



Milwaukee County Board of Supervisors

Chairman Theodore Lipscomb, Sr., 1st District

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Lipscomb Calls for Modernizing County Transit System

Budget Amendment Authorizes Purchase of 11 Battery Electric Buses

MILWAUKEE – County Board Chairman Theodore Lipscomb, Sr., has proposed modernizing Milwaukee County's transit system by purchasing up to 15 battery electric buses and beginning a transition away from fossil fuels. On Thursday the Committee on Finance and Audit unanimously recommended (7-0) including Lipscomb's [proposal](#) in the 2019 county budget.

"Adding battery electric buses begins the transition of modernizing our fleet for the renewable energy future and away from the fossil fuels of the past. Battery electric buses are cleaner and quieter than traditional diesel buses, which is good for riders, other road users, and people who live along bus routes. Electric buses will cost Milwaukee County taxpayers less than diesel buses over their lifetime, and they avoid the unexpected costs associated with the volatility in pricing of diesel fuel," said Lipscomb.

In contrast to the more stable price of electricity, the fluctuation in diesel prices is expensive for Milwaukee County. A one penny increase in diesel prices over one year costs the county \$40,000 in added fuel costs. A one dollar increase costs the county \$4 million.

Lipscomb's amendment would ensure that the 11 buses to be purchased for the Bus Rapid Transit project, currently under development, would be clean electric buses. Four additional buses would be considered for possible use on the Green, Red, or Purple bus routes.

The earliest that the new battery electric buses could be in operation is 2021.

If Lipscomb's amendment is included in the 2019 budget, the first stage of the transition would include purchasing four buses and the necessary charging infrastructure for about \$5 million. Financing would come from issuing general obligation bonds. Future financing could include federal ["Low-No" grant funding](#), which Lipscomb has called for [previously](#).

The public is invited to weigh in on the 2019 Milwaukee County budget at the County Board's [annual public hearing](#) on October 29 at 6:00PM. The public hearing will take place at the Marcus Center for the Performing Arts in Milwaukee.

Final consideration of all proposed budget amendments will take place at the County Board's budget adoption meeting on November 5 at 9:30 a.m.

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2019 Budget: Big Picture Challenges

- Costs grow faster than revenues: Even with no new spending, expenditures grow an average of 2.3 percent annually while revenues only grow by 0.9 percent. The gap is often referred to as the "structural deficit".
- Major capital needs: Deferred maintenance continues to be one of the biggest budgetary challenges, with hundreds of millions of dollars needed to repair or replace county amenities.
- Unfunded or underfunded state mandates: The State of Wisconsin does not provide adequate funding for the services it requires Milwaukee County to provide.
- Long-term liabilities: Pension and healthcare costs continue to grow faster than inflation.

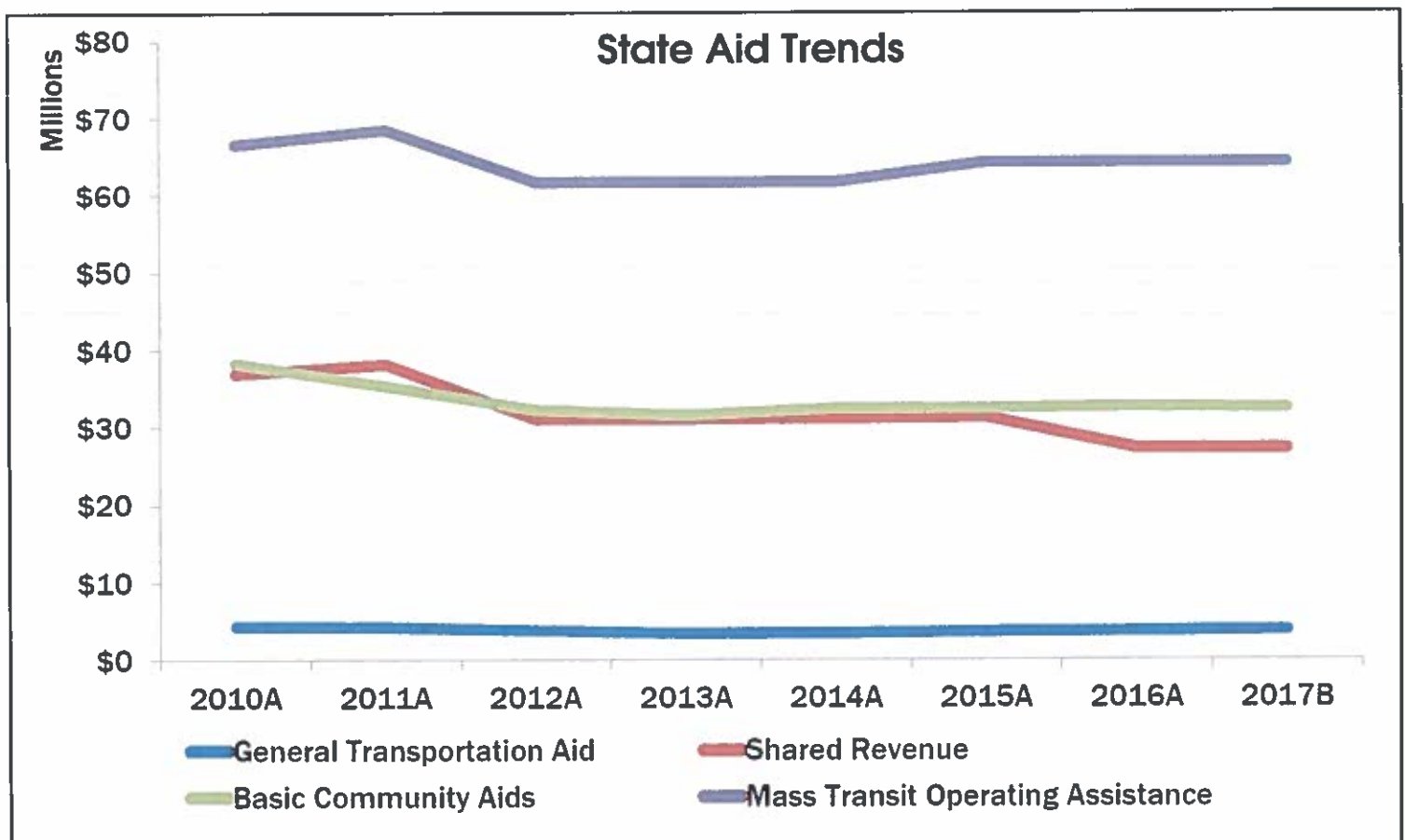
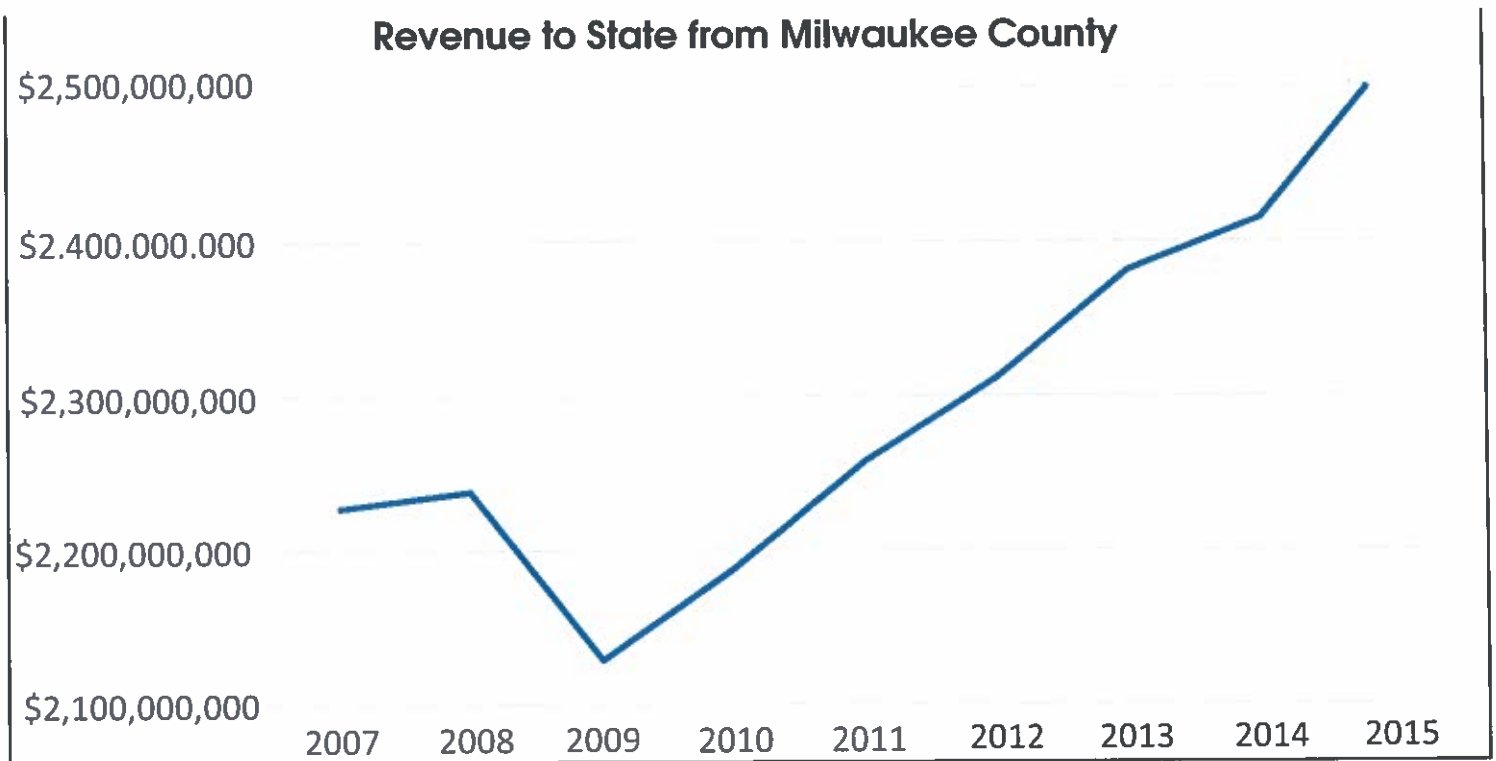
State-County Structure

- Counties are an extension of State government, and County authority is limited to only what the State expressly allows. By contrast, cities and villages are limited only by what the State forbids.
- Milwaukee County revenue sent to the State has increased by more than \$400 million, or 19 percent between 2009 and 2015.
- Shared revenue that the State releases back to Milwaukee County has remained essentially flat (with a \$4 million a year reduction for the Bucks Arena).
- The State of Wisconsin imposes laws that severely restrict Milwaukee County's ability to leverage funds locally.
 - County property tax levy is capped by the State.
 - County sales tax is limited to the current rate of 0.5 percent.
 - Limited local options have included an unpopular wheel tax and user fees for residents. These options do not come close to providing the revenue needed to ensure the long term fiscal health of Milwaukee County.

A Fair Deal for Milwaukee County

- Chairman Lipscomb authored a measure that creates a "Fair Deal for Milwaukee County Workgroup" aimed at establishing a more equitable state-county funding structure.
- Chairman Lipscomb and Executive Abele will co-chair the "Fair Deal Workgroup" and begin to collaboratively work toward solutions immediately upon the adoption of the 2019 Budget in November.
- It is critically important to the future of Milwaukee County that we remain united in our efforts to achieve a "Fair Deal" with the State of Wisconsin that will improve public services and address long deferred maintenance.





Milwaukee County Board Hearing 11/29/18

Good evening. I am Joyce Ellwanger. I am a member of MICAH.

I will be addressing the issue of continuing the Jobs Line bus into Waukesha County.

1. The settlement of our 2014 lawsuit has brought 11.5 million dollars to Milwaukee County transit and the fares collected on Rt. 6 and 61 another million or more. We do have some skin in the game.
2. The cost to run route 61 or 57/22 into Waukesha County for 2019 is about a million and a half dollars.
3. The cost to those inner city black bus riders who will lose their jobs if transportation into Waukesha is eliminated is incalculable in terms of the barriers to finding family supporting jobs, and increased social service costs to Milwaukee County.
4. We know the importance of jobs to these workers, and MICAH is currently working collaboratively on an initiative to add 250 additional transitional jobs for disadvantaged workers in Milwaukee.
5. MICAH sees the budget as a moral document. It speaks to who and what are valued. The Job Lines route has helped open a door into Waukesha County that is not only providing desperately needed family supporting jobs for inner city black workers, it is also helping to dismantle racial stereotypes about the value and reliability of these workers and those invisible but real walls that divide us. Job Lines is a door through those walls. It is only a toe in the door, but it is a beginning. Don't slam that door in the faces of these determined young black workers and their employers. Let them know that you share our belief that black lives matter.
6. Paul Decker, chair of the Waukesha County Board is also chair of the Regional Transit Leadership Council which is full of movers and shakers who share a renewed vision of a multimodal regional transit system funded by a public private partnership. Why not ask them for help to develop a public private partnership model between Milwaukee and Waukesha to take over the funding of the Job Lines in the future? And SEWRPAC has already developed the larger transit vision that the JOB LINE addresses.
7. So our ask is that you restore funding for a JOB LINES bus into Waukesha County for 2019 and that you ask the Regional Transit Leadership Council and SEWRPAC to develop a plan for joint funding of the JOB LINES beyond 2019.



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The Harmful Side Effects of Drug Prohibition

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THE HARMFUL SIDE EFFECTS OF DRUG PROHIBITION

Randy E. Barnett*

I. INTRODUCTION: CURING THE DRUG LAW ADDICTION

Some drugs make people feel good. That is why some people use them. Some of these drugs are alleged to have side effects so destructive that many advise against their use. The same may be said about statutes that attempt to prohibit the manufacture, sale, and use of drugs. Advocating drug prohibition makes some people feel good because they think they are “doing something” about what they believe to be a serious social problem. Others who support these laws are not so altruistically motivated. Employees of law enforcement bureaus and academics who receive government grants to study drug use, for example, may gain financially from drug prohibition. But as with using drugs, using drug laws can have moral and practical side effects so destructive that they argue against ever using legal institutions in this manner.

One might even say—and not altogether metaphorically—that some people become psychologically or economically *addicted* to drug laws.¹ That is, some people continue to support these statutes despite the massive and unavoidable ill

* © 2009 Randy E. Barnett, Carmack Waterhouse Professor of Legal Theory, Georgetown University Law Center. Permission to copy for classroom use is hereby granted. This article revises and updates Randy E. Barnett, *Curing the Drug Law Addiction: The Harmful Side-Effects of Legal Prohibition*, in *DEALING WITH DRUGS* (Ronald Hamowy ed., 1987). My thanks to Professor Erik Luna for his interest in seeing that this article receive a wider audience and to the editors of the *Utah Law Review* for helping to update it.

¹ For those who would object to my use of the word *addiction* here because drug laws cause no physiological dependence, it should be pointed out that, for example, the Illinois statute specifying the criteria to be used to pass upon the legality of a drug nowhere requires that a drug be physiologically addictive. The tendency to induce physiological dependence is just one factor to be used to assess the legality of a drug. Drugs with an accepted medical use may be controlled if they have a potential for abuse, and abuse will lead to “psychological *or* physiological dependence.” 720 ILL. COMP. STAT. 570/205 (2006) (emphasis added); *see also id.* §§ 570/207, 570/209, 570/211. Thus, applying the same standard to drug-law users as they apply to drug users permits us to characterize them as addicts if they are psychologically “dependent” on such laws. Personally, I would favor limiting the use of the term addiction to physiological dependence. As John Kaplan put the matter, “while the concept of addiction is relatively specific and subject to careful definition, the concept of psychological dependence, or habituation, often merely reflects the common sense observation that people who like a drug will continue to use it if they can—so long as they continue to like it: effects.” JOHN KAPLAN, *MARIJUANA: THE NEW PROHIBITION* 160 (1970). The same might be said about those who like drug laws.

effects that result.² The psychologically addicted ignore these harms so that they can attain the “good”—their “high”—they perceive that drug laws produce. Other drug-law users ignore the costs of prohibition because of their “economic” dependence on drug laws; these people profit financially from drug laws and are unwilling to undergo the economic “withdrawal” that would be caused by their repeal.³

Both kinds of drug-law addicts may deny their addiction by asserting that the side effects are not really so terrible or that they can be kept “under control.” The economically dependent drug-law users may also deny their addiction by asserting that (1) noble motivations, rather than economic gain, lead them to support these statutes; (2) they are not unwilling to withstand the painful financial readjustment that ending prohibition would force them to undergo; and (3) they can “quit” their support any time they want to—provided, of course, that they are rationally convinced of its wrongness.

Their denials notwithstanding, both kinds of addicts are detectable by their adamant resistance to rational persuasion. While they eagerly await and devour any new evidence of the destructiveness of drug use, they are almost completely uninterested in any practical or theoretical knowledge of the ill effects of illegalizing such conduct.⁴ Yet in a free society governed by democratic principles, these addicts cannot be compelled to give up their desire to control the consumption patterns of others. Nor can they be forced to support legalization in spite of their desires. In a democratic system, they may voice and vote their opinions about such matters no matter how destructive the consequences of their desires are to themselves or, more importantly, to others. Only rational persuasion may be employed to wean them from this habit. As part of this process of persuasion, drug-law addicts must be exposed to the destruction their addiction wreaks on drug users, law enforcement, and on the general public. They must be made to understand the inherent limits of using law to accomplish social objectives.

This Article will not attempt to identify and “weigh” the costs of drug use against the costs of drug laws. Instead, it will focus exclusively on identifying the harmful side effects of drug law enforcement and showing why these effects are unavoidable. So one-sided a treatment is justified for two reasons. First, a cost-

² See David C. Leven, *Our Drug Laws Have Failed—So Where Is the Desperately Needed Meaningful Reform?*, 28 FORDHAM URB. L.J. 293, 305–06 (2000) (stating that many people still support the current drug laws).

³ See David R. Henderson, *A Humane Economist's Case For Drug Legalization*, 24 U.C. DAVIS L. REV. 655, 662 (1991) (noting that some scholars argue that illegality is more profitable).

⁴ See James Ostrowski, *The Moral & Practical Case for Drug Legalization*, 18 HOFSTRA L.REV. 607, 647–50 (1990) (many proponents of drug laws mischaracterize their effects to gain support).

benefit or cost-cost analysis may simply be impossible.⁵ Second, discussions by persons who support illegalizing drugs usually emphasize only the harmful effects of drug use while largely ignoring the serious costs of such policies. By exclusively relating the other side of the story, this Article is intended to inject some balance into the normal debate.

The harmful side-effects of drug laws have long been noted by a number of commentators, although among the general public the facts are not as well known as they should be.⁶ More importantly, even people who agree about the facts fail to grasp that it is the nature of the means—coercion—chosen to pursue the suppression of voluntary consumptive activity that makes these effects unavoidable. This vital and overlooked connection is the main subject of this Article.

II. CLARIFYING OUR TERMS

The inherently destructive effects of drug laws, results from the combination of two aspects of drug prohibition that need to be distinguished. The first is the coercive nature of the means being used. The second is the type of conduct being coerced. Only by understanding the kind of conduct that is the subject of drug laws and how it differs from other kinds of conduct regulated by law can we begin to see why legal coercion is an inappropriate means in which to pursue our objectives.

Drug laws reflect the decision of some persons that other persons who wish to consume certain substances should not be permitted to act on their preferences. Nor should anyone be permitted to satisfy the desires of drug consumers by making and selling the prohibited drug. For the purposes of this discussion, the most important characteristic of the legal approach to drug use is that these consumptive and commercial activities are being regulated by *force*.⁷ Drug-law

⁵ See Randy E. Barnett, *Pursuing Justice in a Free Society: Part One—Power vs. Liberty*, 4 CRIM.L JUST. ETHICS 50, 63–65 (1985) (discussing some of the problems with efforts at cost benefit calculation).

⁶ While there certainly is no consensus on the conclusions that ought to be drawn from the facts of this tragic story, the facts themselves are not unknown in law enforcement or in academia. See, e.g., ARTHUR D. HELLMAN, *LAWS AGAINST MARIJUANA: THE PRICE WE PAY* 16 (1975) (describing the costs and benefits of drug laws); JOHN KAPLAN, *THE HARDEST DRUG: HEROIN AND PUBLIC POLICY* 94–100 (1983) (noting the problems that would be remedied by free availability); Glenn Garvin et al., *Heroin: Should it be Legal—Advocates are few but Persuasive*, WASH. TIMES, Sept. 28, 1984, at A1; Alan L. Otten, *Dealing With Drugs—The Drug Trade: Experts in the Field of Narcotics Debate Ways to Curb Abuse—One Side Touts Legalization, Other Wants Crackdown; Probably Neither Is Right—Corporate Attitudes Change*, WALL ST. J., Nov. 29, 1984, at 1; Megan Cox, *Dealing With Drugs—The Drug Trade: Abuse of Narcotics in US is by No Means A Recent Phenomenon—In the 1800s Doctors' Praise of Opium and Morphine Caused Much Addiction—Cocaine for the Common Cold*, WALL ST. J., Dec. 3, 1984, at 1.

⁷ While force is a neglected element of a proper moral evaluation of law, it may not be a *necessary* characteristic of law. Some institutions that may be characterized as

users wish to decide what substances others may consume and sell, and they want their decision to be imposed on others by force. The forcible aspect of the legal approach to drug use is one of two factors that combine to create the serious side effects of drug-law use. The other contributing factor is the nature of the conduct that drug laws attempt to prohibit.

No one claims that the conduct sought to be prohibited is of a sort that, if properly conducted, inevitably causes death or even great bodily harm.⁸ Smoking tobacco is bad for your health. It may shorten your life considerably. But it does not immediately or invariably kill you. The same is true of smoking marijuana.⁹ Of course, prohibited drugs can be improperly administered and cause great harm indeed, but even aspirin can be harmful in certain cases. Further, the conduct that drug laws prohibit is not inevitably addicting.¹⁰ Some users become psychologically or physically dependent on prohibited substances. Others do not.¹¹

genuinely legal in nature may do their work without using force. *See, e.g.*, LON L. FULLER, *THE MORALITY OF LAW* 108–10 (1965). What is important here is that the particular kind of law advocated by drug control enthusiasts is that kind that *does* involve the use of force. Therefore, in this chapter I will be using the term “law” in this limited sense, and although I will not repeatedly qualify this use in the manner suggested by Fuller’s analysis, such a limited use is intended and should be implied. *See* Dale A. Nance, *Legal Theory and the Pivotal Role of the Concept of Coercion*, 57 U. COLO. L. REV. 1, 2–3 (1985) (discussing the role of coercion in legal theory).

⁸ Like the federal government, the State of Illinois classifies or “schedules” controlled substances according to their varying characteristics from most serious (Schedule I) to least serious (Schedule V). That drugs can cause death or great bodily harm is not a requirement for prohibition. For drugs under schedules I–V, potential for causing death or great bodily harm is not even a factor to be considered in determining the classification of a controlled substance. *See* 720 ILL. COMP. STAT. ANN. 570/201–212 (West 2003 & Supp. 2008). Schedule I drugs are those drugs that have a “high potential for abuse” and have “no currently accepted medical use in treatment in the United States or lack[] accepted safety for use in treatment under medical supervision.” 720 ILL. COMP. STAT. ANN. 570/203 (emphasis added). In other words, if a drug has no accepted medical use in treatment in the United States, all that is required for it to be scheduled is that it have a “high potential for abuse.” *Id.*

⁹ In discussing the effects of marijuana, the legislative declaration of the Cannabis Control Act of the State of Illinois states only that “the current state of scientific and medical knowledge concerning the effects of cannabis makes it necessary to acknowledge the physical, psychological and sociological damage which is incumbent upon its use.” 720 ILL. COMP. STAT. ANN. 550/1. *But see, e.g.*, Munir A. Khan, Assad Abbas, and Knud Jensen, *Cannabis Usage in Pakistan: A Pilot Study of Long Term Effects on Social Status and Physical Health*, in *CANNABIS AND CULTURE* 349–50 (Vera Rubin, ed., 1975) (“The most significant point which emerged was that in a society such as Pakistan where cannabis consumption is socially accepted, habituation does not lead to any undesirable results. . . . Our study appears to show that cannabis does not produce any serious long-term effects.”).

¹⁰ “[C]ultural and social factors . . . in combination with the individual’s somatic and psychic characteristics, determine the pattern of his drug behavior once he has chosen to experiment with it. The majority of individuals who reach this point progress no further and often discontinue marihuana use.” NATIONAL COMMISSION ON MARIJUANA AND DRUG

What then characterizes the conduct being prohibited by statutes illegalizing drugs? It is conduct where persons either introduce certain intoxicating substances into their own bodies, or manufacture or sell these substances to those who wish to use them.¹² The prime motivation for the drug user's behavior is to alter his state of mind to get "high."¹³ The harmful effects of the substances are not normally the effects being sought by the user; thus they are usually termed "side effects." People could introduce all sorts of harmful substances into their bodies, but do not generally do so unless they think that it will have a mind-altering effect. Anyone who wishes to ingest substances to cause death or great bodily harm will always have a vast array of choices available to him at the corner hardware store. A widespread black market in poisons has not developed to meet any such demand.

One can speculate about the underlying psyche of those who would engage in such risky behavior. One can argue that such persons must be "self-destructive"—that is, out to harm themselves in some way. It is doubtful, however, that such generalizations are any truer for drug users than they are for alcohol users or cigarette smokers, for whom the adverse health effects may be both more likely and more severe than those of many prohibited substances,¹⁴ or for skydivers,

ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING 44 (1972); *see also* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 13 (1967) ("Physical dependence does not develop"); Khan, Abbas, and Jensen, *supra* note 9, at 349 ("We have deliberately used the word habituation rather than addiction because we did not find either increased tolerance or withdrawal symptomatology, which are the essential prerequisites for addiction"); Kaplan, *supra* note 1, at 157-69 (arguing that there is little evidence to prove marijuana causes a physical dependence).

The Illinois statute prohibiting certain substances exemplifies the fact that drug laws are not aimed exclusively at addictive drugs. The criteria of Schedule I drugs, quoted *supra* note 8, requires only that the substance have a high potential for abuse. The other schedules make it clear that "abuse" is not the same as potential for "psychological or physiological dependence," by consistently listing them as separate factors that must be found before a drug that does have a legitimate medical usage in the United States may be legally controlled. *See* 720 ILL. COMP. STAT. ANN. 570/201-212 (West 2003 & Supp. 2008).

¹¹ For a summary of research on the pharmacology of opiates and their effects on the street user, *see* KAPLAN, *supra* note 6, 5-22.

¹² *See supra* note 8.

¹³ One objection to the definition offered in the text for the subject of drug laws is that it would apply to alcohol and caffeine consumption and for this reason must miss some special purpose of drug laws. On the contrary, the manufacture and sale of alcohol were once made illegal for similar reasons. Only the disastrous consequences that resulted from alcohol prohibition and the social acceptability of both alcohol and coffee have kept both substances legal to date. Moreover, at least with alcohol, regulation and even prohibition is constantly being advocated by some and implemented in certain locales.

¹⁴ *See* John C. Ball & John Chapman Urbaitis, *Absence of Major Medical Complications Among Chronic Opiate Addicts*, in THE EPIDEMIOLOGY OF OPIATE ADDICTION IN THE UNITED STATES 301, 304-06 (1970); World Health Org. Special Comm., *Problems Related to Alcohol Consumption: The Changing Situation*, 9 CONTEMP. DRUG PROBS. 185, 194-98 (1980). Since the much heralded appearance of the U.S. DEP'T

skiers, or bicyclers on city streets—not to mention the millions of people who refuse to wear their seat belts.

We can conclude then that the *end* or purpose of drug laws is to discourage people from engaging in risky activity in which they wish to engage either because they desire the intoxicating effects they associate with the consumption of a drug or because they desire the profit that can be realized by supplying intoxicating drugs to others.¹⁵ The *means* that drug laws employ to accomplish this end is using force against those who would engage in such activities, either to prevent them from doing so or to punish those who nonetheless succeed in doing so.

With this understanding of means and ends, I now explain why using force against people who wish to use intoxicants *inevitably* harms them, harms the general public, and harms the legal system.

III. THE HARMFUL EFFECTS OF DRUG LAWS ON DRUG USERS

At least part¹⁶ of the motivation for drug prohibition is that drug use is thought to harm those who engage in it.¹⁷ A perceived benefit of drug prohibition is that fewer people will engage in self-harming conduct than would in the absence of prohibition.¹⁸ While the contention that drug use can be harmful will not be

OF HEALTH, EDUC., AND WELFARE, REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE, SMOKING AND HEALTH, PUBLIC HEALTH SERVICE PUB. NO. 1103 (Jan. 11, 1964), the adverse health effects of tobacco smoking have been much studied and are quite well known.

¹⁵ See *infra* notes 19–21 and accompanying text (discussing the typical policy rationales used to justify drug laws that prohibited perceived self-harming conduct).

¹⁶ The other important motivation for drug prohibition is the perceived effects of drug use on the rest of society. See *infra* note 18 (Illinois legislature declaring its belief that drug consumption creates “consequences upon every element of society”). For a discussion on the countervailing costs imposed on society by drug laws will also be discussed, see *infra* Section IV.

¹⁷ In its legislative declaration, the legislature of the State of Illinois expressed this typical sentiment:

The abuse and misuse of alcohol and other drugs constitutes a serious public health problem the effects of which on public safety and the criminal justice system cause serious social and economic losses, as well as great human suffering. It is imperative that a comprehensive and coordinated strategy be developed . . . to empower individuals and communities through local prevention efforts and to provide intervention, treatment, rehabilitation and other services to those who misuse alcohol or other drugs (and, when appropriate, the families of those persons) to lead healthy and drug-free lives and become productive citizens in the community.

20 ILL. COMP. STAT. 301/1-5 (2009).

¹⁸ See 720 ILL. COMP. STAT. 570/100 (1998) (“It is the intent of the General Assembly, recognizing the rising incidence in the abuse of drugs and other dangerous

disputed here, there is another dimension of the issue of harm to drug users that may seem obvious to most when pointed out, but nonetheless is generally ignored in policy discussions of drug prohibition. Much of the harms associated with drug use is caused not by intoxicating drugs, but by the fact that such drugs are illegal.

A. Drug Laws Punish Users

The most obvious harm to drug users caused by drug laws is the legal and physical jeopardy in which they are placed. Imprisonment must generally be considered a harm to the person imprisoned or it would hardly be an effective deterrent.¹⁹ To deter certain conduct it is advocated that we punish—in the sense of forcibly inflict unpleasantness upon—those who engage in this conduct.²⁰ In so doing it is hoped that people will be discouraged from engaging in the prohibited conduct.

But what about those who are not discouraged and who engage in such conduct anyway? Does the practice of punishing these persons make life better or worse for them? The answer is clear. As harmful as using drugs may be to someone, being imprisoned often makes matters much worse.

Normally when considering matters of legality, we are not concerned about whether a law punishes a lawbreaker and makes him worse off. Indeed, normally such punishment is deliberately imposed on the lawbreaker to protect *someone else* who we consider to be completely innocent—like the victim, or potential victim, of a rape, robbery, or murder.²¹ We are therefore quite willing to harm the lawbreaker to protect the innocent. In other words, the objects of these laws are the victims; the subjects of these laws are the criminal.

substances and its resultant damage to the peace, health, and welfare of the citizens of Illinois, to provide a system of control over the distribution and use of controlled substances which will more effectively: . . . (2) deter the unlawful and destructive abuse of controlled substances; (3) penalize most heavily the illicit traffickers and profiteers of controlled substances, who propagate and perpetuate the abuse of such substances with reckless disregard for its consumptive consequences upon every element of society.”).

¹⁹ Imagine if we told people that if we caught them using drugs, we would send them to the Riviera for a few years, all expenses paid.

²⁰ See Stanley I. Benn, *Punishment*, in 7 THE ENCYCLOPEDIA OF PHILOSOPHY 29, 29 (Paul Edwards ed., Reprint ed. 1972) (“Characteristically, punishment is unpleasant. It is inflicted on an offender because of an offense he has committed; it is deliberately imposed, not just the natural consequence of a person’s action (like a hang-over), and the unpleasantness is essential to it, not an accidental accompaniment to some other treatment (like the pain of a dentist’s drill).”).

²¹ Punishment is also favored on the grounds that the lawbreaker deserves to be punished. See, e.g., John Hospers, *Retribution: The Ethics of Punishment*, in ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS 181, 181–209 (Randy E. Barnett & John Hagel III eds., 1977) (discussing criminal punishment under the retributive theory). But see Walter Kaufmann, *Retribution and the Ethics of Punishment*, in ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS 211, 211–30 (Randy E. Barnett & John Hagel III eds., 1977).

Drug laws are different in this respect from many other criminal laws. With drug prohibition we are supposed to be concerned with the well-being of prospective drug users. So the object of drug laws—the persons whom drug laws are supposed to “protect”—are often the same persons who are the subject of drug laws. Whenever the object of a law is also its subject, however, a problem arises. The means chosen for benefiting prospective drug users seriously harms those who still use drugs and does so in ways that drugs alone cannot: by punishing drug users over and above the harmful effects of drug use. But the harm done by drug prohibition to drug users goes beyond the direct effects of punishment.

B. Drug Laws Raise the Price of Drugs to Users

Illegalization makes the prices of drugs rise.²² By increasing scarcity, all else being equal, the confiscation and destruction of drugs causes the price of the prohibited good to rise. And by increasing the risk to those who manufacture and sell, drug laws raise the cost of production and distribution, necessitating higher prices that reflect a “risk premium.”²³ Like the threat of punishment, higher prices may very well discourage some from using drugs who would otherwise do so. This is, in fact, a principal rationale for interdiction policies.²⁴ But higher prices take their toll on those who are not deterred, and these adverse effects are rarely emphasized in discussions of drug laws.

Higher prices require higher income by users. If users cannot earn enough by legal means to pay higher prices, then they may be induced to engage in illegal conduct—theft, burglary, robbery—in which they would not otherwise engage.²⁵ The increased harm caused to the victims of these crimes will be discussed below as a cost inflicted by drug laws on the general public. Relevant here is the adverse effect drug laws have on the life of drug users. By raising the costs of drugs, drug laws breed criminality.²⁶ They induce some drug users who would not otherwise

²² Morgan Cloud, *Cocaine, Demand, and Addiction: A Study of the Possible Convergence of Rational Theory and National Policy*, 42 VAND. L. REV. 725, 757 (1989).

²³ *Id.* Price increases will not incur indefinitely, however, because at some level higher prices will induce more production.

²⁴ Ian D. Midgley, *Just One Question Before We Get to Ohio v. Robinette: “Are You Carrying any Contraband . . . Weapons, Drugs, Constitutional Protections . . . Anything Like That?”*, 48 CASE W. RES. L. REV. 173, 212 (1997).

²⁵ The traditional linkage between drug use and crime can be accounted for in three ways. First, as suggested in the text, the higher prices caused by illegality induce many drug users to commit profitable crimes to pay for the drugs. Second, criminalization of drug users can force them out of legitimate employment and into criminal employment. See *infra* notes 33-34 and accompanying text. Third, not mentioned in the text, some persons who, for whatever reason, are criminally inclined may be just the sort of persons who are also inclined to use drugs. However, even if the third account is true for some (which it undoubtedly is), the first and second will be true for others; meaning drug laws are causing a comparative increase in the number of persons who are criminally inclined—an effect of drug laws that hardly benefits those drug users so affected.

²⁶ See *supra* note 25.

have contemplated criminal conduct to develop into the kind of people who are willing to commit crimes against others.

Higher prices can also make drug use more hazardous for users.²⁷ Intravenous injection, for example, is more popular in countries where high drug prices caused by prohibition drive users to the most "efficient" means of ingesting the drug. In countries where opiates are legal, the principal methods of consumption are inhaling the fumes of heated drugs or snorting.²⁸ Before the Harrison Act of 1914, "when opiates were cheap and plentiful, they were very rarely injected. Moreover, injection is rare in those Asian countries where opiates are inexpensive and easily available."²⁹ While physical dependence may result from either inhalation or snorting, neither is as likely as intravenous injections to result in an overdose.³⁰ And consumption by injection can cause other health problems as well. For example: "Heroin use causes hepatitis only if injected, and causes collapsed veins and embolisms only if injected intravenously."³¹ Finally, the scourge of HIV-AIDS has been caused, in part, by the sharing of unsterilized needles by drug users.³²

C. Drug Laws Make Drug Users Buy from Criminals

Drug laws attempt to prohibit the use of substances that some people wish to consume. Thus because the legal sale of drugs is prohibited, people who still wish to use drugs are forced to do business with the kind of people who are willing to make and sell drugs in spite of the risk of punishment. Such transactions must deliberately be conducted away from the police. This puts drug users in great danger of physical harm in two ways.

First, users are forced to rely upon criminals to regulate the quality and strength of the drugs they buy. No matter how carefully they measure their dosages, an unexpectedly potent supply may result in an overdose. And if the drug

²⁷ See KAPLAN, *supra* note 6, at 128.

²⁸ See *id.* ("For instance, in Hong Kong until recently, heroin, though illegal, was cheap and relatively available, and the drug was inhaled in smoke rather than injected. In the last few years, however, law enforcement has been able to exert pressure on the supply of the drug, raising its price considerably and resulting in a significant increase in the use of injection.") (footnote omitted).

²⁹ *Id.*

³⁰ Shane Darke & Wayne Hall, *Heroin Overdose: Research and Evidence-Based Intervention*, 80 J. URBAN HEALTH, 189, 195 (2003).

³¹ JOHN KAPLAN, *supra* note 6, at 9 (citing Jerome H. Jaffe, *Drug Addiction and Drug Abuse*, in GOODMAN AND GILMAN'S: THE PHARMACOLOGICAL BASIS OF THERAPEUTICS 535, 546 (Alfred Goodman Gilman et al., eds., 6th ed. 1980)). Kaplan argues that intravenous injection can also increase dependence by producing strong conditioning effects. See *id.* at 44 (citing Travis Thompson & Roy Pickens, *Drug Self-Administration and Conditioning*, in SCIENTIFIC BASIS OF DRUG DEPENDENCE 177, 177-98 (Hannah Steinberg, ed., 1969)).

³² Robert W. Stewart, *Increase Urged in Government AIDS Effort*, L.A. TIMES, Feb. 17, 1987, at 3.

user is suspected to be a police informant, the dosage may deliberately be made potent by the supplier.

Second, users are likely to be the victims of crime. I would estimate that approximately half the murder cases I prosecuted as an Assistant States Attorney in Cook County, Illinois were "drug related" in the sense that the victim was killed because it was thought he had either drugs or money from the sale of drugs. Crimes are also committed against persons who seek out criminals from whom to purchase prohibited drugs. Because drug users and dealers want to avoid the police, crimes against these groups are unlikely to be reported.³³ As a result, these crimes are likely brought to the attention of the authorities only when a victim's body is found.

In 1979, I obtained the confessions that were ultimately used in a prosecution involving the savage murder of three young men.³⁴ One of the three had approached four members of the Latin Kings to purchase marijuana. When his initial attempt to do business with the gang members was rebuffed, he mistakenly believed that this was due to a lack of trust—rather than a lack of marijuana, which was the case. To ingratiate himself with the gang members, he boasted (falsely) about his gang-affiliated friends and his gang membership. Unfortunately the persons he named were members of a rival street gang, the Latin Eagles. The gang members then told him that they could supply marijuana after all and asked the three to accompany them to an alley. There they were held at gun point and eventually stabbed to death. These young men were not members of any street gang. These are drug-law-related deaths. Three young men are dead because drug laws prevented them from buying marijuana cigarettes as safely as they could buy tobacco cigarettes. While smoking either kind of cigarette may have been hazardous to their health, that issue is now moot. Where and how are their deaths registered in the cost-benefit calculation of drug-law advocates?

D. Drug Laws Induce the Invention of New Intoxicating Drugs

Drug laws make some comparatively benign intoxicating drugs—like opiates—artificially scarce and thereby create a powerful black market incentive for clandestine chemists to develop alternative "synthetic" drugs that can be made more cheaply and with less risk of detection by law enforcement.³⁵ The hallucinogen, phencyclidine hydrochloride—or "PCP"—is one drug that went from industrial to recreational usage in by this route.³⁶ Some of these substitute

³³ See Margaret P. Spencer, *Sentencing Drug Offenders: The Incarceration Addiction*, 40 VILL. L. REV. 335, 342 (1995).

³⁴ See *People v. Caballero*, 464 N.E.2d 223, 225 (Ill. 1984) (relating the factual details of the case).

³⁵ See Marissa A. Miller, *History and Epidemiology of Amphetamine Abuse in the United States*, in AMPHETAMINE MISUSE: INTERNATIONAL PERSPECTIVES ON CURRENT TRENDS 113–117 (Hilary Klee ed., 1997).

³⁶ Although originally developed by Parke-Davis, "[t]he PCP that is now on the streets is illegally manufactured. Unfortunately, it is very easy and very inexpensive to

drugs may turn out to be far more dangerous than the substances they replace, both to the user and to others.³⁷

E. Drug Laws Criminalize Users

Prohibition automatically makes drug users into “criminals.” While this point would seem too obvious to merit discussion, the effects of criminalization can be subtle and hidden. Criminalized drug users may not be able to obtain legitimate employment. This increases still further the likelihood that the artificially high prices of illicit drugs will lead drug users to engage in criminal conduct to obtain income. It is difficult to overestimate the harm caused by forcing drug users into a life of crime. Once this threshold is crossed, there is often no return. Such a choice would not be nearly so compelling, nor as necessary, if prohibited substances were legally available and reasonably priced.

Further, criminalization increases the hold that law enforcement agents have on drug users. This hold permits law enforcement agents to extort illegal payments from users or to coerce them into serving as informants who must necessarily engage in risky activity against others.³⁸ Thus, prohibition both motivates and enables the police to inflict harm on drug users in ways that would be impossible in the absence of the legal leverage provided by drug laws.

In all these ways, drug laws harm users of drugs well beyond any harm caused by drug use itself, and this extra harm is an inescapable consequence of using legal coercion as means to prevent people from engaging in activity they deem desirable. While law enforcement efforts typically cause harm to criminals who victimize others, such effects are far more problematic with laws that seriously harm the very people for whom these laws are enacted to help. Support for drug laws in the face of these harms is akin to saying that we have to punish, criminalize, poison, rob, and murder drug users to save them from the harmful consequences of using intoxicating drugs.

To avoid these consequences, some have proposed abolishing laws against personal use of certain drugs, while continuing to ban the manufacture and sale of these substances.³⁹ However, only the first and last of the five adverse consequences just discussed result directly from punishing and criminalizing users. The other three harms to the user result indirectly from punishing those who

make, and you don’t even need a chemistry background.” OAKLEY RAY, *DRUGS, SOCIETY, & HUMAN BEHAVIOR* 414 (3d ed. 1983).

³⁷ Because of the “reefer madness” phenomenon that surrounds early reports of the ill-effects of drug use, such reports should be heavily discounted until time permits more objective researchers to do more extensive studies.

³⁸ See, e.g., DOUGLAS HUSAK, *LEGALIZE THIS! THE CASE FOR DECRIMINALIZING DRUGS* 149 (2002) (discussing the causal link between drug activity and corruption); ROBERT J. MACCOUN & PETER REUTER, *DRUG WAR HERESIES* 120 (2001) (describing police behavior toward informants).

³⁹ See, e.g., KAPLAN, *supra* note 6, at 189–235 (1983), for such a proposal concerning heroin.

manufacture and sell drugs. Decriminalizing the use of drugs would undoubtedly be an improvement over the status quo, but the remaining restrictions on manufacturing and sale would continue to cause serious problems for drug users beyond the problems caused by drug use itself.

As long as coercion is used to reduce drug use, these harms are unavoidable. They are caused by (1) the use of force to inflict pain on users, thereby directly harming them; and (2) the dangerous and criminalizing black market in drugs that results from efforts to stop some from making and selling a product others genuinely wish to consume. There is nothing that more enlightened law enforcement personnel or a more efficient administrative apparatus can do to prevent these effects from occurring. But, as the next section reveals, enlightened law enforcement personnel or an efficient administrative apparatus are not what results from employing legal force to prevent adults from engaging in consensual activity.

IV. THE HARMFUL EFFECTS OF DRUG LAWS ON THE GENERAL PUBLIC

The harmful side effects of drug laws are not limited to drug users. This section highlights the various harms that drug laws inflict on the general public. There is an old saying in the criminal courts that is particularly apt here: "What goes around, comes around." In an effort to inflict pain on drug users, drug laws inflict considerable costs on nonusers as well.

A. Resources Spent on Drug Law Enforcement

The most obvious cost of drug prohibition is the expenditure of scarce resources to enforce drug laws—resources that can thus not be used to enforce other laws or be allocated to other productive activities outside of law enforcement. Every dollar spent to punish a drug user or seller is a dollar that cannot be spent collecting restitution from a robber. Every hour spent investigating a drug user or seller is an hour that could have been used to find a missing child. Every trial held to prosecute a drug user or seller is court time that could be used to prosecute a rapist in a case that might otherwise have been plea bargained. These and countless other expenditures are the "opportunity costs" of drug prohibition.

B. Increased Crime

By artificially raising the price of illicit drugs and thereby forcing drug users to obtain large sums of money, drug laws create powerful incentives to commit property and other profitable crimes. And the interaction between drug users and criminally-inclined drug sellers presents users with many opportunities to become involved in all types of illegal conduct apart from the drug trade.

Finally, usually neglected in discussions of drugs and crime are the numerous "drug-related" robberies and murders (sometimes of innocent parties wrongly thought to have drugs) created by the constant interaction between users and

criminal sellers.⁴⁰ Drug dealers and buyers are known to carry significant quantities of either cash or valuable substances.⁴¹ They must deliberately operate outside the vision of the police. They can rely only on self-help for personal protection.

Many drug-law users speculate quite freely about the intangible “adverse effects of drug use on a society.”⁴² They are strangely silent, however, about how the fabric of society is affected by the increase in both property crimes and crimes of violence caused by drug laws.⁴³

C. Harms Resulting from the “Victimless” Character of Drug Use

The most overlooked and well-hidden harms to the general public caused by drug prohibition may also be the most serious. These are harms that result from efforts to legally prohibit activity that is “victimless.” It was once commonplace to call drug consumption victimless, but not anymore. Therefore, before proceeding, it is very important to explain carefully the very limited concept of “victimless” crime that will be employed in this section.

To appreciate the hidden costs of drug law enforcement, it is not necessary to claim that the sale and use of drugs are “victimless” in the *moral* sense—that is, to claim that such activity harms only consenting parties and therefore that it violates no one’s rights and may not justly be prohibited.⁴⁴ For this limited purpose it is not necessary to question the contentions that drug users and sellers “harm society” or that drug use violates “the rights of society.”⁴⁵

Nevertheless, to understand the hidden costs of drug laws, it is vitally important to note that drug laws attempt to prohibit conduct that is “victimless” in a strictly nonmoral or *descriptive* sense: there is no victim to complain to the police and to testify at trial.

1. The Incentives Created by Crimes without Victims

When a person is robbed, the crime is usually reported to the police by the victim. When the robber is caught, the victim is the principal witness in any trial that might be held. As a practical matter, if the crime is never reported, there will normally not be a prosecution because the police will never pursue and catch the

⁴⁰ See THE ROYAL COLLEGE OF PHYSICIANS, *DRUGS: DILEMMAS AND CHOICES* 93–95 (2000).

⁴¹ See Chris Wilkins, *Cannabis Transactions and Law Reform*, 8 *AGENDA* 321, 328 (2001).

⁴² See THE ROYAL COLLEGE OF PHYSICIANS, *supra* note 40, at 83–94.

⁴³ See *id.* at 88–89.

⁴⁴ I will discuss later the issue of whether drug laws are just. See *infra* Part V.

⁴⁵ See, e.g., William F. McDonald, *The Role of the Victim in America*, in *ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION AND THE LEGAL PROCESS* 295 (Randy E. Barnett & John Hagel III eds., 1977) (discussing the history of social attitudes toward crime and asserting that today “[c]rime is regarded as an offense against the state”).

robber. From the perspective of the legal system, it will be as though the robbery never took place. So too, if the victim refuses to cooperate with the prosecution after a suspect has been charged, the prosecution of the robber will usually not go forward.⁴⁶ What special law enforcement problems result from an attempt to prosecute crimes in the absence of a “complaining witness” who will assist law enforcement officials?

To answer this question, let us imagine that robbery—a crime that undoubtedly has a victim⁴⁷—was instead a “victimless” crime in this very limited sense, and that the police set out to catch, and prosecutors to prosecute, all robbers whose victims refused to report the crime to the police and cooperate with the prosecution. How would the police detect the fact that a crime had occurred? How would they go about identifying and proving who did it? How would the case be prosecuted?

To detect unreported crimes, the police would have to embark on a program of systematic surveillance. Because they could not simply respond to a robbery victim’s complaint as they do at present, the police would have to be watching everywhere and always. Robberies perpetrated in public places—on public streets or transportation, in public alleys or public parks—might be detected with the aid of sophisticated surveillance equipment located in these spaces. Those robberies committed in private places—homes and stores would require even more intrusive practices.

If the police did detect a robbery, they would be the principal witnesses against the defendant at trial. It would be their word against that of the alleged robber. As a practical matter, it would be within their discretion to go forward with the prosecution or not. There would be no victim pressing them to pursue prosecution and potentially questioning any decision they might make to drop the charges or withhold a criminal complaint.

⁴⁶ See Maria T. Lopez & Carol M. Bast, *The Difficulties in Prosecuting Stalking Cases*, 41 NO. 1 CRIM. L. BULLETIN 2 (2009) (discussing a prosecutor’s option “to either drop the case or continue the case even with a low probability of success” when an uncooperative victim’s testimony is the only evidence); Marc C. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 146 (2008) (discussing the “proof problem” presented to prosecutors when victims of alleged crimes refuse to cooperate). To enforce his decision of noncooperation, the victim always has available the threat of unhelpful testimony at trial. “I don’t remember if that is the man who robbed me” is all the victim need say to end the case—and (notwithstanding the theoretical availability of perjury charges) prosecutors know this.

⁴⁷ See Guyora Binder, *The Culpability of Felony Murder*, 83 NOTRE DAME L. REV. 965, 1038 (2008) (discussing robbery victims). I have chosen robbery as my example because I wish in this section to separate the issue of who is affected by a crime (who is and who is not a “victim” in this sense) from the issue of how certain crimes must be enforced in the absence of a cognizable victim-witness complainant. Robberies undoubtedly “affect” the persons who are robbed, and other persons as well. But notwithstanding these effects, if robberies were “victimless” in the sense used in the text—that is, if there was no victim complaining to the police and testifying at trial—certain unavoidable enforcement problems would develop.

We can easily imagine the probable results of such a policy of victimless robbery enforcement. To the extent that they were doing their job and that money permitted, the police would be omnipresent. One could not do or say anything in public without the chance that police agencies would be watching and recording. The enormous interference with individual liberty that such surveillance would cause is quite obvious. And putting robbery prosecutions entirely in the hands of the police would create lucrative new opportunities for corruption in at least two ways, depending on whether a crime had or had not in fact occurred.

When a crime had occurred, if the effective decision of whether or not to prosecute is solely in the hands of the police, police officers would be far more able to overlook a criminal act than they are when a cognizable victim exists. As a result, the opportunities for extortion of bribes and the incentives for robbery suspects to offer bribes are both tremendously increased.⁴⁸ When a crime had not occurred, the fact that the courts would be accustomed to relying solely on police testimony in such cases would give the police a greater opportunity to fabricate, or threaten to fabricate, cases to punish individuals they do not like, to coerce someone into becoming an informant, or to extort money from those they think will pay it.

All of the increased opportunity for corruption would result directly from an attempt to prosecute robberies when robbery victims do not come forward to report and prosecute the crime themselves. If robbery were victimless in this descriptive sense, the natural counterweight to these corrupt practices—the potential outrage of the victim of the robbery and the normal reliance by courts on victim testimony—would be absent.

Of course we know that this is not how robbery victims normally behave. Victims do routinely report instances of robbery, creating a case that the police department must “clear” in some way. And they are usually willing to cooperate with the prosecution, giving the police far less ability to influence the success of a given prosecution. Where a victim exists, the problem of corruption is enormously reduced; this is true even for the crime of murder where, in the absence of the victim can be a witness, a coroner’s office exists to establish causes of death.

Now suppose that, in addition to not reporting the crime and not testifying at trial, robbery victims were willing to pay to be robbed; that they actively but secretly sought out robbers, deliberately meeting them in private places so that the crime would be perpetrated without attracting the attention of the police; that billions of dollars in cash were received by robbers in this way.

Such a change in the behavior of robbery victims would dramatically affect law enforcement efforts. First, as will be discussed in the next section, the secrecy

⁴⁸ See Randy E. Barnett, *Bad Trip: Drug Prohibition and the Weakness of Public Policy*, 103 Yale L.J. 2593, 2597 (1994) (reviewing STEVEN B. DUKE & ALBERT C. GROSS, *AMERICA’S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS* (1990)); Stephanie A. Martz, Note, *Legalized Gambling and Public Corruption: Removing the Incentive to Act Corruptly, or, Teaching an Old Dog New Tricks*, 13 J. L. & Pol. 453, 463 (1997) (noting police propensity for corruption in victimless crimes).

engendered by the consensual nature of this transaction would make necessary far more intrusive kinds of investigative techniques than we at first supposed. Second, the victims' willingness to pay robbers to be robbed would make robbery more lucrative than it would otherwise be and would thus increase the ability of robbers to bribe the police when they are caught.

Police who are willing to fabricate evidence against someone they knew to be a robber would expect that such a person would probably be able to afford a substantial payoff. Of course, corrupt police officers would be risking detection by honest officers and prosecutors. So we can expect that corrupt officers will attempt to minimize their risk by entering into a regular prepayment arrangement with professional robbers to ensure that they would not be arrested when they commit a robbery. Such an illicit arrangement could be enforced by the corrupt officer's credible threat to prosecute a legitimate case or, if necessary, to fabricate a case.

The sale and use of illicit drugs are like victimless robberies, including this final twist. Drug users not only fail to report violations of the drug laws, they actively seek out sellers in ways that are designed to avoid police scrutiny. Drug use is an act deliberately conducted in private. And, because drugs users desire to consume drugs, they are quite willing to pay for the product.

Because drug use and sale are "victimless" in the purely descriptive sense employed here, the hypothetical consequences of policing victimless robberies are the very real results of drug law enforcement. The next three sections will discuss some of the more serious of these consequences.

2. *Drug Laws and Invasion of Privacy.*

Because drug use takes place in private and drug users and sellers conspire to keep their activities away from the prying eyes of the police, law enforcement surveillance must be extremely intrusive to be effective. The police must somehow gain access to private areas to watch for this activity.

One way to accomplish this is for a police officer, or more likely an informant, to pose as a buyer or seller. This means that the police must initiate the illegal transaction and run the risk that the crime being prosecuted was one that would not have occurred but for the police instigation.⁴⁹ And, since possession alone is also illegal, searches of persons without probable cause might also be necessary to find contraband.⁵⁰

Such illegal conduct by police is to be expected when one seeks to prohibit activity that is deliberately kept away from normal police scrutiny by the efforts of both parties to the transaction, thereby requiring police intrusion into private areas if they are to detect these acts.⁵¹ It is impossible for police to establish probable

⁴⁹ See, e.g., HELLMAN, *supra* note 6, at 60-88; EDWIN M. SCHUR, CRIMES WITHOUT VICTIMS 136 (1965).

⁵⁰ See HELLMAN, *supra* note 6, at 66-70.

⁵¹ *Id.* at 103 ("[A] large proportion of . . . [marijuana] arrests result from police conduct that violates the spirit if not the letter of the Fourth Amendment's prohibition

cause for every search for illicit drugs, no matter how small the quantity. Where no constitutional grounds exist for such an intrusion, a police department and its officers are forced to decide which is more important: the protection of constitutional rights or the political consequences of failing to get results.

3. *The Weakening of Constitutional Rights*

The fact that such privacy-invading conduct by police may be unconstitutional and therefore illegal does not prevent it from occurring.⁵² Some of those who are most concerned about the harm caused by drug laws are lawyers who have confronted the massive violations of constitutional rights that drug laws have engendered.⁵³ Such unconstitutional behavior is particularly likely, given our bizarre approach to policing the police.⁵⁴

At present we attempt to rectify police misconduct mainly by preventing the prosecution from using any illegally seized evidence at trial.⁵⁵ While this would generally be enough to scuttle a drug law prosecution, it will not prevent the police from achieving at least some of their objectives. They may be more concerned with successfully making an arrest and confiscating contraband than they are with obtaining a conviction.⁵⁶ This is especially true when they would have neither confiscation nor conviction without an unconstitutional search.

A policeman who is unwilling to lie about probable cause or to conceal a prior illegal search may still be inclined to make an arrest for possession of marijuana, even if he is aware that it will not stand up under judicial scrutiny. At a minimum he will have confiscated a supply of an illegal drug. The defendant will be jailed and have to post bail, and in many cases will have to hire a lawyer; these alone serve as forms of punishment. Finally, there is always the possibility that the defendant will plead guilty to a lesser offense rather than risk a felony conviction.⁵⁷

In most instances, the success of a suppression motion depends on whether the police tell the truth about their constitutional mistake in their report and at

against unreasonable searches and seizures"); see KAPLAN, *supra* note 6, at 96 ("Many of the techniques used to enforce heroin laws do end up violating the constitutional rights of individuals").

⁵² See Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 941-42 (1983).

⁵³ See *id.* at 975-77.

⁵⁴ The discussion that immediately follows in the text is only suggestive of a detailed analysis of this problem and a possible solution I have presented elsewhere. See *id.* at 937-85 (noting especially the discussion on victimless crimes spanning pages 980-85).

⁵⁵ See *id.* at 941.

⁵⁶ Comment, *Possession of Marijuana in San Mateo County: Some Social Costs of Criminalization*, 22 STAN. L. REV. 101, 114-15 (1969).

⁵⁷ *Id.* at 115.

trial.⁵⁸ They may not do so if they think that their conduct is illegal.⁵⁹ “There is substantial evidence to suggest that police often lie in order to bring their conduct within the limits of the practices sanctioned by judicial decisions.”⁶⁰ The only person who can usually contradict the police version of the incident is the defendant, and a defendant’s credibility does not generally compare favorably with that of police officers.⁶¹

Those who have committed no crime—who possess no contraband—will have no effective recourse at all. Because no evidence was seized, there is no evidence to exclude from a trial.⁶² As a practical matter, then, the police only have to worry about unconstitutional searches if something illicit turns up; but if they can confiscate whatever turns up and make an arrest, they may be better off than if they respect constitutional rights and do nothing at all.⁶³ Moreover, by encouraging such frequent constitutional violations, the enforcement of drug laws desensitizes the police to constitutional safeguards in other areas as well.

The constitutional rights of the general public are therefore threatened in at least two ways. First, the burden placed on law enforcement officials to enforce possessory laws without complaining witnesses virtually compels them to engage in wholesale violations of constitutional prohibitions against unreasonable searches and seizures. For every search that produces contraband there are untold scores of searches that do not. Given our present method of deterring police misconduct by excluding evidence of guilt, there is little effective recourse against the police available to those who are innocent of any crime.⁶⁴

Second, the widespread efforts of police and prosecutors to stretch the outer boundaries of legal searches can be expected, over time, to contribute to the eventual loosening up of the rules by the courts. In drug prosecutions, the evidence being suppressed strongly supports the conclusion that the defendants are guilty. The more cases that police bring against obviously guilty defendants, the more opportunities and incentives appellate courts will have to find a small exception here or there.⁶⁵ And instead of prosecuting the police for illegal conduct, the prosecutor’s office becomes an insidious and publicly financed source of political and legal agitation in the defense of such illegal conduct. As I have said elsewhere, “the arm of the government whose function is to prosecute illegal conduct is called upon, in the name of law enforcement, systematically to justify police irregularities. If these arguments are successful, the definition of illegal conduct

⁵⁸ See Barnett, *supra* note 52, at 953.

⁵⁹ HELLMAN, *supra* note 6, at 105.

⁶⁰ *Id.*

⁶¹ See Barnett, *supra* note 52, at 960–61.

⁶² *Id.*

⁶³ See *id.*

⁶⁴ See Barnett, *supra* note 52, at 962.

⁶⁵ See *id.* at 959–66 (discussing the costs imposed on courts that decide to suppress evidence).

will be altered.”⁶⁶ Refusing to consider these long run effects on the stability of constitutional protections is both dangerous and unrealistic.

One point should be made clear. The police are not the heavies in this tale. They are only doing what drug-law advocates have asked them to do by the only means such a task can be done effectively. It is the drug-law advocates who must bear the responsibility for the grave social problems caused by their favored policies. By demanding that the police do a job that cannot be done effectively without violating constitutional rights, drug-law proponents ensure that constitutional rights will be violated and that the respect of law enforcement personnel for these rights will be weakened.

4. *The Effect of Drug Laws on Corruption*

While most people have read about corrupt law enforcement officials who are supposed to be enforcing drug laws, few people are fully aware how this corruption is caused by the type of laws being enforced.⁶⁷ Drug laws allow the police to use force to prevent voluntary activities.⁶⁸ Unavoidably, the power to prohibit also gives the police a de facto power to franchise the manufacture and sale of drugs, in return for a franchise fee.⁶⁹

The corruption caused by prohibiting consensual activity is increased still further by the ease with which law enforcement officers can assist criminals when there is no complaining witness. As was seen in the discussion of “victimless robberies,” without a victim to file an official complaint, it is easier for police to overlook a crime that they might see being committed. When there is no victim to contradict the police version of events, it is much easier for police to tailor their testimony to achieve the outcome they desire, for example by describing circumstances of a bad search that would lead to the evidence being suppressed and the charges dropped. When it is the word of the police against the defendant’s, the defendant usually loses. With no victim pressing for a successful prosecution, the police, prosecutor, or judge may scuttle a prosecution with little fear of public exposure.

When compared to a victim crime like robbery, the victimless character of drug offenses (in the descriptive sense discussed above), and the fact that drug users are willing to pay for drugs, creates perverse incentives. When robbery is made illegal, robbers who take anything but cash must sell their booty at a tremendous discount. In other words, laws against robbery reduce the profit that sellers of illegally obtained goods receive and thereby discourage both robbery and the potential for corruption.⁷⁰

⁶⁶ *Id.* at 976.

⁶⁷ HELLMAN, *supra* note 6, at 150.

⁶⁸ *Id.* at 6–8.

⁶⁹ See KAPLAN, *supra* note 6, at 97–98.

⁷⁰ Organized burglary and auto theft remain profitable victim crimes, in spite of the fact that they are legally prohibited, and the profits earned from these crimes are used in part to pay for the services of corrupt law enforcement officials. Note however that—as

Drug laws have the opposite effect. Drug law enforcement creates an artificial scarcity of a desired product resulting in sellers receiving a *higher* price than they would without such laws. While it is true that drug prohibition makes it more costly to engage in the activity, this cost is partially or wholly offset by an increased return in the form of higher prices and by attracting criminal types who are less risk-averse—that is, individuals who are less likely to discount their realized cash receipts by their risk of being caught.⁷¹ For such persons, the subjective costs of providing illicit drugs are actually less than they are for more honest persons.

The extremely lucrative nature of the illicit drug trade makes the increased corruption of police, prosecutors, and judges all but inevitable. And this corruption extends far beyond the enforcement of drug laws. Beginning with the prohibition of alcohol, we have witnessed the creation of a multibillion dollar world-wide industry to supply various prohibited goods and services.⁷² The members of this industry are ruthless profit maximizers whose comparative market advantage is their ability and willingness to rely on violence and corruption to maintain their market share and to enforce their agreements.

The prohibition of alcohol and other drugs has created a criminal subculture that cares little about the distinction between crimes with victims and those without. To make matters worse, hiding the source of their income from tax and other authorities encourages these criminals to become heavily involved in legal businesses so that they may launder their illegally obtained income. They then can bring to these “legitimate” businesses their brutal tactics, which they use to drive out honest competitors.

The fact that law enforcement personnel are corrupted by drug laws should be no more surprising than the fact that many people decide to get high by ingesting certain chemicals. Among the many tragic ironies of drug prohibition is that by attempting to prevent the latter, they make the former far more prevalent. Yet drug-law advocates typically avoid the question of whether the increased systemic

compared with robbery—these crimes typically occur when the victim is not around, making them effectively “victimless” with respect to having occurrence witnesses available. And property insurance policies greatly reduce the victim’s enthusiasm to cooperate in the prosecution, which is another feature of a truly victimless crime.

⁷¹ For a discussion of the “time horizons” of criminals that may affect their internal rate of discount, see Edward C. Banfield, *Present-Orientedness and Crime*, in *ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS* 133, 133–42 (1977); see also Gerold P. O’Driscoll, Jr., *Professor Banfield on Time Horizon: What Has He Taught Us About Crime*, in *ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS* 143, 143–62 (1977); Mario J. Rizzo, *Time Preference, Situational Determinism, and Crime*, in *ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS* 163, 163–77 (1977).

⁷² See Morgan Cloud, III, *Cocaine, Demand, and Addiction: A Study of the Possible Convergence of Rational Theory and National Policy*, 42 *VAND. L. REV.* 725, 727–28 (1989) (stating that the illegal drug industry collects annual revenues of 100 billion dollars or more).

corruption that their favored policies unavoidably cause is simply too high a price to pay for whatever reduction in the numbers of drug users is achieved.

V. THE INJUSTICE OF DRUG LAWS

To this point, my argument has dwelled exclusively on exposing the hidden costs of drug prohibition—costs that unavoidably result from the fact that drug use is consensual and victimless. There is, however, a more principled lesson to be drawn from this discussion of harmful consequences of today's drug policy: Policy makers, are inherently much more limited in their ability to construct good policy than is normally acknowledged. First, policy makers suffer from a pervasive ignorance of consequences.⁷³ In advance of implementing certain kinds of social programs, it is difficult, if not impossible, to predict the precise effects they will have. The foregoing discussion of the hidden costs of drug laws illustrates that it is often very difficult even to detect and demonstrate the adverse effects of policies that have already occurred.

Second, the judgment of policy makers and other "experts" is often influenced by self-interest (as all judgment can be). After staking one's career on a commitment to certain kinds of programs, rejecting them becomes difficult when their consequences are not as expected. Jobs will be lost if programs are seen as counterproductive or harmful. In rendering opinions, such influences can be hard to resist.

To minimize decisions made in ignorance or out of self-interest, legal policy makers must somehow be constrained. And one historically important way to constrain them is by crafting general principles and rules that are based on a conception of individual rights that rests on fundamental principles of justice.⁷⁴

A sound legal system requires a firmer foundation for analyzing questions of legality than ad hoc arguments about the exigencies of particular policies. It requires the identification of general principles that reduce the hidden costs of the sort we have seen results from drug laws without resorting to an endless series of explicit cost-benefit analyses. It requires principles of general application that can be defended as basically just and right, despite the fact that circumstances will arise when adherence to such principles appears to be causing harm, which a deviation from principle would seem to be able to rectify.

A legal system based on such principles—if such principles can actually be identified—would not be as vulnerable to the shifting winds of opinion and prejudice as are particularistic public-policy discussions. I have discussed the vital social role and the appropriate substance of individual rights at greater length

⁷³ For an excellent summary of the literature that discusses the "knowledge problem" facing public policy analysts, see DON LAVOIE, *NATIONAL ECONOMIC PLANNING: WHAT IS LEFT?* 51–92 (1985).

⁷⁴ This section is based on the analysis of the pervasive social problems of knowledge, interest, and power in RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* (1998).

elsewhere and shall not repeat the analysis here.⁷⁵ The conclusion of such an analysis when applied to drug laws is that such laws are not only harmful, they are unjust.

The only practical way of facilitating the pursuit of happiness for each individual who chooses to live in a social setting is to recognize the rights of individuals to control their external possessions and their bodies—traditionally known as property rights—free from the forcible interference of any other person. If the pursuit of happiness is the Good for each person, then property rights are the prerequisites for pursuing that Good while living in close proximity to others. And the social prerequisites of the Good are the tenets of justice that all must live by. To deny these rights is to act unjustly.

The inalienable rights of individuals to live their own lives and to control their own bodies are, according to this analysis, essential to human survival and fulfillment in a social setting. Drug laws undermine this control by seeking to subject the bodies of some persons to the forcible control of other persons. Such laws seek forcibly to prevent persons from using their bodies in ways that they desire and that do not interfere with the equal liberty of others.

A proper rights analysis would avoid wasteful, and often irreversible, social experimentation. Two factors were seen above to generate the hidden costs of drug laws: the use of forcible *means* to achieve the *end* of controlling consensual conduct. These are the very factors that together identify drug laws as violations of individual rights and unjust interferences with individual liberty.

Just as you do not need to try PCP to know it is, on balance, bad for you, a proper rights analysis can reveal that we do not have to try drug laws to know they are socially harmful. This illustrates why a system of rights is ultimately preferable to a system of ad hoc public policy determinations. Had we adhered to a system of properly crafted individual rights, we would have avoided these serious harms in the first place.

John Stuart Mill once provided a defense of the distinction between matters of justice or rights that are properly subject to legal enforcement and matters of morality or vice that are not: "Justice is a name for certain classes of moral rules, which concern the essentials of human well-being more nearly, and are therefore of more absolute obligation, than any other rules for the guidance of life. . . ." ⁷⁶ And "the essence of the idea of justice," is "that of a right residing in the individual. . . ." ⁷⁷ As Mill then concluded, "[t]he moral rules which forbid mankind to hurt one another (in which we must never forget to include wrongful interference with each other's freedom), are more vital to human well-being than any maxims, however important, that only point out the best mode of managing

⁷⁵ See *id.*

⁷⁶ JOHN STUART MILL, UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT 55 (Ernest Rhys ed., E.P. Dutton & Co 1920) (1910).

⁷⁷ *Id.*

some department of human affairs.”⁷⁸ The proposition that the law should not attempt to regulate all vices is, of course, much older than Mill.⁷⁹

A rights analysis does it deny that drug use can adversely “affect” the lives of others. Many kinds of conduct from quitting school to having sex with strangers—can adversely affect the lives of those close to the persons who engage in such activity. But this does not justify collapsing the distinction between acts that adversely affect another and acts that violate another’s rights.

Herbert Spencer considered the objection that there is no “essential difference between right conduct toward others and right conduct toward self, [because] . . . what are generally considered purely private actions, do eventually affect others to such a degree, as to render them public actions; as witness the collateral effects of drunkenness or suicide.”⁸⁰ In this allegation, he conceded “there is much truth; and it is not to be denied that under a final analysis, all such distinctions as those above made must disappear.”⁸¹ Nevertheless, the difficulty of drawing such a line is characteristic of all classifications. “The same finite power of comprehension which compels us to deal with natural phenomena by separating them into groups and studying each group by itself,” he replied, “may also compel us to separate those actions which place a man in direct relationship with his fellows, from others which do not so place him; although it may be true that such a separation cannot be strictly maintained.”⁸²

⁷⁸ See *id.* at 73.

⁷⁹ See, e.g., Thomas Aquinas, *The Summa Theologica II*, in 20 GREAT BOOKS OF THE WESTERN WORLD 205 (Robert Maynard Hutchins & Mortimer J. Adler eds., Fathers of the English Dominican Province trans., 1952). There he poses the question, “Whether It Belongs to Human Law to Repress All Vices?” and answers in part:

Thus the same is not possible to a child as to a full-grown man, for which reason the law for children is not the same as for adults, since many things are permitted to children which in an adult are punished by law or at any rate are open to blame. In like manner many things are permissible to men not perfect in virtue which would be intolerable in a virtuous man. Now human law is framed for a number of human beings, the majority of whom are not perfect in virtue. Therefore human laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to abstain, and chiefly those that are *to the hurt of others, without the prohibition of which human society could not be maintained*; thus human law prohibits murder, theft and the like.

Id. at 231–32 (emphasis added). The absence of tangible “injuries to others” led some modern writers to characterize laws regulating matters of vice as “victimless crimes.” See, e.g., EDWIN M. SCHUR, CRIMES WITHOUT VICTIMS 163 (1965).

⁸⁰ HERBERT SPENCER, SOCIAL STATICS; OR THE CONDITIONS ESSENTIAL TO HUMAN HAPPINESS SPECIFIED, AND THE FIRST OF THEM DEVELOPED 85–87 (D. Appleton and Co., 1888) (1865) (emphasis added).

⁸¹ *Id.*

⁸² *Id.*

Legal institutions are not capable of correcting every ill in the world. On this point most would agree. Serious harm results when legal means are employed to correct harms that are not amenable to legal regulation. The harmful side-effects of drug laws represent a case in point. A properly formulated analysis of individual rights provides a way of distinguishing harms that are properly subject to legal prohibition from those that are not.

VI. CONCLUSION

An addiction to drug *laws* is caused by an inadequate understanding of individual rights and the vital role such rights play in deciding matters of legality. As a result, policies are implemented that cause serious harm to the very individuals whom these policies were devised to help and to the general public.

If the rights of individuals to choose how to use their person and possessions are fully respected, there is no guaranty that people will exercise their rights wisely. Some may mistakenly choose the path of finding happiness in a bottle or in a vial. Others may wish to help these people by persuading them of their folly and supporting them when they seek to wean themselves from their dependency.

We must not, however, give in to the powerful temptation to grant some the power to impose their consumptive preferences on others by force. This power—the essence of drug laws—is not only addictive once tasted, it also carries with it one of the few guaranties in life: the guaranty of untold corruption and human misery.

Vices are Not Crimes: A Vindication of Moral Liberty

By Lysander Spooner (1875)

I.

VICES are those acts by which a man harms himself or his property. Crimes are those acts by which one man harms the person or property of another.

Vices are simply the errors which a man makes in his search after his own happiness. Unlike crimes, they imply no malice toward others, and no interference with their persons or property.

In vices, the very essence of crime—that is, the design to injure the person or property of another—is wanting.

It is a maxim of the law that there can be no crime without a criminal intent; that is, without the intent to invade the person or property of another. But no one ever practises a vice with any such criminal intent. He practises his vice for his own happiness solely, and not from any malice toward others.

Unless this clear distinction between vices and crimes be made and recognized by the laws, there can be on earth no such thing as individual right, liberty, or property; no such things as the right of one man to the control of his own person and property, and the corresponding and co-equal rights of another man to the control of his own person and property.

For a government to declare a vice to be a crime, and to punish it as such, is an attempt to falsify the very nature of things. It is as absurd as it would be to declare truth to be falsehood, or falsehood truth.

II.

EVERY voluntary act of a man's life is either virtuous or vicious. That is to say, it is either in accordance, or in conflict, with those natural laws of matter and mind, on which his physical, mental, and emotional health and well-being depend. In other words, every act of his life tends, on the whole, either to his happiness, or to his unhappiness. No single act in his whole existence is indifferent.

Furthermore, each human being differs in his physical, mental, and emotional constitution, and also in the circumstances by which he is surrounded, from every other human being. Many acts, therefore, that are virtuous, and tend to happiness, in the case of one person, are vicious, and tend to unhappiness, in the case of another person.

Many acts, also, that are virtuous, and tend to happiness, in the case of one man, at one time, and under one set of circumstances, are vicious, and tend to unhappiness, in the case of the same man, at another time, and under other circumstances.

III.

TO know what actions are virtuous, and what vicious,— in other words, to know what actions tend, on the whole, to happiness, and what to unhappiness,— in the case of each and every man, in each and all the conditions in which they may severally be placed, is the profoundest and most complex study to which the greatest human mind ever has been, or ever can be, directed. It is, nevertheless, the constant study to which each and every man—the humblest in intellect as well as the greatest—is necessarily driven by the desires and necessities of his own existence. It is also the study in which each and every person, from his cradle to his grave, must necessarily form his own conclusions; because no one else knows or feels, or can know or feel, as he knows and feels, the desires and necessities, the hopes, and fears, and impulses of his own nature, or the pressure of his own circumstances.

IV.

IT is not often possible to say of those acts that are called vices, that they really are vices, except in degree. That is, it is difficult to say of any actions, or courses of action, that are called vices, that they really would have been vices, if they had stopped short of a certain point. The question of virtue or vice, therefore, in all such cases, is a question of quantity and degree, and not of the intrinsic character of any

single act, by itself. This fact adds to the difficulty, not to say the impossibility, of any one's—except each individual for himself—drawing any accurate line, or anything like any accurate line, between virtue and vice; that is, of telling where virtue ends, and vice begins. And this is another reason why this whole question of virtue and vice should be left for each person to settle for himself.

V.

VICES are usually pleasurable, at least for the time being, and often do not disclose themselves as vices, by their effects, until after they have been practised for many years; perhaps for a lifetime. To many, perhaps most, of those who practise them, they do not disclose themselves as vices at all during life. Virtues, on the other hand, often appear so harsh and rugged, they require the sacrifice of so much present happiness, at least, and the results, which alone prove them to be virtues, are often so distant and obscure, in fact, so absolutely invisible to the minds of many, especially of the young, that, from the very nature of things, there can be no universal, or even general, knowledge that they are virtues. In truth, the studies of profound philosophers have been expended—if not wholly in vain, certainly with very small results—in efforts to draw the lines between the virtues and the vices.

If, then, it be so difficult, so nearly impossible, in most cases, to determine what is, and what is not, vice; and especially if it be so difficult, in nearly all cases, to determine where virtue ends, and vice begins; and if these questions, which no one can really and truly determine for anybody but himself, are not to be left free and open for experiment by all, each person is deprived of the highest of all his rights as a human being, to wit: his right to inquire, investigate, reason, try experiments, judge, and ascertain for himself, what is, to him, virtue, and what is, to him, vice; in other words, what, on the whole, conduces to his happiness, and what, on the whole, tends to his unhappiness. If this great right is not to be left free and open to all, then each man's whole right, as a reasoning human being, to "liberty and the pursuit of happiness," is denied him.

VI.

WE all come into the world in ignorance of ourselves, and of everything around us. By a fundamental law of our natures we are all constantly impelled by the desire of happiness, and the fear of pain. But we have everything to learn, as to what will give us happiness, and save us from pain. No two of us are wholly alike, either physically, mentally, or emotionally; or, consequently, in our physical, mental, or emotional requirements for the acquisition of happiness, and the avoidance of unhappiness. No one of us, therefore, can learn this indispensable lesson of happiness and unhappiness, of virtue and vice, for another. Each must learn it for himself. To learn it, he must be at liberty to try all experiments that commend themselves to his judgment. Some of his experiments succeed, and, because they succeed, are called virtues; others fail, and, because they fail, are called vices. He gathers wisdom from his failures, as well as from his successes; from his so-called vices, as from his so-called virtues. He gathers wisdom as much from his failures as from his successes; from his so-called vices, as from his so-called virtues. Both are necessary to his acquisition of that knowledge—of his own nature, and of the world around him, and of their adaptations or non-adaptations to each other—which shall show him how happiness is acquired, and pain avoided. And, unless he can be permitted to try these experiments to his own satisfaction, he is restrained from the acquisition of knowledge, and, consequently, from pursuing the great purpose and duty of his life.

VII.

A MAN is under no obligation to take anybody's word, or yield to anybody's authority, on a matter so vital to himself, and in regard to which no one else has, or can have, any such interest as he. He cannot, if he would, safely rely upon the opinions of other men, because he finds that the opinions of other men do not agree. Certain actions, or courses of action, have been practised by many millions of men, through successive generations, and have been held by them to be, on the whole, conducive to happiness, and therefore virtuous. Other men, in other ages or countries, or under other conditions, have held, as the result of their experience and observation, that these actions tended, on the whole, to unhappiness, and

were therefore vicious. The question of virtue or vice, as already remarked in a previous section, has also been, in most minds, a question of degree; that is, of the extent to which certain actions should be carried; and not of the intrinsic character of any single act, by itself. The questions of virtue and vice have therefore been as various, and, in fact, as infinite, as the varieties of mind, body, and condition of the different individuals inhabiting the globe. And the experience of ages has left an infinite number of these questions unsettled. In fact, it can scarcely be said to have settled any of them.

VIII.

IN the midst of this endless variety of opinion, what man, or what body of men, has the right to say, in regard to any particular action, or course of action, "We have tried this experiment, and determined every question involved in it? We have determined it, not only for ourselves, but for all others? And, as to all those who are weaker than we, we will coerce them to act in obedience to our conclusion? We will suffer no further experiment or inquiry by any one, and, consequently, no further acquisition of knowledge by anybody?"

Who are the men who have the right to say this? Certainly there are none such. The men who really do say it, are either shameless impostors and tyrants, who would stop the progress of knowledge, and usurp absolute control over the minds and bodies of their fellow-men; and are therefore to be resisted instantly, and to the last extent; or they are themselves too ignorant of their own weaknesses, and of their true relations to other men, to be entitled to any other consideration than sheer pity or contempt.

We know, however, that there are such men as these in the world. Some of them attempt to exercise their power only within a small sphere, to wit, upon their children, their neighbors, their townsmen, and their countrymen. Others attempt to exercise it on a larger scale. For example, an old man at Rome, aided by a few subordinates, attempts to decide all questions of virtue and vice; that is, of truth or falsehood, especially in matters of religion. He claims to know and teach what religious ideas and practices are conducive, or fatal, to a man's happiness, not only in this world, but in that which is to come. He claims to be miraculously inspired for the performance of this work; thus virtually acknowledging, like a sensible man, that nothing short of miraculous inspiration would qualify him for it. This miraculous inspiration, however, has been ineffectual to enable him to settle more than a very few questions. The most important of these are, first, that the highest religious virtue to which common mortals can attain, is an implicit belief in his (the pope's) infallibility! and, secondly, that the blackest vices of which they can be guilty are to believe and declare that he is only a man like the rest of them!

It required some fifteen or eighteen hundred years to enable him to reach definite conclusions on these two vital points. Yet it would seem that the first of these must necessarily be preliminary to his settlement of any other questions; because, until his own infallibility is determined, he can authoritatively decide nothing else. He has, however, heretofore attempted or pretended to settle a few others. And he may, perhaps, attempt or pretend to settle a few more in the future, if he shall continue to find anybody to listen to him. But his success, thus far, certainly does not encourage the belief that he will be able to settle all questions of virtue and vice, even in his peculiar department of religion, in time to meet the necessities of mankind. He, or his successors, will undoubtedly be compelled, at no distant day, to acknowledge that he has undertaken a task to which all his miraculous inspiration was inadequate; and that, of necessity, each human being must be left to settle all questions of this kind for himself. And it is not unreasonable to expect that all other popes, in other and lesser spheres, will some time have cause to come to the same conclusion. No one, certainly, not claiming supernatural inspiration, should undertake a task to which obviously nothing less than such inspiration is adequate. And, clearly, no one should surrender his own judgment to the teachings of others, unless he be first convinced that these others have something more than ordinary human knowledge on this subject.

If those persons, who fancy themselves gifted with both the power and the right to define and punish other men's vices, would but turn their thoughts inwardly, they would probably find that they have a great work to do at home; and that, when that shall have been completed, they will be little disposed to do more towards correcting the vices of others, than simply to give to others the results of their experience and

observation. In this sphere their labors may possibly be useful; but, in the sphere of infallibility and coercion, they will probably, for well-known reasons, meet with even less success in the future than such men have met with in the past.

IX.

IT is now obvious, from the reasons already given, that government would be utterly impracticable, if it were to take cognizance of vices, and punish them as crimes. Every human being has his or her vices. Nearly all men have a great many. And they are of all kinds; physiological, mental, emotional; religious, social, commercial, industrial, economical, etc., etc. If government is to take cognizance of any of these vices, and punish them as crimes, then, to be consistent, it must take cognizance of all, and punish all impartially. The consequence would be, that everybody would be in prison for his or her vices. There would be no one left outside to lock the doors upon those within. In fact, courts enough could not be found to try the offenders, nor prisons enough built to hold them. All human industry in the acquisition of knowledge, and even in acquiring the means of subsistence, would be arrested; for we should all be under constant trial or imprisonment for our vices. But even if it were possible to imprison all the vicious, our knowledge of human nature tells us that, as a general rule, they would be far more vicious in prison than they ever have been out of it.

X.

A GOVERNMENT that shall punish all vices impartially is so obviously an impossibility, that nobody was ever found, or ever will be found, foolish enough to propose it. The most that any one proposes is, that government shall punish some one, or at most a few, of what he esteems the grossest of them. But this discrimination is an utterly absurd, illogical, and tyrannical one. What right has any body of men to say, "The vices of other men we will punish; but our own vices nobody shall punish? We will restrain other men from seeking their own happiness, according to their own notions of it; but nobody shall restrain us from seeking our own happiness, according to our own notions of it? We will restrain other men from acquiring any experimental knowledge of what is conducive or necessary to their own happiness; but nobody shall restrain us from acquiring an experimental knowledge of what is conducive or necessary to our own happiness?"

Nobody but knaves or blockheads ever thinks of making such absurd assumptions as these. And yet, evidently, it is only upon such assumptions that anybody can claim the right to punish the vices of others, and at the same time claim exemption from punishment for his own.

XI.

SUCH a thing as a government, formed by voluntary association, would never have been thought of, if the object proposed had been the punishment of all vices, impartially; because nobody wants such an institution, or would voluntarily submit to it. But a government, formed by voluntary association, for the punishment of all crimes, is a reasonable matter; because everybody wants protection for himself against all crimes by others, and also acknowledges the justice of his own punishment, if he commits a crime.

XII.

IT is a natural impossibility that a government should have a right to punish men for their vices; because it is impossible that a government should have any rights, except such as the individuals composing it had previously had, as individuals. They could not delegate to a government any rights which they did not themselves possess. They could not contribute to the government any rights, except such as they themselves possessed as individuals. Now, nobody but a fool or an impostor pretends that he, as an individual, has a right to punish other men for their vices. But anybody and everybody have a natural right, as individuals, to punish other men for their crimes; for everybody has a natural right, not only to defend his own person and property against aggressors, but also to go to the assistance and defence of everybody

else, whose person or property is invaded. The natural right of each individual to defend his own person and property against an aggressor, and to go to the assistance and defence of every one else whose person or property is invaded, is a right without which men could not exist on the earth. And government has no rightful existence, except in so far as it embodies, and is limited by, this natural right of individuals. But the idea that each man has a natural right to sit in judgment on all his neighbor's actions, and decide what are virtues, and what are vices,—that is, what contribute to that neighbor's happiness, and what do not,—and to punish him for all that do not contribute to it, is what no one ever had the impudence or folly to assert. It is only those who claim that government has some rightful power, which no individual or individuals ever did, or ever could, delegate to it, that claim that government has any rightful power to punish vices.

It will do for a pope or a king—who claims to have received direct authority from Heaven, to rule over his fellow-men—to claim the right, as the vicegerent of God, to punish men for their vices; but it is a sheer and utter absurdity for any government, claiming to derive its power wholly from the grant of the governed, to claim any such power; because everybody knows that the governed never would grant it. For them to grant it would be an absurdity, because it would be granting away their own right to seek their own happiness; since to grant away their right to judge of what will be for their happiness, is to grant away all their right to pursue their own happiness.

XIII.

WE can now see how simple, easy, and reasonable a matter is a government for the punishment of crimes, as compared with one for the punishment of vices. Crimes are few, and easily distinguished from all other acts; and mankind are generally agreed as to what acts are crimes. Whereas vices are innumerable; and no two persons are agreed, except in comparatively few cases, as to what are vices. Furthermore, everybody wishes to be protected, in his person and property, against the aggressions of other men. But nobody wishes to be protected, either in his person or property, against himself; because it is contrary to the fundamental laws of human nature itself, that any one should wish to harm himself. He only wishes to promote his own happiness, and to be his own judge as to what will promote, and does promote, his own happiness. This is what every one wants, and has a right to, as a human being. And though we all make many mistakes, and necessarily must make them, from the imperfection of our knowledge, yet these mistakes are no argument against the right; because they all tend to give us the very knowledge we need, and are in pursuit of, and can get in no other way.

The object aimed at in the punishment of crimes, therefore, is not only wholly different from, but it is directly opposed to, that aimed at in the punishment of vices.

The object aimed at in the punishment of crimes is to secure, to each and every man alike, the fullest liberty he possibly can have—consistently with the equal rights of others—to pursue his own happiness, under the guidance of his own judgment, and by the use of his own property. On the other hand, the object aimed at in the punishment of vices, is to deprive every man of his natural right and liberty to pursue his own happiness, under the guidance of his own judgment, and by the use of his own property.

These two objects, then, are directly opposed to each other. They are as directly opposed to each other as are light and darkness, or as truth and falsehood, or as liberty and slavery. They are utterly incompatible with each other; and to suppose the two to be embraced in one and the same government, is an absurdity, an impossibility. It is to suppose the objects of a government to be to commit crimes, and to prevent crimes; to destroy individual liberty, and to secure individual liberty.

XIV.

FINALLY, on this point of individual liberty: Every man must necessarily judge and determine for himself as to what is conducive and necessary to, and what is destructive of, his own well-being; because, if he omits to perform this task for himself, nobody else can perform it for him. And nobody else will even attempt to perform it for him, except in very few cases. Popes, and priests, and kings will assume to perform it for him, in certain cases, if permitted to do so. But they will, in general, perform it only in so far as they can minister to their own vices and crimes, by doing it. They will, in general, perform it only in so far

as they can make him their fool and their slave. Parents, with better motives, no doubt, than the others, too often attempt the same work. But in so far as they practise coercion, or restrain a child from anything not really and seriously dangerous to himself, they do him a harm, rather than a good. It is a law of Nature that to get knowledge, and to incorporate that knowledge into his own being, each individual must get it for himself. Nobody, not even his parents, can tell him the nature of fire, so that he will really know it. He must himself experiment with it, and be burnt by it, before he can know it.

Nature knows, a thousand times better than any parent, what she designs each individual for, what knowledge he requires, and how he must get it. She knows that her own processes for communicating that knowledge are not only the best, but the only ones that can be effectual.

The attempts of parents to make their children virtuous are generally little else than attempts to keep them in ignorance of vice. They are little else than attempts to teach their children to know and prefer truth, by keeping them in ignorance of falsehood. They are little else than attempts to make them seek and appreciate health, by keeping them in ignorance of disease, and of everything that will cause disease. They are little else than attempts to make their children love the light, by keeping them in ignorance of darkness. In short, they are little else than attempts to make their children happy, by keeping them in ignorance of everything that causes them unhappiness.

In so far as parents can really aid their children in the latter's search after happiness, by simply giving them the results of their (the parents') own reason and experience, it is all very well, and is a natural and appropriate duty. But to practise coercion in matters of which the children are reasonably competent to judge for themselves, is only an attempt to keep them in ignorance. And this is as much a tyranny, and as much a violation of the children's right to acquire knowledge for themselves, and such knowledge as they desire, as is the same coercion when practised upon older persons. Such coercion, practised upon children, is a denial of their right to develop the faculties that Nature has given them, and to be what Nature designs them to be. It is a denial of their right to themselves, and to the use of their own powers. It is a denial of their right to acquire the most valuable of all knowledge, to wit, the knowledge that Nature, the great teacher, stands ready to impart to them.

The results of such coercion are not to make the children wise or virtuous, but to make them ignorant, and consequently weak and vicious; and to perpetuate through them, from age to age, the ignorance, the superstitions, the vices, and the crimes of the parents. This is proved by every page of the world's history.

Those who hold opinions opposite to these, are those whose false and vicious theologies, or whose own vicious general ideas, have taught them that the human race are naturally given to evil, rather than good; to the false, rather than the true; that mankind do not naturally turn their eyes to the light; that they love darkness, rather than light; and that they find their happiness only in those things that tend to their misery.

XV.

BUT these men, who claim that government shall use its power to prevent vice, will say, or are in the habit of saying, "We acknowledge the right of an individual to seek his own happiness in his own way, and consequently to be as vicious as he pleases; we only claim that government shall prohibit the sale to him of those articles by which he ministers to his vice."

The answer to this is, that the simple sale of any article whatever—independently of the use that is to be made of the article—is legally a perfectly innocent act. The quality of the act of sale depends wholly upon the quality of the use for which the thing is sold. If the use of anything is virtuous and lawful, then the sale of it, for that use, is virtuous and lawful. If the use is vicious, then the sale of it, for that use, is vicious. If the use is criminal, then the sale of it, for that use, is criminal. The seller is, at most, only an accomplice in the use that is to be made of the article sold, whether the use be virtuous, vicious, or criminal. Where the use is criminal, the seller is an accomplice in the crime, and punishable as such. But where the use is only vicious, the seller is only an accomplice in the vice, and is not punishable.

XVI.

BUT it will be asked, "Is there no right, on the part of government, to arrest the progress of those who are bent on self-destruction?"

The answer is, that government has no rights whatever in the matter, so long as these so-called vicious persons remain sane, *compos mentis*, capable of exercising reasonable discretion and self-control; because, so long as they do remain sane, they must be allowed to judge and decide for themselves whether their so-called vices really are vices; whether they really are leading them to destruction; and whether, on the whole, they will go there or not. When they shall become insane, *non compos mentis*, incapable of reasonable discretion or self-control, their friends or neighbors, or the government, must take care of them, and protect them from harm, and against all persons who would do them harm, in the same way as if their insanity had come upon them from any other cause than their supposed vices.

But because a man is supposed, by his neighbors, to be on the way to self-destruction, from his vices, it does not, therefore, follow that he is insane, *non compos mentis*, incapable of reasonable discretion and self-control, within the legal meaning of those terms. Men and women may be addicted to very gross vices, and to a great many of them,—such as gluttony, drunkenness, prostitution, gambling, prize-fighting, tobacco-chewing, smoking, and snuffing, opium-eating, corset-wearing, idleness, waste of property, avarice, hypocrisy, etc., etc.,—and still be sane, *compos mentis*, capable of reasonable discretion and self-control, within the meaning of the law. And so long as they are sane, they must be permitted to control themselves and their property, and to be their own judges as to where their vices will finally lead them. It may be hoped by the lookers-on, in each individual case, that the vicious person will see the end to which he is tending, and be induced to turn back. But, if he chooses to go on to what other men call destruction, he must be permitted to do so. And all that can be said of him, so far as this life is concerned, is, that he made a great mistake in his search after happiness, and that others will do well to take warning by his fate. As to what may be his condition in another life, that is a theological question with which the law, in this world, has no more to do than it has with any other theological question, touching men's condition in a future life.

If it be asked how the question of a vicious man's sanity or insanity is to be determined? the answer is, that it is to be determined by the same kinds of evidence as is the sanity or insanity of those who are called virtuous; and not otherwise. That is, by the same kinds of evidence by which the legal tribunals determine whether a man should be sent to an asylum for lunatics, or whether he is competent to make a will, or otherwise dispose of his property. Any doubt must weigh in favor of his sanity, as in all other cases, and not of his insanity.

If a person really does become insane, *non compos mentis*, incapable of reasonable discretion or self-control, it is then a crime, on the part of other men, to give to him or sell to him, the means of self-injury.[1] And such a crime is to be punished like any other crime.

There are no crimes more easily punished, no cases in which juries would be more ready to convict, than those where a sane person should sell or give to an insane one any article with which the latter was likely to injure himself.

XVII.

BUT it will be said that some men are made, by their vices, dangerous to other persons; that a drunkard, for example, is sometimes quarrelsome and dangerous toward his family or others. And it will be asked, "Has the law nothing to do in such a case?"

The answer is, that if, either from drunkenness or any other cause, a man be really dangerous, either to his family or to other persons, not only himself may be rightfully restrained, so far as the safety of other persons requires, but all other persons—who know or have reasonable grounds to believe him dangerous—may also be restrained from selling or giving to him anything that they have reason to suppose will make him dangerous.

But because one man becomes quarrelsome and dangerous after drinking spirituous liquors, and because it is a crime to give or sell liquor to such a man, it does not follow at all that it is a crime to sell liquors to the hundreds and thousands of other persons, who are not made quarrelsome or dangerous by drinking them. Before a man can be convicted of crime in selling

liquor to a dangerous man, it must be shown that the particular man, to whom the liquor was sold, was dangerous; and also that the seller knew, or had reasonable grounds to suppose, that the man would be made dangerous by drinking it.

The presumption of law is, in all cases, that the sale is innocent; and the burden of proving it criminal, in any particular case, rests upon the government. And that particular case must be proved criminal, independently of all others.

Subject to these principles, there is no difficulty in convicting and punishing men for the sale or gift of any article to a man, who is made dangerous to others by the use of it.

XVIII.

BUT it is often said that some vices are nuisances (public or private), and that nuisances can be abated and punished.

It is true that anything that is really and legally a nuisance (either public or private) can be abated and punished. But it is not true that the mere private vices of one man are, in any legal sense, nuisances to another man, or to the public.

No act of one person can be a nuisance to another, unless it in some way obstructs or interferes with that other's safe and quiet use or enjoyment of what is rightfully his own.

Whatever obstructs a public highway, is a nuisance, and may be abated and punished. But a hotel where liquors are sold, a liquor store, or even a grog-shop, so called, no more obstructs a public highway, than does a dry goods store, a jewelry store, or a butcher's shop.

Whatever poisons the air, or makes it either offensive or unhealthful, is a nuisance. But neither a hotel, nor a liquor store, nor a grog-shop poisons the air, or makes it offensive or unhealthful to outside persons.

Whatever obstructs the light, to which a man is legally entitled, is a nuisance. But neither a hotel, nor a liquor store, nor a grog-shop, obstructs anybody's light, except in cases where a church, a school-house, or a dwelling-house would have equally obstructed it. On this ground, therefore, the former are no more, and no less, nuisances than the latter would be.

Some persons are in the habit of saying that a liquor-shop is dangerous, in the same way that gunpowder is dangerous. But there is no analogy between the two cases. Gunpowder is liable to be exploded by accident, and especially by such fires as often occur in cities. For these reasons it is dangerous to persons and property in its immediate vicinity. But liquors are not liable to be thus exploded, and therefore are not dangerous nuisances, in any such sense as is gunpowder in cities.

But it is said, again, that drinking-places are frequently filled with noisy and boisterous men, who disturb the quiet of the neighborhood, and the sleep and rest of the neighbors.

This may be true occasionally, though not very frequently. But whenever, in any case, it is true, the nuisance may be abated by the punishment of the proprietor and his customers, and if need be, by shutting up the place. But an assembly of noisy drinkers is no more a nuisance than is any other noisy assembly. A jolly or hilarious drinker disturbs the quiet of a neighborhood no more, and no less, than does a shouting religious fanatic. An assembly of noisy drinkers is no more, and no less, a nuisance than is an assembly of shouting religious fanatics. Both of them are nuisances when they disturb the rest and sleep, or quiet, of neighbors. Even a dog that is given to barking, to the disturbance of the sleep or quiet of the neighborhood, is a nuisance.

XIX.

BUT it is said, that for one person to entice another into a vice, is a crime.

This is preposterous. If any particular act is simply a vice, then a man who entices another to commit it, is simply an accomplice in the vice. He evidently commits no crime, because the accomplice can certainly commit no greater offence than the principal.

Every person who is sane, compos mentis, possessed of reasonable discretion and self-control, is presumed to be mentally competent to judge for himself of all the arguments, pro and con, that may be addressed to him, to persuade him to do any particular act; provided no fraud is employed to deceive him.

And if he is persuaded or induced to do the act, his act is then his own; and even though the act prove to be harmful to himself, he cannot complain that the persuasion or arguments, to which he yielded his assent, were crimes against himself.

When fraud is practised, the case is, of course, different. If, for example, I offer a man poison, assuring him that it is a safe and wholesome drink, and he, on the faith of my assertion, swallows it, my act is a crime.

Volenti non fit injuria, is a maxim of the law. To the willing no injury is done. That is, no legal wrong. And every person who is sane, *compos mentis*, capable of exercising reasonable discretion in judging of the truth or falsehood of the representations or persuasions to which he yields his assent, is "willing," in the view of the law; and takes upon himself the entire responsibility for his acts, when no intentional fraud has been practised upon him.

This principle, that to the willing no injury is done, has no limit, except in the case of frauds, or of persons not possessed of reasonable discretion for judging in the particular case. If a person possessed of reasonable discretion, and not deceived by fraud, consents to practise the grossest vice, and thereby brings upon himself the greatest moral, physical, or pecuniary sufferings or losses, he cannot allege that he has been legally wronged. To illustrate this principle, take the case of rape. To have carnal knowledge of a woman, against her will, is the highest crime, next to murder, that can be committed against her. But to have carnal knowledge of her, with her consent, is no crime; but at most, a vice. And it is usually holden that a female child, of no more than ten years of age, has such reasonable discretion, that her consent, even though procured by rewards, or promises of reward, is sufficient to convert the act, which would otherwise be a high crime, into a simple act of vice.[2]

We see the same principle in the case of prize-fighters. If I but lay one of my fingers upon another man's person, against his will, no matter how lightly, and no matter how little practical injury is done, the act is a crime. But if two men agree to go out and pound each other's faces to a jelly, it is no crime, but only a vice.

Even duels have not generally been considered crimes, because each man's life is his own, and the parties agree that each may take the other's life, if he can, by the use of such weapons as are agreed upon, and in conformity with certain rules that are also mutually assented to.

And this is a correct view of the matter, unless it can be said (as it probably cannot), that "anger is a madness" that so far deprives men of their reason as to make them incapable of reasonable discretion.

Gambling is another illustration of the principle that to the willing no injury is done. If I take but a single cent of a man's property, without his consent, the act is a crime. But if two men, who are *compos mentis*, possessed of reasonable discretion to judge of the nature and probable results of their act, sit down together, and each voluntarily stakes his money against the money of another, on the turn of a die, and one of them loses his whole estate (however large that may be), it is no crime, but only a vice.

It is not a crime, even, to assist a person to commit suicide, if he be in possession of his reason.

It is a somewhat common idea that suicide is, of itself, conclusive evidence of insanity. But, although it may ordinarily be very strong evidence of insanity, it is by no means conclusive in all cases. Many persons, in undoubted possession of their reason, have committed suicide, to escape the shame of a public exposure for their crimes, or to avoid some other great calamity. Suicide, in these cases, may not have been the highest wisdom, but it certainly was not proof of any lack of reasonable discretion.[3] And being within the limits of reasonable discretion, it was no crime for other persons to aid it, either by furnishing the instrument or otherwise. And if, in such cases, it be no crime to aid a suicide, how absurd to say that it is a crime to aid him in some act that is really pleasurable, and which a large portion of mankind have believed to be useful?

XX.

BUT some persons are in the habit of saying that the use of spirituous liquors is the great source of crime; that "it fills our prisons with criminals;" and that this is reason enough for prohibiting the sale of them.

Those who say this, if they talk seriously, talk blindly and foolishly. They evidently mean to be understood as saying that a very large percentage of all the crimes that are committed among men, are committed by

persons whose criminal passions are excited, at the time, by the use of liquors, and in consequence of the use of liquors.

This idea is utterly preposterous. In the first place, the great crimes committed in the world are mostly prompted by avarice and ambition.

The greatest of all crimes are the wars that are carried on by governments, to plunder, enslave, and destroy mankind.

The next greatest crimes committed in the world are equally prompted by avarice and ambition; and are committed, not on sudden passion, but by men of calculation, who keep their heads cool and clear, and who have no thought whatever of going to prison for them. They are committed, not so much by men who violate the laws, as by men who, either by themselves or by their instruments, make the laws; by men who have combined to usurp arbitrary power, and to maintain it by force and fraud, and whose purpose in usurping and maintaining it is, by unjust and unequal legislation, to secure to themselves such advantages and monopolies as will enable them to control and extort the labor and properties of other men, and thus impoverish them, in order to minister to their own wealth and aggrandizement.[4] The robberies and wrongs thus committed by these men, in conformity with the laws,—that is, their own laws,—are as mountains to molehills, compared with the crimes committed by all other criminals, in violation of the laws.

But, thirdly, there are vast numbers of frauds, of various kinds, committed in the transactions of trade, whose perpetrators, by their coolness and sagacity, evade the operation of the laws. And it is only their cool and clear heads that enable them to do it. Men under the excitement of intoxicating drinks are little disposed, and utterly unequal, to the successful practice of these frauds. They are the most incautious, the least successful, the least efficient, and the least to be feared, of all the criminals with whom the laws have to deal.

Fourthly. The professed burglars, robbers, thieves, forgers, counterfeiters, and swindlers, who prey upon society, are anything but reckless drinkers. Their business is of too dangerous a character to admit of such risks as they would thus incur.

Fifthly. The crimes that can be said to be committed under the influence of intoxicating drinks are mostly assaults and batteries, not very numerous, and generally not very aggravated. Some other small crimes, as petty thefts, or other small trespasses upon property, are sometimes committed, under the influence of drink, by feeble-minded persons, not generally addicted to crime. The persons who commit these two kinds of crime are but few. They cannot be said to “fill our prisons;” or, if they do, we are to be congratulated that we need so few prisons, and so small prisons, to hold them.

The State of Massachusetts, for example, has a million and a half of people. How many of these are now in prison for crimes—not for the vice of intoxication, but for crimes—committed against persons or property under the instigation of strong drink? I doubt if there be one in ten thousand, that is, one hundred and fifty in all; and the crimes for which these are in prison are mostly very small ones.

And I think it will be found that these few men are generally much more to be pitied than punished, for the reason that it was their poverty and misery, rather than any passion for liquor, or for crime, that led them to drink, and thus led them to commit their crimes under the influence of drink.

The sweeping charge that drink “fills our prisons with criminals” is made, I think, only by those men who know no better than to call a drunkard a criminal; and who have no better foundation for their charge than the shameful fact that we are such a brutal and senseless people, that we condemn and punish such weak and unfortunate persons as drunkards, as if they were criminals.

The legislators who authorize, and the judges who practise, such atrocities as these, are intrinsically criminals; unless their ignorance be such—as it probably is not—as to excuse them. And, if they were themselves to be punished as criminals, there would be more reason in our conduct.

A police judge in Boston once told me that he was in the habit of disposing of drunkards (by sending them to prison for thirty days—I think that was the stereotyped sentence) at the rate of one in three minutes! and sometimes more rapidly even than that; thus condemning them as criminals, and sending them to prison, without mercy, and without inquiry into circumstances, for an infirmity that entitled them

to compassion and protection, instead of punishment. The real criminals in these cases were not the men who went to prison, but the judge, and the men behind him, who sent them there.

I recommend to those persons, who are so distressed lest the prisons of Massachusetts be filled with criminals, that they employ some portion, at least, of their philanthropy in preventing our prisons being filled with persons who are not criminals. I do not remember to have heard that their sympathies have ever been very actively exercised in that direction. On the contrary, they seem to have such a passion for punishing criminals, that they care not to inquire particularly whether a candidate for punishment really be a criminal. Such a passion, let me assure them, is a much more dangerous one, and one entitled to far less charity, both morally and legally, than the passion for strong drink.

It seems to be much more consonant with the merciless character of these men to send an unfortunate man to prison for drunkenness, and thus crush, and degrade, and dishearten him, and ruin him for life, than it does for them to lift him out of the poverty and misery that caused him to become a drunkard.

It is only those persons who have either little capacity, or little disposition, to enlighten, encourage, or aid mankind, that are possessed of this violent passion for governing, commanding, and punishing them. If, instead of standing by, and giving their consent and sanction to all the laws by which the weak man is first plundered, oppressed, and disheartened, and then punished as a criminal, they would turn their attention to the duty of defending his rights and improving his condition, and of thus strengthening him, and enabling him to stand on his own feet, and withstand the temptations that surround him, they would, I think, have little need to talk about laws and prisons for either rum-sellers or rum-drinkers, or even any other class of ordinary criminals. If, in short, these men, who are so anxious for the suppression of crime, would suspend, for a while, their calls upon the government for aid in suppressing the crimes of individuals, and would call upon the people for aid in suppressing the crimes of the government, they would show both their sincerity and good sense in a much stronger light than they do now. When the laws shall all be so just and equitable as to make it possible for all men and women to live honestly and virtuously, and to make themselves comfortable and happy, there will be much fewer occasions than now for charging them with living dishonestly and viciously.

XXI.

BUT it will be said, again, that the use of spirituous liquors tends to poverty, and thus to make men paupers, and burdensome to the tax-payers; and that this is a sufficient reason why the sale of them should be prohibited.

There are various answers to this argument.

1. One answer is, that if the fact that the use of liquors tends to poverty and pauperism, be a sufficient reason for prohibiting the sale of them, it is equally a sufficient reason for prohibiting the use of them; for it is the use, and not the sale, that tends to poverty. The seller is, at most, merely an accomplice of the drinker. And it is a rule of law, as well as of reason, that if the principal in any act is not punishable, the accomplice cannot be.

2. A second answer to the argument is, that if government has the right, and is bound, to prohibit any one act—that is not criminal—merely because it is supposed to tend to poverty, then, by the same rule, it has the right, and is bound, to prohibit any and every other act—though not criminal—which, in the opinion of the government, tends to poverty. And, on this principle, the government would not only have the right, but would be bound, to look into every man's private affairs, and every person's personal expenditures, and determine as to which of them did, and which of them did not, tend to poverty; and to prohibit and punish all of the former class. A man would have no right to expend a cent of his own property, according to his own pleasure or judgment, unless the legislature should be of the opinion that such expenditure would not tend to poverty.

3. A third answer to the same argument is, that if a man does bring himself to poverty, and even to beggary,—either by his virtues or his vices,—the government is under no obligation whatever to take care of him, unless it pleases to do so. It may let him perish in the street, or depend upon private charity, if it so pleases. It can carry out its own free will and

discretion in the matter; for it is above all legal responsibility in such a case. It is not, necessarily, any part of a government's duty to provide for the poor. A government—that is, a legitimate government—is simply a voluntary association of individuals, who unite for such purposes, and only for such purposes, as suits them. If taking care of the poor—whether they be virtuous or vicious—be not one of those purposes, then the government, as a government, has no more right, and is no more bound, to take care of them, than has or is a banking company, or a railroad company.

Whatever moral claims a poor man—whether he be virtuous or vicious—may have upon the charity of his fellow-men, he has no legal claims upon them. He must depend wholly upon their charity, if they so please. He cannot demand, as a legal right, that they either feed or clothe him. And he has no more legal or moral claims upon a government—which is but an association of individuals—than he has upon the same, or any other individuals, in their private capacity.

Inasmuch, then, as a poor man—whether virtuous or vicious—has no more or other claims, legal or moral, upon a government, for food or clothing, than he has upon private persons, a government has no more right than a private person to control or prohibit the expenditures or actions of an individual, on the ground that they tend to bring him to poverty.

Mr. A, as an individual, has clearly no right to prohibit any acts or expenditures of Mr. Z, through fear that such acts or expenditures may tend to bring him (Z) to poverty, and that he (Z) may, in consequence, at some future unknown time, come to him (A) in distress, and ask charity. And if A has no such right, as an individual, to prohibit any acts or expenditures on the part of Z, then government, which is a mere association of individuals, can have no such right.

Certainly no man, who is *compos mentis*, holds his right to the disposal and use of his own property, by any such worthless tenure as that which would authorize any or all of his neighbors,—whether calling themselves a government or not,—to interfere, and forbid him to make any expenditures, except such as they might think would not tend to poverty, and would not tend to ever bring him to them as a supplicant for their charity.

Whether a man, who is *compos mentis*, come to poverty, through his virtues or his vices, no man, nor body of men, can have any right to interfere with him, on the ground that their sympathy may some time be appealed to in his behalf; because, if it should be appealed to, they are at perfect liberty to act their own pleasure or discretion as to complying with his solicitations.

This right to refuse charity to the poor—whether the latter be virtuous or vicious—is one that governments always act upon. No government makes any more provision for the poor than it pleases. As a consequence, the poor are left, to a great extent, to depend upon private charity. In fact, they are often left to suffer sickness, and even death, because neither public nor private charity comes to their aid. How absurd, then, to say that government has a right to control a man's use of his own property, through fear that he may sometime come to poverty, and ask charity.

4. Still a fourth answer to the argument is, that the great and only incentive which each individual man has to labor, and to create wealth, is that he may dispose of it according to his own pleasure or discretion, and for the promotion of his own happiness, and the happiness of those whom he loves.[5]

Although a man may often, from inexperience or want of judgment, expend some portion of the products of his labor injudiciously, and so as not to promote his highest welfare, yet he learns wisdom in this, as in all other matters, by experience; by his mistakes as well as by his successes. And this is the only way in which he can learn wisdom. When he becomes convinced that he has made one foolish expenditure, he learns thereby not to make another like it. And he must be permitted to try his own experiments, and to try them to his own satisfaction, in this as in all other matters; for otherwise he has no motive to labor, or to create wealth at all.

Any man, who is a man, would rather be a savage, and be free, creating or procuring only such little wealth as he could control and consume from day to day, than to be a civilized man, knowing how to create and accumulate wealth indefinitely, and yet not permitted to use or dispose of it, except under the supervision, direction, and dictation of a set of meddling, superserviceable fools and tyrants, who, with no more knowledge than himself, and perhaps with not half so much, should assume to control him, on the

ground that he had not the right, or the capacity, to determine for himself as to what he would do with the proceeds of his own labor.

5. A fifth answer to the argument is, that if it be the duty of government to watch over the expenditures of any one person,—who is *compos mentis*, and not criminal,—to see what ones tend to poverty, and what do not, and to prohibit and punish the former, then, by the same rule, it is bound to watch over the expenditures of all other persons, and prohibit and punish all that, in its judgment, tend to poverty.

If such a principle were carried out impartially, the result would be, that all mankind would be so occupied in watching each other's expenditures, and in testifying against, trying, and punishing such as tended to poverty, that they would have no time left to create wealth at all. Everybody capable of productive labor would either be in prison, or be acting as judge, juror, witness, or jailer. It would be impossible to create courts enough to try, or to build prisons enough to hold, the offenders. All productive labor would cease; and the fools that were so intent on preventing poverty, would not only all come to poverty, imprisonment, and starvation themselves, but would bring everybody else to poverty, imprisonment, and starvation.

6. If it be said that a man may, at least, be rightfully compelled to support his family, and, consequently, to abstain from all expenditures that, in the opinion of the government, tend to disable him to perform that duty, various answers might be given. But this one is sufficient, viz.: that no man, unless a fool or a slave, would acknowledge any family to be his, if that acknowledgment were to be made an excuse, by the government, for depriving him, either of his personal liberty, or the control of his property.

When a man is allowed his natural liberty, and the control of his property, his family is usually, almost universally, the great paramount object of his pride and affection; and he will, not only voluntarily, but as his highest pleasure, employ his best powers of mind and body, not merely to provide for them the ordinary necessities and comforts of life, but to lavish upon them all the luxuries and elegancies that his labor can procure.

A man enters into no moral or legal obligation with his wife or children to do anything for them, except what he can do consistently with his own personal freedom, and his natural right to control his own property at his own discretion.

If a government can step in and say to a man,— who is *compos mentis*, and who is doing his duty to his family, as he sees his duty, and according to his best judgment, however imperfect that may be,—“We (the government) suspect that you are not employing your labor to the best advantage for your family; we suspect that your expenditures, and your disposal of your property, are not so judicious as they might be, for the interest of your family; and therefore we (the government) will take you and your property under our special surveillance, and prescribe to you what you may, and may not do, with yourself and your property; and your family shall hereafter look to us (the government), and not to you, for support”—if a government can do this, all a man's pride, ambition, and affection, relative to his family, would be crushed, so far as it would be possible for human tyranny to crush them; and he would either never have a family (whom he would publicly acknowledge to be his), or he would risk both his property and his life in overthrowing such an insulting, outrageous, and insufferable tyranny. And any woman who would wish her husband—he being *compos mentis*—to submit to such an unnatural insult and wrong, is utterly undeserving of his affection, or of anything but his disgust and contempt. And he would probably very soon cause her to understand that, if she chose to rely on the government, for the support of herself and her children, rather than on him, she must rely on the government alone.

XXII.

STILL another and all-sufficient answer to the argument that the use of spirituous liquors tends to poverty, is that, as a general rule, it puts the effect before the cause. It assumes that it is the use of the liquors that causes the poverty, instead of its being the poverty that causes the use of the liquors.

Poverty is the natural parent of nearly all the ignorance, vice, crime, and misery there are in the world.[6]

Why is it that so large a portion of the laboring people of England are drunken and vicious? Certainly not because they are by nature any worse than other men. But it is because their extreme and hopeless poverty

keeps them in ignorance and servitude, destroys their courage and self-respect, subjects them to such constant insults and wrongs, to such incessant and bitter miseries of every kind, and finally drives them to such despair, that the short respite that drink or other vice affords them, is, for the time being, a relief. This is the chief cause of the drunkenness and other vices that prevail among the laboring people of England.

If those laborers of England, who are now drunken and vicious, had had the same chances and surroundings in life as the more fortunate classes have had; if they had been reared in comfortable, and happy, and virtuous homes, instead of squalid, and wretched, and vicious ones; if they had had opportunities to acquire knowledge and property, and make themselves intelligent, comfortable, happy, independent, and respected, and to secure to themselves all the intellectual, social, and domestic enjoyments which honest and justly rewarded industry could enable them to secure,—if they could have had all this, instead of being born to a life of hopeless, unrewarded toil, with a certainty of death in the workhouse, they would have been as free from their present vices and weaknesses as those who reproach them now are.

It is of no use to say that drunkenness, or any other vice, only adds to their miseries; for such is human nature—the weakness of human nature, if you please—that men can endure but a certain amount of misery, before their hope and courage fail, and they yield to almost anything that promises present relief or mitigation; though at the cost of still greater misery in the future. To preach morality or temperance to such wretched persons, instead of relieving their sufferings, or improving their conditions, is only insulting their wretchedness.

Will those who are in the habit of attributing men's poverty to their vices, instead of their vices to their poverty,—as if every poor person, or most poor persons, were specially vicious,—tell us whether all the poverty and want that, within the last year and a half,*[7] have been brought so suddenly—as it were in a moment—upon at least twenty millions of the people of the United States, were brought upon them as a natural consequence, either of their drunkenness, or of any other of their vices? Was it their drunkenness, or any other of their vices, that paralyzed, as by a stroke of lightning, all the industries by which they lived, and which had, but a few days before, been in such prosperous activity? Was it their vices that turned the adult portion of those twenty millions out of doors without employment, compelled them to consume their little accumulations, if they had any, and then to become beggars,—beggars for work, and, failing in this, beggars for bread? Was it their vices that, all at once, and without warning, filled the homes of so many of them with want, misery, sickness, and death? No. Clearly it was neither the drunkenness, nor any other vices, of these laboring people, that brought upon them all this ruin and wretchedness. And if it was not, what was it?

This is the problem that must be answered; for it is one that is repeatedly occurring, and constantly before us, and that cannot be put aside.

In fact, the poverty of the great body of mankind, the world over, is the great problem of the world. That such extreme and nearly universal poverty exists all over the world, and has existed through all past generations, proves that it originates in causes which the common human nature of those who suffer from it, has not hitherto been strong enough to overcome. But these sufferers are, at least, beginning to see these causes, and are becoming resolute to remove them, let it cost what it may. And those who imagine that they have nothing to do but to go on attributing the poverty of the poor to their vices, and preaching to them against their vices, will ere long wake up to find that the day for all such talk is past. And the question will then be, not what are men's vices, but what are their rights?

Notes

[1] To give an insane man a knife, or any other weapon, or thing, by which he is likely to injure himself, is a crime.

[2] The statute book of Massachusetts makes ten years the age at which a female child is supposed to have discretion enough to part with her virtue. But the same statute book holds that no person, man or woman, of any age, or any degree of wisdom or experience, has discretion enough to be trusted to buy and

drink a glass of spirits, on his or her own judgment! What an illustration of the legislative wisdom of Massachusetts!

[3] Cato committed suicide to avoid falling into the hands of Cæsar. Who ever suspected that he was insane? Brutus did the same. Colt committed suicide only an hour or so before he was to be hanged. He did it to avoid bringing upon his name and his family the disgrace of having it said that he was hanged. This, whether a really wise act or not, was clearly an act within reasonable discretion. Does any one suppose that the person who furnished him with the necessary instrument was a criminal?

[4] An illustration of this fact is found in England, whose government, for a thousand years and more, has been little or nothing else than a band of robbers, who have conspired to monopolize the land, and, as far as possible, all other wealth. These conspirators, calling themselves kings, nobles, and freeholders, have, by force and fraud, taken to themselves all civil and military power; they keep themselves in power solely by force and fraud, and the corrupt use of their wealth; and they employ their power solely in robbing and enslaving the great body of their own people, and in plundering and enslaving other peoples. And the world has been, and now is, full of examples substantially similar. And the governments of our own country do not differ so widely from others, in this respect, as some of us imagine.

[5] It is to this incentive alone that we are indebted for all the wealth that has ever been created by human labor, and accumulated for the benefit of mankind.

[6] Except those great crimes, which the few, calling themselves governments, practise upon the many, by means of organized, systematic extortion and tyranny. And it is only the poverty, ignorance, and consequent weakness of the many, that enable the combined and organized few to acquire and maintain such arbitrary power over them.

[7] That is, from September 1, 1873, to March 1, 1875.

