

Twenty-First Century Illicit Drugs and Their Discontents: Finis

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KEY TAKEAWAYS

The criminal justice system is necessary to ensure an orderly society and should be used regardless of the race or religion of offenders or the causes they espouse.

We should always punish severely drug traffickers who use violence to profit from someone else's misery.

At the same time, we also need to reconsider some of our drug policies—to ratchet some down and others up while ditching some entirely.

This is the tenth and last paper in The Heritage Foundation's series on *Twenty-First Century Illicit Drugs and Their Discontents*.¹ At the end of each prior paper, I have offered several policy proposals that I hoped would alleviate some of the problems that certain particular drugs pose for contemporary Americans. Accordingly, there is no need for a lengthy list of "dos" and "don'ts" in this conclusion. A few final observations, however, are in order.

Where Are We?

Hopefully, at our destination—which was *not* intended to be a medical school-like textbook on the pharmacology or history of illicit substances. Numerous medical and scientific publications have offered a comprehensive treatment of those features of illicit controlled substances.² They performed that chore

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far better than I could, so I did not intend to repeat it in this series. Instead, I designed it to offer the public policy reader a concise description of the manifold problems posed by the most serious illicit drugs that America faces today and to offer various responses to reduce the horrific effect that those drugs have wreaked on Americans and will continue to wreak on us unless we change our response. Among those drugs are the synthetic opioids fentanyl and nitazene along with the synthetic stimulant methamphetamine. The first two put a user at risk of crossing the River Styx in a go-fast boat; the last one takes a user there aboard a slow-moving tramp steamer. In either case, the ride is not a pleasant one, and the destination leaves much to be desired. We need to reconsider some of our drug policies—to ratchet some down and others up while ditching some entirely—to help our brothers and sisters avoid winding up on the real-life *Titanic* or the fictional *Botany Bay* from *Star Trek*.

Public Policy Remedies

I have tried to discuss various plusses and minuses in the approaches that we have taken in trying to stem or minimize the harms resulting from drugs that are abused. By and large, we have employed the heavy artillery of the criminal justice system, particularly imprisonment, to stop people from manufacturing, smuggling, distributing, possessing, and using dangerous drugs. That is a necessity in the United States. America is a socially and culturally heterogeneous society in which the ordinary restraints on behavior—such as community norms and religious conventions—play a far smaller role in corralling independent-minded people toward acceptable behavior than was the case centuries ago in the days of the Pilgrims or is the case now in homogeneous societies where widely shared customs restrain centrifugal social forces. A large number of contemporary Americans—and virtually all of the nation’s corporate television and social media outlets, including Hollywood—also belittle the value of self-sacrifice while extolling self-satisfaction as the *ne plus ultra* in life. The combination of those 20th-century developments forces society to use the criminal justice system as the first line of defense against antisocial conduct rather than as the last.

People who bemoan our resort to arrests, prosecution, and imprisonment as means of enforcing the controlled substances laws to maintain communal order and safety offer no alternative strategy for avoiding chaos or surrendering our neighborhoods to disorder and violence. For proof, just compare the relative safety and order on colleges campuses in Florida and

Texas, where university presidents and governors made it clear that vandalism and disruption would not be tolerated, in the spring of 2024 with what we have seen at schools like Columbia University, George Washington University, and UCLA, where classes have been disrupted, school buildings have been damaged, statues defaced, university-wide graduations cancelled, and Jewish students intimidated if not assaulted.³ Appeasing, let alone surrendering to, parties who wish to destroy safe and orderly communal life only encourages more of that conduct.

We should always punish severely drug traffickers who use violence to profit from someone else's misery. We should always imprison senior-level traffickers and violent offenders for the widespread suffering that they cause users and communities. That should go without saying. Yet recent events have made its reiteration a necessity. So I will repeat it: The criminal justice system is a necessary mechanism for ensuring an orderly society and should be used regardless of the race or religion of offenders or the causes that they espouse.

At the same time, we should be more discriminating as to how we use that hammer. A lengthy term of imprisonment is not necessary for every drug offender, particularly every user or small-scale dealer.⁴ We have better uses for our prisons than simply housing every such person in an endless supply of them, not all of whom should effectively be thrown away. We should reconsider the length of mandatory minimum sentences for small-scale dealers just looking to make a buck to "score" drugs for their own needs. We did so in a small way in the First Step Act of 2018, which gave federal district court judges some additional leeway to sentence below a mandatory minimum in drug cases.⁵ Drug courts have also been a valuable, remedial alternative to the traditional criminal prosecution of drug offenders.⁶ There are other, kindred approaches to drug courts, ones that also do not demand putting the hammer down on every drug offender. The Hawaii Opportunity Probation with Enforcement and 24/7 Sobriety Programs are two of them.⁷ Perhaps additional, nonpunitive approaches might be successful. We should consider upping our game.

We also need non-legal approaches to drug problems, including short-term and long-term antidotes to the range of dangerous drugs that people consume. Naloxone is a short-term treatment for an opioid overdose, while methadone and buprenorphine are long-term substitutes for opiates. But we do not have comparable "off switches" for methamphetamine or many of the numerous varieties of synthetic drugs that pop up like mushrooms after a period of heavy rain. We can use the savings from a lower incarceration rate to fund the research necessary to devise those safety valves.

In addition, we must find better ways to educate and dissuade minors and young adults from starting down the path toward addiction by taking illicit drugs even on an experimental basis. Robert DuPont, a former White House drug policy advisor and former Director of the National Institute on Drug Abuse, has found that minors who do not experiment with tobacco, alcohol, or cannabis before reaching age 21 are unlikely later to succumb to the allure of illegal drugs.⁸ We need to promote that message, particularly on social media, both because that is where people in their 20s and 30s learn their news and because those individuals are the primary clientele for drug traffickers.⁹ Widespread, consistent, cultural disapproval of cigarette smoking and drunk driving has saved thousands of lives.¹⁰ Perhaps it could also work for drug use and drug-impaired driving. The presence of fentanyl in other illicit drugs, such as cocaine, and in counterfeit pills made to resemble Adderall puts every experimental drug user or final examination-crasher at risk of meeting St. Peter or Cerberus.¹¹ Because no one knows how much fentanyl is in cocaine powder or counterfeit pills bought over the Internet, “using them is like playing Russian Roulette with more than one round in the chamber.”¹²

To make an education strategy effective, we need someone—a President, another influential elected or appointed official, a professional athlete, a movie star, a popular singer—to become the champion of a policy that would save lives and that no one would publicly oppose. So far, however, no one has stepped forward to be that leader. Perhaps that is due to a fear of being seen as illiberal on a policy issue—legalized cannabis use—favored by voters or fans who are less than 40 years old. Perhaps some other motivation, such as the feared public disclosure of past drug use, is responsible. But it is critical to reach the audience of adolescents and young adults who are at extreme risk of making a dumb mistake that can ruin their lives¹³ or end them in the blink of an eye.¹⁴ So far, no one has volunteered, but hope springs eternal.

A Conservative Approach to Our Drug Problem

I understand that some readers would have in mind the following response to what I have argued in this series: “You have correctly identified some serious national drug problems, and I agree that we must address them. I also agree that we should commit to re-evaluating the steps that we have taken over the past 50-plus years. Where I disagree, however, is with your refusal to admit defeat and legalize drugs, as well as with your specific policy proposals. Each one comes at the problem from a conservative

bent, which isn't my cup of tea. So my question to you is this: Why should I consider your suggestions? Besides, legalization is inevitable. Refusing to accept that reality is foolish.”

There has always been a vocal debate over the success, merit, and desirability of the respective drug policy strategies of criminalization and legalization.¹⁵ The literature on the two sides of this debate almost outnumbers the stars in the heavens, and it shows no sign of letting up.¹⁶ I do not believe that we will solve America's illicit drug problem by endorsing the Millsian strategy of allowing, and maybe even enabling, drug users to continue down the path toward oblivion.¹⁷ As the late Professor John Kaplan observed, no modern society has endorsed a purely *laissez faire* or libertarian approach to drug policy, and no modern welfare state would be able to maintain that scheme for long—particularly a state that serves as the principal guardian of the freedoms that contemporary Western civilization holds dear.¹⁸ Legalization poses the serious risk of making a mistake that we cannot remedy by recriminalizing the conduct that we once outlawed. We could wind up creating a critical mass of people who are physically dependent on or addicted to dangerous drugs, a number that overtaxes our medical and welfare systems to the point of causing an economy-crushing demand for taxpayer-funded services that could have been avoided and cannot be undone without placing extraordinary stress on government enforcement mechanisms and informal social structures.¹⁹ We should not take that chance.

If you want proof that drug legalization can go extraordinarily badly, look at Oregon's recent experience with legalization. In 2020, Oregon decided to legalize possession of small amounts of any illicit drug.²⁰ The four years that have passed since then have witnessed dystopian images ordinarily seen only in movies but this time played out in real life in homeless encampments.²¹ In 2024, Oregon was willing and able to learn from and recognize its mistake, recriminalizing what it had legalized four years ago.²² It is far from clear that the nation could have done an about-face and recriminalized drugs if Congress had done for the nation what Oregon did for the Beaver State. If not, a decision to legalize drug possession and use could become a permanent and even more widespread feature of American life, regardless of its adverse consequences.

Not every enhancement of human freedom is a net plus for individuals and society. Addictive drugs have the short-term effect of offering a user a euphoria that people seek but cannot find in their Thoreauvian “lives of quiet desperation.” But this comes at a price in the form of a lost ability to live a life without the “fix” necessary to stave off the physical and

psychological suffering that addiction brings. Even Mills would not allow people to sell themselves into slavery. If so, why is a heroin or methamphetamine addiction different? Overcoming the agony of unassisted, cold-turkey withdrawal is a price that most people cannot pay. We can delude ourselves that legalization is yet another victory for human freedom or civil rights, but delusions are not reality and are not desirable.²³

Finally, to the objection that my proposals address these problems from a conservative perspective, my answer is, “Guilty as charged.” I confess to a disbelief in the power of reason always and everywhere to undermine the merit of a long-standing, steadfastly held policy, even when it shows some gray around the temples. William F. Buckley once defined a conservative as “someone who stands athwart history, yelling Stop, at a time when no one is inclined to do so, or to have much patience with those who so urge it.” Conservatism does not always require us to take that stance, but I do think that a long-standing policy should not be abandoned or changed unless there is a powerful case for doing so. From my perspective, none of the advocates favoring unrestricted access to dangerous illicit drugs has made that case.

To be sure, it is possible that someone might be able to devise a new argument supporting unrestricted adult drug use, but that’s not likely. John Stuart Mill published his famous essay *On Liberty* 165 years ago; “for all its flaws,” that essay remains “the clearest, most candid, most persuasive and most moving exposition of the point of view of those who desire an open and tolerant society,” including parties who desire to see legalization of adult substance use,²⁴ and libertarians have been trying to buttress Mill’s case ever since.²⁵ The odds are slim that someone can devise an entirely new argument for drug legalization.

A Final Thought on Cannabis

Before we end, some of you may be wondering: “Why did I include cannabis in this series?”

Every reasonable person would understand the dangerous nature of drugs like fentanyl and synthetic drugs that have popped up like weeds over past decades. Their use can lead to a life resembling the one that Thomas Hobbes described in the state of nature: a life that is “solitary, poore, nasty, brutish, and short.”²⁶ In the case of fentanyl, death is “just a shot away.”²⁷ Methamphetamine is different. If fentanyl is the express train, meth is the local. But it can take a user to the same destination by slowly corroding one’s physical abilities and mental faculties, leaving a user searching for gratification like the ever-hungry ghouls in the Buddhist afterlife.²⁸ So no one is likely to be wonder why I discussed those drugs in this series.

Some people might well ask, however, why I included cannabis. “After all,” they might say, “cannabis is legal for medical or recreational use in more than half of the states, and states would not legalize a dangerous drug.”

I did not include cannabis in this series because I believe that it is *as* dangerous as the other drugs I discussed; it is not. Millions of people have experimented with cannabis and not only have lived to tell that tale, but have thrived. Some have even gone on to become President of the United States. So I cannot slot cannabis into the same category as fentanyl and methamphetamine.

But cannabis certainly can injure its users physically and mentally. It is not the terror that the 1936 movie *Reefer Madness* made it out to be, as the supporters of cannabis legalization have told us endlessly. But cannabis is far more dangerous than the popcorn that anyone ate while watching that film. As Dr. Nora Volkow, Director of the National Institute on Drug Abuse (NIDA), once wrote, “[m]arijuana is not a benign drug” and “has significant adverse health effects and consequences associated with its use.”²⁹ Those harms go double for anyone who initiates heavy, long-term cannabis use with today’s drug.³⁰ Those harms go triple if someone begins heavy or long-term use during adolescence.³¹ The possible harms quadruple when you count the potential damage to the child of a mother who uses cannabis while pregnant or nursing.³² Yet, even so, cannabis cannot go toe-to-toe in a match with fentanyl or meth.

No, I included cannabis because we have been lied to for decades about its supposedly benign effects. New studies have identified a variety of harms from its use that advocates for cannabis reform are not wont to acknowledge.³³ Perhaps the lies that cannabis’s reformers told to state legislators to dupe the latter into passing medical and recreational cannabis régimes were the reformers’ payback for the long-ago, over-the-top scare campaigns used to outlaw cannabis nationwide from 1937, when Congress passed the Marijuana Tax Act, until California launched the first medical cannabis program in 1996. Turnabout is fair play, I suppose, even when lying is the currency used to make a point. If so, we have reaped what we sowed; shame on us.

But it is hardly cricket to penalize *other, innocent people* today for *our* past mistakes, and punishment is what evasion, silence, and deceit regarding cannabis’s harms will accomplish. There is a certainty that cannabis legalization will ruin the lives of some users as well as kill some innocent third parties—such as people who are drivers, passengers, or pedestrians unlucky enough to be hit by someone driving under the influence of cannabis.³⁴ “Today there is a wealth of evidence that marijuana is an impairing substance that affects skills necessary for safe driving.”³⁵ In 2010, Gil

Kerlikowski, the “Drug Czar” under President Barack Obama, concluded that drug-impaired driving was as troublesome as the universally condemned problem of alcohol-impaired driving.³⁶ In 2021, Kerlikowski joined three other past Office of National Drug Control Policy Directors—Barry McCaffrey, Bob DuPont, and Jim Carroll—at a Heritage Foundation event that I moderated on the subject of drug-impaired driving.³⁷ Each former Drug Czar—two who served in Democratic Administrations and two in Republican ones—agreed that drug-impaired driving is a serious national problem.³⁸ For the people already killed by drug-impaired drivers and the ones whom it will later kill, this problem truly justifies the label “existential” that Washington, D.C., politicians and media observers bandy about these days. At a minimum, it deserves far more attention from our elected officials than it has received to date.

The elected and appointed officials who bought the half-truths and lies that reformers sold are even more culpable than the reformers themselves. Government officials take an oath to serve the body politic, not particular interest groups and certainly not themselves. Ignoring the harms that they know will follow from their votes and actions is a violation of their oath to serve the public. The legislators who traded their votes for campaign contributions, interest group endorsements, or political support and who closed their eyes and ears to this problem and legalized cannabis use under state law without making any effort to halt drug-impaired driving have blood on their hands.

Perhaps we need a better quality of politicians—which is one of the changes that we can make to improve our drug policies. There is a reason why we elect politicians for only limited terms. Dishonesty is as good a reason as any for showing politicians the door, and it is a better reason than most. Besides, the Latin maxim *Falsus in uno, falsus in omnibus*—which means “False in one thing, false in everything”—is instructive in this regard. While that precept is not as universal as the law of gravity, it certainly pays to keep it in mind when dealing with any politician. If we know that they are dishonest about any one subject, we should be suspicious about their veracity when they discuss other ones, particularly the ones about which the average person knows nothing.³⁹ Anyone who believes that a decision to “*Throw the bums out!*” is an extreme reaction should keep that advice in mind.

Conclusion

As a legal scholar at The Heritage Foundation, all I can do to alleviate the drug-related misfortunes that the different illicit drugs discussed in this series pose for others is to identify problems, analyze them to the best of my

abilities, and offer proposals for the public to mull over. I will consider this series a success if readers come away from it with the belief that we are in deep kimchi today, that an even bleaker future awaits us unless we commit both to seriously and honestly debating how to address the nation's illicit drug problems and to changing our policies now. This will require raising awareness of our drug policy problems and generating a commitment to rectifying them. Even baby steps will eventually get us where we want to go as long as those steps are in the right direction. The situation is dire, and there is no time to waste.

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Endnotes

1. The earlier papers are *An Introduction*, HERITAGE FOUND., Legal Memorandum No. 310 (2022), https://www.heritage.org/sites/default/files/2022-09/LM310_0.pdf; *The Scourge of Illicit Fentanyl*, HERITAGE FOUND., Legal Memorandum No. 313 (2022), <https://www.heritage.org/sites/default/files/2022-11/LM313.pdf> [hereafter Larkin, *Fentanyl*]; *The Troubling Potency of Twenty-First Century Cannabis*, HERITAGE FOUND., Legal Memorandum No. 317 (2022), <https://www.heritage.org/sites/default/files/2022-12/LM317.pdf> [hereafter Larkin, *Cannabis Potency*]; *The Potential Risks that Cannabis Use by Pregnant and Nursing Women Poses to Their Children*, HERITAGE FOUND., Legal Memorandum No. 319 (2022), <https://www.heritage.org/sites/default/files/2023-04/LM319.pdf> [hereafter Larkin, *Cannabis and Pregnancy*]; *The Failure of Cannabis Legalization to Eliminate an Illicit Market*, HERITAGE FOUND., Special Report No. 326 (2023), https://www.heritage.org/sites/default/files/2023-04/LM326_0.pdf; *Why the FDA Could Not Approve Raw Cannabis as a “Safe,” “Effective,” and Uniform” Drug*, HERITAGE FOUND., Special Report No. 275 (2023), <https://www.heritage.org/sites/default/files/2023-08/SR275.pdf> [hereafter Larkin, *Cannabis and the FDA*]; *Methamphetamine—The Downs of Ups, or Tweaking the Night Away*, HERITAGE FOUND., Legal Memorandum No. 348 (2023), <https://www.heritage.org/sites/default/files/2023-12/LM348.pdf>; *Driving Down the Psychedelic Highway*, HERITAGE FOUND., Special Report No. 279 (2024), <https://www.heritage.org/sites/default/files/2024-03/SR279.pdf>; and *The Challenges Posed by Novel Psychoactive Substances*, HERITAGE FOUND., Special Report No. 282 (forthcoming 2024) [hereafter Larkin, *NPS*].
2. See, e.g., RICHARD J. BONNIE & CHARLES H. WHITBREAD II, *THE MARIJUANA CONVICTION: A HISTORY OF MARIJUANA PROHIBITION IN THE UNITED STATES* (Lindesmith Ctr. 1999) (1974); *MARIJUANA AND MADNESS* (Deepak D’Souza et al. eds., 3d ed. 2023); ROBERT L. DUPONT, *THE SELFISH BRAIN: LEARNING FROM ADDICTION* (2019 ed. 1997); ROY GERONA, *DESIGNER DRUGS* (2024); JOHN KAPLAN, *THE HARDEST DRUG: HEROIN AND PUBLIC POLICY* (1983); LESLIE L. IVERSEN, *THE SCIENCE OF MARIJUANA* (2d ed. 2008); *THE EFFECTS OF DRUG ABUSE ON THE HUMAN NERVOUS SYSTEM* (Bertha K. Madras & Michael Kuhar eds., 2014); LOWINSON AND RUIZ’S *SUBSTANCE ABUSE: A COMPREHENSIVE TEXTBOOK* (Pedro Ruiz & Eric Strain eds., 5th ed. 2011); JERROLD S. MEYER & LINDA F. QUENZER, *PSYCHOPHARMACOLOGY* (2d ed. 2018); SAM QUINONES, *THE LEAST OF US: TRUE TALES OF AMERICA AND HOPE IN THE TIME OF FENTANYL AND METH* (2021); *CONTEMPORARY HEALTH ISSUES ON MARIJUANA* (Kevin A. Sabet & Ken C. Winters eds., 2018); BRIAN F. THOMAS & MAHMOUD A. ELSOHLY *THE ANALYTICAL CHEMISTRY OF CANNABIS* (2016); BEN WESTHOFF, *FENTANYL, INC.: HOW ROGUE CHEMISTS ARE CREATING THE DEADLIEST WAVE OF THE OPIOID EPIDEMIC* (2019).
3. See, e.g., Christine Mai-Duc, *UCLA Chancellor Widely Criticized for Slow Response to Campus Violence*, WALL ST. J., May 3, 2024, https://www.wsj.com/us-news/ucla-chancellor-gene-block-criticism-protests-80c6ba2b?mod=hp_lead_pos9.
4. Jonathan P. Caulkins & Keith Humphreys, *New Drugs, Old Misery: The Challenge of Fentanyl, Meth, and Other Synthetic Drugs*, MANHATTAN INST., Issue Brief 5 (2023): “A more productive path is for police to focus on ameliorating the harms of drug selling, just as public health can focus on reducing the harms from drug use. For example, close the open-air drug markets that are damaging neighborhoods in cities such as Boston, San Francisco, Seattle, Philadelphia, and Portland. Forcing drug markets underground does not eliminate sales, but it limits the disorder, stress, and crime that open-air markets inflict on neighbors and communities. To paraphrase the CUNY criminologist David Kennedy: There are many neighborhoods in America that have drug use and drug selling but no open-air markets. They’re called suburbs. Freedom from being harassed or intimidated by flagrant retail drug sellers should be a right for all Americans, not just a privilege of the better-off.”
5. See First Step Act of 2018, § 402, Pub. L. No. 115-391, 132 Stat. 5194; see Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128 YALE L.J. FORUM 791, 795–96 (2019) (discussing the Section 402 “safety valve” sentencing revision and the act’s other reforms).
6. See, e.g., JAMES L. NOLAN, JR., *REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT* (2001).
7. See Paul J. Larkin, Jr., *Swift, Certain, and Fair Punishment—24/7 Sobriety and HOPE: Creative Approaches to Alcohol- and Illicit Drug-Using Offenders*, 105 J. OF CRIM. L. & CRIMINOLOGY 39 (2016).
8. See, e.g., Sharon Levy, Michael D. Campbell, Corinne L. Shea & Robert L. DuPont, *Trends in Abstaining from Substance Use in Adolescents: 1975–2014*, 142 PEDIATRICS e20173498 (2018); see also INST. FOR BEHAV. & HEALTH, *PREVENT TEEN DRUG USE: ONE CHOICE FOR HEALTH* (undated), <https://www.ibhinc.org/prevent-teen-drug-use> (last visited Apr. 20, 2024).
9. See Larkin, *NPS*, *supra* note 1, at 20 & n.198.
10. See Keith Humphreys & Jonathan Caulkins, *Destigmatizing Drug Use Has Been a Profound Mistake*, ATLANTIC, Dec. 12, 2023, <https://www.theatlantic.com/ideas/archive/2023/12/destigmatizing-drug-use-mistake-opioid-crisis/676292/> (“Cultural disapproval of harmful behavior can be a potent force for protecting public health and safety—as the examples of increased stigma against drunk driving and tobacco smoking show.”).
11. “Fentanyl was present in the system of 40 percent of the people who overdosed and died from cocaine in 2016.” Larkin, *Fentanyl*, *supra* note 1, at 12 (footnote omitted); see also, e.g., BRODIE RAMIN, *THE AGE OF FENTANYL: ENDING THE OPIOID EPIDEMIC* 5 (2020) (“In October 2018, all twenty-one samples of drugs tested at my clinic in Ottawa, which were sold on the street as heroin, contained fentanyl; none contained heroin.”); WESTHOFF, *supra* note 2; *HOW ROGUE CHEMISTS ARE CREATING THE DEADLIEST WAVE OF THE OPIOID EPIDEMIC* (2019); Richard G. Frank & Harold A. Pollack, *Addressing the Fentanyl Threat to Public Health*, 376 NEW ENG. J. MED. 605, 605 (2017) (“Many people who die from fentanyl overdose appear to have been unaware that they were using the drug. In addition to being mixed with heroin, fentanyl is sometimes sold as methylenedioxymethamphetamine (MDMA), or ecstasy. Recent analysis in Canada showed that fentanyl was present in 89% of seized counterfeit OxyContin tablets. In the United States, recent fatalities have also been attributed to fentanyl in counterfeit Xanax (alprazolam), Norco (acetaminophen–hydrocodone), and other medications.”); Bryce Pardo, *Fentanyl in Canadian Drugs—Insights into Mixing Fentanyl and Benzodiazepines from Canadian Drug Seizures*, 79 JAMA PSYCHIATRY 81 (2022); Jon Kamp & Julie Wernau, *Fentanyl Invades More Illicit Pills, with Deadly Consequences*, WALL ST. J., Dec. 16, 2021, <https://www.wsj.com/articles/fentanyl-invades-more-illicit-pills-with-deadly-consequences-11639650605?page=1> (“Federal authorities say they are encountering more pills passing for medications

such as oxycodone that contain fentanyl. They have seized more than 20 million fake pills this year, the vast majority containing fentanyl, the Drug Enforcement Administration said Thursday. [¶] ‘The supply of these pills is going up exponentially,’ said Joseph Palamar, an associate professor and drug epidemiologist at New York University Langone Health. ‘They are easy to transport and difficult to track. Pills are the ultimate fake out. You can fake out your parents, your friends, your partner, law enforcement.’ [¶] The mass production of such pills by Mexican cartels has escalated the threat, according to the DEA.”; Utsha H. Khatri et al., *Lethal Fentanyl and Cocaine Intoxication*, 379 *NEW ENG. J. MED.* 1782 (2018); Sarah Maslin Nir, *Inside Fentanyl’s Mounting Death Toll: “This Is Poison”*, *N.Y. TIMES*, Nov. 22, 2021, <https://www.nytimes.com/2021/11/20/nyregion/fentanyl-opioid-deaths.html?referringSource=articleShare> (“Fentanyl’s spread has been pushed by the profit imperative, according to interviews with dealers: On each leg of the journey of a drug like heroin or cocaine, from cartel to end user, sellers often cut the pure product with cheap powders that are similar in appearance, a process known as ‘stepping on’ the drug. Once it was things like baby formula; today, it is likely to be fentanyl. [¶] There is no quality control: A street dealer might cut fentanyl into cocaine that already contains it, creating a lethal dose. [¶] In interviews, dealers described lacing as completely ad hoc. One said she measured out fentanyl with a McDonald’s ice cream spoon, leveled with a playing card. More than one dealer did not measure at all, spritzing liquid fentanyl onto baking sheets of marijuana, creating a once-rare concoction that some dealers say is increasingly requested.”).

12. Larkin, *Fentanyl*, *supra* note 1, at 12 (footnote omitted).
13. See Larkin, *NPS*, *supra* note 1, at (manuscript 14–15) (“[S]ome new drugs—such as MPTP—cause permanent symptoms of Parkinson’s Disease, by destroying dopamine-creating neurons, leaving users in an irreversibly frozen state, creating real-life images of the fictional depiction of Han Solo frozen in carbonite in *The Empire Strikes Back*.”) (footnotes omitted).
14. See Larkin, *Fentanyl*, *supra* note 1, at 10 (“As Illinois’ Madison County Coroner Stephen Nonn put it, ‘When we go to a death scene and you still see the needle in the arm, we know it was fentanyl because it works that quick[ly].’”) (footnote omitted).
15. For a particularly good exchange, compare Ethan A. Nadelmann, *The Great Drug Debate: The Case for Legalization*, 92 *PUB. INTEREST* 3 (Summer 1988), with John Kaplan, *The Great Drug Debate: Taking Drugs Seriously*, 92 *PUB. INTEREST* 32 (Summer 1988); see also James Q. Wilson, *Against the Legalization of Drugs*, 89 *COMMENT.* 21 (1990).
16. See, e.g., JAMES B. BAKALAR & LESTER GRINSPOON, *DRUG CONTROL IN A FREE SOCIETY* (1984); PHILIP BEAN, *LEGALISING DRUGS: DEBATES AND DILEMMAS* (2010); WILLIAM J. BENNETT & ROBERT A. WHITE, *GOING TO POT: WHY THE RUSH TO LEGALIZE MARIJUANA IS HARMING AMERICA* (2015); HENRY H. BROWNSTEIN, *CONTEMPORARY DRUG POLICY* (2013); *DRUG LEGALIZATION: FOR AND AGAINST* (Rod L. Evans & Irwin M. Berent eds., 1999); GARY L. FISHER, *RETHINKING OUR WAR ON DRUGS: CANDID TALK ABOUT CONTROVERSIAL ISSUES* (2006); *SEARCHING FOR ALTERNATIVES: DRUG-CONTROL POLICY IN THE UNITED STATES* (Melvyn B. Krauss & Edward P. Lazear eds., 1991); *PSYCHOACTIVE DRUGS AND HARM REDUCTION: FROM FAITH TO SCIENCE* (Nick Heather et al. eds., 1992); DOUGLAS HUSAK & PETER DE MARNEFFE, *THE LEGALIZATION OF DRUGS: FOR AND AGAINST* (2006); *THE DRUG LEGALIZATION DEBATE* (2d ed. James A. Inciardi ed., 1999); MARK A.R. KLEIMAN ET AL., *DRUGS AND DRUG POLICY: WHAT EVERYONE NEEDS TO KNOW* (2011); MARK A.R. KLEIMAN, *AGAINST EXCESS: DRUG POLICY FOR RESULTS* (1992); ROBERT J. MACCOUN & PETER REUTER, *DRUG WAR HERESIES* (2001); JACOB SULLUM, *SAYING YES: IN DEFENSE OF DRUG USE* (2003); *DRUG CONTROL POLICY: ESSAYS IN HISTORICAL AND COMPARATIVE PERFORMANCE* (William O. Walker III ed., 1992). For excellent discussions of the proper treatment of cannabis, see JONATHAN P. CAULKINS ET AL., *MARIJUANA LEGALIZATION: WHAT EVERYONE NEEDS TO KNOW* (2012); MITCH EARLEYWINE, *UNDERSTANDING MARIJUANA: A NEW LOOK AT THE SCIENTIFIC EVIDENCE* (2002); Jonathan P. Caulkins, *The Real Dangers of Marijuana*, 33 *NAT’L AFFS.* 21 (2016); Mark A.R. Kleiman, *The Public-Health Case for Legalizing Marijuana*, 59 *NAT’L AFFS.* 68 (2019); compare, e.g., Kevin A. Sabet, *Marijuana and Legalization Impacts*, 23 *BERKELEY J. CRIM. L.* 84 (2018), with, e.g., Tamar Todd, *The Benefits of Marijuana Legalization and Regulation*, 23 *BERKELEY J. CRIM. L.* 99 (2018). See generally Paul J. Larkin, Jr., *Introduction to a Debate: “Marijuana: Legalize, Decriminalize, or Leave the Status Quo in Place?”*, 23 *BERKELEY J. CRIM. L.* 73 (2018). For excellent histories of America’s drug policy, see, for example, RICHARD J. BONNIE & CHARLES H. WHITEBREAD II, *THE MARIJUANA CONVICTION* (1999); MICHAEL MASSING, *THE FIX: SOLVING THE NATION’S DRUG PROBLEM* (1998); H. WAYNE MORGAN, *DRUGS IN AMERICA: A SOCIAL HISTORY, 1800–1980* (2001); SALLY L. SATEL, *DRUG TREATMENT: THE CASE FOR COERCION* 3–14 (1999).
17. See JOHN STUART MILL, *ON LIBERTY* (1859).
18. See Kaplan, *supra* note 15, at 36: “This is not an issue to be decided by John Stuart Mill’s ‘simple principle’—that is, by letting each person decide for himself. No nation in the world follows his rule regarding self-harming conduct, and the rule is probably unworkable in a complex, industrial society—particularly one that is a welfare state. Mill’s principle, moreover, seems singularly inappropriate to a habit-forming, psychoactive drug that alters the user’s perspective as to postponement of gratification and his desire for the drug itself.”
19. See KAPLAN, *supra* note 2.
20. For a discussion of the text, history, and rationale for Oregon’s 2020 decriminalization law, see, e.g., *Oregon Measure 110 Election Results: Decriminalize Some Drugs and Provide Treatment*, *N.Y. TIMES*, Dec. 4, 2020, <https://www.nytimes.com/interactive/2020/11/03/us/elections/results-oregon-measure-110-decriminalize-some-drugs-and-provide-treatment.html>.
21. See Paul J. Larkin, *Camping and the Constitution*, 22 *Geo. J.L. & Pub. Pol’y* (forthcoming 2024).
22. For a discussion of the text, history, and rationale for Oregon’s 2024 recriminalization law, see, e.g., *Oregon Botches the Decriminalisation of Drugs*, *ECONOMIST*, Apr. 13, 2023, <https://www.economist.com/leaders/2023/04/13/oregon-botches-the-decriminalisation-of-drugs>; *Oregon’s Drug Decriminalisation Has Had a Troubled Start*, *ECONOMIST*, Apr. 13, 2023, <https://www.economist.com/united-states/2023/04/13/oregons-drug-decriminalisation-has-had-a-troubled-start>; Editorial Bd., *Oregon Has a Drug Epiphany*, *WALL ST. J.*, Apr. 3, 2024, https://www.wsj.com/articles/oregon-ends-drug-decriminalization-tina-kotek-measure-110-ac5fac33?mod=Searchresults_pos1&page=1; Editorial Bd., *Oregon Rethinks Drug Decriminalization*, *WALL ST. J.*, Jan. 29, 2024, <https://www.wsj.com/articles/oregon-rethinks-drug-decriminalization-measure-110-aclu-744d2544>; Editorial Bd., *Recriminalizing Drugs, Oregon Offers a Cautionary Tale*, *WASH. POST*, Apr. 7, 2024, <https://www.washingtonpost.com/opinions/2024>

- /04/07/oregon-drugs-decriminalization-failure-lessons/; Mike Baker, *Oregon Is Recriminalizing Drugs, Dealing Setback to Reform Movement*, N.Y. TIMES, Mar. 1, 2024, <https://www.nytimes.com/2024/03/01/us/oregon-drug-decriminalization-rollback-measure-110.html>; Mike Baker, *Oregon Is Recriminalizing Drugs. Here's What Portland Learned*, N.Y. TIMES, Apr. 1, 2024, <https://www.nytimes.com/2024/04/01/us/oregon-drug-law-portland-mayor.html>; Joseph Choi, *Did Oregon Pull the Plug Too Soon on Drug Decriminalization?*, THE HILL, Apr. 7, 2024, <https://thehill.com/homenews/4575434-oregon-drug-decriminalization-too-soon/>; Noelle Crombie, "Open-Air Drug Use Is at an All-Time High" in Downtown Portland: Police Turn to Citations as Fentanyl Crisis Explodes, OREGONIAN, June 6, 2023, <https://www.oregonlive.com/portland/2023/06/open-air-drug-use-is-at-an-all-time-high-in-downtown-portland-police-turn-to-citations-as-fentanyl-crisis-explodes.html>; Noelle Crombie, *Police Issue Few Tickets Under New Drug Decriminalization Law; Most People Ignore Court, Hotline*, OREGONIAN, Oct. 29, 2021, <https://www.oregonlive.com/politics/2021/10/police-issue-few-tickets-under-new-drug-decriminalization-law-most-people-ignore-court-hotline.html>; Kevin Dahlgren, *How Drugs Turned Portland into a "Demoniac Hellhole"*, SPECTATOR WORLD, Dec. 17, 2023, <https://thespectator.com/topic/drugs-portland-demoniac-hellhole-fentanyl/>; Jim Hinch, *What Happened When Oregon Decriminalized Hard Drugs*, ATLANTIC, July 19, 2023, <https://www.theatlantic.com/politics/archive/2023/07/oregon-drug-decriminalization-results-overdoses/674733/>; Nate Hochman, *The Tragedy of Portland: "It's a Ghost Town, Except for Zombies"*, NAT'L REV., Dec. 17, 2021, <https://www.nationalreview.com/2021/12/the-tragedy-of-portland-its-a-ghost-town-except-for-zombies/>; Jan Hoffman, *Scenes from a City That Only Hands Out Tickets for Using Fentanyl*, N.Y. TIMES, July 31, 2023, <https://www.nytimes.com/2023/07/31/health/portland-oregon-drugs.html>; Jack Holmes, *The Land Beyond the Drug War*, ESQUIRE, Aug. 1, 2023, <https://longreads.com/2023/08/02/the-land-beyond-the-drug-war/>; Hannah Ray Lambert, *Crisis in the Northwest: Fentanyl "Killing the Mentally Ill for a Dollar a Pill" in State with Loose Drug Laws*, FOX NEWS, Feb. 3, 2024, <https://www.foxnews.com/politics/crisis-northwest-fentanyl-killing-mentally-ill-dollar-pill-state-loose-drug-laws>; Hannah Ray Lambert, *Crisis in the Northwest: Are Voters "Beyond a Turning Point" After Decades of Progressive Politics?*, FOX NEWS, Jan. 27, 2024, <https://www.foxnews.com/politics/crisis-northwest-voters-beyond-turning-point-decades-progressive-politics>; Hannah Ray Lambert, "Enormous Mistake": Business Leaders, Residents Fed Up with Blue State Drug Laws Issue 2024 Ultimatum, FOX NEWS, Dec. 6, 2023, <https://www.foxnews.com/politics/enormous-mistake-business-leaders-residents-fed-blue-state-drug-laws-issue-2024-ultimatum>; Kellen Rusoniello et al., *Decriminalization of Drug Possession in Oregon: Analysis and Early Lessons*, 9 DRUG SCI., POL'Y & L. 1 (2023); Kevin Sabet, *Oregon Makes a U-Turn on Drug Decriminalization*, WALL ST. J., Mar. 6, 2024, <https://www.wsj.com/articles/oregon-makes-a-u-turn-on-drug-decriminalization-cede4a40>; Eric Westervelt, *Oregon's Pioneering Drug Decriminalization Experiment Is Now Facing the Hard Test*, NPR, June 18, 2021.
23. "The legalization movement has celebrated its victories as though they were triumphs for civil rights. Regardless of whether legalization is good or bad policy, it is certainly not a cause for jubilation. Borrowing again from Mark Kleiman, choosing legalization over prohibition or vice versa just trades one set of problems for another. Choosing prohibition means choosing black markets; choosing legalization means choosing greater drug dependence. It is trite but true: A country can choose what kind of drug problem it wants, but it cannot choose not to have a drug problem." Jonathan P. Caulkins, *The Real Dangers of Marijuana*, NAT'L AFFS. 21, 33–34 (Winter 2016).
 24. See, e.g., JAMES B. BAKALAR & LESTER GRINSPON, DRUG CONTROL IN A FREE SOCIETY 1 (1985) (quoting Isaiah Berlin, *Two Concepts of Liberty* (1959), in ISIAH BERLIN, FOUR ESSAYS ON LIBERTY 50 (1969)).
 25. See, e.g., JACOB SULLUM, SAYING YES: IN DEFENSE OF DRUG USE (2003).
 26. THOMAS HOBBS, LEVIATHAN ch. 13, at 186 (Penguin Classics 2017) (1651).
 27. Rolling Stones, *Gimmie Shelter*, on *Rolling Stones, Let It Bleed* (London Records 1969).
 28. See GABOR MATE, IN THE REALM OF HUNGRY GHOSTS (2011).
 29. Nora D. Volkow, *Marijuana and Medicine: The Need for a Science-Based Approach*, in 2 PROFESSIONAL PERSPECTIVES ON ADDICTION MEDICINE 23, 28 (Mark Sanford & Donald Avoy eds., 2009); see, e.g., NAT'L INST. ON DRUG ABUSE, RESEARCH REPORT: CANNABIS (MARIJUANA) RESEARCH REPORT 15 (Rev. July 2020); Shea-Lee Godin & Sherif Shehata, *Adolescent Cannabis Use and Later Development of Schizophrenia: An Updated Systematic Review of Longitudinal Studies*, 78 J. CLINICAL PSYCHOLOGY 1331 (2018); Abra M. Jeffers et al., *Association of Cannabis Use with Cardiovascular Outcomes Among US Adults*, J. AM. HEART ASS'N (2024); Amitoj Singh et al., *Cardiovascular Complications of Marijuana and Related Substances: A Review*, 7 CARDIO. THER. 45 (2018).
 30. THC is the acronym for delta9-tetrahydrocannabinol, the principal psychoactive ingredient in cannabis. In 1967, cannabis had a 1 percent–3 percent THC content. Today, the content can approximate 100 percent. That enhancement is responsible for some of its current harms. Larkin, *Cannabis Potency*, *supra* note 1, at 7–10.
 31. Cannabis adversely affects the wiring of the adolescent brain, which remains in a labile state until one's early or mid-twenties. Paul J. Larkin, Jr., *Marijuana Edibles and "Gummy Bears"*, 66 BUFF. L. REV. 313, 315–16, 322–39 (2018).
 32. Larkin, *Cannabis and Pregnancy*, *supra* note 1, at 2–10.
 33. See *supra* note 32.
 34. See, e.g., Paul J. Larkin, Jr., *Reflexive Federalism*, 44 HARV. J.L. & PUB. POL'Y 523, 554–60 (2021); Paul J. Larkin, Jr., *Reconsidering Federal Marijuana Regulation*, 18 OHIO ST. J. CRIM. L. 99, 135–41 (2020).
 35. Robert L. DuPont et al., *Marijuana-Impaired Driving: A Path Through the Controversies*, in Sabet & Winters, *supra* note 2, at 186; see also, e.g., MARCELLINE BURNS, MEDICAL-LEGAL ASPECTS OF DRUGS 153 (2003) ("Without exception, all illicit drugs have the potential to impair the cognitive and behavioral skills that allow a person to engage in normal daily activities, such as driving and working.").

36. In a 2009 report, the National Highway Traffic Safety Administration (NHTSA) found that 11 percent of daytime drivers and 14.4 percent of nighttime drivers tested positive for drug use, principally cannabis; that nearly 22,000 drivers had been killed in vehicle accidents that year; and that nearly 4,000 of those drivers tested positive for some drug. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., DEP'T OF TRANSP., DOT HS 811 415, DRUG INVOLVEMENT OF FATALY INJURED DRIVERS 1 (2010). NHTSA also found that approximately 20,000 drivers nationwide involved in fatal crashes tested positive for cannabinoids from 1992 to 2009. Scott V. Masten & Gloriam Vanine Guenzburger, *Changes in Driver Cannabinoid Prevalence in 12 U.S. States After Implementing Medical Marijuana Laws*, 50 J. SAFETY RES. 35 (2014). In 2010, Gil Kerlikowski, then Director of the White House Office of National Drug Control Policy, concluded that drug-impaired driving poses as great a threat to public safety as alcohol-impaired driving and “demands a response on a level equivalent to the highly successful effort to prevent drunk driving.” OFF. OF NAT'L DRUG CONTROL POLICY, NATIONAL DRUG CONTROL STRATEGY, 2010, at 23 (July 2010).
37. *The Problem of Driving Under the Influence of Drugs: The Views of Four Former “Drug Czars,”* HERITAGE FOUND., Event (Feb. 24, 2021), <https://www.heritage.org/public-health/event/virtual-event-the-problem-driving-under-the-influence-drugs-the-views-four> (last visited Apr. 20, 2024).
38. The proof of those propositions is overwhelming. See, e.g., NAT'L INST. ON DRUG ABUSE, CANNABIS (MARIJUANA) RESEARCH REPORT 7–8 (2020); NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., MARIJUANA, ALCOHOL, AND ACTUAL DRIVING PERFORMANCE (1999); EUROPEAN MONITORING CNTR. FOR DRUGS AND DRUG ADDICTION, DRUGS USE, IMPAIRED DRIVING AND TRAFFIC ACCIDENTS 36 (2d ed. 2014); AM. AUTO. ASS'N FOUND. FOR TRAFFIC SAFETY, LEVERAGING AND ENHANCING ALCOHOL COUNTERMEASURES TO REDUCE DRUGGED DRIVING—ENFORCEMENT, LEGAL, AND POLICY-BASED APPROACHES (2018); AM. AUTO. ASS'N FOUND. FOR TRAFFIC SAFETY, LEVERAGING AND ENHANCING ALCOHOL COUNTERMEASURES TO REDUCE DRUGGED DRIVING—BEHAVIORAL AND EDUCATIONAL INTERVENTIONS (2018); GOVERNORS HIGHWAY SAFETY ASS'N, DRUG-IMPAIRED DRIVING: A GUIDE FOR STATES (2017); RYAN C. SMITH ET AL., AM. AUTO. ASS'N FOUND. FOR TRAFFIC SAFETY, COUNTERMEASURES AGAINST PRESCRIPTION AND OVER-THE-COUNTER DRUG-IMPAIRED DRIVING (2018); NAT'L ACAD. SCIS., ENG'G & MED., THE HEALTH EFFECTS OF CANNABIS AND CANNABINOIDS 227–30 (2017); ED WOOD, WEAKEST IN THE NATION (2018); Rebecca L. Hartman & Marilyn A. Huestis, *Cannabis Effects on Driving Skills*, 59 CLIN. CHEMISTRY 478 (2013); Paul J. Larkin, Jr., *Medical or Recreational Marijuana and Drugged Driving*, 52 AM. CRIM. L. REV. 453 (2015); Johannes E. Ramaekers, *Driving Under the Influence of Cannabis: An Increasing Public Health Concern*, 319 JAMA 1433 (2018).
39. See *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) (approving “the general principle of evidence law that the factfinder is entitled to consider a party’s dishonesty about a material fact as ‘affirmative evidence of guilt.’”) (quoting *Wright v. West*, 505 U.S. 277, 296 (1992) (plurality opinion)); see also, e.g., *Wilson v. United States*, 162 U.S. 613, 621 (1896); 2 JOHN HENRY WIGMORE, EVIDENCE § 278(2), at 133 (J. Chadbourn rev. 1979).