

## THE WAR ON DRUGS

Congress should

- repeal the Controlled Substances Act of 1970;
- failing that, remove marijuana from the list of scheduled substances in the Controlled Substances Act;
- remove lysergic acid diethylamide (LSD), psilocybin, and 3,4-methylenedioxy-methamphetamine (MDMA) from the list of scheduled substances in the Controlled Substances Act;
- direct the administration not to interfere with the implementation of state initiatives that allow for the recreational or medical use of marijuana or states that have legalized or decriminalized psychedelics;
- repeal federal mandatory minimum sentences; and
- shut down the Drug Enforcement Administration.

Congress and states should

- expressly provide for the abatement of current prosecutions of marijuana offenses;
- pardon those serving sentences for now-repealed marijuana crimes, or work with the judiciary to schedule resentencing hearings for those currently incarcerated for marijuana offenses that either are no longer law or now carry substantially reduced penalties; and
- authorize automatic expungement of criminal records and arrest records for those charged or convicted of marijuana-related offenses.

The drug war is one of the worst things the American government has done and one of its most counterproductive policy failures. Fifty-one years after President Richard M. Nixon declared a “war on drugs,” over 100,000 Americans died of drug overdoses between May 2020 and April 2021—more than gun

deaths and automobile deaths combined. Aside from the \$1 trillion fiscal price tag, the total cost of our drug war is incalculable: lives lost to overdoses, time lost to prison, children growing up without fathers and mothers, inner cities suffering from epidemics of gang violence, the militarization of our police, the destabilization of Central and South American countries, and the loss of trust between our government and our citizens. Drug legalization has long been perceived as the “radical” position, but it’s now clear that it’s the prohibitionists who must account for their radicalism in the face of clear facts.

Arguing for reform is not an endorsement of drug use. The issues here are the damaging effects of prohibition and the rights of adults to make choices about what they put in their bodies.

The government’s attempts to prevent the harms of drug use have backfired in devastating ways. To name one, drug smugglers prefer transporting the highest potency version of a drug to evade detection, just as those who sneak alcohol into a football game prefer hard spirits to beer. That has created incentives for the black market to distribute fentanyl, the leading cause of death for Americans ages 18–45.

Federal drug prohibition has always been a bad fit for America, constitutionally and culturally. Before alcohol prohibition, states had different policies regarding alcohol. Some states were fully dry, some allowed only lower-potency beer and wine, and others had few restrictions. Drugs listed in the Controlled Substances Act are no different. Utah need not have the same alcohol policies as Massachusetts or Texas, and Alabama need not have the same marijuana policies as Colorado or Oregon.

Ours is a federal republic. The federal government has only the powers granted to it in the Constitution, and prohibiting drugs is not one of those powers. Federal alcohol prohibition was enacted (and rescinded) by a constitutional amendment because Congress at the time did not believe it was constitutionally authorized to prohibit the manufacture and distribution of alcohol within the states. Yet just over 50 years after the Eighteenth Amendment established alcohol prohibition—and without any intervening relevant constitutional amendment that increased the powers of Congress—the Controlled Substances Act was passed as a simple statute.

And the United States has a tradition of individual liberty, vigorous civil society, and limited government. Identification of a problem does not mean the government should undertake to solve it. Moreover, the fact that a problem occurs in more than one state does not mean it is a proper subject for federal policy.

In rethinking federal drug policy, it’s important to keep those core ideas in focus. America is a large and diverse country that should not have a one-size-fits-all drug policy. That point is increasingly obvious to Americans when it

comes to marijuana, and it is also true of “harder” drugs such as opioids, psychedelics, or MDMA. The Constitution does not give Congress the power to prohibit what Americans can put in their bodies because the Framers understood that such a power was unnecessary and unwise, and thus they intentionally withheld it from Congress.

It’s time to restore some sanity and morality to our constitutional order.

## **Repeal the Controlled Substances Act**

The Controlled Substances Act (CSA) creates five levels—“schedules”—of drug regulation. Drugs in Schedule I are prohibited in all cases except for research because they are deemed to have “no currently accepted medical use and a high potential for abuse.” All other schedules are defined relative to each other. Schedule II drugs are defined as having a medical purpose but also as having a high potential for abuse. And medical opioids—such as morphine and Dilaudid (hydromorphone)—are placed in Schedule II, as are cocaine and methamphetamine. The other schedules are simply defined by being less dangerous than the previous schedule (e.g., Schedule V drugs are defined as having a lower potential for abuse than Schedule IV drugs).

The scheduling system is irrational and unscientific. Marijuana unquestionably has medical uses, yet it is in Schedule I. Heroin is used as a painkiller in dozens of countries, as well as in addiction treatment, yet it is Schedule I—while fentanyl, which is 50 times more potent, is Schedule II. Thousands of studies have shown that LSD, psilocybin (magic mushrooms), and MDMA (ecstasy) have immense potential to treat depression, anxiety, alcoholism, and other mental health issues, yet the CSA denies the states the freedom to even explore those drugs as medical treatment.

Congress should deal with drug prohibition the way it dealt with alcohol prohibition. The Twenty-First Amendment did not actually legalize the sale of alcohol; it simply repealed the federal prohibition and returned to the states the authority to set alcohol policy. States took the opportunity to design diverse liquor policies that were in tune with the preferences of their citizens. After 1933, three states and hundreds of counties continued to practice prohibition. Other states chose various forms of alcohol legalization.

Congress has abundant cause to end the federal government’s disastrous war on drugs. First and foremost, the federal drug laws are constitutionally dubious. As noted, the federal government can exercise only the powers that have been delegated to it. The Tenth Amendment reserves all other powers to the states or to the people. However misguided the alcohol prohibitionists turned out to have been, they deserve credit for honoring our constitutional system by seeking a constitutional amendment to explicitly authorize a national

policy on the sale of alcohol. Congress never asked the American people for additional constitutional powers to declare a war on drug consumers. That usurpation of power is something that few politicians or prohibitionists wish to discuss.

Second, drug prohibition creates higher levels of crime. Addicts commit crimes to pay for a habit that would be easily affordable if it were legal. Police sources have estimated that as much as half of the property crime in some major cities is committed by drug users. More dramatically, because drugs are illegal, participants in the drug trade cannot go to court to settle disputes, whether between buyer and seller or between rival sellers. When black-market contracts are breached, the result is often some form of violent sanction, which usually leads to retaliation and then open warfare in the streets.

Make no mistake, the annual carnage from gang violence has little to do with the mind-altering effects of marijuana gummies or LSD tabs. It is instead one of the grim and bitter consequences of an ideological crusade whose proponents will not yet admit defeat.

Third, it is a gross misallocation of law enforcement resources to have federal police agents looking for heroin and fields of marijuana when they could be helping solve crimes committed against other people and their possessions rather than crimes that are purportedly committed against oneself (e.g., putting drugs in your body). The Drug Enforcement Administration has 10,000 agents, intelligence analysts, and support staff members. Their skills would be much better used if they were redeployed to investigate crimes against persons or property.

Fourth, drug prohibition is a classic example of throwing money at a problem. In 1981, the federal drug war budget was about \$1 billion. In 2021, the budget was \$40.4 billion. Even accounting for inflation, that's over a 1,200 percent increase, with little to show for it. Moreover, as noted, the soaring overdose rate in America is a direct consequence of drug prohibition, so that money not only has been spent in vain, but also has killed people.

For years, drug war bureaucrats have been tailoring their budget requests to the latest news reports. When drug use goes up, taxpayers are told the government needs more money so that it can redouble its efforts against a rising drug scourge. When drug use goes down, taxpayers are told that it would be a big mistake to curtail spending just when progress is being made. Good news or bad, spending levels must be maintained or increased.

Fifth, drug prohibition channels billions of dollars per year into a criminal underworld that is occupied by an assortment of criminals, corrupt politicians, and international drug cartels. Alcohol prohibition drove reputable companies into other industries or out of business altogether, which paved the way for mobsters to make millions in the black market. If drugs were legal, organized

crime would stand to lose billions, and drugs would be regulated and sold by legitimate businesses in an open marketplace.

Sixth, drug prohibition fundamentally transformed Americans' relationship with law enforcement. Public confidence in police has declined, and now only a bare majority of the public expresses confidence in police. Commanding that our police find and eliminate controlled substances has resulted in abuses of their search and seizure limitations established by the Fourth Amendment. The result is that police encounters are marked by distrust and fear—much of which could be avoided if we did not open the door to police searching and arresting people for carrying drugs. As citizens' distrust for police grows, police must reckon with declining morale. Public safety has become jeopardized as reputationally damaged police forces struggle to hire and retain able recruits.

The damage to the police-community relationship is particularly pronounced with people of color. Only 27 percent of black Americans expressed confidence in the police in 2021. Confidence plummeted from 36 percent to 30 percent in 2014, the year police killed Eric Garner while attempting to arrest him for selling hand-rolled cigarettes. That tragic encounter, which police would have no authority to initiate in a society with rational and restrained drug laws, ignited the Black Lives Matter movement and perpetuated the widespread perception that the broad discretion police departments have to carry out the drug war has unfairly targeted black communities.

The drug war fundamentally alters the dynamic between police and the community in ways that substantially impede rebuilding public trust. When police are confined to investigating crimes against people and possessions, victims of those crimes invite the police into their private spaces to investigate. If your house is robbed, you invite the police in to take evidence and pursue the culprit. Yet when the criminal and victim are the same person—which is what purportedly happens when you put drugs in your body—the police are tasked with tracking down the “criminal” when the “victim” doesn't want the “criminal” to be caught. Thus, police must resort to invasive and constitutionally dubious surveillance and enforcement tactics to catch the unwitting victims. Drug prohibition also gives police an ever-ready pretext for searching and seizing someone by claiming that they “smelled marijuana” or the suspect was “clearly impaired by drugs.” Police officers with racial bias or animus can use the pretext of drug possession to go after racial minorities, with little or (more likely) no consequences for their actions.

In repealing the CSA, Congress has an opportunity to pass meaningful drug reform that respects the constraints of federalism. The CSA, after all, does more than just prohibit drugs; it also regulates how various legal drugs can be acquired and distributed. States are competent to decide what constraints should be placed on acquiring various drugs—such as age limits or prescrip-

tions—and those laws can vary between states, as our system of federalism intended.

Students of American history will someday ponder the question of how today’s elected officials could readily admit to the mistaken policy of alcohol prohibition in the 1920s but recklessly pursue a policy of drug prohibition. Indeed, the only historical lesson that recent presidents and Congresses seem to have drawn from Prohibition is that government should not try to outlaw the sale of booze. One of the broader lessons that they should have learned is this: prohibition laws should be judged according to their real-world effects, not their promised benefits. If Congress subjects the federal drug laws to that standard, it will recognize that the drug war is not the answer to problems associated with drug use.

### **Remove Marijuana from the Controlled Substances Act**

If the CSA is retained, Congress should act promptly to remove marijuana from scheduling entirely. Although some proposals suggest rescheduling marijuana, the drug deserves no place in the CSA because of its variety, its overall safety, and its clear beneficial uses.

Marijuana’s odd and unnecessary placement in Schedule I is due to a combination of ignorance, racial animus, and inertia. The original federal marijuana law, the Marihuana Tax Act of 1937, placed a prohibitory tax on the plant. The drafters of the act deliberately chose the word “marihuana,” rather than the commonly known “cannabis,” to imbue the law with racial undertones. When marijuana was placed in Schedule I of the CSA in 1970, it was claimed to be provisional, and an official commission was formed to investigate the drug and its effects. The Shafer Commission, chaired by former Pennsylvania governor Raymond P. Shafer, recommended that marijuana be placed no higher than Schedule III. The recommendation was ignored by Congress and the Nixon administration.

Now, with 18 states and the District of Columbia having legalized recreational marijuana for adult use, marijuana’s inclusion in the CSA is more than anachronistic, it’s immoral and unconstitutional. Moreover, even in the 19 states where marijuana is legal only for medical use, the CSA sees no difference from those states that allow recreational use. Because of marijuana’s Schedule I status—which recognizes no medical uses for the drug—all states with any form of legalized marijuana are violating the CSA.

Various bills have suggested rescheduling marijuana to either Schedule II (like cocaine, fentanyl, and methamphetamine) or Schedule III (like anabolic steroids and codeine) because of its recognized medical uses. Yet this is the wrong approach. Marijuana, as a plant with over 500 active compounds that

may be smoked, vaporized, or ingested, will never sit easily with the Food and Drug Administration as “medicine.” The FDA prefers drugs with a defined molecular structure that can be tested in randomized controlled trials. “Marijuana,” as a category, is as broad as “alcohol,” including various strains such as *C. indica* and *C. sativa*, not to mention different hybrids that growers have long produced and are now producing at a higher rate than ever. In short, the FDA is as likely to recognize marijuana as medicine as it would chicken soup.

Thus, like the broad category of “alcohol,” marijuana, in all its forms, doesn’t belong in any schedule of the CSA. Congress should immediately end the nearly 100-year misguided attempt at prohibiting a generally safe drug.

### **Provide Forgiveness Remedies for Past Marijuana Crimes**

In the past three years, the number of states where all citizens can freely use marijuana has doubled. These states recognized something many Americans have known for some time: personal use of marijuana is generally safe, and legal efforts to stop Americans from consuming cannabis have subjected citizens to numerous harms.

Policymakers who are legalizing marijuana should also rein in the damage wrought by past criminalization of the possession, sale, manufacture, and transport of marijuana and marijuana paraphernalia. Over 40,000 Americans are currently incarcerated for marijuana crimes, depriving them of liberty and livelihood at taxpayer expense. Countless more Americans face hardships applying for jobs, education programs, and mortgages because of past marijuana crimes on their records. Policymakers should do three things to reduce these burdens.

First, policymakers should stop active prosecutions of marijuana crimes by including in the repeal measure their intent to abate marijuana charges pending adjudication. Doing so not only will prevent the conviction of people for actions that will no longer be illegal, but also will spare the state the cost of having attorneys, judges, and prison guards carry out the convictions.

Second, the president and state governors should commute the sentences of people currently incarcerated for marijuana offenses. If heads of state are hesitant to pardon these crimes despite their pending repeal, legislatures can instruct the judiciary to hold resentencing hearings where people convicted of marijuana offenses can have their sentences commuted.

Third, policymakers should set a deadline by which marijuana offenses must be automatically expunged from criminal records and arrest records. Such legislation should explicitly specify that the expunction may be legally treated as any arrest, charge, or conviction having never occurred at all. By making expungement automatic, policymakers will efficiently remove barriers that

are impeding thousands of citizens' economic opportunities. An expeditious deadline for district attorneys, courts, and police departments to identify and erase these records will ensure that citizens get relief promptly.

## **Remove LSD, Psilocybin, and MDMA from the Controlled Substances Act**

A growing body of research shows the benefits of various psychedelic compounds that are listed in Schedule I of the CSA. LSD, psilocybin, and MDMA exhibit none of the harmful characteristics of many other Schedule I drugs and have significant and demonstrated medical benefits. They should be removed from the CSA, or at a minimum, appropriately rescheduled to reflect their demonstrated medical applications and low potential for abuse.

Before being added to the CSA in 1970, LSD was extensively researched as a treatment for various mental health disorders, including depression and alcoholism. The effects on alcoholism were very promising, with some studies showing significant decreases in alcohol misuse months after taking LSD. For those suffering from depression and other disorders, LSD treatment was a valuable option. The actor Cary Grant credited his over 100 LSD therapy sessions with healing his depression and other mental health issues.

Similarly, before being added to the CSA in 1985, MDMA, also known as "ecstasy," had been used for decades by psychologists and psychotherapists to treat a variety of issues, from marriage counseling to depression and posttraumatic stress disorder (PTSD). Recently, in clinical trials to treat PTSD, MDMA showed such promise that the FDA had to put the drug on the "fast track" to approval, a statutory requirement for highly effective drugs. And the National Institutes of Health recently funded the first research into psilocybin in 50 years.

None of these drugs have an overdose risk—no known lethal dose exists for any of them—nor are they addictive. Their inclusion in Schedule I of the CSA is a product of myth and fear, and Americans are unnecessarily denied their numerous mental health benefits. Congress should remove them from the CSA.

## **Respect State Initiatives**

The failures of drug prohibition are becoming obvious to more and more Americans. In 2012, voters in Colorado and Washington made those the first states to legalize marijuana for recreational purposes. Sixteen states and the District of Columbia have since followed their lead. More are inevitably to come. If Congress can't repeal the CSA or deschedule marijuana and psychedelics,



it should at least refrain from interfering with states that are rolling back prohibition.

A particularly tragic consequence of the war on drugs has been the refusal to allow sick people to use marijuana as medicine. Prohibitionists insist that marijuana is not good medicine, or at least that legal alternatives to marijuana are equally good. Those who believe that individuals should make their own decisions—rather than have Washington bureaucracies make their decisions for them—simply say that that’s a decision for patients and their doctors to make. But in fact, good medical evidence shows the therapeutic value of marijuana—despite the difficulty of conducting adequate research on an illegal drug. A National Institutes of Health panel concluded that consuming marijuana may help treat a number of conditions, including nausea and pain. It can be particularly effective in improving the appetite of AIDS and cancer patients. The drug could also help people who fail to respond to traditional remedies.

More than 70 percent of U.S. cancer specialists in one survey said they would prescribe marijuana if it were legal; nearly half said they had urged their patients to break the law to acquire the drug. In 2013, Dr. Sanjay Gupta, the chief medical correspondent for CNN, apologized to his viewers for previously voicing his opposition to medical marijuana without having done his own homework. He admitted that he had basically assumed that the Drug Enforcement Administration had sound scientific proof that marijuana could not benefit persons who are ill. After studying the subject more thoroughly, Gupta said, “We have been terribly and systematically misled for nearly 70 years in the United States, and I apologize for my own role in that.”

The most relevant point for federal policymakers is that 37 states have authorized physicians licensed in those states to recommend the use of medical marijuana to patients residing in the states, without being subject to civil and criminal penalties.

In November 2020, Oregon became the first state to decriminalize psilocybin and legalize it for medical use. Various cities, such as Denver, Oakland, and Santa Cruz, have followed suit. Congress should respect state prerogatives in this area.

One of the benefits of a federal republic is that different policies may be tried in different states. One of the benefits of our Constitution is that it limits the power of the federal government to impose one policy on the several states. The federal government should capitalize on these benefits by respecting state initiatives.

## Repeal Mandatory Minimums

The common law in England and America has always relied on judges and juries to decide cases and set punishments. Under our modern system, of course, many crimes are defined by the legislature, and appropriate penalties are defined by statute. However, mandatory minimum sentences and rigid sentencing guidelines shift too much power to legislators and regulators who are not involved in particular cases. They turn judges into clerks and prevent judges from weighing all the facts and circumstances in setting appropriate sentences.

Mandatory minimums for nonviolent drug offenders can result in sentences grotesquely disproportionate to the gravity of the offense. These draconian penalties are likely intended to deter drug addiction. They may, however, actually make it more difficult for those struggling with addiction to recover because incarceration handicaps their ability to pursue education or find work. Research has shown no relationship between aggressive incarceration policies and drug misuse, suggesting that mandatory minimums for drug crimes are unjustly punishing drug users without accomplishing their intended purpose. Congress should end this ineffective and harmful practice, repeal mandatory minimums, and let judges perform their traditional function of weighing the facts and setting appropriate sentences.

## Conclusion

Drug abuse is a problem for those involved in it and for their families and friends. But it is better dealt with as a medical problem than as a criminal problem—“a problem for the surgeon general, not the attorney general,” as former Baltimore mayor Kurt Schmoke put it.

Congress should repeal the Controlled Substances Act of 1970, shut down the Drug Enforcement Administration, and let the states set their own policies with regard to currently illegal drugs. State governments are fully capable of assessing and managing the harms associated with drug use and legalization. It is a near certainty that states will take up the mantle to prohibit drug sales to children, driving under the influence, and other unambiguously harmful applications.

By repealing the CSA, Congress would acknowledge that our current drug policies have failed. It would restore authority to the states, as the Founders envisioned. It would save taxpayers' money, and it would give states the power to experiment with drug policies and perhaps devise more successful rules.

Repeal of prohibition would take the astronomical profits out of the drug business and destroy the drug kingpins who terrorize parts of our cities and many Central and South American countries. Reform not only would reduce crime, but also would free federal agents and local police to concentrate on crimes that harm persons and property.

Prohibition has failed, again, and should be repealed, again.

### **Suggested Readings**

- Burrus, Trevor. "The Hidden Costs of Drug Prohibition." *American Consequences*, March 19, 2019.
- . "Imagining a World without the War on Drugs." In *Visions of Liberty*, edited by Aaron Ross Powell and Paul Matzko, chap. 6. Washington: Cato Institute, 2020.
- Coyne, Christopher J. and Abigail R. Hall. "Four Decades and Counting: The Continued Failure of the War on Drugs." Cato Policy Analysis no. 811, April 12, 2017.
- Hari, Johann. *Chasing the Scream: The First and Last Days of the War on Drugs*. New York: Bloomsbury, 2015.
- Hart, Carl. *High Price: A Neuroscientist's Journey of Self-Discovery That Challenges Everything You Know about Drugs and Society*. New York: Harper, 2014.

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