

## WHY CRIMINAL SANCTIONS AGAINST RECREATIONAL DRUG USE ARE UNCONSTITUTIONAL

Criminal sanctions against recreational drug use are unconstitutional because they invade our privacy, abrogate our right to be free of invasive and unnecessary laws, and inflict harm on people for acts which have not harmed others in a criminal way.

The Charter of Rights and Freedoms is not limited to the specific rights named therein. It also states that, “The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.” These unspecified rights include the right to privacy, which among other things, means the right to be left alone by government, except for good cause. The Charter also provides that our rights and freedoms are “subject only to such reasonable limits, prescribed by law, as can be demonstrably justified in a free and democratic society”. In other words, the government may not arbitrarily deem an act a crime merely because it disapproves of it; it must ‘demonstrably justify’ any such limitation of our liberty.

I propose that in order to ‘demonstrably justify’ criminal sanctions against drug use, the government must meet the following tests: The problem must be severe enough to warrant government action, and the laws enacted to deal with it must be appropriate, effective, and not cause more harm, either to society, or the offender, than that caused by the problem itself.

### **Severity of the Problem**

The government must demonstrate that recreational drug use, *of and by itself*, causes problems for people *other than the drug user* sufficiently severe to warrant some form of government action. It must identify exactly what these problems are, how the law will address them, and any negative consequences of its application. Claims regarding the potential harm of wide-spread drug use to society are too vague and general to justify criminal sanctions. It has never been acceptable in a free and democratic country to lock people up merely because they ‘might’ pose some unspecified threat.

The government cannot use the harmfulness of recreational drugs to the user as justification, unless it applies the same sanctions against those who engage in other self-

dangerous recreational activities such as mountain climbing, bull-riding, sky-diving, and so forth. It makes as much sense to put heli-jet skiers in jail to protect them from avalanches as it does to put pot-smokers in jail to protect them against lung cancer.

Nor can the government use the crimes that addicts commit to support their habits as evidence of the harm of drug abuse to others, unless it can also prove that those crimes are the result of addiction *per se*, and not of the high prices generated by the criminal sanctions themselves. Recreational drugs are not particularly expensive to manufacture, and if addicts could obtain their drugs at licensed outlets, and consult with their own physicians for treatment as for any other medical problem, they would have no drug-related incentive to steal or prostitute themselves, and the incidence of these activities would drop precipitously. Furthermore, besides being considerably cheaper than our current practice, this approach would in the long run, be more likely to lead addicts to eventually kick their habit than does hunting down, convicting, and jailing them, which has an abysmally low success rate.

### **Appropriateness**

Even if drug use could be proven to be a sufficiently serious problem to those other than the drug user to warrant some kind of action, the government must demonstrate that criminal sanctions are an *appropriate* response—that is, that real criminal behaviour is involved. A real crime involves one or more people inflicting specific, direct harm on one or more other people—that is, murder, rape, theft, impaired driving, etc.. Phony crimes are acts which the government has criminalized because it (and some of the public) disapproves of them—such as drug use, soliciting for prostitution, and (formerly) homosexuality. In all cases, the laws against these activities are not only ineffectual, but also create far more harm than the proscribed activities themselves.

Using drugs may or may not harm the user (the evidence varies), and hurts no one else in a criminal sense. Other people may suffer negative effects, such as second hand smoke, or loss of income, but as well as being common to such legal activities as smoking and gambling, these effects lack the intentional violation, or willful negligence characteristic of real crimes; they are negative by-products of an act, not deliberate transgres-

sions in themselves, and can be better dealt with by private and civil means. Furthermore, if drug users commit real crimes such as assault, or impaired driving, there are already laws in place to deal with them.

### **Effectiveness**

Even if they were shown to be appropriate, criminal sanctions must also be shown to be effective; that is, they must solve or mitigate the problem they are meant to address.

Do criminal sanctions prevent drug use? No, if anything, they publicize and glamorise it. Do they ameliorate the medical or social problems attributed to addiction? No, they make these problems more difficult to treat. Do they deter drug dealing? No, they encourage it, by inflating the price. Are they enforceable? No. Despite thousands of convictions for drug offenses per year, many more thousands of Canadians use illegal drugs as often as they wish. Police admit they intercept only 10% of the traffic, despite their best efforts. In fact, criminal sanctions have supported a lucrative black market for over 60 years, for the harsher the penalties, the higher the price, and the more people are drawn into the trade.

However, even if criminal sanctions could be shown to be appropriate and effective, their severity and expense require that, before resorting to them, the government must demonstrate that they are the *only* appropriate and effective response, and that all less drastic methods have been tried, and have failed. Alternatives such as education and treatment must be adequately funded, given sufficient time to establish themselves, and be carried on under conditions of non-criminalized drug use, in order to determine their efficacy. (I predict drug use would decline because the most successful anti-drug efforts to date have been against tobacco and alcohol use, which are legal.)

### **Harm Caused Society**

The government must also demonstrate that its laws do not inflict greater harm on society than the harm they purport to prevent; that is, they must prove that the peaceful use of drugs is more harmful than the damage caused by criminal sanctions, such as:

- 1) The danger, especially to the elderly, of falling victim to a mugging or home

invasion because criminalization artificially inflates the price of drugs, increasing the incentive to steal. Increasing the severity of the penalties, rather than deterring drug trafficking, drives up the price, brings in more dealers, and encourages the carrying and use of weapons, including guns;

2) The threat to everyone's privacy from police prying. Since there are no victims, drug use is difficult to detect, leading police to employ such questionable tactics as wire-tapping, undercover agents, snitches, and entrapment to obtain evidence. The 'war on drugs' has already led to provisions that the police may break the law in order to catch drug dealers. The very rule of law itself is undermined when certain groups, but especially the police, are exempted from it, no matter what the reason. The end does not justify the means; rather, bad means corrupt good ends. And since the police can, and frequently do, make mistakes, every one of us is endangered.

Even worse, some people advocate using 'the notwithstanding clause' to strip Canadians of our civil rights in order to fight organized crime. But there is no need for this drastic action when a far more telling blow could be struck by legalizing the products purveyed by organized crime, thereby destroying their value. The gangs' profits would melt like snow under a spring sun if heroin, for example, became legally obtainable;

3) The waste of hundreds of millions of dollars finding, convicting, and imprisoning drug offenders; money which could be more usefully employed in providing education, and treatment. Ironically, and sadly, many addicts who want treatment are unable to get it because money is wasted funding enforcement and prisons instead of clinics and counselling. Police would also be more usefully employed patrolling neighbourhoods on foot and by bicycle, enhancing our sense of security, than engaged in prolonged and costly undercover operations to catch drug dealers. Further hundreds of millions of dollars are lost because the enormous profits of drug dealers are not taxed;

4) The infringement of our right to practice the religious ceremonies of our choice. Constitutional challenges to the drug laws based on religion have failed on the grounds that freedom of religion does not include practices which contravene the Criminal Code—a reasonable limitation regarding human or animal sacrifice, but entirely unreasonable when applied to the peaceful, ceremonial ingestion of drugs. The latter prohi-

bition is equivalent to telling Christians they can believe in Holy Communion, but they can't drink the wine or swallow the wafer;

5) The threat to public health from AIDS and other illnesses because, fearing the legal consequences, many people are deterred from seeking treatment for their addiction, and continue to engage in unsafe practices such as sharing dirty needles;

6) The denial to patients of the benefits of heroin (pain relief), and marijuana (asthma, nausea, glaucoma), and the prevention of the use of more benign forms of recreational drugs—coca leaf tea instead of crack cocaine, for example; and finally,

7) The danger to our children. Illegality itself provides an incentive to experiment with drugs, while inflated prices encourage dealers to get young people hooked as early as possible. However, if huge profits could no longer be made, most dealers would go out of business, and access to drugs would be more limited. It is true that some under-age people currently smoke cigarettes and drink alcohol because of advertising aimed at them, but even so, tobacco and alcohol companies, whatever their faults, are far more vulnerable and amenable to government control (and far less violent) than are those who deal in illegal drugs.

### **Harm Caused Drug Users**

Laws also must not inflict greater harm on transgressors than transgressors actually inflict on others; this is the real meaning of 'an eye for an eye, a tooth for a tooth'. The present penalties for drug use are the equivalent of taking an eye for a fingernail paring, for they inflict grievous harm on real people, while one person's drug use does not, of itself, cause harm to others. Nor can the government justify protecting people from the ravages of dope by subjecting them to the ravages of prison.

### **The Proper Role of Government**

Where do we draw the line? When does the government have the right to impose limitations on our liberty? Regarding the use of criminal sanctions, the line should be drawn between those acts which intentionally (or by willful negligence) cause direct harm to others, and those acts which do not. The peaceful use of, and trade in, recreational

drugs should not be deemed a crime, or even a misdemeanour, for it directly endangers no one else, while impaired driving, whether the impairment is due to drugs, alcohol, or fatigue, is rightfully considered a crime, because of its danger to others.

The mistaken assumption underlying our present anti-drug laws is that the only way to control an activity that some people deem undesirable is to make it illegal. As we have seen, this actually removes the activity from control by driving it underground. The fact is, citizens wish to engage in various forms of what is termed vice, and the law, as has been shown over and over again, cannot stop them. The government must accept that its proper role is not to act as our protector, or our parent, but to provide the legal framework within which adults can enjoy the vices of their choice in a peaceful, orderly, and responsible manner. The government should concern itself with, for example, ensuring that drugs are pure, accurately measured, and correctly labelled (including appropriate warnings, if any); that games of chance are honest; that prostitutes are of age and free of disease, and brothels are small, quiet, and co-operatively owned; and that all who profit from vice pay their fair share of taxes.

## **Conclusion**

Criminal sanctions against recreational drug use cannot be justified because they are unnecessary, inappropriate, and ineffective, and cause far more harm to individuals and society than the use of recreational drugs itself.

In his famous work *On Liberty*, John Stuart Mill asserts “one very simple principle” regarding the relations between society and the individual, which is, “the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection.” That is, the government has no right to deliberately inflict harm on those who have not intentionally, or through negligence, harmed others.

The issue regarding criminal sanctions is not how harmful recreational drug use may be to the user; the issue is how harmful is it to others? No activity is entirely free of ill-effects for someone (my beautiful music may be your ugly noise). The ill-effects of recreational drugs on others, such as second-hand smoke, fall into the category of nui-

sances that are best controlled by private (“No smoking in *my* house”) and civil (no smoking in indoor public places) means, rather than by imposing criminal sanctions, which instead of protecting us, merely feed the profits of organized crime. These sanctions should be repealed as quickly as possible, and replaced with sensible regulations along the lines of those which govern the use of tobacco and alcohol.

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P.S. Some people fear the wrath of the Americans if we were to unilaterally legalize recreational drug use, but there is growing support world-wide for legalization, and many people in the United States also feel it is time to try regulation and taxation as methods of control instead of criminalization. I’m sure that if we had the courage to act, we would find we could not only establish sensible laws for ourselves without suffering American retribution, but also serve as a model for the U.S. to follow—which they might very well do, as other hemispheric leaders—Vicente Fox of Mexico and Jorge Ibanez of Uruguay—are now talking positively about legalization.

Would unilateral legalization make us a haven for drug crazies? Of course, some people would visit Canada to buy drugs, just as some tourists come to buy Screech or Canadian whisky, but I do not believe we would suffer an invasion of addicts. Amsterdam does not appear to have suffered unduly because of its relaxed enforcement regarding marijuana, which has been in effect for some 25 years.

One definition of insanity is to continue to expect, despite all evidence to the contrary, that previously unproductive behaviour, repeated under the same circumstances, will eventually lead to success—I think this aptly describes our futile 60-year ‘war on drugs’, and I urge the Members of this Committee to do all that you can to free the country of this self-inflicted, tax-guzzling, and unnecessary madness.