in the U.S. A more potent, cheaper drug produced by firms that have the skill to promote and shape the product to appeal to daily and near-daily users presents much greater dangers to society.

THE UBIQUITY OF REGULATORY CAPTURE IN AMERICA

Regulatory capture, in which the regulated industry influences the behavior of the agency set to regulate it, is so common in the US that it no longer seems, as they say, a bug but rather a feature. When alcohol Prohibition was repealed, it was replaced with a highly restrictive regulatory system, with limited access and high taxes. For example, fifteen states initially had state monopolies and only six states allowed the sale of alcohol without food (MacCoun and Reuter 2001). Over time the restrictions have steadily eroded so that alcohol regulation now involves minimal control of promotion or access. Inflation-adjusted tax rates have declined to very low levels (Cook 2007). For example, Kenkel (1996) estimated that whereas in 1950 taxes accounted for 60% of the average price of a drink, that figure had fallen to 20% by 1990. In the following 25 years state taxes fell by about 25% more in real terms (Naimi et al. 2018)

With cannabis, the industry and industry-friendly advocates were involved from the beginning in writing the rules, most obviously in the states where voter propositions defined the regulatory architecture. When Oregon named 15 people to its new cannabis rules advisory committee, four were growers and three provided various services to the cannabis industry. Another committee member was a county commissioner who was later sued for taking cash from the industry while in office and then bilking investors in his cannabis store (Crombie 2015; Mann 2017). Problems continue, including with bribes being paid to influence licensing decisions (McGreery 2019), to the point that the FBI has opened investigations into such public corruption in the industry (Angell 2019).

The prescription opioid disaster is yet another reminder of the fragility of regulation in this country. The industry was able to persuade the FDA to let it market Oxycontin, despite a weak evidence base on its dependency creating properties (McGreal 2017). There have been credible allegations of corruption related to the licensing, with the senior FDA official taking an industry job soon after he had made the critical decisions (Meier 2018). Perdue Pharma paid a $600 million fine in 2007 but continued aggressive marketing; prescription opioid deaths, even with regulatory crackdowns post 2010, still amounted to 14,000 in 2019.

The phenomenon is not confined to industries producing dependency creating substances. The Great Recession of 2008–2012 is often ascribed to the failure of the federal financial regulatory agencies to rein in banks. The industry spent heavily on ensuring that the powers of the regulators were weakened, for example through weakening regulation of the two housing finance giants, Fanny Mae (Federal National Mortgage Association) and Freddy Mac (Federal Home Loan Banks) (Carpenter and Moss 2013).

The mechanism of capture in each case is much the same. The regulated industry has a strong interest in less regulation. It has the resources to provide substantial funds to politicians who will back industry-favoring nominees for regulatory positions. The public interest is more diffuse and NGOs representing that interest are poorly funded (Christensen 2011).

This history of regulatory capture across a variety of industries and different levels of government throws a wrench in the drug legalization argument.
Sure, a clever academic might be able to design a set of regulations that would minimize harms, but clever academics don’t get to write laws, let alone implement them. The challenge is to make a credible case that industry will accept those regulations.

CONCLUDING COMMENTS

In our view, the harms suffered by the one-fifth or so of users who struggle to control their consumption, outweigh the gains of the rest who become, in Dr. Hart’s estimation “more altruistic, empathetic, euphoric, focused, grateful, and tranquil.” Moreover, it is likely that the number unable to control their consumption will be larger if a legal industry emerges. A legal industry for cocaine, heroin and methamphetamine will be an aggressive promoter of its products.

So if not legalization, how to prevent prohibition from degenerating into a War on Drugs? We have argued in a number of papers that a modestly enforced prohibition of production and sale generates most of the benefits with fewer of the adverse consequences (e.g., Caulkins and Reuter 2010, 2017). It can prevent the creation of a legal industry, with all the tools of persuasion that modern advertising presents; it hinders the development of new technologies and products and ensures that production is costly and enterprises are small. All these are attractive outcomes. The challenge, of course, is how to prevent the creation of the repressive enforcement that has characterized drug enforcement in this country, and some others. We believe that is a reasonable challenge, perhaps more realistic than trying to work out how to avoid the multiple problems of legalization, including regulatory capture by a legal industry set up to produce dependency creating drugs.

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OPEN PEER COMMENTARIES

Racial Justice and Economic Efficiency Both Require Ending the War on Drugs

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The paper by Earp, Lewis, and Hart (2021) offers a strong criticism of the so-called “war on drugs.” The authors very convincingly argue that the war “has worsened many aspects of public health while disproportionately targeting certain racialized communities.” They call for “the immediate decriminalization of recreational drugs and, ultimately, for their timely and appropriate legal regulation”—in short, for an end to the war on drugs.

While we fully share the authors’ conclusions, we believe that the case against prohibition is actually even stronger. The stated purpose of the war on drugs is to reduce (and ideally annihilate) consumption through two channels: discouraging demand (in particular by criminalizing drug possession and use) and reducing supply. As Earp, Lewis and Hart rightly argue, the first channel is largely inefficient, if not counterproductive, while generating huge social costs, particularly for specific communities. But standard economic analysis strongly suggests that the second channel is just as counterproductive, if not even more.

The crucial argument relies on the notion of price elasticity, which measures the sensitivity of demand to price variations. Technically, an elasticity of, say, 0.5 implies that a 10% increase in price reduces consumption by 0.5 \times 10\% = 5\%. Empirical studies, as well as common sense, indicate that, in the case of recreational drugs—or, for that matter, of any addictive consumption—price elasticity is typically low: even significant price changes can only trigger mild