

**COERCED ABSTINENCE:  
A NEO-PATERNALIST DRUG POLICY INITIATIVE**

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### **Overview**

The criminal law treats drunkenness in bizarre and inconsistent ways: as an aggravation to a charge of reckless driving, but potentially a mitigation to a charge of assault. That inconsistency illustrates some of the conceptual and practical difficulties of adapting essentially liberal institutions to situations that do not conform to the axioms of liberal thought. In particular, liberalism finds it hard to deal with the behavior, and to serve the needs, of those who do not conform to the axioms of individually self-interested rationality.

Intoxicated persons are more in need of paternalistic care than we assume healthy adults to be; it is as if intoxication temporarily transformed adults back into children, while leaving them with the physical and social capacities, and the legal independence, of adults. Liberal institutions are ill-fitted to deal with this fact. Addiction challenges the assumption of self-command, and the institutions built around it, in different but no less profound ways.

It should, then, come as no surprise that otherwise liberal societies and polities restrict the distribution and consumption of intoxicating and potentially addictive chemicals in ways that go beyond the simple protection of third parties. The liberal regime assumes that healthy adults are capable of taking care of themselves and that they are willing, under appropriate inducements, to respect the interests of others. Where those assumptions diverge sharply from reality, action should reflect different assumptions. One argument for paternalistic intervention into intoxication is to avoid the need that would otherwise arise to build paternalism into other policies in order to provide protection for, and from, intoxicated persons.

But the proposition that paternalistic intervention is justified does not entail the proposition that it will be done well. Indeed, one would expect that a liberal society trying to act paternalistically would, like a horse trying to swim, do so rather clumsily. Nor would that expectation be disappointed. Discourse and practice with respect to drug policy are confused and disjointed. Neither the nature of the divergences between actual behavior and the rational-actor model nor the problem of how to design policies to close that gap has been accurately grasped. The resulting policies have been both less effective and more expensive – expensive not only in money but in needless suffering – than they might have been or ought to be.

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Correctional policy faces an analogous problem. Crime – at least the varieties of

crime which often lead to arrest and punishment – tends to attract those who are reckless and impulsive, rather than those who fit the model of self-interested rationality. That simple observation has strong implications for efforts aimed at both deterrence and rehabilitation, but those implications have either not been drawn or not been acted on. Moreover, the obvious opposition of interest between offenders and everyone else has been allowed to conceal from the public consciousness the common interest in improving offenders' capacities for self-command.

But it is at the junction between drug abuse and criminality – in the lives of drug-involved offenders – where the failure of policy is greatest. The relatively small number of offenders who are frequent, high-dose users of cocaine, heroin, and methamphetamine account for such a large proportion both of crime and of the money spent on illicit drugs that getting a handle on their behavior is inseparable from getting a handle on street crime and the drug markets. And yet current policies for dealing with them ignore everything we know both about addiction and about deterrence.

This essay is about how to get paternalism right in managing drug-involved offenders. It will develop the following propositions:

1. The assumption that healthy adults are capable of acting rationally in their own interests matches reality only imperfectly.
2. The divergences between actual and normatively rational behavior are greater than usual with respect to the use of intoxicating and potentially addictive chemicals.
3. Those divergences are greater among the population of frequently-arrested offenders than in the population at large.
4. The overlap between the offender population and the population of heavy users of expensive drugs is very substantial.
5. The three million or so persons who are both heavy users of expensive drugs and involved with the criminal justice system account for large proportions of both offending and consumption of expensive drugs.
6. Continued use of expensive drugs among offenders is linked with continued high rates of criminal activity.
7. Illicit street markets cause enormous social damage. Reducing demand in those markets would reduce that damage.
8. For the reckless and impulsive, deferred and low-probability threats of severe punishment are less effective than immediate and high-probability threats of mild punishment.
9. Current practices for dealing with offenders over-rely on severity at the sacrifice of certainty and immediacy.

10. The probation and parole systems are the key to managing the population of drug-using offenders. Abstinence from drug use ought to be made a condition of continued liberty, and that condition ought to be enforced with frequent drug tests and predictable sanctions.

11. The benefits of mounting such a program would vastly outstrip its costs, and the benefits of any other program that could be mounted against drugs and crime using comparable resources.

12. The administrative and political barriers to doing so are formidable but not insurmountable.

### **Background:**

#### **The Phenomenology and Politics of the Drug Problem**

Drug-taking can create problems for those who engage in it and for those around them. It can damage health; it can lead to irresponsible, reckless, criminal, or violent behavior; and it can create the self-sustaining misery of addiction.

Drug control measures create problems of their own. Any non-trivial regulation will generate attempts at evasion. If those attempts are not punished, the regulation becomes no more than a suggestion. If they are punished, then the punishments themselves create suffering, and violence may be added to evasion as law-breakers struggle to avoid capture. In either case, the existence of a set of commercial relations not governed by law may lead to intra-market violence, with predictable spillovers onto non-participants. Moreover, the higher prices created by regulation (or, in the extreme, prohibition) may generate crime to pay for expensive habits.

If we weigh up these problems as they appear under contemporary US conditions, we see the two licit drugs, alcohol and nicotine, accounting for much more of the damage than one would guess from reading political discussions of the “drug problem.” With respect to health damage, between them they constitute the vast bulk of the story, with an estimated combined total of approximately 500,000 deaths per year (400,000 for nicotine, 100,000 for alcohol)<sup>1</sup>. No comparable calculation – taking into account chronic health damage as well as acute overdose – has been done for the illicit drugs, but even a full tally would not get anywhere close to these enormous figures. Cigarette smoking is the dominant drug-related source of health damage; alcohol dominates the problems of intoxicated bad behavior and addiction. The illicit drugs come up far behind.

Still, the damage associated with illicit drugs and their control is impressive enough:

- several million dependent users<sup>2</sup>;
- an illicit industry generating tens of billions of dollars in revenue<sup>3</sup>;
- recent cocaine or heroin use by nearly half of all those arrested for serious crimes in big cities<sup>4</sup>;
- hundreds of thousands of people, many of them very young, regularly committing felony drug-selling offenses<sup>5</sup>;

- enormous (though not well-measured) amounts of violence associated with drug transactions, or at least with weapons obtained for use in, and with the proceeds of, drug-selling;
- neighborhood disruption due to the disorder and violence of open illicit markets;
- \$25 billion spent on drug law enforcement, out of a total national enforcement budget of \$110 billion<sup>6</sup>;
- 350,000 persons behind bars for drug sales or possession<sup>7</sup> out of a total national prison-plus-jail population of 1.4 million<sup>8</sup>;
- injection drug use a strong second to sex in the transmission of HIV<sup>9</sup>.

All of this damage is highly concentrated in poor, urban neighborhoods with primarily ethnic-minority populations. (Two-thirds of those admitted to state prisons for drug offenses are African-American.<sup>10</sup>)

Cocaine and heroin (and in some places methamphetamine) are the illicit drugs most closely associated both with crime by users and with violence and disorder surrounding drug dealing. Persons dependent on cocaine and heroin dominate the publicly-paid treatment systems. Yet judging the nature of the drug problem in the United States by a content analysis of the political debate, one might easily conclude that marijuana use among teenagers was the primary problem. Making marijuana control the centerpiece of national drug policy is rarely argued for in so many words, but it is implicit in the use of survey data on the prevalence of illicit drug use, especially among teenagers, as the primary problem measure. Since marijuana is by far the most widely used of the illicit drugs, focusing on the total number of users of any illicit drug means, in practice, focusing on marijuana.

This disconnection between phenomenon and discourse is no mere accident. The politics of the “drug problem” is dominated by the fears of middle-class parents that their children will fall victim to “drugs” (not, for this purpose, defined to include alcohol or nicotine, the two most widely abused drugs among teenagers as among adults). The illicit drug most widely used, and abused, among teenagers is marijuana, and it is therefore marijuana that parents fear. Their fear is not to be mocked. The situation in 1978, when more than one high school senior in ten reported using marijuana twenty or more times per month<sup>11</sup>, was not a tolerable one for them, or for those trying to raise them, teach them, or learn with them. Despite the absence of a marked physical withdrawal syndrome, persistent heavy use of cannabis can be a hard habit to shake, and while it rarely produces the concentrated misery of heroin or cocaine addiction or of alcoholism, it is more than bad enough to worry about.

But for a variety of pharmacological and sociological reasons, marijuana forms only a small part of the crime/violence/disorder/prison “drug problem.” That problem centers around cocaine, heroin, and methamphetamine, and it is to that problem that this paper addresses itself.

## **The Conceptual Basis of Paternalism**

All paternalist interventions rest on a common central insight: that there are large and systematic divergences between the actual behavior of some human beings, or of human beings generally under some circumstances, and the canons of rationally self-interested action as micro-economists understand them.

The assumption that healthy adults are, always or almost always, capable stewards of their own well-being, or at least will achieve better results on their own than could be produced by any practicable system of outside interference, plays a central role in American social and political thought. Those who are called "conservative" tend to embrace it with special vigor in the economic realm, while those who are called "liberal" tend to insist on it more particularly as it applies to expression, sexual conduct, and family structure.<sup>12</sup>

Wherever applied, the assumption that individuals have sufficient wit and self-command to control their own actions in their own interests has powerful implications. It points out freedom and facilitation, rather than authoritative restriction, as the sole means of helping individuals. A rationally self-interested individual, if given a set of options from which to choose, is capable of choosing the best. Adding elements to that "choice set" will at worst leave that person's well-being unchanged – this will be the case when none of the new options is as good as the one that would have been selected from the shorter list – and will improve well-being whenever one of the new options is chosen instead. By the same token, subtracting elements from the choice set will at best leave well-being (what the economists call "welfare") unchanged, and any change will be for the worse. Replacing any element of the set by a more-preferred one, for example by reducing the cost associated with some benefit, in effect expands the range of choice, and thus, on the rationalist assumption, can only do good; replacement with a less-preferred element, for example by increasing cost, can only do harm.

This is the argument that underlies John Stuart Mill's case for perfect liberty as applied to "self-regarding actions": if it is the nature of human beings to make good choices for themselves, then there is no gain to be had in regulating their actions except where those actions affect others.<sup>13</sup> Forbidding someone to do something he would like to do, or imposing a cost on doing so, cannot make that person better off, and should only, on this argument, be engaged in when it can make someone else better off to a degree that more than compensates both for the loss to the person restricted and the social overhead costs of making and enforcing such restrictions.

One familiar challenge to Mill lies in the definition of the domain of self-regarding actions. Families, governments, charities, and insurance companies all tend to spread risk by calling on those with more resources and lesser needs to help those with greater needs and fewer resources. Within that web of risk- and resource-sharing, a wide range of choices that Mill would think of as self-regarding, such as the decision to get up in the morning and go to work, come to have important impacts on the well-being of others.

Fashion effects – instances where people desire, not to satisfy their own tastes, but to be in step with conventional behavior – similarly narrow the range of activities that can properly be viewed as purely self-regarding. If we all wear shoes that hurt our feet when we walk, or fail to wear helmets to protect our heads when we bicycle, because doing otherwise would be unfashionable, rather than because we like bunions or concussions, then requiring everyone to wear helmets or sensible shoes can improve everyone's well-being.

The paternalist challenge cuts even deeper. If I am not a perfectly rational actor as regards my own interests – if, for example, I have a tendency to procrastinate or to eat too much fat – then increasing my range of options, by offering me Beef Wellington as an alternative to boiled tofu or a good mystery to read as an alternative to writing my paper for Larry Mead's book, may make me worse off by inducing me to make a choice not in my best interest. Recognizing temptation as an important feature of life will radically expand the set of possibly useful policies.

We can, imperfectly, divide the sources of less-than-rational action into two categories: cognitive and behavioral. Cognitively, when rationality demands calculation, someone who gets the calculation wrong may act in ways not conducive to his goals, whether in a paper-and-pencil exercise or in real life. But even a completely correct cognitive picture of the relationship between actions and results is not, by itself, enough to ensure rational behavior. There may also be gaps between what a person cognitively understands as rational behavior and the way that person actually behaves. Schelling has called these gaps "failures of self-command;"<sup>14</sup> Aristotle called the problem *akrasia* (literally, "weakness," but usually translated as "weakness of will").<sup>15</sup>

Casual empiricism and results from the psychology and behavioral-economics laboratories alike suggest that subtlety, delay, and uncertainty are all potential sources of divergence between rational-actor models and actual behavior.

If some commodity or service that I consume affects me in ways that are not obvious, then my behavior toward it may not take into account all of the costs it imposes. Even if I am aware, cognitively, of subtle effects, they may not be programmed into my behavioral responses, especially if there are more salient effects in the opposite direction; an activity with obvious pleasures and hidden costs may be overindulged in, even by a subject who at the cognitive level "knows better."<sup>16</sup>

Similarly, if the benefits of some activity arrive right away and the costs are delayed, there may be a mismatch between actual behavior and the behavior that a rational actor would choose, with present costs and benefits getting excessive weight compared to delayed ones.<sup>17</sup>

Consider offering a six-year-old the choice between a candy bar today and two candy bars a week from now. Then consider offering that same child the choice between a candy bar six months from now and two candy bars six months plus one week from now. In each case, the choice is the same: he can wait a week to get two candy bars rather than one.

If the choice, and the opportunity to have a candy bar right now, is immediate, the child is likely to take the smaller, quicker reward in preference to the larger, slower one. But if the choice is now but the result is deferred, the child, no longer dazzled by the prospect of immediate gratification, is likely to prefer to wait. This “preference reversal” cannot be accounted for by the standard economic theory of rationally discounting future benefits.

Learning to have the capacity to defer gratification will improve the child’s prospects in life. Assisting in the development of that capacity is a central element of the parental role. The problem of impatience and “temporal myopia” is not confined to children. Consider how your diet would change if you were to make all decisions about what to eat a day in advance, or how much effort you waste due to procrastination.

Behavior in the presence of risk presents a different set of problems. A rational person in the economic sense ought to be somewhat risk-averse; that is, unwilling to accept a gamble with an equal chance of winning or losing the same sum, if that sum is large compared to the person's total income or wealth. That follows from the capacity to budget; since a rational person will spend money or other resources first on the most pressing needs, each additional dollar spent should deliver less and less additional satisfaction. (The technical phrase is “declining marginal utility of income.”) Applied statistical decision theory provides a complete normative account of rational behavior under uncertainty.<sup>18</sup>

But actual behavior in the presence of risk turns out to match more closely an inconsistent set of axioms, known as “prospect theory.” Prospect-theoretic behavior is risk-averse in gains, but risk-loving in losses; an even chance at doubling a gain of \$100 will be rejected, but a chance to play double-or-nothing with a \$100 loss will be accepted. In effect, prospect-theoretic behavior pays more attention to the frequency of gain or loss than to the magnitude of what is gained or lost. This can lead to inconsistent choices depending on how the issue is verbally framed.<sup>19</sup>

Learning to pay attention to hidden costs and benefits, to delay gratification, and to avoid unwise gambles are all important parts of the process of growing up. The capacity to act well in such circumstances is not innate, and no one acquires the appropriate skills easily or completely. Classically, they are reckoned among the virtues. The capacity to endure present pain or danger when endurance is called for is named “courage.” The capacity to resist the lure of pleasure when accompanied by subtle costs is called “temperance.” The capacity to reckon with risk is part of “prudence.” The capacity to assimilate delayed costs or benefits into current actions is called “foresight.” Prudence and foresight together make up “wisdom.” (The fourth classical virtue after courage, temperance, and wisdom, “justice,” takes us beyond rational self-interest to consider the interests of others.)\*

In wealthy societies, divergences from individual rationality in the economic sense will

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\* Or perhaps not. Plato’s Socrates asserts that all unjust actions are contrary to self-interest, properly understood, because injustice damages the *psyche* (“soul”), and no benefit gained by injustice can be adequate to compensate for a damaged *psyche*. (See *Republic* I. 351d-354.)

tend to be more frequent and severe among the poor than among the non-poor, with causal arrows pointing both ways. In one direction, the conditions of mass poverty amid affluence are not conducive to the development or maintenance of prudence, foresight, or temperance. In particular, the lack of predictability in the relationship between actions and results tends to be highly demoralizing. (See Orwell's description of the impact of temporary poverty on the behavior of an Eton graduate in *Down and Out in Paris and London*.<sup>20</sup>) In the other causal direction, imprudence, improvidence, and intemperance all have poverty among their possible consequences. As a consequence, paternalism will have a special role in policies relating to the poor.

But given the deep roots of departures from rationality, it would be a mistake to assume that the appropriate reach of paternalism extended only to recipients of public income-support payments. There are ample examples of such deviations, and of opportunities for interventions to enhance well-being, among the non-poor as well.

To be sure, identifying behavioral divergences from individual rationality is not sufficient to establish the value of paternalist policies. Public decision-making, is fallible, as much as, or perhaps even more than, private decision-making. If I am a bad steward of my own welfare, it may be asked, then how good a steward am I, or the officials I help elect, likely to be of another's? Moreover, actually putting paternalist policies into practice involves restricting choice and imposing costs, which remain in general welfare-reducing actions. To all this must be added the costs of administration, the costs of punishing violators of paternalistically-imposed rules, and the damage done by the rule-evasion behavior of those who find their desires thwarted for (assertedly) their own good. To fully justify paternalist intervention, it will be necessary to find instances where the divergence of actual behavior from individual self-interest are large and systematic, and where the costs of intervention are smaller than the resulting gains.

One should also ask of any paternalist intervention whether it tends to ameliorate, or rather to exacerbate, the deficits in self-command that give rise to the need for such intervention in the first place. Improving someone's short-term well-being at the expense of his future capacity for self-management will usually be a bad bargain. This resembles the more familiar problem of whether formal social controls tend on balance to reinforce, or rather to displace, informal social controls.

A likely place to look for instances where paternalistic interventions will be worth their costs is at points where behavior that is likely to be sub-optimal from a personal-welfare viewpoint intersect with behavior that is likely to damage others. Criminal activity is one such intersection; the excessive consumption of intoxicating and addictive chemicals (licit or illicit) is another. Picking out these areas of behavior for special scrutiny need not rest on the assumption that all criminal behavior, or all drug-taking, is either irrational or socially damaging. It requires only that irrationality and external harm are more densely concentrated around crime and drug-taking than around, say, home repair and bowling.

Where drug-taking and criminal activity meet – in the drug consumption of those nominally under supervision by one or another element of the criminal-justice system – the case for

some sort of paternalist intervention seems especially strong. For a combination of conceptual and organizational reasons, the United States has developed a set of policies toward drug-taking by offenders that diverge dramatically from a sensible paternalist prescription. While the laws nominally require abstinence from illicit drug-taking on the part of persons under criminal-justice supervision, that requirement is enforced with infrequent tests and sporadic, but occasionally severe, sanctions. Such an enforcement strategy implicitly assumes the capacity of its subjects to make rationally self-interested choices about their drug-taking when faced with small, and temporally rather distant, probabilities of large unwanted consequences.

A sensibly paternalistic alternative would recognize that those whose drug habits have gotten them into trouble with the law are less likely than average to be able to adjust well under such randomized severity. Higher probability – ideally, the virtual certainty – of small penalties, and perhaps the promise of small rewards for continued good conduct, will be more effective in shaping behavior. The combination of high probability and low severity will also generate less total punishment, to the benefit of the user/offenders and the rest of the community alike.

The potential gains from an effective paternalist intervention to reduce the consumption of illicit drugs by persons on probation or parole are large compared to the returns available from investing comparable resources elsewhere in the criminal-justice system or elsewhere in the drug abuse control effort. Such a program would therefore repay the substantial investment in conceptual re-thinking and organizational capacity-building required to make it a reality.

### **Drug-Taking As a Special Case**

If the most appropriate targets of paternalist interventions are areas of conduct in which there are large and systematic divergences between actual behavior and rationally self-interested behavior, and in which those divergences do damage not only to the decision-makers but to others, it is natural that drugs have been singled out from among other commodities and activities as the focus of special rules. Drug-taking threatens self-control, and thus challenges the axioms of the rational-actor model, in two distinct ways: intoxication, which involves failures of self-command once under the influence, and addiction, which involves failures of self-command over drug-taking itself. Neither form of failure is inevitable, but both are more or less characteristic of many drugs and many drug-takers.

Some, though by no means all, drug-induced states cause some, but by no means all, of those subject to them to act with less regard for consequences than those same persons would act if sober. This liberation from the chains of calculated behavior may be one of the desired effects of taking a drug, as is frequently the case with alcohol. The fact that intoxication is a socially recognized phenomenon provides a layer of insulation between intoxicated behavior and personal reputation, and thus an additional source of behavioral freedom. However, unless special care is taken about times, places, and circumstances, the

results of intoxicated behavior may cause profound regret, not only for the intoxicated person but also for those around him. This effect of drug-taking has been referred to as "behavioral toxicity." Its nature and extent vary profoundly from drug to drug, from user to user, and from circumstance to circumstance, in ways only imperfectly understood.

The ordinary mechanisms of social control, formal and informal, on which any open society must rely, depend on the foresight and caution of those subject to that control: depend, that is, on their acting more or less according to the canons of rational self-interest. By making people less rational, intoxication makes them less controllable, by reducing their capacity to respond to the promises and threats embodied in the institutions of social control. (This effect helps explain why the drunken-driving laws are so hard to enforce: the very drunkenness that creates the prohibition on driving reduces the "deterability" of the potential violator.)

Addiction, like intoxication, represents a departure from the self-interested self-command ascribed to healthy adults by standard economic theory. While Becker and Murphy have shown that a rational person might choose to consume a dependency-inducing drug, and might become dependent on it,<sup>21</sup> their account of "rational addiction" bears only a limited resemblance to addiction as it is actually encountered. While there are descriptions of long-term heroin users deliberately going through withdrawal in order to run themselves back up the curve of dependency, so as to have the pleasure of running back down it again,<sup>22</sup> the typical account of a relapse to alcohol or smoking or cocaine is of a greatly feared and bitterly regretted failure of self-command, not of a voluntary, still less a rational, choice.

Thus the use of intoxicating and potentially addictive chemicals is a natural target of policies designed to protect individuals from themselves, and, in fact, drug-taking has long been the subject of paternalistic intervention. Restrictions on the availability of psychoactive substances, justified in part by the damage they do those who (to all appearances voluntarily) consume them, have been around in one form or another for many years, though the substances that attract concern have varied over time. Mill's *On Liberty* – the first comprehensive attack on paternalism – was written largely in response to the enactment in the State of Maine of an alcohol-prohibition statute, which in retrospect appears as the laboratory-scale version of the Volstead Act.

## **Paternalism and its Discontents: Drug Laws as an Example**

The existence of commodities and behaviors that challenge, both theoretically and practically, the model of rational self-control in the service of individual self-interest, poses a problem of policy design. What is needed is a politically and organizationally stable array of feasible laws, institutions, and programs that protect actual and potential consumers of such commodities from the harm they would otherwise do themselves, improve (or at least not further impair) their capacity to regulate their own behavior in the future, and protect others from the collateral damage. All of this must be done at acceptable cost and with tolerable levels of unwanted side-effects. The problem thus stated is a formidable one, but by definition it must have some best solution, or set of equally good solutions, in any given social context. That is not, however, the face the “drug problem” presents to the political process, and the actuality of drug policy demonstrates the dangers of paternalist interventions.

First, paternalistic policies can be expensive, because restricting powerful impulses will create powerful incentives for evasion. Drug offenses (not “drug-related” offenses such as theft by users or violence among dealers, but violations of the laws against manufacture, sale, and possession) now fill about one-quarter of America's prison cells.<sup>23</sup> This has two classes of undesirable effects.

First, and most obviously, it creates enormous suffering for those imprisoned and their intimates, and enormous social dislocation in the neighborhoods from which they are mostly drawn. While the canons of rational behavior as economists understand them would suggest that drug dealers as a class must come out ahead as a result of the drug laws (else rational persons would not enter the game), there is reason to suspect that dealing is often an irrational choice, and that the net effect of the flashy, risky illicit jobs created by the dealing system is to reduce the well-being of those attracted to them.<sup>24</sup>

Only a stubborn insistence that all voluntary behavior must be the rational product of some set of preferences would generate the oft-heard assertion that retail crack dealing is a rational choice for young residents of poor urban neighborhoods. The cumulative probabilities of death, serious injury, addiction, and imprisonment are absurdly disproportionate to actual dealing wages.<sup>25</sup> Moreover, if dealers were rational, they would have responded to the vastly increased enforcement severity of the past decade by cutting back sharply on their willingness to supply drug-dealing labor at the old, rather modest, wages, thus forcing wages (and therefore prices) higher to compensate for the increased risk. The failure of dealing wages to rise, as evidenced by the failure of retail margins in the crack trade to rise, is therefore inconsistent with economic rationality on the part of the (predominantly youthful) retail dealers.<sup>26</sup>

Retail drug-dealing is precisely the sort of activity that produces less-than-rational behavior, because the deferred and probabilistic nature of the punishments for drug dealing weakens their effects on behavior when compared with the immediate and certain rewards.

The extensive use of prison cells to punish dealers also reduces the supply of cells

available for crimes against persons and property. While many imprisoned drug dealers also commit non-drug crimes, on average they do so at lower rates than those imprisoned for non-drug offenses.

Second, paternalistic interventions can increase as well as limit damage, to users and to others. In general, whatever forbidden behavior is not prevented will become more individually and socially damaging than it would have been if permitted. The much higher prices in illicit markets tend to impoverish users, and create incentives for them to commit property crimes or engage in commercial sex or drug-selling to maintain their habits. Dose for dose, an illicit drug is likely to be more toxic because made to less exacting standards, unpredictably adulterated, and uncertain as to its dosage: going blind from bathtub gin came and went with Prohibition. The illicit drug trade is marked by violence and corruption largely absent from the package-goods trade. The short-term benefits of the illicit dealing also attract adolescents, especially from poor urban neighborhoods, into criminal activity and away from school or licit work, and gives them both motive and means to acquire and carry high-lethality weapons.

Insofar as one technique of paternalistic intervention is “preventive education,” the process of research and policy debate can become entangled in the prevention campaign. In order to shape the behavior of schoolchildren, prevention programs tend to simplify, overdramatize, and sometimes frankly falsify the facts about drugs, drug-taking, and drug users. Those accounts enter the journalistic and political idea-stream, and become the part of the basis on which legislators and officials make laws and policies. Critics of current policies are urged to censor themselves for fear of damaging the prevention effort. Once that point is reached, the political logic of vice regulation can easily lead to the most extreme and perverse policies – such as the suppression of research into the therapeutic uses of banned drugs – which cannot be opposed without risking the label “legalizer.”

Finally, paternalist restrictions can create a relationship of hostility between the public authorities and those whom the law was intended to protect. Their refusal to be protected, and their participation in the system of lawbreaking that is the illicit market, converts them into public enemies. Messages from the prevention campaign sometimes reinforce that identification. Instead of trying to protect users from their own folly, the public aim becomes damaging them, as a punishment and a warning to others. This effect undercuts paternalism at its foundations, by eating away at the benevolent intentions that are supposed to undergird and justify the coercive interventions.

So, for example, the anonymous testing services that used to give illicit-drug buyers some protection against adulteration or mislabeling have been regulated out of business lest the reduced risk encourage drug use. Similarly, the provision of sterile needles to heroin users is opposed on the grounds that it would condone and thus encourage injection drug use. As a result, the avoidable risks of poisoning and infection are added to the fundamental risks of using various mind-altering drugs.\* Drug treatment, which, despite its modest capacity to

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\* Whether, to what extent, under what circumstances, and at what costs needle exchange programs would reduce the rates of infection, and how they compare with alternative approaches, remains an open question.

produce lasting “cures” (defined popularly and politically in terms of immediate and lasting abstinence) is clearly cost-justified by its contribution to crime and disease prevention while the treatment is going on and thereafter, remains politically unpopular and badly underfunded because it appears as a measure of assistance to those who willfully damage themselves and others.

In this atmosphere of hostility, the potentially valuable role of arrest and legal pressure in moving people away from addiction is perverted by making possession for personal use a crime punishable by prison. In California, for example, punching someone in the face or throwing a rock through his window is a misdemeanor, while possession -- not sale, merely possession -- of \$5 worth of cocaine is not only a felony, but a “serious felony,” and thus a potential “third strike” subjecting the offender to a mandatory 25 years to life in prison. (Drug possession -- specifically, possession of marijuana -- accounts for more “third strike” sentences in California than all other crimes combined.)

Against the background assumption that healthy adults are by nature good stewards of their own well-being, the problem of drug addiction seems almost inexplicable. It is tempting to treat either the drugs, or the addicts, or both, as qualitatively special cases. The alternative would be to acknowledge that all humans deviate, more or less, from full rationality, and that all commodities are, more or less, potential objects of abuse, and that we need to fit policies to persons and circumstances; it is much more comfortable to assume instead that drugs are discontinuously different from everything else, and to forget everything else we know in making policies toward them.

Correctly understanding the theoretical underpinnings of paternalist interventions will allow us to understand and justify the regulation, and even the prohibition, of commodities and activities which are sources of harmless pleasure to some, or even most, of those who engage in them. This then allows us to acknowledge that the practice of taking mood-altering chemicals is not evil *per se*, but merely risky in a specific fashion, and that our policies ought to be designed to manage those risks, whether by reducing the risk of any given incident or use career or by reducing the number of such incidents or careers. This is not a less value-driven approach to policy than the one underlying the quest for a “drug-free America,” but it might well be less divisive and more capable of adapting itself to actual circumstances.

## **Offenders as a Special Case**

For both practical and principled reasons, paternalistic interventions are easier to justify

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(See Mark A.R. Kleiman and Jenny W. Rudolph, “Assessing Needle Exchange: The Limits of Benefit Cost Analysis”, paper commissioned by the National Research Council Panel on Needle Exchange and Bleach Distribution, Working Paper 04-03-94, Program in Criminal Justice Policy and Management, John F. Kennedy School of Government, Harvard University, 1994). But the political opposition to such programs runs far deeper than the empirical and operational issues.

when applied to those convicted of breaking the laws than when applied to ordinary adults.

Paternalistic policies can be thought of as “social prostheses” for individuals deficient in providence, prudence, and temperance.\* Those deficiencies are more common among convicted law-breakers, and especially among recidivists, than they are in the general population,<sup>27</sup> if only because most law-breaking has immediate and high-probability benefits accompanied by larger, but deferred and lower-probability, costs. “The wages of sin,” it has been said, “are usually below the legal minimum.” Therefore the average prisoner, parolee, or probationer will be less capable of minding his own business successfully than the average ordinary citizen.

Moreover, since repeat offenders impose costs on their victims, and on those who incur expense or forgo opportunity in order to avoid victimization, their failures of self-command a social, rather than a merely personal, problem. The public costs of paternalistic intervention are easily justified if it has as one of its side-effects reduced criminal activity, and therefore reduced need for imprisonment.

At the level of principle, limiting the choices of those who have transgressed against the rights of others seems much less in conflict with the norms of liberal society than limiting the choices of those who have not done so. Advocates of paternalistic interventions cannot deny that such policies limit (at least *prima facie* and in the short run) the freedom of those subjected to them, and that inevitably some of those whose freedom is limited will wind up worse off, rather than better off, as a result of the intervention. (This is emphatically true if we use the values of the subjects, rather than those of the policy-makers, as the basis for evaluating “better off” and “worse off.”) That puts a heavy onus of moral justification on the advocates of any given paternalistic policy.

But some loss of liberty is incident to virtually any punishment, and loss of liberty seems to be an apposite response to the abuse of liberty that constitutes the original offense. The long-term interest of the offender in becoming a better steward of his own well-being coincides with the common interest of the offender and his neighbors in returning him to compliance with the laws, even against the offender’s immediate will and preferences. All these reasons suggest that punishment should be shaped, to the extent possible technically within the bounds set by proportionality, to serve those paternalist and mixed-paternalist goals: should be shaped, that is, to the end of rehabilitation.

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\* The phrase is Steven Hyman’s.

## Drug-involved Offenders

The two special cases discussed above unite when we consider drug use by convicted offenders. The special characteristics of drug-taking suggest that there will be more call for paternalistic intervention in that realm of behavior than in most others; the special characteristics of offenders make them especially appropriate targets for such interventions. Since all of these matters involve degree rather than kind, and probabilities rather than certainties, it will not be the case that all drug-taking by all offenders requires, or repays, paternalistic intervention, but our attention is naturally drawn to what might be done around offender drug-taking for the benefit of offenders and the rest of us.

Much has been made of the contribution of drug-taking, and especially of illicit drug-taking, to criminality: perhaps too much. If, as argued above, repeatedly committing crimes and losing control of one's drug-taking reflect similar failures of self-command, it is not surprising that there is a more-than-random overlap between the population of chronic high-dose drug-takers and the population of repeat offenders. Moreover, the artificially high prices created by prohibition and enforcement guarantee that, in poor neighborhoods, only those with illicit sources of income have the wherewithal to use substantial quantities of heroin and cocaine. Biographical evidence suggests that the arrow of causation points at least as much from criminal activity to hard drugs as it does from hard drugs to criminal activity: most heroin-using criminals started to steal before they started to use heroin. Thus the observation that 50% or more of felony arrestees in big cities test positive for cocaine<sup>28</sup> does not imply that eliminating cocaine-taking would eliminate 50% of the crimes, any more than the observation that many lawyer/lobbyists drive Mercedes-Benzes implies that outlawing the importation of luxury automobiles would reduce influence-peddling.

Nonetheless, it remains true that continued use of expensive drugs by those who pay for their habits from the proceeds of their crimes virtually guarantees continued criminal activity. Among offenders, the use of expensive drugs predicts both high-rate offending and persistence in crime. Therefore any policy to deal with hard-core offenders needs to address their substance abuse problems.

Moreover, offenders make an enormous financial contribution to the illicit drug-dealing industries, with all of their undesirable side-effects: violence, disorder, corruption, enforcement expense, imprisonment, and the diversion of adolescents in poor urban neighborhoods away from school and licit work and toward drug dealing. The numbers are rather startling.

About four-fifths of the cocaine and heroin sold is consumed by heavy, rather than casual, users. (The precise proportion depends, of course, on the definition of the term "heavy," but all of the plausible definitions have to do with people who spend more than \$10,000 per year on their chosen drugs; for cocaine, this group accounts for somewhere between one-fifth and one-quarter of all the "current" [past-month] users.<sup>29</sup>) This highly-skewed distribution of consumption volumes accords with the general heuristic principle known as Pareto's Law,"

(which holds that 80% of the volume of any activity is accounted for by 20% of the participants) and with what is known about the distribution of alcohol consumption. It is also supported by a comparison of consumption-based and enforcement-based estimates of cocaine volumes: a projection of cocaine users' reports on how much they consume from the National Household Survey on Drug Abuse accounts for only about 30 metric tons of cocaine a year<sup>30</sup>, while enforcement data suggest total consumption of about 300 metric tons.<sup>31</sup> That gap implies the existence of an unmeasured hard core which does the bulk of the consumption. In any case, no plausible definition of "casual" use, multiplied by the survey-estimated number of users, could account for any substantial proportion of the \$30 billion estimated annual cocaine market.<sup>32</sup>

Statistics from the Drug Abuse Forecasting (DUF) system, soon to be renamed the Arrestee Drug Abuse Monitoring (ADAM) system, suggest that the "hidden" population of heavy users consists largely of frequent offenders.<sup>33</sup> While not all of those who are arrested and who test positive for cocaine are heavy users, the short (48- to 72-hour) "detection window" for the urine monitoring of cocaine use means that heavy users are likely to account for most of the positive post-arrest tests. By one calculation, about 1.7 million different heavy cocaine users are arrested for felonies in the course of any given year, or about three-quarters of the estimated 2.2 million total heavy users.<sup>34</sup> When not in prison or jail, these user/offenders tend to be on probation or parole.

If heavy users account for 80% of the cocaine, and if three-quarters of them are in the criminal-justice population, then 60% of the total cocaine is sold to persons under (nominal) criminal-justice supervision. Therefore any short- to medium-term effort aimed at reducing demand for cocaine must focus on this group, on the principle that if you're going duck hunting you have to go where the ducks are.

### **Current Policies for Dealing with Addict/Offenders**

Alas, neither current drug policies nor current correctional policies offer any real hope of substantially reducing drug consumption by user/offenders. The drug-policy triad of prevention-enforcement-treatment is largely irrelevant. Let's take them in order.

First, prevention. Not only is it obviously futile to prevent what has already occurred, there is no evidence that either school-based or media-based drug-prevention messages have much to say to those who are likely to develop into drug-involved offenders in the future, as opposed to the middle-class kids whose parents' concerns dominate the political side of drug policy. (A focus on preventing drug *dealing*, using some mix of messages to change attitudes and other policies to shrink dealing opportunities, might be more relevant, but that idea is nowhere near the policy agenda.)<sup>35</sup>

Second, enforcement. By making drugs more expensive and harder to obtain, enforcement can reduce both consumption by current users and the initiation rate. Compared to the hypothetical baselines of either legalization or zero enforcement, prohibition and enforcement have certainly been successful: illicit-market cocaine costs twenty times the price of the licit pharmaceutical product, and much of the population has no easy access to the drug. But the capacity of more enforcement to drive prices higher, or even to prevent continued price declines, is very limited, as the drug law enforcement explosion of the past fifteen years demonstrates. Of all users, the hard-core user/offenders are least likely to find themselves unable to acquire supplies.

Third, treatment. A wide variety of “modalities” has been shown to be effective in reducing drug consumption and criminal activity while the treatment lasts, seemingly regardless of whether entry into treatment is voluntary or coerced.<sup>36</sup> But even if there were sufficient treatment slots in programs appropriate to the criminal-justice population, and even if treatment providers were motivated to serve user/offenders rather than other, less refractory, clients, there would remain the problem of recruitment and retention. While some user/offenders want to quit, and even want to quit enough to go through the discomforts of the treatment process, many prefer, or act as if they preferred, cocaine or heroin, as long as they can get it.

In the abstract, there is a good case for expanding treatment capacity, focusing treatment on the user/offender population whose continued drug use imposes such high costs, and using the courts, prisons, and community corrections institutions to force user/offenders to enter, remain in, and comply with treatment. Adding drug treatment to incarceration makes sense, and good in-prison treatment with good post-release follow-up has been shown to reduce recidivism by about one-fifth,<sup>37</sup> thus more than paying for itself in budget terms alone.

But the unpopularity of user/offenders makes the funding problems difficult if not insoluble; the capacity and willingness of treatment providers to address the needs of this population remain unclear; and the administrative problems of enforcing treatment attendance and compliance through the criminal-justice system are daunting. Starting from the current political situation and the current capacities and practices of the treatment system and the criminal-justice system, it would be fatuous to expect expanded treatment availability to generate large changes in overall drug demand over the next several years.

So much for the repertoire of standard drug policies.

Turning to corrections policies, we see a picture not much brighter. The routine functioning of the of the courts and corrections system does very little to address the substance abuse of those assigned to it, and much of that little is wrong.

Nominally, those on probation or parole are required to abstain from illegal activity, including drug possession, as a condition of their continued liberty. Almost all states give probation and parole officials the authority to administer drug tests, and a “dirty” (positive) test constitutes a violation of conditional release and thus grounds for sanctions, including revocation of conditional-release status and thus incarceration or re-incarceration, for a

period up to the original nominal sentence.

In practice, however, most parole and (especially) probation offices are under-budgeted and overwhelmed by their caseloads; a big-city probation officer may be “managing” 150 offenders at any one time.<sup>38</sup> Funds for testing are scarce, and facilities for testing, including both equipment and staff to observe the specimen collection, even more so. If the specimens are sent out for analysis, turnaround time is measured in days. As a result, even special, “intensive supervision” probation efforts rarely test more than once a month<sup>39</sup>, and routine probation tests much less frequently than that. Thus a probationer on intensive supervision who uses cocaine or heroin has less than one chance in ten of being detected on any given occasion of use. (Perversely, marijuana is detectable for up to a month, making it the most likely to be detected.)

The result is widespread use, and therefore high rates of detection even with infrequent testing. That leaves the community-corrections system in a bind. In most states, probation and parole officers have no individual power to sanction: they can only refer their wayward “clients” back to the parole board (for parolees) or the court (for probationers) with a recommendation that conditional-release status be revoked and the offender incarcerated or re-incarcerated. For probationers, the revocation hearing is a full adversarial proceeding; parole revocation is often simpler and usually swifter, but in any case there is a substantial paperwork burden. If the judge or parole board takes any action at all against the offender (by no means assured given the prison-crowding problem) it is likely to be severe: a few months behind bars is typical, and offenders have been sent back to finish multi-year sentences for a single positive marijuana test.

As a result, there are strong incentives, especially in the probation system, not to take every positive test back to the judge. Probationers may be counseled, warned, or referred to treatment providers several times before being (in the perhaps unintentionally graphic jargon term) “violated.” It is hard to fault probation officers for attempting to “jawbone” their charges out of drug use rather than proceeding immediately to drastic measures. But the resulting system could hardly be more perverse in its effects.

An offender who has a strong craving for cocaine or heroin is put in a situation where the probability of detection conditional on one use is rather small, and the probability of punishment conditional on detection is larger, but still unknown and far less than certainty. For a hypothetical rational actor, the cumulative probability of eventually going to, or back to, prison for a period of months would be an ample deterrent: the “expected value” of the punishment is surely greater than the user would willingly pay for the pleasure of a single evening with his favorite drug, and the randomness of the punishment would increase its disutility for anyone appropriately risk-averse. That is to say, the current system would be adequate – though still not optimal – to deter drug use by the sort of people who make and administer the laws.

Those who run afoul of the laws tend to behave differently. Crack-addicted burglars are much less likely to make careful comparisons between current benefits and anticipated future costs. Otherwise they would be neither crack-addicted nor burglars, since neither crack-

smoking nor burglary is a positive-expected-utility activity on any reasonable estimate of values and probabilities. The key to fixing the situation is to adapt the penalty structure to the decision-making styles of the people whose behavior one is trying to influence. That means swift and certain, though relatively mild, punishment rather than randomized Draconianism.

## **Diversion and Drug Courts**

Drug diversion and drug courts are the two major categories of special programs that attempt to use the authority of the criminal justice system to reduce drug-taking by offenders. Each is useful, but limited in its impact.

Drug diversion involves offering a defendant the option of a deferred, suspended, or probationary sentence in lieu of possible incarceration on the condition of receiving drug substance abuse treatment. Diversion programs vary enormously. Some are formal treatment plans administered under the rubric of TASC (an acronym which once stood for “Treatment Alternatives to Street Crime” but now represents “Treatment Alternatives for Special Clients”) a network of specialists who find treatment placements for court-referred clients, monitor their progress, and report back to the court on treatment compliance. Others are as simple as a judge’s demand for “thirty in thirty” (attendance at thirty Twelve-Step meetings in the next thirty days) from someone accused of public intoxication or drunken driving.

In drug courts, the judge acts as the case manager, rather than delegating that responsibility to a TASC provider. Defendants come in frequently to review their treatment compliance and drug-test results, and are praised or rebuked for good or bad conduct by the judge in open court. After a period of months, the defendant is sentenced on the original offense, with the promise that the sentence will reflect his pre-sentencing behavior.

Because they are built around the idea of treatment, many diversion programs and drug courts tend to put as much stress on showing up for treatment sessions as they do on actual desistance from drug use. Moreover, most drug courts and TASC programs do not place heavy reliance on immediate sanctions to enforce compliance. Instead, they rely primarily either (for diversion programs) on the threat of removal from the program and sentencing on the original charge or (for drug courts) the fact that sentencing is still to come. Most drug court judges hope and believe that praise and reproof from the bench, backed with the judge’s reserve powers of incarceration, will serve as sufficiently potent and immediate rewards and punishments without resorting to more material sanctions. Doubtless, they are right with respect to some judges and some offenders.

What drug diversion and drug courts have in common is that participation is voluntary (defendants can, and some do, choose routine sentencing instead) and restricted to defendants whom the court and the prosecution are prepared *not* to incarcerate if the defendants will just clean up their acts. By their nature as “alternatives to incarceration,”

they cannot apply to those whose crimes have been especially severe. That excludes most violent crimes, and the federal law providing funding for drug courts specifies that defendants admitted to drug-court treatment have no prior violent offenses either. Thus many of the most troublesome offenders, those whose drug consumption it would be most valuable to influence, are excluded from the beginning.

Moreover, budget constraints limit drug-court and diversion populations; there is no mechanism by which the net cost savings they likely generate for the corrections system are recycled into program operations. Budgetary stringency both reinforces the programs' limited scope and creates a strong incentive for limited duration as well.

Typically, supervision under such programs lasts for periods measured in months: small fractions of typical addiction, and criminal, careers. This is not only a budgetary matter; it also derives from the limited leverage prosecutors have over most of the offenders eligible for diversion or drug-court processing. Offenders who refuse to enter these voluntary special programs and choose routine processing instead face relatively short prison or jail stays. In practice, some defendants prefer a short fixed period of incarceration to a longer period of supervision that may lead to incarceration if they backslide. The longer the period of supervision, the greater the temptation to just "do the time" and get it over with.

Thus limited scope and limited duration put an upper bound on the potential impact of diversion and drug courts. Making a larger impact could require a more comprehensive approach.

### **Coerced Abstinence**

To make a substantial dent in the drug consumption of addict/offenders, we need a system that will extend the supervisory capacities of drug courts and diversion programs to a larger proportion of the offender population and for longer periods. Such an approach would have to be simple enough to be operated successfully by ordinary judges and probation officers, rather than enthusiasts, cheap enough to be feasible from a budgetary standpoint, and sparing of scarce treatment and confinement capacity.

One option would be to substitute, to the maximum feasible extent, testing and automatic sanctions for services and personal attention from the judge. Instead of coerced treatment, this approach might be called "coerced abstinence," because it aims directly at reduced drug consumption rather than at the intermediate goals of treatment entry, retention, and compliance.

Here's how such a system might work:

- Probationers and parolees are screened for cocaine, heroin, or methamphetamine use, using a combination of records review and chemical tests.

- Those identified as users, either at the beginning of their terms or by random testing thereafter, are subject to twice-weekly drug tests. They may choose any two days of the week and times of day for their tests, as long as the two chosen times are separated by at least 72 hours. That means that there is effectively no “safe window” for undetected use.
- Every positive test results in a brief (say, two-day) period of incarceration. (The length of the sanction, and whether and how sharply sanctions should increase with repeated violations, is a question best determined by trial and error, and the best answer may vary from place to place.)
- The sanction is applied immediately, and no official has the authority to waive or modify it. (Perhaps employed users with no recent failures should be allowed to defer their confinement until the weekend to avoid the risk of losing their jobs.) The offender is entitled to a hearing only on the question of whether the test result is accurate; the penalty itself is fixed.
- Missed tests count as “dirty.” (Perhaps the sanction should be somewhat greater, to discourage absconding.)
- After some long period (six months?) of no missed or positive tests, or alternatively achievement of some score on a point system, offenders are eligible for less frequent testing. Continued good conduct leads to removal to inactive status, with only random testing.

To operate successfully, such a program will require:

- the capacity to do tests at locations reasonably accessible to those being tested (since they have to appear twice a week);
- on-the-spot test results, both to shrink the time gap between misconduct and sanctions and to reduce the administrative burden of notifying violators and bringing them back for hearings and punishment;
- the capacity for quick-turnaround (within hours) verification tests on demand;
- authority to apply sanctions after an administrative hearing or the availability of an on-call judge who can hear a case immediately;
- confinement spaces for short-term detainees available on demand; and
- the capacity to quickly apprehend those who fail to show up for testing.

None of these should be, in principle, impossible to obtain; but having all of them together, and reliably available, may well lie beyond the realm of practical possibility in many

jurisdictions unless extraordinary political force is brought to bear. Thus elected officials will have to make coerced abstinence one of their goals, or it is unlikely to become a reality.

A wide variety of actual programs could be covered by the rubric “coerced abstinence.” Crafting any particular implementation will require the resolution of several major design issues.

- One important but tricky decision involves what drugs to test for, both at the initial screen and for offenders under active monitoring. There is a strong case for omitting marijuana, at least at the initial screening stage: because it remains detectable for long periods and is widely used, any program that does not exclude it is likely to have a substantial proportion marijuana-only clients. The individual and social benefits from reducing marijuana demand among offenders do not approach the benefits from reducing cocaine, methamphetamine, and heroin demand. On the other hand, once an offender is identified as a cocaine, methamphetamine, or heroin user, it may be the case that continued marijuana use will prove to be a risk factor for backsliding, both because it requires contact with drug sellers and because marijuana intoxication reduces sensitivity to the consequences of actions and thus deterrability. That suggests ignoring marijuana in the preliminary screening, but including it in ongoing monitoring.
- An especially touchy question is whether alcohol should be included. Its very short detection window makes it virtually impossible to detect all alcohol use, but very recent use is detectable in urine. Its legal status reduces the surface justification for forbidding it, but its link to violence (and complementarity with cocaine) create a strong argument for doing so anyway. Alcohol could be another candidate for inclusion in routine testing but exclusion from the preliminary screen.
- The case for an automatic, and therefore necessarily formulaic, sanctions structure is very strong, and such a structure must start out with relatively mild sanctions or the program will collapse of its own weight. But there is no analytic answer to the questions of how to start out and how rapidly, or how far, to increase severity with repeated violations.
- Just as important as the sanctions structure is the reward structure: that rewards shape behavior more powerfully than punishments is a well-established result. Of course, the political problems of rewarding law-breakers for obeying the law are substantial ones, and the best feasible approach may be to use praise and reduced supervision as the primary forms of reward. But collecting an up-front “participation fee” or “fine” that is then returned in small increments for each “clean” test might greatly reduce the failure rate.
- After some period of compliance, both the need to reward desired behavior and simple budget pressures create a strong case for reduced supervision. Such crucial details as the

schedule, the nature of the ongoing monitoring, and what to do with those who backslide under reduced supervision need to be resolved.

- Some participants will prove unable or unwilling to reform under punitive pressure alone. For that group, treatment is essential, if only to reduce the burden they put on sanctions capacity. In addition, it is probably true that the availability of treatment, or perhaps even a requirement to accept treatment, would cut down on violation rates. What sort of paid treatment to offer (and how to make use of the Twelve-Step programs), to whom it should be offered, and whether and under what circumstances it should be required, are all open questions.
- The crucial practical details of how to apprehend absconders, and what sort of confinement capacity to maintain for violations, need to be addressed.

### **Benefits and Costs**

The costs and benefits of such programs will depend on details of their implementation, on local conditions, and on the (as yet unknown) behavior of offenders assigned to them. High compliance will translate into great benefits and modest costs, low compliance into the reverse. Only experience, ideally in the form of well-designed experiments, will allow informed judgments about whether, where, and how to put the concept of coerced abstinence into practice.

Still, it is possible to calculate in advance some of the costs and benefits of such programs under specified assumptions about design and results. Those calculations support the idea that coerced abstinence deserves a thorough set of trials.

The catalogue of potential benefits is impressive:

- The primary benefit would be reduced drug abuse (to the extent that substitution is not complete), due not only to the deterrent effect of the sanctions but also to the “tourniquet” effect of interfering with incipient relapses before they can turn into full-fledged “runs” of heavy use. In the District of Columbia Drug Court experiment (see below) coercion outperformed (admittedly not very good) treatment.<sup>40</sup> That would suggest that successful coercion programs might match the reduction of two-thirds in drug consumption typical of users under treatment.
- If that were right, and if all the high-dose user/offenders were under testing and sanctions, and if they account for 60% of total hard-drug consumption, the result would be a reduction in dealers’ revenues of 40%. No other feasible anti-drug program offers any real hope of comparable levels of market shrinkage.
- Smaller markets would have manifold benefits: shrinking access for potential new users, protecting neighborhoods from the side effects of illicit markets (most notably violence), diverting fewer adolescents and young adults away from school or licit work into dealing,

and reduced diversion of police effort into drug law enforcement and prison capacity into holding convicted dealers. (Currently, about one-quarter of prison cells are occupied by persons serving sentences for drug dealing offenses<sup>41</sup>; shrinking that number by 40% would allow either a 10% cut in prison spending, for a savings of about \$3.5 billion per year,<sup>42</sup> or increased imprisonment for non-dealing offenses.)

- The direct benefits of reduced consumption are comparably diverse: improved health; improved social functioning (job, family, neighborhood); and reduced crime by the offenders subject to testing and therefore reduced imprisonment demand among a population with a tendency to cycle in and out of confinement. With drug-involved offenders committing about half of all the felonies in big cities<sup>43</sup>, these potential benefits are great, though it would not be reasonable to expect a shrinkage in crime proportionate to the shrinkage in drug consumption. But if the reduction in overall offending were even half as large as the reduction in drug consumption, and if the sort of drug-involved offenders who would be subject to coerced abstinence account for 40% of the population behind bars for other than drug-dealing offenses, that would be another 13% of total confinement capacity (costing about \$4 billion per year) saved, giving states the choice between increased deterrence and incapacitation for other offenders and cuts in prison spending.
- A reliably operating coerced-abstinence system as part of probation and parole would also be expected to change the behavior of judges and parole boards with respect to making confinement decisions. By making probation or parole more meaningful alternatives to incarceration, the coerced-abstinence approach should lead to more use of community corrections in otherwise borderline cases. Instead of having to guess about whether a given drug-involved offender will elect to go straight this time, the decision-maker can allow the offender to select himself for conditional freedom or confinement by his drug-taking behavior as revealed by the tests.
- Coerced abstinence would also be expected to have beneficial effects on the treatment system. Some of those now referred to treatment by the courts would show themselves capable of abstaining from drug use without treatment, under the steady pressure of testing and sanctions, perhaps with the aid of a Twelve-Step fellowship or similar self-help group. Those in treatment would have increased incentive to succeed, with the pressure coming not from the therapist or the program but from an external force. Those not in treatment who found themselves incapable of complying on their own would have a strong incentive to find treatment, and their repeated failure would bring their treatment need to the attention of the courts and community-corrections authorities, while the cost of their continual short confinement stays would create a financial incentive for the local government to provide it.

The cost picture is somewhat simpler, though still quite speculative until there are some working models to study. The important elements of cost would be testing operations, probation or parole supervision, sanctions and arrest capacity, and treatment, and a cost calculation will require both unit-cost and volume estimates. For unit costs, we can assume:

- Community-corrections officers at \$60,000 per year, including fringe benefits, overhead, and supervision. Police officers at \$100,000 per year, also inclusive.
- Testing at \$5 for a five-drug screen. This is less than most agencies currently pay, but consistent with the current costs in the mass-production DC Pretrial Services Agency and not hard to imagine given the testing volumes that would exist with a full-scale national coerced-abstinence program.
- Confinement costs of \$50/day, less than a typical jail, but consistent with the reduced need for services and security for short-term confinement: roughly the cost of a mediocre motel room.
- Treatment at \$5,000 per year, reflecting a blend of methadone, outpatient drug-free counseling, and therapeutic communities for the most intractable. (Partly a design decision.)

In terms of volume, we assume:

- 10% of the test results will be positive or no-shows. (This should be realistic for early stages of the program, perhaps pessimistic once the reliability of the tests and sanctions has been established in the minds of participants.)
- The average sanction for a violation is 3 days.
- 10% of active cases will be in mandated (paid) treatment, over and above those who would have been in treatment in the absence of the program. (Pure guess, and partly a design decision.)
- One-quarter of the population that originally qualified for active testing will have complied to the point of being moved to some form of low-cost monitoring and not been moved back to active testing as a result of a violation. (Pure guess, and partly a design decision.)
- One probation or parole officer can manage 50 active testing-and-sanctions cases.
- One police officer to chase absconders is needed for each 250 active cases.

On these assumptions, total program costs for a group of 1000 probationers who originally qualified for testing and sanctions, with 750 on active testing at any one time, would be:

|   |   |                            |
|---|---|----------------------------|
| 15 probation officers @ \$60,000                    | = | \$0.9 million              |
| 3 police officers @ \$100,000                       | = | \$0.3 million              |
| 750 offenders x 104 tests/yr. = 78,000 tests @ \$10 | = | \$0.8 million              |
| 78,000 tests x 10% x 3 days = 23,400 days @ \$50    | = | \$1.2 million              |
| 750 offenders x 10% = 75 treatment slots @ \$5,000  | = | \$0.4 million              |
| <b>TOTAL</b>  | = | <b>\$3.6 million</b>       |
|   |   | <b>\$3600 per offender</b> |

This estimate of \$3600 per offender per year represents only about one-eighth of the annual cost of a prison cell. The probation department's share (probation salaries plus testing costs) would be \$2100 per offender, about twice the average annual cost of probation supervision.

### **Sources of Resistance**

Anyone advocating a major change in the way a piece of the public's business is done must confront the public-sector version of the old question, "If yer so derved smart, why ain't ye rich?" If this is such a good idea, why is it not now being pursued? A variety of barriers, conceptual, organizational, and practical, have stood and still stand in the way of developing testing and sanctions into a working piece of administrative machinery.

Conceptually, testing-and-sanctions challenges current understandings both of deterrence and of addiction. It seems hard to conceive that small sanctions would prove effective deterrents to those so signally resistant to the threat of large sanctions. (This resembles the question posed about bottle-deposit laws by the flacks for the beverage industries: "If a \$500 fine doesn't stop a litterbug, what's a 5-cent deposit going to do?" The answer, of course, was that the \$500 fine was largely notional, while the nickel actually gets collected.)

To some, the concept of addiction as a disease process involving loss of voluntary control over drug-taking implies that threats cannot change addictive behavior. This idea is related to the empirically discredited, but still powerful, notion that addiction implies that changes in price have little impact on the quantity purchased (inelastic demand).<sup>44</sup> There is laboratory-animal evidence that addictive demand is sensitive both to "price" (in the form of effort required) and to consequences<sup>45</sup> and human experimental evidence that immediate rewards for non-use can substantially improve treatment success among those trying to quit.<sup>46</sup>

Since even pathological behaviors can still be responsive to their consequences, the disease model of addiction does not rule out the possibility that coerced abstinence can succeed. Nonetheless, the notion that addicts are sick and therefore unresponsive to incentives remains a powerful one, and a strong source of resistance to testing-and-sanctions

proposals.

In ideological terms, the testing-and-sanctions idea does not, at least at first blush, satisfy either the moralistic/punitive or the compassionate/ therapeutic impulses that dominate the current political discourse about drugs, though it has something to offer to each side. That, plus its conceptual complexity, makes it unattractive as a political campaign proposal, except in the masquerade of yet another “get-tough-on-drugs” proposal.

Alongside this lack of popular appeal is active unpopularity with an important interest group: treatment advocates. By no means do all treatment providers dislike coerced abstinence, but it tends to encounter resistance among treatment administrators and advocates on three different grounds. Ideologically, it seems to be in tension with the disease concept of addiction, which is central to treatment providers’ self-understanding and to their claims on public and private resources. In economic terms, coerced abstinence is one more competitor for scarce funds. (Curiously, proponents of drug courts, who might also have been expected to see testing and sanctions as a competitor for funding, have instead been rather friendly toward the idea.) But at a deeper level, those with a strong commitment to drug treatment may reasonably regard testing-and-sanctions as an inferior substitute.

For some drug-involved offenders, removal of drug dependency would allow them to live substantially happier lives. But for many, their drug habits are only a part, and often the smaller part, of their problems. Drug treatment often involves addressing far more than drug problems; this is most evident in the case of Therapeutic Communities, with their holistic attempt to reshape character. From the viewpoint of those most concerned about persons with addictions, testing-and-sanctions threatens to provide much, if not most, of the benefits of treatment from the viewpoint of crime victims and government budgets while providing little in the way of relief to those suffering from addiction.

The primary form this resistance has taken has been the attempt to redefine testing-and-sanctions proposals as programs either of coerced treatment or of treatment needs assessment for the offender population. That process can be observed in the history of the Breaking the Cycle initiative, a joint effort of the National Institute of Justice and the Office of National Drug Control Policy.

Nor are the agencies most effected by coerced abstinence, and which will have to do most of the work, necessarily its supporters. Probation departments, usually badly overworked and understaffed, have not in general been aggressive in seeking out new missions and responsibilities. Police are anything but eager to make warrant service a high priority, though shifts towards community policing and towards holding area commanders responsible for reducing rates of criminal activity may be changing that. Corrections officials are not looking for new business, and especially not for the short-stay clients whose processing in and out takes so much effort.

Moreover, by contrast with ideas such as mandatory sentencing that are virtually self-implementing once legislation is passed, the degree of inter-agency coordination required to make a testing-and-sanctions program a success means that its implementation will require

enormous effort on the part of whoever takes on the entrepreneurial role.

Finally, coerced abstinence suffers from two budget mismatches, one of timing and one of level of government. Even if the program turns out to be cost-neutral or better in the long run, there is no denying its immediate costs and immediate demands on scarce confinement capacity. The long-term savings are likely to be dismissed as typical program-advocate pie in the sky. Similarly, it is a rare county executive or sheriff who is eager to spend the county's resources on testing-and-sanctions in order to save the Governor money in the form of reduced prison spending.

## **Experience**

To date no large jurisdiction has instituted testing and sanctions on the model described above as part of routine probation and parole supervision. Scattered judges have created such programs on their own initiative, and informal reports suggest good results, but there have been no published evaluations, and in any case such pioneer efforts often turn out to rely too heavily on the charismatic characteristics of their founders to be easily portable. There have been four more systematic efforts:

Santa Cruz County instituted aggressive testing of known heroin users on probation in the late 1980s, along with a focused crackdown on street-level dealing. The county reported a 22% reduction in burglaries the following year, when burglaries were slightly up in adjacent comparable counties, but there was no careful examination of the relationship, if any, between the testing and the burglary reduction.

The Multnomah County Drug Testing and Evaluation Program looked like a testing-and-sanctions program at the outset, but evolved into merely one more tool in the probation officer's toolkit, with neither continuity of testing, predictability of sanctions, nor any real program integrity (in terms of which offenders were subject to it and which not). No firm conclusion could be drawn about its performance.

Project Sentry in Lansing, Michigan, has provided mostly short-term testing for drug-involved offenders on probation or pre-sentencing release (about one-third of them felons) over the past 25 years. In the 29,650 specimens collected in the fifteen months ended December 31, 1996, there were 3096 positive tests (where each drug tested for counts as one test). If each positive test represented a different specimen, the positive rate per specimen would have been just over 10%; double-counting for multiple drugs detected from a single specimen would bring that figure down somewhat.<sup>47</sup>

The largest controlled trial to date has been the "sanctions track" of the District of Columbia Drug Court, where defendants randomly assigned to twice-a-week testing with immediate sanctions based on a formula took less drugs than either those mandated to treatment or those assigned to routine drug-court processing (with test results reviewed by a judge and considered at sentencing time). Since the DC drug court is not restricted to drug-defined offenses but includes drug-involved defendants facing a variety of charges, this result may have some application to the broader run of felony and misdemeanor offenders, but the

fact that the drug court is a voluntary diversion program limits the inferences that can be drawn about the potential of testing-and-sanctions as an element of routine probation.<sup>48</sup>

The “Breaking the Cycle” program in Birmingham, Alabama, now getting under way with federal research funding, is intended to be a full-scale test combining testing and sanctions with treatment. Details of program implementation have yet to be announced, but an elaborate evaluation is planned and some results should be available sometime in 1998.

### **Experimental Approaches**

Two sorts of experiments ought to be done to help define the feasibility and utility of testing-and-sanctions programs: one taking the offender as the unit of analysis, the other taking the jurisdiction. Given the variety of circumstances and possible program implementations, each type of experiment should probably be run in more than one location, and in each case a strong argument can be made for a shakedown period of trial-and-error program development before any formal evaluation starts. Too many promising innovations have run aground on the shoals of single, premature evaluations.

At the individual level, one would want to test the extent to which offenders made subject to a well-implemented testing-and-sanctions program would modify their drug-taking behavior and the effect of those modifications on crime and social functioning. That same test would provide estimates of failure rates and thus of sanctions demand. At its

simplest, an experiment would involve the random assignment of offenders to either business-as-usual processing or testing-and-sanctions. A useful way to complicate such an experiment would be to introduce systematic variation within the testing-and-sanctions condition, to help answer some of the program-design questions.

Jurisdiction-level experiments would be, in effect, pilot implementations, with results compared either to “control” jurisdictions or to historical results. Either basis of comparison brings with it substantial methodological issues, but there are two sets of questions that can be answered only at the jurisdictional level:

- How closely can the actual performance of courts, probation, police, corrections, and treatment organizations approach to the theoretical design of a testing-and-sanctions program?
- What effect would such a program have on the local drug markets? Here the quantities of interest would include the level of dealing activity, the extent of market-related disorder and violence, and the numbers of dealing-related arrests, convictions, and sentences.

### **Recent developments**

Proposals for coerced abstinence started to float around in Clinton Administration circles

almost from the beginning of the first Clinton term, but they were sidetracked into the more treatment-oriented “Breaking the Cycle” experiment and never emerged into political prominence. But during the run-up to the 1996 elections, coerced abstinence was adopted, first as an Administration proposal and then as a law requiring every state to create a program of testing and sanctions for drug-involved offenders as a condition of receiving federal grants to build prisons.

At minimum, every state will now have to consider whether and how to make drug testing and sanctions abstinence a part of the criminal-justice process. Maryland has already announced a pilot program in Baltimore,<sup>49</sup> and planning is also underway in Massachusetts. The current approach to drug-involved offenders makes so little sense from any perspective that something almost has to replace it. Perhaps that something will turn out to be some version of coerced abstinence.

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