

## A PARADOX IN OVERCRIMINALIZATION

Ekow N. Yankah\*

*Given that one of the central roles of political philosophy and criminal theory is illuminating the borders of justified state punishment, the modern crisis of overcriminalization is a painful defeat. Generations of legal theory, grounded in liberalism, has done little to stem the tide of criminal law and the explosion of criminal punishment.*

*One notable island of decriminalization has been the retreat of criminal punishment surrounding marijuana consumption. With the combination of medical marijuana regimes, reduction of punishment, and halting steps toward full decriminalization, marijuana stands in stark contrast to the highly visible war on drugs that has driven much contemporary overcriminalization.*

*This piece argues that opponents of overcriminalization have much to learn from the functional decriminalization of marijuana. Marijuana decriminalization has not been successful because of a swing in public attitudes about marijuana use. Rather, decriminalization is possible because advocates can marshal agreement across philosophical starting points, bringing both liberals and nonliberals into consensus. This groundswell demonstrates that legal theorists concerned about containing state power must look beyond liberal theories. Most importantly, this example reveals that legal theorists interested in turning back the tide of overcriminalization must do more than wait for areas of Rawlsian overlapping consensus; they must reach out to generate consensus with Rawlsian conjecture by viewing law not only from the liberal vantage point but from the nonliberal's perspective as well.*

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\*Associate Professor, Cardozo School of Law.

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*New Criminal Law Review*, Vol. 14, Number 1, pps 1–34. ISSN 1933-4192, electronic ISSN 1933-4206. © 2011 by the Regents of the University of California. All rights reserved. Please direct all requests for permission to photocopy or reproduce article content through the University of California Press's Rights and Permissions website, <http://www.ucpressjournals.com/reprintInfo.asp>. DOI: 10.1525/nclr.2011.14.1.1.

## INTRODUCTION

Among the core tasks of political theory is illuminating the legitimate basis of state power and, by implication, its appropriate limits. Despite the focus on the appropriate limits of state power, the modern state has expanded the services it performs (and is expected to perform). Related, the number of things from which the state is expected to protect its citizens and, by compliment, the number of demands the state is viewed as permissibly making of its citizens, have exploded. The most morally salient and visceral of these demands, of course, are the ones enforced by punishment, those of the criminal law.<sup>1</sup> The explosion of criminal law has vastly expanded state power, some times for the better, but often creating unprecedented powers to monitor, arrest, and imprison vast swaths of the population.

Among the most thoughtful and powerful calls for a public mission to justify the modern explosion in criminal law is Douglas Husak's *Overcriminalization*.<sup>2</sup> The virtues of Husak's book, and there are many, and the progress he makes focusing the liberal project of containing state power in modern criminal law have been rightfully lauded. Even without his valuable prescription, Husak's diagnosis of the problem and call to

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1. I doubt much of this growth is due to any grand shifts in shared public philosophical commitments. Rather, I suspect the changes in public attitude are more often incremental changes that respond to brute facts on the ground. As times and technology change to make it possible for the state to implement an emergency phone system such as 911, for example, citizens either acquiesce, come to expect, or demand such a service. Nicola Lacey is an insightful observer of how even the most abstract political legal norms we take to be criterial are historically contingent. Nicola Lacey, *Philosophy, Political Morality, and History: Explaining the Enduring Resonance of the Hart-Fuller Debate*, 83 N.Y.U. L. Rev. 1059 (2008).

Nonetheless, changes in acts viewed as legitimate state action interacts with our public philosophical commitments, if only insofar as much of state action must either be accommodated and accepted or at least skirted and ignored (driving vast segments of activities underground) upon pain of festering unrest and eventual revolution. And with due respect to the much hated tax codes, nowhere is this more visceral than in our criminal law; it is not for nothing that the most disturbing fixations of various militia groups focus on law enforcement. My point, readily accepted among philosophers, but I dare say not as salient in the public, is that philosophical acceptance (justifiability would be the strongest form) has an important role to play in criminal law in particular. My further point is that the particular role it has to play is not the one that most philosophers, with very important exceptions, would like it to play.

2. Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (2007).

action are important. Husak explores the extent of the problem of modern overcriminalization, offers interesting thoughts on its sources, illustrates the way it undermines the rule of law, and sounds the trumpet for academics either to justify this trend or, more likely, to participate in bringing it under control.

Husak is surely right about the growth and dangers of overcriminalization. Still, he misses one odd feature in his assessment, stranger still because it lies in the heart of Husak's long-running academic project.<sup>3</sup> Despite what otherwise seems like the relentless creep of criminal law, important American jurisdictions are currently conducting a very public reexamination and, in many cases, recession of state drug laws surrounding the use of marijuana. Admittedly, this may seem like quite little when surveying the landscape of our drug laws or, even more generally, the totality of our criminal law. Further, even this relatively minor change has often been conducted ostensibly to allow the consumption of medical marijuana—though many understand this to border on sheer euphemism.

But there are reasons why even this seemingly minor change deserves closer scrutiny. First, the criminalization of marijuana has long imposed widespread social costs. These costs cannot be measured merely in the immense expense of catching and prosecuting violations of various marijuana laws. Instead, a profound cost of criminalizing marijuana is that it turns many millions of Americans into criminal offenders. Further, by imposing criminality on wide swaths of Americans the criminalization of marijuana greatly expands police powers to detain and search wide numbers of people or enter into countless homes and cars. Most disturbingly, the power to stop, search, and arrest has, intentionally or unintentionally, disproportionately affected racial minorities, in some places virtually granting officials the power to police African American and Hispanic poor under a nearly distinct policing regime. The intersection of wealth, class, and law means that whereas many middle class can buy marijuana out of police view, many poor who engage in the same activity do so in public view, on street corners and the like, and are thus subject to stop, frisk, and arrest. These features—the widespread use of marijuana, the broad powers conferred on

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3. Douglas Husak, *Drugs, Addiction, Therapy and Crime: Predicting the Future: A Bad Reason to Criminalize Drug Use*, 2009 *Utah L. Rev.* 105 (2009); Douglas Husak & Peter de Marneffe, *The Legalization of Drugs: For and Against* (2005); Douglas Husak, *Drugs and Rights* (1992).

the police, and the disparate impact criminalization has on the poor and minorities—have long made the prohibition of marijuana the *bête noire* of liberal scholars. The very public examination and rollback of the drug regime here deserves attention. The question then is, does this very public retreat of the criminal law in an age of explosive growth give any instruction?

I believe that this very public reexamination, in fits and starts, reveals something important for responding to Husak's call to arms. Some important features in the decriminalization of marijuana are critical to the success of any sustained effort to stem the tide of overcriminalization. The goal of this piece is to focus on the philosophical features that apply to the decriminalization of marijuana and to urge those interested in the limitation of government power to isolate and highlight other areas of criminal law that share those features. Part I will very briefly survey the radical change in criminal laws regulating marijuana use in the last few years. Though these changes have received extensive media coverage, the depth of the change seems to have attracted little attention from criminal law theorists. Whether that is because the liberalization of these laws so far has changed little on the ground, because it is viewed as overdue, or because these changes have flown under the guise of medical marijuana, it is remarkable that generations of liberals and libertarians advocating decriminalization of drug laws have found little in these victories to celebrate.

Part II will explore the particular features of the criminal regulation of marijuana that have made decriminalization efforts a success. As with any event of complex and uncertain causes, it goes without saying that no single cause can be definitively isolated. Moreover, many factors, economic and political, lay outside of the realm of those focused on the philosophical facets of criminal law. Nonetheless, Part II will argue the decriminalization owes its success in part to particular philosophical features of the arguments mounted against the criminalization of marijuana. Specifically, we will see how arguments to decriminalize marijuana can garner agreement across a broad span of philosophical frameworks. Put concretely, the remarkable thing about decriminalization of marijuana is that one can agree with decriminalization regardless of whether one begins from deontological, consequentialist or virtue-centered foundations in one's legal theory.

It is unsurprising that the greatest successes in political reforms should come where one can find the greatest agreement. Yet, as unsurprising as this feature is, it is largely ignored by those engaged in legal theory. Part III will begin by examining Husak's admirable and persuasive model in

*Overcriminalization.* Although some minor points of disagreement will be explored, the goal in this section will not be to prosecute any particular disagreement with Husak's effort, much of which is compelling. Rather, Part III will argue that even Husak's model fails to take seriously the need to garner consensus across philosophical paradigms, particularly the need to contend seriously with points of view not grounded in purely liberal starting points. Nor, the argument goes, is it sufficient to look to purely empirical (and preexisting) consensus, as exemplified in the work of Paul Robinson. Rather, a uniquely philosophical and principled aspect lies at the heart of legal reform. Part III will conclude by arguing that to fail to grapple with nonliberal and virtue-centered perspectives of criminal law fatally undermines efforts to stem the tide of overcriminalization. What is needed for progress is a project of philosophical consensus building that engages with nonliberal critiques of criminal law.

Some of this echoes familiar territory, and similar ideas have been examined by political theorists from a variety of angles. The best known and developed version of this problem is that of John Rawls, who described the inability to agree about the deep justifications of our political doctrines as the fact of reasonable pluralism. Part IV will explore the aspects of this project, which are captured in Rawls's model of overlapping consensus. Though the Rawlsian model points out some of what is missing in prior legal reform projects generally and decriminalization specifically, I will argue that even Rawls's idea of overlapping consensus fails to motivate agreement that can generate legal reform. Something more is needed, a more deeply engaged project that does not simply accept the fact of a plurality of views but goes deeper. Although Rawls hints at such a possible enterprise, it is developed nowhere in his work. I will argue that engaging in this deeper level of agreement is critical to garnering the type of consensus necessary to make progress in decriminalization.

I will then return to apply this model to the task at hand and draw some conclusions. I will once again review the features of our marijuana policy that made it a likely candidate for decriminalization. More importantly, focusing on these features will guide both the methods of advocacy and the areas of law that are most promising in the battle to curtail government power. This, of course, is not unalloyed news. Indeed, seeing the unique features of the seeming paradox of decriminalization in one area will indicate the difficulty of curtailing government power and criminalization where these features are lacking. Put plainly, where one cannot generate

philosophical agreement among deontological, consequentialist, and virtue-centered theories of law, the chances of curtailing criminalization are weakened.

## I. MARIJUANA AND DECRIMINALIZATION

There is a sense in which any attempt to write a piece advocating the decriminalization of marijuana would be already a rear guard movement. Despite the apparent static nature at the federal level, the seas of criminal legislation regulating marijuana are roiling; indeed, the tides are in deep retreat. This section need only briefly canvas the changes in current legislation to illustrate the current trends toward decriminalization of marijuana.

Since the Controlled Substances Act of 1970 (CSA), marijuana has been classified as a Schedule I substance, along with heroin, LSD, and peyote.<sup>4</sup> Thus the federal government maintains a policy of prohibition, officially holding that marijuana has no currently accepted medical use.<sup>5</sup> This uncompromising position of the federal government has, almost from the start, been undermined by countervailing medical demand. As early as 1978, lawsuits proved successful in requiring the Food and Drug Administration to allow medical use, beginning with Robert Randall, who needed cannabis cigarettes to treat his glaucoma.<sup>6</sup> The program eventually expanded to include thirteen other individuals.

From this minuscule number, the modern medical marijuana movement has grown. In 1996, California passed the Compassionate Use Act, which decriminalized medical marijuana, allowing patients with a valid doctor's recommendation to cultivate and possess marijuana for personal use. The act has since been expanded to protect a growing system of growth and distribution cooperatives. Since the passage of California's Compassionate Use Act, at least sixteen other states have passed similar bills to allow the personal use of marijuana with a doctor's recommendation.<sup>7</sup>

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4. Controlled Substances Act, 21 U.S.C. 801-901 (1970).

5. *Id.*

6. Emily Farr, *United States v. Oakland Cannabis Buyers' Cooperative: The Medical Necessity Defense as an Exception to the Controlled Substances Act*, 53 S.C. L. Rev. 439, 452 (2002).

7. See Cong. Research Serv., 109th Cong.: Review and Analysis of Federal and State Policies 17-18 & n.59 (2005) ("Twelve states [Alaska, California, Colorado, Hawaii, Maine,

One might argue that the restricted use of marijuana for medical purposes does little to evidence a coherent trend toward decriminalization were it not for two obvious features. The first is that the link between personal marijuana consumption and medical need in many of these jurisdictions is becoming increasingly illusory.<sup>8</sup> In many places, doctor's recommendations are a bare formality, some outfits having set up shop for the sole purpose of distributing such recommendations when recommendations are required at all.<sup>9</sup> Thus there is reason to suspect that in many jurisdictions, medical marijuana has become a euphemism for decriminalization.

Secondly, the proliferation of permissive medical marijuana regimes has occurred in concert with an explicit decriminalization of marijuana use or recession of criminal penalties on the state and local levels.<sup>10</sup> Decriminalization statutes typically remove the criminal sanctions for the possession of marijuana for personal use. Thirteen states have now adopted some form of decriminalization.<sup>11</sup> Typical of these statutes is the very recent change in California, which reduces the possession of an ounce of marijuana to an infraction punishable by a \$100 fine, the lowest level of offense under state law, akin to a traffic ticket.<sup>12</sup> Moreover, the change occurred just ahead of Proposition 19, a ballot initiative that would have legalized marijuana in the state.<sup>13</sup> Though Proposition 19 ultimately failed in the November 2010 ballot, the long term points to decreasing criminal liability and accelerated decriminalization. Whereas federal law remains uncompromising in its prohibition of marijuana, changes on the state and

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Montana, Nevada, New Mexico, Oregon, Rhode Island, Vermont, and Washington], covering about 22% of the U.S. population, have enacted laws to allow the use of cannabis for medical purposes.”), available at <http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-8244:1>. More current information is available at [http://en.wikipedia.org/wiki/Medical\\_cannabis#United\\_States](http://en.wikipedia.org/wiki/Medical_cannabis#United_States).

8. Peter J. Cohen, *Drugs, Addiction, Therapy and Crime: Medical Marijuana: The Conflict Between Scientific Evidence and Political Ideology*, 2009 *Utah L. Rev.* 35, 92–95 (2009); Jesse McKinley, *Marijuana Hotbed Retreats on Medical Use*, *New York Times*, June 9, 2008, at A1.

9. Cohen, *supra* note 8.

10. Cynthia S. Duncan, *The Need for Change: An Economic Analysis of Marijuana Policy*, 41 *Conn. L. Rev.* 1701, 1726–29 (2009).

11. *Id.*; David Abel, *Marijuana Law Advocates Seek Wider Change*, *Boston Globe*, Nov. 8, 2008, at B3.

12. Jesse McKinley, *California Reduces Its Penalty for Marijuana*, *New York Times*, October 1, 2010, at A9.

13. *Id.*

local levels make criminal regulation of marijuana an increasingly patchwork affair. Some jurisdictions have functionally decriminalized personal consumption of marijuana.

## II. THE APPARENT PARADOX OF OVERCRIMINALIZATION

Perhaps the recession of criminal liability and punishment surrounding marijuana does not immediately strike some as remarkable. After all, liberalization of marijuana laws has been championed by liberals for decades. Yet when viewed in proper context, the recession of liability is no less remarkable for having near consensus among liberals.

The most striking feature of the decriminalization in criminal laws governing marijuana is that it comes in a historical period most notable for its explosive increase in criminalization. Doug Husak, among many authors, has persuasively described the unprecedented growth in the reach of state and federal criminal law.<sup>14</sup> Even more remarkable, much of the overcriminalization that affects the day-to-day lives of citizens has come in the form of drug laws. This impact is captured not solely in terms of stops and arrests, with which many citizens will never be confronted; it is also felt in the looming shadow of police power to subject suspicious behavior to further inquiry and investigation, the normalization of random searches in a variety of places, and perhaps most hidden from view, the stunning costs of criminalization, arresting and warehousing so many nonviolent offenders. These costs, invisibly disappearing from tax revenues, still do not fully capture the cost of our current drug criminalization regime. Whatever the right answer to the difficult question of addictive drugs, there is no question that the current war on drugs, besides leading to the arrest and conviction of millions, has visited pain in deeply racialized lashes, yoking countless young people with a felony record that often prevents them from seeking an education, holding a job, or in some cases, obtaining food in times of need.<sup>15</sup> The growth of the war on drugs, combined with all too condemnable criminal behavior among minority communities, has hollowed out neighborhoods,

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14. Husak, *supra* note 2, 3–17.

15. *Id.* at 6; Ekow N. Yankah, *Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment*, 25 *Cardozo L. Rev.* 1019, 1031–32 (2004); Ekow N. Yankah, *Virtue's Domain*, 2009 *U. Ill. Rev.* 1167, 1183 (2009).

guttled families, and all but guaranteed failed communities and generations. Nor is it trivial that this period has all too often ineligibly linked in the communal mind, the image of the young black or brown man, and the petty drug dealer. As I have argued elsewhere, broadly painting so many with the stigma of criminal punishment, combined with a view that criminal punishment is in part based on a person's criminal character, leads naturally to the creation of a despised criminal class.<sup>16</sup>

Whatever one's opinion about the war on drugs may be, there are two features to notice. The first is that despite certain hidden costs, the war on drugs is itself highly visible and controversial.<sup>17</sup> Put another way, given its central role in the expansion of the jurisdiction of criminal law, the fact that a significant and controversial facet of the war on drugs is in retreat, is striking and calls for explanation. The second is that, although attitudes toward the use of marijuana may be changing, the broad reversal of criminal sanctions for personal marijuana consumption is not a result of a sudden reversal in popular opinion about its criminalization. Indeed, the majority of Americans remain in favor of retaining criminal punishment for personal use of marijuana.<sup>18</sup>

The combination of these features brings to the fore this seeming paradox. In an age and area of exploding criminalization, we have a highly visible area of law that is experiencing a concerted retreat in the breadth of its criminal reach. What explains this rather pinpointed retreat in criminalization? For those opposing the increasing reach of government power and criminal law, what lessons can be drawn from this retreat of criminal liability?

As with any complex set of interactions, it would be impossible to prove definitively any singular causal element to the rollback of marijuana criminalization. A couple important things do seem worth noting. One, already mentioned, is that this decriminalization is not due to a sea change in the attitudes of the majority about marijuana. The majority of Americans still oppose the legalization of marijuana.<sup>19</sup>

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16. Yankah, *Good Guys and Bad Guys*, supra note 15; Yankah, *Virtue's Domain*, supra note 15, 1171–72, 1183.

17. Husak, supra note 2, 16.

18. Joseph Carroll, *Who Supports Marijuana Legalization?*, Gallup, Nov. 1, 2005, <http://www.gallup.com/poll/19561/Who-Supports-Marijuana-Legalization.aspx> (reporting Gallup poll results that show support for marijuana legalization increasing from 12 percent in 1969 to 36 percent in 2005).

19. *Id.*

A more promising empirical explanation is that the tremendous cost of enforcing the marijuana laws combined with an unprecedented economic recession have led to states rolling back marijuana enforcement to save money. Certainly this explanation makes a lot of sense. Yet it seems to me that the recession, whatever part it plays, cannot fully explain this trend. First, the decriminalization of marijuana seems broader and deeper than can be explained by the economic recession. It is broader in that the retreat of criminal punishment for marijuana in many places precedes the onset of the economic crisis. It is deeper in that it seems less transient; those who advocate decriminalization do so with the intention that it is here to stay. To say this is to note that in comparison with other criminal law measures caused by the recession, such as the early release of nonviolent offenders to save the imprisonment costs, the arguments for decriminalizing marijuana rely less explicitly, which is not to say never, on the economic costs, more often invoke principle, and are rarely described as temporary or stopgap. Lastly, even if the recession is among the principle reasons for the rollback in criminalization, one might quite reasonably ask why this particular regime, out of the countless ways the government could seek to save money, was so readily susceptible to decriminalization. Thus, the economic recession, like many alternative explanations of motivation, merely obscures the question. Regardless of the multiple causal sources, those interested in stemming the tide of criminalization ought still to be interested in what lessons can be drawn from this example.

So the suggestion is, not surprisingly, that something deeper is at work here. The decriminalization of marijuana is motivated not merely by economic convenience and is not supported by actual agreement among Americans. Rather, the decriminalization of marijuana is supported by philosophical agreement. In particular, the decriminalization of marijuana is supported not solely by liberal legal theories, though liberals have advocated reforms of drug laws for generations. Indeed, more important than liberal consensus is the fact that liberals and nonliberals alike can agree on the decriminalization of marijuana. This philosophical agreement, although not unique to marijuana, manifests itself in decriminalization and explains more than actual agreement why decriminalization has been a success.

It may strike some as a charmingly naïve conceit at best and bordering on delusion at worst to imagine that philosophical agreement, even were it shown, could be the reason for dramatic legal changes. Although I will return to this point, I am afraid I will have too little to say about the precise

causal path. There is a sense in which I cannot prove my contention to those who are deeply skeptical of the power of philosophical arguments to affect change at all. Nonetheless, as we noticed, the remarkable reversal in drug policy comes at a time when the majority of Americans remain opposed to its decriminalization.<sup>20</sup>

One important way of seeing that the decriminalization of marijuana can garner agreement across a philosophical spectrum is to see how those starting at a variety of philosophical foundations can come to agreement on a policy of decriminalization. Deontological theories of a Kantian flavor have long been scaffolding for liberal theories that make the respect of individual rights and freedoms the centerpiece of law. These stand in stark contrast to neo-Aristotelian aretaic theories of law that place law's role in the formation of good character, sound practical reasoning, and a flourishing life front and center.

Although any significantly contrasting positions could illustrate the point, it is most informative to contrast deontological liberal theories of law with virtue-centered theories for two reasons. First, these two types of theories are often seen as radically contrasting positions, as opposed to, for example, Kantian-based deontological theories and Benthamite or Millian utilitarian theories, which are often fellow travelers on the road of liberal theories. Second, the case for the other most compelling philosophical starting position, that is, a utilitarian analysis of the decriminalization of marijuana, strikes me as so obvious and over-determined as to lack the desired contrast.

To best illustrate that agreement can be reached across the philosophical spectrum, it is important that we use positions that illustrate the center of both our examples. It is of little use to generate illusory agreement by choosing the most malleable targets. For example, it is perfectly coherent to use an example of a virtue theorist of law who agrees with the decriminalization of marijuana because she was convinced that drug use posed no threat to moral well-being. Such a position, however, is neither persuasive nor, as

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20. One might point out that other legal rules surely obtain despite the opposition of a majority of Americans. For example, a political rent story may be told about the shape of our campaign finance rules. That sort of story is not as obvious here, where the criminalization of marijuana has been such a long-term policy. Even were that the case, it remains true that we would be interested in knowing what made as high-profile a regime as marijuana regulation vulnerable to reform. In telling that story, the ability to garner principled agreement is a plausible, indeed, likely causal element.

importantly, does it strike me as reflecting the core position of those committed to a virtue-centered theory of law. The critical point is that, even starting from the central positions of opposing philosophical foundational theories, marijuana decriminalization is distinct in that it can generate agreement.

### A. Liberalism and Decriminalization

For many, liberalism's fundamental commitment to equally respect of the autonomous choice of each citizen makes it a natural home for arguing that government regulation of drugs is illegitimate. Thus in David A.J. Richards's noteworthy text, a liberal legal system generally and criminal law specifically is properly viewed as an "autonomy-based concept of treating persons as equals rest[ing] on respect for the individual's ability to determine, evaluate, and revise the meaning of his or her own life."<sup>21</sup> Some might find the use of drugs abhorrent or persuade others that drug use inherently involves a loss of self-control and attendant debasement of their moral persons.<sup>22</sup> Others, however, will be within their rights to choose differently and to express their self-respect by regulating the quality and versatility of their own life experiences to include the use of recreational drugs.<sup>23</sup> Because each individual's autonomous choices command equal respect from the state, the state cannot justify criminal punishment to enforce one choice over the other.<sup>24</sup>

I choose Richards's text not because I am in agreement with his conclusions, particularly with his expressed ambivalence about the moral value of a life of drug use.<sup>25</sup> Rather Richards's text is representative in its central commitments and broadly outlines the liberal case for decriminalization of drug use. Like much of liberalism, it is premised on the central idea of rejecting legal moralism and legal perfectionism.<sup>26</sup> That is to say, broadly

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21. David A.J. Richards, *Sex, Drugs, and the Law: An Essay on Human Rights and Overcriminalization* 172 (1982).

22. *Id.* at 169–73.

23. *Id.* at 170.

24. *Id.* at 172.

25. *Id.* at 170.

26. There are important liberal positions that explicitly adopt sophisticated versions of legal moralism or legal perfectionism. See Michael Moore, *Placing Blame* (1997); Joseph Raz, *The Morality of Freedom* (1986).

understood, liberalism insists on the distinction between moral rules writ large and legal rules enforceable by the state.<sup>27</sup>

If the argument that drug use is degrading was the only one the liberal had to face, then the standard reply advocating the freedom of each individual from the imposition of another's moral judgment would indeed be sufficient. Indeed, Immanuel Kant, the foundational thinker of modern liberalism, is clear on maintaining the distinction between immoral behavior that degrades oneself and the impositions on another's freedom that are the proper object of legal sanction.<sup>28</sup> On this simple reading of Kant, one could safely divide self-regarding immoralities, important as they are, and other-regarding injustices, such as actions that impose on the freedom of others.<sup>29</sup> But Kant's writings give reason to doubt that one can so quickly set aside drug use as protected by liberalism's elevation of individual autonomy to pride of place.

Remember that the primary reason liberals argue that law and private morality govern separate domains is that each individual's ability to evaluate the choices, commitments, and values by which she will guide her life is owed equal respect so long as it harms no one else. Richards describes this form of equal respect as required by the autonomy-based conception of law.<sup>30</sup> For Kant, this distinction is the foundation of the claim that law serves not to enforce morality but rather to prevent injustice between people.<sup>31</sup> Criminal conduct was not founded in the purity of will that determined the moral worth of one's acts but rather was centered on external action.<sup>32</sup> In Kant's framework law was not a matter of moral duty but concerned itself with violations of the external freedom of others; in

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27. For a more extended discussion, see Ekow N. Yankah, *Liberal Virtue*, in *Law, Virtue and Justice* (Alalia Amaya & Ho Hock Lai eds., forthcoming 2011).

28. *Id.*; Immanuel Kant, *Lectures on Ethics* 117–18 (Harper & Row 1963).

29. Kant, *supra* note 28; Immanuel Kant, *Groundwork of the Metaphysics of Morals* 165–66 (Cambridge Univ. Press 1998) (1785); Yankah, *supra* note 27.

30. Richards, *supra* note 21.

31. Kant, *supra* note 28, 117, 157. For an excellent treatment of the distinction between Kant's moral theory and political theory, see Arthur Ripstein, *Force and Freedom* (2010).

32. Kant, *supra* note 28 at 116–17, 157; Immanuel Kant, *Metaphysical Elements of Justice* 31 (Bobbs-Merrill Co. 1965) (1797); Immanuel Kant, *The Metaphysics of Morals* 13–14 (Cambridge Univ. Press 1996). George Fletcher attempted to capture this important distinction as one between the *Wille* and the *Willkür*. George P. Fletcher, *The Grammar of Criminal Law* 208 (2007).

Kantian language, law was not a matter of morality but of justice.<sup>33</sup> Notice that in both formulations, however, the respect for your freedom rests on some version of one's intrinsic freedom and autonomy.

So an immediate problem makes itself obvious. The feature about you that demands that I respect your choices, commitments, and values is your autonomy or freedom. But one of the critical features that grounds the arguments for prohibiting drugs is that they are addictive; they undermine the very capacity to revise and evaluate one's life choices that grounded your freedom from interference.<sup>34</sup> This stands in contrast to the case where equal respect for your freedom demands that you are permitted to pursue a life others condemn as shallow or unattractive—say, focusing solely on the collection of expensive cars and jewelry. In that case, you can claim that you maintain the ability to (re)evaluate and choose (or affirm) such a life. But if one is in the grip of an addictive drug, the ability to evaluate and choose a life one values is destroyed.

Were the problem of drug use merely the problem of choosing an unattractive way of life, then the liberal could rightfully maintain that a legal system committed to respecting autonomy cannot legitimately usurp that choice.<sup>35</sup> Such is the case were Kant argues that, although succumbing to excessive drink is degrading, the use of opium is worse because it not only leads to depression and weakness but lacks even the sociability of shared drink.<sup>36</sup> This seems a mere matter of taste, the opinion of an old philosopher to whom sociable vices are life is preferable.

But Kantian worries about drugs reflect a much deeper worry about addiction. As Kant points out,

Freedom . . . is that faculty which gives unlimited usefulness to all other faculties. It is the highest order of life, which serves as the foundation of all perfections and is their necessary condition. . . . If the will of all beings were so bound to sensuous impulse, the world would possess no value. The inherent value of the world, the *summum bonum*, is freedom in accordance with a will that is not necessitated to action.<sup>37</sup>

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33. Kant, *Metaphysics of Morals*, supra note 32, at 13–14, 19–21, 139; Kant, *Metaphysical Elements of Justice*, supra note 32, at 231; Fletcher, supra note 32, at 208.

34. Michael Moore, *Liberty and Drugs*, in *Drugs and the Limits of Liberalism: Moral and Legal Issues*, 102–4 (Pablo De Greiff ed., 1999).

35. Yankah, *Virtue's Domain*, supra note 15, 1208–10; Richards, supra note 21, 170–72.

36. Kant, supra note 28, 159; Kant, *Metaphysics of Morals*, supra note 32, 180–81.

37. Kant, supra note 28 at 121.

Elsewhere, Kant explains that the preservation of this freedom also turns on the proper relationship between the mind and the body:

The mind must gain such mastery over the body that it can guide and direct it in accordance with moral and pragmatic principles and maxims . . . the mind need only secure that the body does not exercise any compulsion upon it. . . . If the mind does not exercise a proper mastery over the body, the habits which we allow the body to acquire can become necessities; and if the mind does not repress the propensity of the body, the latter can gain dominance over it.<sup>38</sup>

The concern of a mind bound to sensuous impulse, gripped by compulsion, and of habits becoming physical necessities and undermining one's free will is precisely the fear of the way addiction undermines freedom and, in so doing, undermines the right to be free of interference.

Of course, how persuasive one finds this argument turns, in large part, on how much one thinks drug addiction resembles this picture. As philosopher Michael Moore has noted, the evidence of whether drug and alcohol addiction is truly analogous to "a kind of frozen fixation of desire somewhat analogous to the frozen beliefs of a paranoid schizophrenic" is conflicted.<sup>39</sup> Whether the typical drug user resembles the cinematic addict turns on a number of factors including the frequency and extent of drug-driven cravings, the way in which they are experienced as ego-alien, and how dominant the desires are such that they defeat other desires, even those one claims to value more.<sup>40</sup>

Many argue that the image of the drug addict in the grip of an irresistible impulse is overly naïve or simplistic.<sup>41</sup> Richards argues that there is no

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38. *Id.* at 157.

39. Moore, *supra* note 34, 103–4. Moore usefully imposes greater precision on the general picture of addiction:

This "craving" conception of addiction, where the desire for drugs of the intoxicated addict has the following qualities: (1) it is experienced phenomenologically as a hunger, that is, a datable sensation of need; (2) it is experienced as "ego-alien," that is, as an urge alien to one's sense of self and an intruder on that self's sense of control; (3) it is unamenable to correction, restraint, or even delay by other desires that the actor in quieter moments might say he values more; (4) it is accompanied by the belief that, if the desire is not satisfied, the threat of unpleasant consequences of withdrawal will ensue; and (5) its need for drugs increases constantly.

40. *Id.*

41. Richards, *supra* note 21, 174–76.

straight-forward link between tolerance to a drug, physical dependence, and physiological dependence.<sup>42</sup> Further, he argues the archetypes for addiction, psychological and physiological dependence, are neither permanent nor unique to drug dependence.<sup>43</sup> In his view, drug use is not distinct from one who is “addicted” to money or love; that is, one who makes either the central goal of their lives to the dominance of other valuable ends.<sup>44</sup> While Moore rejects the optimistic picture that Richards paints, he too is suspicious that addiction resembles “a body exerting compulsion over a mind” such that it practically undermines freedom.<sup>45</sup>

I am skeptical of Richards’s seeming equanimity over the power of addiction. My interactions with those who have recovered from addiction revealed lives in which addictions severely undermine not only the ability to resist cravings but, more worryingly, the ability to make one’s desires responsive to reevaluations of goals, plans, and desires. In my view, there are too many situations in which drugs can destroy freedom and shatter lives. But this clash of armchair sociology need not be settled here. Indeed, to return to the point of this extended meditation, although the addictive nature of drugs undermines the liberal position, it does so only to the extent the drug is addictive. The further point, of course, is that the lack of any serious contention that marijuana is physiologically addictive, or is more so than legal drugs such as cigarettes and alcohol, easily makes the case that marijuana cannot be legitimately criminalized.<sup>46</sup> “Hard drugs,” to the extent they are addictive, are difficult to justify under a view of liberal freedom. But for the liberal, decriminalization of marijuana is an easy case.

## B. Virtue, Law, and Decriminalization

Whereas liberals focus on the need of the state to justify invasions of a citizen’s autonomy, for nonliberals generally and virtue-centered theorists specifically, the justification for state power lies elsewhere entirely. Virtue

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42. *Id.*

43. *Id.*

44. *Id.* at 175–77.

45. Moore, *supra* note 26, 554–55, 559–60.

46. Cohen, *supra* note 8, 37–38; Carlton K. Erickson, *Epidemiology of Dependence: Understanding the Population*, 1 *Addiction Professional* 6, 6–7 (2003); see also Sandra P. Welch & Billy R. Martin, *The Pharmacology of Marijuana*, in *Principles of Addiction Medicine* 249, 260 (3d. ed. 2003).

theories of law, particularly neo-Aristotelian versions, not only do away with the strict divide between law and morality but go further. Virtue-centered theories do not focus on individual rights and duties; rather they focus on the highest forms of human achievement and the promotion of human flourishing.<sup>47</sup> On a classic view, because human beings are unique in being rational, human flourishing consists of reasoning well in accordance with human values over the course of a full life.<sup>48</sup> Thus, in a virtue-centered theory of law, the central role of law is to promote the development of human virtue, suppress vice, and promote a well-lived life.

In a virtue-centered view, it would seem natural to think of drug use as a quintessential way one inhibits and undermines the flourishing of rational human excellence. As Moore notes, “the haze of intoxication is not itself a form of human attainment and . . . in fact such intoxication inhibits genuine forms of human flourishing. Drug use may prevent students from doing well in school, artists from doing art, scientists from doing science, and social engineers from social engineering. Drugs in such a case undercut our perfectionist ambition to be the best we can be in any field of potential human excellence.”<sup>49</sup>

Some, of course, will argue that drug use may in fact contribute to human flourishing by expanding the mind, allowing one to get in touch with hidden parts of their psyche, or some such thing.<sup>50</sup> So Richards advocates the mind-expanding nature of hallucinogenics and the increased flexibility of imagination.<sup>51</sup> Lurking in the background is always every drug advocate’s favorite pet example; an artist inspired to the heights of unique expression by drug use or the like. But we need not be held hostage to such exotic and stylish examples; indeed, one has to be willfully blind to the scores of musicians and artists whose talents have been sacrificed rather than enhanced by drugs, to say nothing of the seas of those in less glamorous pursuits. I am in agreement with Moore that “worthwhile human achievement is not so easily purchased.”<sup>52</sup>

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47. Aristotle, *Nicomachean Ethics*, in *The Basic Works of Aristotle* (1941) at bk. I, chs. VII–X. For extended discussions, see Yankah, *Virtue’s Domain*, *supra* note 15, 1173–75, 1178–79; Yankah, *supra* note 27.

48. Aristotle, *supra* note 47.

49. Moore, *supra* note 34, at 101.

50. Richards, *supra* note 21, at 170.

51. *Id.*

52. Moore, *supra* note 34, 101.

Given Moore's liberal commitments, the fact that drug use undermines human flourishing does not answer the further question of whether drug use is properly criminalized. Those who see law as rightfully committed to the promotion of human flourishing, however, will reject the liberals' elevation of autonomy to primary importance. So the fact that drug use all too easily cheapens a good life, inhibits the attainment of our highest excellences and undermines our moral virtue will be salient in determining whether it should be outlawed.

But the fact that drug use generally undermines human achievement does not settle the question of whether the virtue theorist ought to be opposed to the decriminalization of marijuana. That question will turn on two particular features. First, it will turn not on whether drugs generally undermine human flourishing but on whether marijuana use specifically undermines human flourishing.

The question of whether marijuana undermines moral virtue and human well-being yields no uncontroversial answer. After all, even Aristotle recognized that the pleasures of the flesh, including drinking, could contribute to a good life when pursued in moderation.<sup>53</sup> Many count a cocktail with a friend or wine with dinner among life's great pleasures. Enjoying marijuana, so the argument goes, is no different.

Perhaps this is so, but I am skeptical that the use of marijuana is really compatible with bringing out the best of our rational practices. Whereas one may drink to add the soft glow of a sociable evening or derive great joy from pairing the subtle flavors of an exquisite wine with great food, it seems to me that marijuana is enjoyed as a means to get high. To my mind, it lacks the aesthetic values of, say, wine or scotch. The slightly incoherent conversations that accompany its intoxication seem of a less engaged nature; the analogy would be to drinking solely for the purpose of getting drunk. Nonetheless, I am admittedly woefully ignorant on the subject and may be accused of merely being an observer with conventional and conservative tastes.

If the question of whether marijuana stymies human excellence is controversial, the second feature informing our virtue-centered jurisprudence strikes me as decidedly less controversial. It is critical to remember that those committed to the role of law in human virtue are not committed to the idea that law ought to prohibit every vice. Rather, the appropriate question is whether a particular law promotes the development of virtuous citizens and

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53. Aristotle, *supra* note 47, bk. III, chs. X–XI.

a flourishing society over all. Legal philosopher Lawrence Solum has recently explored the shape of a legal system built on Aristotle's virtue of justice.<sup>54</sup> Though Aristotle viewed law as having a role in inculcating virtue, he also took into account the special role law serves in securing a flourishing human society. Given this goal, it may seem lawmakers and judges ought to aim at promoting ethical lives. The problem, of course, is that there is persistent and deeply held disagreement about what constitutes an ethical life. Thus, if each lawmaker were to act on her own conception of the good, it would lead to endless clash, ironically undermining the conditions for human flourishing.

An aretaic system of law then ought not allow lawmakers to render legal decisions based on their first-order views of what is moral.<sup>55</sup> Rather, Solum proposes that the virtue of justice in an aretaic theory is governed by Aristotle's virtue of lawfulness—a judge's recognition and internalization of the publicly reached decisions on public controversies.<sup>56</sup> These public conclusions need not be only law but may include the widely held stable norms and customs of the society as well. Lawmakers in such a model have deeply internalized the shared norms of the community; in Aristotle's language, they are *nomimos*. Further, laws based on this model are only truly laws if they comport with the society's norms, the *nomoi*.

For Solum, the aretaic justification is integrated in two ways into his model. First, the *nomos* must themselves be aimed at promoting human flourishing. Thus, to the extent that social norms are directly opposed to human flourishing, they may not qualify as true *nomos*.<sup>57</sup> Moreover, the virtue of justice is only one part of human flourishing. To the extent that lawfulness conflicts with human flourishing, the aretaic lawmaker must re-examine the value of lawfulness in her society. The aretaic lawmaker must, above all, be sensitive to the conditions that allow for human excellence. In Aristotle's language, a virtuous law-giver must display practical wisdom or *phronesis*; he must be *phronimos* as well as *nomimos*.<sup>58</sup>

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54. Lawrence B. Solum, *Natural Justice*, 51 *Am. J. Juris.* 73 (2006). There are, of course, other strategies one might take to build an aretaic theory. Kyron Huigens, for example, has developed an aretaic theory of punishment over many years that, although originally Aristotelian, parts from Aristotle in many respects. See Kyron Huigens, *Homicide in Aretaic Terms*, 6 *Buff. Crim. L. R.* 97 (2002).

55. Solum, *supra* note 54, at 87.

56. *Id.* at 89–91.

57. *Id.* at 97–98.

58. *Id.*

The details are complex, but the upshot is intuitive. The ultimate question on this picture is not whether each law requires virtuous behavior; rather, it is to what extent a legal regime nurtures virtue and a flourishing society. Say alcohol is viewed as detracting from a life of virtue, a claim that, if not universally true, certainly applies to a significant range of cases. If the prohibition of alcohol leads to generalized disrespect for the law among the public, millions of dollars for criminal syndicates, and a reign of widespread violence and terror, then surely the law of prohibition cannot be considered to be robustly supported by a virtue-centered theory of law. A view that focuses only on the prohibited acts and ignores all other effects of a law on the health, virtue, and flourishing of a society is too narrow to be a plausible view of virtue-centered governing.

Thus the question for a virtue-centered theory of law is not whether smoking marijuana is a vice, but whether a prohibition on smoking marijuana promotes a virtuous and flourishing society. It is hard for me to imagine that the answer to that question could be yes. Marijuana prohibition closely resembles our hypothetical above. To say that marijuana use is widespread is to be guilty of gross understatement. Marijuana is the most widespread illicit drug—by some estimates almost half the American population has tried it, and 15 percent have smoked marijuana in the last month<sup>59</sup>—and the prohibition against its use has done little to stem consumption.<sup>60</sup> Given its widespread use, its prohibition serves largely to impose criminality on a wide swath of Americans. Further, this prohibition commits millions of Americans to treating the law with either disrespect or hypocrisy.<sup>61</sup> In part this is because citizens who view marijuana as nearly harmless grow distrustful of the judgment and wisdom of the law when they see marijuana listed among the most serious of drugs, as a Schedule I substance.

Further, by criminalizing persistent widespread behavior, the state simply expands its power to stop, search, seize, and monitor its citizens at

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59. Office of Nat'l Drug Control Pol'y, Executive Office of the President, *Marijuana Facts & Figures: Extent of Use*, [http://www.whitehousedrugpolicy.gov/drugfact/marijuana/marijuana\\_ff.html](http://www.whitehousedrugpolicy.gov/drugfact/marijuana/marijuana_ff.html).

60. NORML.org, *About Marijuana*, <http://www.norml.org/index.cfm?Group ID=7305>; Duncan, *supra* note 10, 1717–18.

61. Husak, *supra* note 2, 12. Although breaking the law arguably does not commit one to an attitude of disrespect or hypocrisy, widespread flouting of the law does betray these attitudes in a society.

its whim.<sup>62</sup> Even graver, this expansion of state power results in a deep, persistent, and ugly racial divide that stains our nation. It is well known that blacks are arrested for drug crimes at startlingly disproportionate numbers to their representation in the population.<sup>63</sup> The evidence is stunning: though Blacks make up roughly an eighth of the population, one-third of those arrested and one half of those imprisoned for drug offenses are black.<sup>64</sup> Thus black men are more than twelve times more likely to be imprisoned for drug offenses than white men.<sup>65</sup> The prohibition on marijuana is a tremendous driver of this racial disparity, as four in ten drug arrests were for marijuana possession.<sup>66</sup> The cruelty of the racial disparity is brought home by the fact that both races use illegal drugs at roughly the same rates.<sup>67</sup> It is a stunning indictment of our current drug regime that a black man born in the 1960s, after the civil rights era, is more than twice as likely to go to jail as one born in the Jim Crow era.<sup>68</sup>

Put plainly, the drug laws surrounding marijuana result in the rich flouting the law comfortably at home while the police stop, often harass, pat down, arrest, and imprison young men of color.<sup>69</sup> This breeds nothing but a sense of injustice and frustration within minority drug offenders, who are well aware that their fellow white citizens who engage in the same behavior are untouched by the law.<sup>70</sup> Any society in which a law professor can seriously and plausibly recommend that juries take the law into their own hands and systematically nullify verdicts against any racial minorities

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62. *Id.* at 13.

63. The evidence on this point is voluminous and, frankly, depressing to catalog. Erik Eckholm, Reports Find Persistent Racial Gap in Drug Arrests, *New York Times*, May 6, 2008, at A21; Jamie Fellner, Drug Laws: Policy and Reform: Race, Drugs, and Law Enforcement, 20 *Stan. L. & Pol'y Rev.* 257 (2009); Michael Tonry & Matthew Melewski, The Malign Effect of Drug and Crime Control Policies on Black Americans, 37 *Crime & Just.* 1 (2008).

64. Eckholm, *supra* note 63; Fellner, *supra* note 63, 26166.

65. Eckholm, *supra* note 63.

66. *Id.*

67. *Id.*; Substance Abuse & Mental Health Servs. Admin., U.S. Dep't of Health & Human Servs., Results from the 2007 National Survey on Drug Use and Health: Detailed Tables tbl.1.19B (2008), <http://www.oas.samhsa.gov/NSDUH/2k7NSDUH/tabs/Sect1pt19B.htm>.

68. Bruce Western, Punishment and Inequality in America 25–26 (2006).

69. Fellner, *supra* note 63, 261; Substance Abuse & Mental Health Servs. Admin., *supra* note 67, 46.

70. Fellner, *supra* note 63, at 257.

convicted of nonviolent drug crimes—whatever the evidence—is not a healthy one.<sup>71</sup>

The claim is simple: the current regime of prohibition undermines rather than promotes a virtuous society. The prohibition institutionalizes a level of lawlessness among the population. It breeds contempt, distrust, and disrespect for the law. It empowers the police to monitor and invade the privacy of vast numbers of citizens. Most importantly, it results in the arrest and imprisonment of countless black men and other minorities, breeding anger and resentment while hollowing out communities. Not to mention the hundreds of millions of dollars that flow into the coffers of organized crime and are drained from our collective resources, or the widespread corruption by drug money. Notice that these features are not utilitarian costs or violations of liberal rights, though some may redescribe them as such. The distinctive feature of these social ills is that they undermine the health and flourishing of a virtuous society. Put plainly, even those who believe as I do, that smoking marijuana is a vice that ought to be suppressed, can agree the current system is ill suited to do so.

Of course the arguments above do not prove universal agreement. Utilitarian theories have not been explored, though as mentioned, I believe the utilitarian case for decriminalization of marijuana is overwhelming.<sup>72</sup> For those committed to divine will or other religious theories of law, the belief that God forbids us from polluting our bodies may foreclose consensus. Lastly, among other arguments not herein pursued is the often argued (but largely discredited) contention that marijuana is a gateway drug.<sup>73</sup>

Still the arguments above illustrate that the decriminalization of marijuana is not as controversial on the level of principle as one might suppose. For liberals, the right to be free from interference is premised on an

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71. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 *Yale L.J.* 677 (1995); Paul Butler, *The Role of Race-Based Jury Nullification in American Criminal Justice: Race-Based Jury Nullification: The Case in Chief*, 30 *J. Marshall L. Rev.* 911 (1997).

72. But for the shape of a utilitarian and paternalistic justification for drug laws generally, see Husak & Peter de Marneffe, *supra* note 3, 109–98. De Marneffe, however, largely focuses on heroin, admitting that the case of the decriminalization of marijuana is the most compelling. *Id.* at 177–80.

73. *Id.* at 178–81. Cohen, *supra* note 8, 67–69; Eric Blumenson & Eva Nilsen, *No Rational Basis: The Pragmatic Case for Marijuana Law Reform*, 17 *Va. J. Soc. Pol'y & L.* 43, 56 (2009).

individual's freedom. Thus, addictive hard drugs are properly criminalized. To the extent that marijuana is no more addictive than many tolerated drugs, it is a poor candidate for decriminalization in a liberal legal system. For those committed to the idea that the law ought to promote a virtuous and flourishing society, the prohibition of marijuana gravely undermines the well-being of our society. Thus, the reasons to decriminalize marijuana are not strictly limited to liberals; even those who reject liberalism can agree on the decriminalization of marijuana.

### III. DECRIMINALIZATION AND PHILOSOPHICAL CONSENSUS

That there can be agreement between these vastly different philosophical systems is both remarkable and instructive. Indeed, my contention is that the fact that liberals and nonliberals alike can agree on the decriminalization of marijuana does much to explain the apparent paradox of its decriminalization in our era of overcriminalization. Contrast decriminalization of marijuana with the early release of prisoners by states to save money during the current economic crisis. Political backlash has been swift and severe, in many cases, causing retreat.<sup>74</sup> One reason, it seems to me, is that the reasons for releasing prisoners early rests solely on utilitarian grounds—saving the cost of imprisonment. Those committed to the roughly Kantian position that wrongdoers deserve to be punished in proportion to their wrongdoing are left cold by the utilitarian justification. This impulse, whether expressed explicitly or felt implicitly, precludes garnering consensus.

To be sure, the argument here is not simply the obvious one that political movements are more successful when people are in agreement. This is not a matter of push-polling and playing to prejudice. Indeed, the trend toward decriminalization illustrates how agreement in principle can be more important than empirical agreement. As noted repeatedly, this decriminalization has continued despite its high visibility and the opposition

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74. John Gramlich, *States Using Early Release of Prisoners to Save Money*, New Jersey Newsroom, March 1, 2010, at <http://www.newjerseynewsroom.com/nation/states-using-early-release-of-prisoners-to-save-money>; AFP, *US Inmates Get Early Release Amid Budget Crisis*, at [http://www.google.com/hostednews/afp/article/ALeqM5hmEt\\_CX97LHIT6NJuJ9jjuGe\\_PoA](http://www.google.com/hostednews/afp/article/ALeqM5hmEt_CX97LHIT6NJuJ9jjuGe_PoA).

of a majority of Americans.<sup>75</sup> Because political leaders and reform advocates have the ability to appeal to a variety of philosophical starting points and across the political landscape, they are able to overcome widespread empirical disagreement.

Thus the success of decriminalization efforts in the case of marijuana reveal why current theoretical analysis of overcriminalization fails. Many theorists committed to stemming the tide of overcriminalization have instincts that are cousin to my central claim but vary in important and flawed ways. On one end of the spectrum, take the important and engaging work of criminal law theorist Paul Robinson. For Robinson, the important task in achieving consensus between philosophical intuition and criminal law practice comes not by persuading or illustrating shared principles but rather by interrogating and unearthing pre-existing intuitions.<sup>76</sup> Put another way, Robinson, suspicious of the ability of philosophical reasoning to generate change and agreement, is primarily focused on empirical agreement. Pessimism aside, Robinson has important arguments for pursuing a strategy of unearthing and cataloging felt intuitions about the relative gravity of various and often finely distinguished offenses. The first is his persuasive argument that the cost of enforcing the law declines and respect for the law increases when punishment tracks ordinary and widely shared moral intuitions.<sup>77</sup> Secondly, focusing on overcriminalization, Robinson advocates using the empirical findings of ordinal weights of seriousness of crimes to influence legislators, judges, and other legal actors to order punishments rationally, scaling back punishments or reexamining where a crime that is perceived as less serious is punished more severely than a more serious one.<sup>78</sup> For example, if an assault on a stranger is widely considered more serious than an attack on someone the attacker knows, then the punishment for an attack on a stranger should reflect this by being more severe.

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75. Carroll, *supra* note 18.

76. Paul H. Robinson & John M. Darley, *Justice, Liability, and Blame: Community Views and the Criminal Law* (1995).

77. Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 *Nw. U. L. Rev.* 453, 468–77 (1997); Paul H. Robinson, *Is Just Just Us? A Symposium on the Use of Social Science to Inform the Substantive Criminal Law: Testing Lay Intuitions of Justice: How and Why?*, 28 *Hofstra L. Rev.* 611, 611–13 (2000).

78. Robinson & Darley, *supra* note 77, at 488–96; Robinson & Darley, *supra* note 76, 2–7, 201–15.

There is no denying the power of Robinson's project. Further, I take it there will often be great areas of overlap between what I have termed Robinson's empirical consensus and deeper principled consensus because the reported empirical intuitions will be based on deeper, if not always coherently formulated, moral principles. Yet for all its intelligence, Robinson's empiricism reveals the weaknesses of pursuing consensus built only on empirical grounds. Primarily, Robinson's empirical consensus largely takes preferences as given, unnecessarily restricting opportunities for reform. The example of marijuana reform is telling; Robinson's model would unnecessarily retard the success in reforming the criminal law regime surrounding marijuana by *eliciting* empirical disagreement as opposed to illustrating how even contrasting principles can reach agreement.

To be fair, Robinson is not fatalistic about generating reform, but because his primary justification is the increase in perceived legitimacy when law coheres to community intuitions, reforming these intuitions will be considered a utilitarian cost.<sup>79</sup> Further, Robinson may argue that my example is loaded insofar as community attitudes toward marijuana, if not in favor of decriminalization, are unsettled.<sup>80</sup> Still, Robinson's example will miss opportunities for philosophical arguments to make an impact by revealing deeper consensus that underlies surface disagreement. This shows not only in the case of marijuana but is certain to apply in future cases, stymieing desperately needed efforts to curb the excesses of overcriminalization.<sup>81</sup>

On the other end of the spectrum lies Douglas Husak's powerful call to arms, rallying legal theorists to pay serious attention to the dangers of a criminal law system growing out of control.<sup>82</sup> Husak is profound and compelling in describing the dangers to both citizens and the rule of law from a system that doles out too much crime and too much punishment.<sup>83</sup> Husak's most important and humane contribution is that he reminds us that the problem of overcriminalization is not merely an abstract problem for the intellectual grist of legal theorists, but one that produces excessive and

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79. Robinson & Darley, *supra* note 77.

80. Robinson & Darley, *supra* note 76, 13.

81. For one example, see Yankah, *supra* note 27, arguing that illustrating that those committed to the role of law in promoting virtue can support the deregulation of prostitution is critical in achieving reform of criminal prohibition and the protection of tens of thousands of victimized women.

82. Husak, *supra* note 2.

83. *Id.* at 3–32, 34–43.

unjustifiable amounts of punishment to be visited on real people.<sup>84</sup> These punishments may be unjust because they exceed any justifiable response to the criminal conduct, but often simply because they are leveled at conduct that ought not be criminalized at all.<sup>85</sup> It is stunning to realize that a quarter of the world's prisoners are in the United States.<sup>86</sup>

Husak advocates containing the overgrowth of criminal law by proposing certain political moral norms, both internal and external to criminal law itself, which delineate the borders of legitimate criminal law.<sup>87</sup> In constructing his model, Husak attempts to avoid controversial philosophical foundations in order to build the broadest support for a minimalist criminal law.<sup>88</sup> Thus, his project is focused on the narrowest philosophical grounds possible for justification for criminal law.

Husak is persuasive in illustrating the urgent need to curtail the growth of criminal law. Though I cannot help but agree with many, if not all, of Husak's constraints, I think his model has limited chance of success. What Husak has exactly right is the tone and level of engagement that aims at philosophical modesty (which is not to say, modest philosophy) in order to forge agreement. The worry is that, given the generations of philosophers who have advocated for liberal constraints on criminal law, there is little reason to believe that even Husak's convincing model can stem the tide of overcriminalization. Because Husak's model cannot accommodate nonliberal philosophical starting points, it lacks the resources to build consensus, motivate political will, and make any significant progress in curtailing unjustified governmental power.

This limitation in Husak's model can be seen in his internal constraints on the criminal law. Husak argues that criminal law is only justified if it prevents a nontrivial harm, suppresses wrongful behavior, and punishes those who deserve to be punished.<sup>89</sup> So stated, these constraints are hard

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84. *Id.* at 3–15. As Husak points out, 1 in every 138 residents in the United States is incarcerated. One in every 20 child born in this nation is destined to serve time in state or federal prison. The devastating effect of this rate of incarceration on minority communities has been explored earlier. See text accompanying notes 63–71. Further, 4.2 million people are on parole or probation, nearly double the 2.2 million prisoners incarcerated.

85. *Id.*

86. *Id.* at 5.

87. *Id.* at 56–83, 92–101, 132–77.

88. *Id.* at 56.

89. *Id.* at 65–83.

to reject. But focusing on Husak's criteria of wrongfulness and his desert constraint reveals a deep fissure. Virtue-centered legal theorists and many commonly held lay intuitions view law as having a role to play in promoting good character, securing virtuous behavior, and encouraging a virtuous society. For these people, what counts as wrongful behavior will be in part defined by its effect on the moral standing of both the actors and their communities. Husak, by contrast, unequivocally rejects such a justification, embedding his notions of wrongfulness and desert in a retributivist framework.<sup>90</sup> Thus Husak dismisses moral education theories because he focuses on the notion that moral education can only respond to the wrongful action of an offender rather than the perfectly sensible Aristotelian notion that the law serves as moral guidance in each citizen's development.<sup>91</sup> Thus Husak's retributivist framework erects a distinction between private and public wrongdoing that does not exist in nonliberal frameworks, allowing him to demur on the question of which wrongdoing will be of interest to the criminal law and which will not.<sup>92</sup> The same fundamentally liberal commitment reveals itself in Husak's external constraints to criminal law as well.

I note these limitations in Husak's model not because I disagree with his liberalism; indeed, I am entirely persuaded by much of what he says. The problem is that there is no reason to believe, after generations of liberal argumentation, that liberal arguments alone can be successful in commanding the kind of agreement needed to make progress on legal reform. The fact that the body politic contains a wide range of philosophical and political commitments is not a mere inconvenience. That very fact is the morally relevant landscape with which theories of governance must contend. As Rawls and Waldron, among others, have explored in different ways, a diverse range of fundamental philosophical commitments *is* the problem of

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90. *Id.* at 70–77, 82–85, 101–2; Husak & de Marneffe, *supra* note 3, 30–31.

91. Husak, *supra* note 2 at 88, 92. Husak's rejection of competing rationales is put clearly elsewhere in his discussion of utilitarian justifications for drug laws. Husak & de Marneffe, *supra* note 3, 36–37.

92. Husak, *supra* note 2 at 82, 92, 101–2. Husak does tackle positions that bear a passing resemblance to virtue-centered theories when he discusses legal moralism. But as he makes clear, the version of legal moralism on which he focuses, Michael Moore's prominent version, is at heart a liberal conception. Particularly noteworthy, Moore's version of legal moralism avoids criminalizing many of the controversial areas of criminal law such as prostitution by omitting them from the realm of morality. *Id.* at 197.

politics.<sup>93</sup> Theories that depend on all citizens eventually being convinced of the same philosophical starting points may make enlightening political philosophy, but they are not likely to be successful theories of reform.

To be clear, I find myself torn when reflecting on this important point. Like Husak, I believe in the important project of pure philosophical debate. In different moods, I too attempt to marshal arguments to persuade others of my particular metaphysics.<sup>94</sup> But any reform project that requires others to adopt one's own unique philosophical justification sacrifices opportunities for reform on the altar of metaphysical truth. And given Husak's compelling portrait of the ills of overcriminalization, such a sacrifice will not do. What the successes of the movement to decriminalize marijuana, as compared to the backlash against the early release of prisoners, shows is that successful arguments for reform turn on the ability to find consensus across philosophical starting points.

If the flaw in Robinson's position is that it premised reform solely on preexisting empirical consensus, the flaw in Husak's position is that it leaves no room for consensus at all. Elsewhere, Husak has argued against holding reform hostage to empirical agreement: "In deciding what criteria to apply in evaluating competing ideas about drug policy, the test is not what the public *does* accept, but what the public *should* accept. . . . I would not be persuaded to retract my basic claim because I was assured that the public did not accept it. Instead, I would redouble my efforts to convince those who disagree with me."<sup>95</sup> This pursuit of the best true justification of criminal law is surely noble, but dedicating one's arguments solely to a singular position even when "assured" of its failure is no trivial sacrifice, and there is little guarantee that redoubling one's efforts will produce more success. The problem with Robinson's empirical starting point is that it is committed to where the public *does* agree, thereby stifling reform. The problem with Husak's unifacted position is that it ties reform to where the public *should* agree, thereby holding reform hostage to agreement with a unique philosophical foundation. The lesson of the decriminalization of marijuana is that reform turns on illustrating where the public *can* agree.

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93. John Rawls, *Political Liberalism* (1993); Jeremy Waldron, *Law and Disagreement* (1999).

94. Yankah, *Virtue's Domain*, *supra* note 15, arguing for a rigorous commitment to Kantian and Hegelian deontological theories in law.

95. Husak & de Marneffe, *supra* note 3, at 33.

#### IV. DECRIMINALIZATION, PRINCIPLED AGREEMENT, AND CONJECTURE (OR, PUT YOURSELF IN MY SHOES)

Returning to the project of decriminalization and the example of marijuana allows us to highlight the philosophical lesson above. The basic argument is that decriminalization has been successful in the context of marijuana because people from various philosophical starting points, liberals and non-liberals alike, can reach consensus on the issue. One would be forgiven for thinking this point was painfully obvious were it not so remarkably absent from the theoretical literature.

Those involved in politics and persuasion are of course aware that finding a variety of ways to craft agreements and coalitions is critical to successful reform. Nor should the business of legal and political philosophy be synonymous with the necessarily rough and uneven business of political horse-trading. Nonetheless, any theory of governance, as opposed pure political philosophy, that does not make space for reasonable disagreement, itself borders on being unreasonable and is certainly doomed to failure.<sup>96</sup> Thus, it is surprising that even those legal theorists committed to advocating reform ignore and in fact negate the opportunity to find common ground. Specifically, the dominance of liberals in the academy has meant that, whereas one may occasionally find a retributivist gesturing toward a truce with utilitarians, few have been willing to measure out common ground with nonliberals.<sup>97</sup> So, although Husak's book is uncommonly insightful, it is all too typical in prosecuting reform as a matter of persuading others to adopt one's unique position in an abstract philosophical debate.

There are a couple of notable exceptions to the general philosophical habit of eschewing common ground in favor of persuading others to a uniquely correct position. Most prominently among those who focused on this problem was John Rawls. This is not the place for a full exploration of Rawls's sophisticated theory of political liberalism, but a brief sketch will allow useful comparison and contrast. Rawls perceived that the problem of justifying the use of state power—for example, the sanctions attached to our institutions of criminal punishment—could never be solved by referring

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96. John Rawls, *Justice as Fairness: Political not Metaphysical*, 14 *Phil. & Pub. Aff.* 223 (1985).

97. Husak, *supra* note 2, at 7, 12. This truce usually does not last long, as legal theorists congenitally seek disagreement. *Id.* at 189–96; Husak & de Marneffe, *supra* note 3, 36–39.

to a singular political doctrine since one's fellow citizens would never unite behind one comprehensive philosophical doctrine.<sup>98</sup> The fact that citizens would "remain profoundly divided by reasonable religious, philosophical, and moral" doctrines Rawls described in the now familiar phrase, "reasonable pluralism."<sup>99</sup>

For Rawls the fact of reasonable pluralism required the idea of public reason, that is, the idea that the arguments used to advocate the use of state power must rely on widely shared beliefs and ideals, and eschew controversial or deep comprehensive political, philosophical, or religious doctrines.<sup>100</sup> By relying on these "thinner" grounds for political justifications of state power, Rawls proposed that a society could achieve "overlapping consensus," a situation where each citizen is committed to a political conception that allows for other comprehensive political views, though they themselves do not share those views.<sup>101</sup> So though the political liberal and the religious nonliberal do not share comprehensive doctrines, they are both committed to a political community that avoids the use of their respective comprehensive doctrines as justification.<sup>102</sup> Although Rawls's is the most famous and fully developed view along these lines, Kent Greenawalt has applied comparable ideas to the area of excuses and justifications.<sup>103</sup> Similar ideas find a contemporary incarnation in Cass Sustein's model of incompletely theorized agreements.<sup>104</sup>

This group of ideas has much in common with my proposal. If we are to stem the flood waters of overcriminalization and reform areas of law viewed as controversial, we cannot rely on convincing others to accept our singular (and controversial) philosophical premises. But the Rawlsian picture of overlapping agreement differs from my proposal in important ways. For Rawls, overlapping consensus promotes a stable political culture because citizens agree to *avoid* their own deepest convictions for the political good. Although citizens will continue trying to persuade others on a range of controversial subjects, they will do so by relying on public reasons and

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98. Rawls, *supra* note 93, at 3–11, 212–27.

99. *Id.*

100. *Id.* at 144–45, 224–25.

101. *Id.* at 147–58, 170–71.

102. *Id.*

103. Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 *Colum. L. Rev.* 1897 (1984).

104. Cass Sustein, *Incompletely Theorized Agreements*, 108 *Harv. L. Rev.* 1733 (1995).

not on their own comprehensive liberal, religious, or philosophical world views, as the case may be.<sup>105</sup>

My proposal asserts, in some ways, the mirror image. To make progress and garner consensus on issues of reform, it is not sufficient to avoid relying solely on one's comprehensive world view. Philosophers who wish to arm legislatures, judges, and other political actors must find a way to reason from the comprehensive views of others to garner consensus and provide arguments for the way forward. The nonreligious must be more than tolerant of the religious; rather, they must strive to give the religious citizen reasons based in their faith to agree. Our example showed how the liberal could illustrate to the virtue-centered nonliberal the ways in which the prohibition on marijuana not merely violates rights but corrupts society, making the current regime prime for reform. (Likewise, the rights-based liberal could marshal utilitarian arguments to the consequentialist to reform the current drug policy.) It is this ignored aspect of civil discourse, which Rawls briefly mentions as conjecture, that can serve not merely to preserve stability but to garner philosophical agreement, forge principled alliances, and inspire reform.<sup>106</sup>

There is a sense in which garnering philosophical consensus by appealing to the fundamental philosophical starting points of others is strategically savvy. Rawlsian conjecture is a positive rather than negative response to the fact of reasonable pluralism, that is, to the fact that we will never be able to unite all members of a community behind a single comprehensive doctrine, be it be liberalism or what have you. It is also positive in that, as opposed to the negative constraint of merely avoiding destabilizing the political community, it offers hope in movement, development, and reform of our political community. So there are good, prudential reasons to "put

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105. Rawls, *supra* note 93, 151–52. There are intricacies in Rawls's view of public reason that do not fundamentally alter the analysis above. Particularly, in later work, Rawls allows what he refers to as "The Proviso," in which one may publicly argue controversial premises from one's comprehensive world view, provided that when the time comes, one can fully justify their arguments relying solely on public reasons. In this case, the fundamental point remains that one should eschew holding political conversation hostage to one's own comprehensive political doctrine. John Rawls, *The Idea of Public Reason Revisited*, in *Collected Papers* 462 (Samuel Freeman ed., 1999).

106. Rawls saw that this was a viable way to protect public reasoning and overlapping consensus but, although mentioning it as "conjecture," spent scant time developing it. Rawls, *The Idea of Public Reason Revisited*, *supra* note 105, 591–94.

yourself in another's shoes." In the case of decriminalization, success may well turn on it.

Nevertheless, there are important philosophical reasons for adopting conjecture as a mode of theoretical engagement. First, as Rawls recognized, eschewing our deepest comprehensive doctrines will leave many controversial issues unsolved, and we will need to find ways to move forward on those.<sup>107</sup>

Further, we will not be able to get all to agree to respect the kind of public reason Rawls advocates, and even then domain of questions that belong to public reason will be controversial.<sup>108</sup> Some will argue that their comprehensive reasons are accessible to public reason, thus denying the fact of reasonable pluralism. Others will insist that some questions are not appropriately classified as public, and thus, their religious or comprehensive philosophical views should be at play.<sup>109</sup> To take one example, whether a self-inflicted moral harm, such as the vice of smoking marijuana, is at all a question subject to public reason will turn in part on the comprehensive world view one is meant to cabin. This is the case because the obvious trigger of the use of police power is not the only public method of addressing marijuana use. Whether public funds should be spent on educating people about its harms or a variety of other actions may themselves be controversial.

In these cases, Rawls urges us to avoid relying on our comprehensive philosophical positions because it shows respect and civility to others and evidences that we are committed to the project of living in a community that makes room for their views. But this is no reason not to reason from *their* point of view. Quite the opposite: if done sincerely and respectfully, by admitting that we do not share their views, and by showing that we can imagine the world from their vantage point and illustrate where agreement can be found, conjecture stands to increase the bonds of civility within a community.<sup>110</sup> Thus, Rawlsian conjecture, or putting yourself in the shoes of another, shows how we can make progress not only in the face of reasonable pluralism but also of quasi-reasonable pluralism, barely reasonable pluralism and unreasonable pluralism.

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107. Rawls, *supra* note 93, 151–52.

108. *Id.*

109. *Id.*

110. Rawls, *The Idea of Public Reason Revisited*, *supra* note 105, 591–94.

## CONCLUSION

A few brief closing remarks. I have argued here that seeking philosophical consensus with other comprehensive philosophical views is both sorely lacking in academic discourse and important to success in reforming our legal system. It is fair to say that I cannot prove, and do not claim, that philosophical agreement is a panacea that will lead magically to altering the political landscape in response to our whims. After all, many political actors try mightily to craft consensus without success. But philosophers and legal theorists can arm those working to reform law with a richer intellectual toolkit with which they can face their challenges. Further, the case of marijuana reform shows it is plausible to believe that principled arguments can sometimes move the law in advance of actual agreement. In any case, if there no reason to believe that theoretical principles on which there can be agreement would have an effect, there is less reason still to think unique and controversial ones would be more successful.

Secondly, it is worth pausing to realize that this is a strategy that may be limited in scope. Although I think legal philosophers underestimate the agreement possible on important or even controversial issues, there are clearly many issues on which opposing theories cannot be brought into accord. Indeed, as I have argued, part of the success in the decriminalization of marijuana turns on its fulfilling these distinctive requirements.

Third, there may be good reason to avoid overly relying on not merely finding agreement but attempting to do so by reasoning from another's point of view. The most obvious reason is that philosophers must often, indeed primarily, aim not only for reform and political action but also for truth. How to balance these competing needs, I do not pretend to know. More subtly, at times it will be important to require others to respect positions that do not start from their philosophical premises. Thus one may think there are times to restrain Rawlsian conjecture and insist on the values of respect behind overlapping consensus.

Even with these words of caution, there are lessons to be learned from the example set by the decriminalization of marijuana. In an era of unprecedented growth in the reach of the criminal law, much of it centered on the war on drugs, one of the most highly visible reversals in modern criminalization is simultaneously occurring. This apparent paradox does not stem from a fortuitous alignment of public opinion. Rather it is generated by a convergence of underlying principles that support marijuana decriminalization.

The costs of unchecked growth in government power generally and criminal law specifically are enormous. The explosion in criminal law results in ever-increasing numbers of Americans arrested and imprisoned and for ever-increasing lengths of time. Further, unchecked state power threatens to criminalize so much behavior as to leave the actual exertion of power over the citizen all too often at the whim of the state. Lastly, this power has all too often been focused on racial minorities and the poorest among us. With so much behavior increasingly falling under the government's criminal law powers, unrestrained and discriminatory enforcement discretion threatens to undermine the rule of law itself.

Academics who recognize this threat are rightfully searching for the tools to stem the swelling of government power under criminal law. Yet too often, by inclination and training, the response is to base appropriate limitations on state power on nuanced and controversial tenants of political philosophy. The search for the most persuasive true theory is, of course, not only a justifiable academic project but a critical one as well. Nonetheless, any progress that requires people to be ultimately convinced of the correctness of a unique set of philosophical starting points is not a promising method for generating legal reform in the real world; they are unlikely to garner the consensus needed to result in changes to the law. The lesson that can be learned from the surprising retreat in criminal supervision of marijuana use is the importance of revealing shared principles obscured by surface conflict. By searching for places where agreement can be forged across liberal and nonliberal philosophical views, legal philosophers can share progress in properly containing state power. Legal theorists owe this not to the poor and vulnerable, unjustifiably besieged by the state, but for the sake of a just state itself, to search not only for their most sophisticated disagreements but for the surprising places where agreement can be found.