

**Report of the Legal Frameworks Group
to the King County Bar Association Board of Trustees:**

**Parameters of a New Legal Framework
for Psychoactive Substance Control**

**King County Bar Association
Drug Policy Project**

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Introduction

This report is the product of the Legal Frameworks Group of the King County Bar Association Drug Policy Project, which included the participation of more than two dozen attorneys and other professionals, as well as scholars, public health experts, state and local legislative staff, current and former law enforcement representatives and current and former elected officials. The Legal Frameworks Group was established as an outgrowth of the work of the Task Force on the Use of Criminal Sanctions, which published its own report in 2001 examining the effectiveness and appropriateness of the use of criminal sanctions related to psychoactive drug use.

The Criminal Sanctions Task Force report found that the continued arrest, prosecution and incarceration of persons violating the drug laws has failed to reduce the chronic societal problem of drug abuse and its attendant public and economic costs. Further, the Task Force found that toughening drug-related penalties has not resulted in enhanced public safety nor has it deterred drug-related crime nor reduced recidivism by removing drug offenders from the community. The Task Force also chronicled the numerous “collateral” effects of current drug policy, including the erosion of public health, compromises in civil rights, clogging of the courts, disproportionately adverse effects of drug law enforcement on poor and minority communities, corruption of public officials and loss of respect for the law. Based on those findings, the Task Force concluded that the use of criminal sanctions is an ineffective means to discourage drug use or to address the problems arising from drug abuse, and it is extremely costly in both financial and human terms, unduly burdening the taxpayer and causing more harm to people than the use of drugs themselves.

The Legal Frameworks Group, building on the work of the Criminal Sanctions Task Force, moved beyond the mere criticism of the current drug control regime and set out to lay the foundation for the development of a new, state-level regulatory system to control psychoactive substances that are currently produced and distributed exclusively in illegal markets. The purposes of such a system would be to render the illegal markets in psychoactive substances unprofitable, to improve restrictions on access by young persons to psychoactive substances and to expand dramatically the opportunities for substance abuse treatment in the community. Those purposes conform to the primary objectives of drug policy reform identified by the King County Bar Association in 2001: to reduce crime and public disorder; to enhance public health; to protect children better; and to use scarce public resources more wisely.

This report is the fifth of five major research initiatives supporting a resolution by the King County Bar Association seeking legislative authorization for a state-sponsored study of the feasibility of establishing a regulatory system for psychoactive substances. This report outlines the parameters of such a system, including consideration of a host of complex practical questions around manufacturing, purity and safety, labeling, distribution, medical supervision, licensing, prescriptions, advertising and counter-advertising, criminal enforcement, third-party liability and other issues.

PARAMETERS OF A NEW LEGAL FRAMEWORK FOR PSYCHOACTIVE SUBSTANCE CONTROL

Treating drug use as a criminal matter rather than a social and medical issue has not been successful in reducing drug use, nor the harms arising from drug use.¹ For over three decades the state has been seeking new tools to fight the persistent crime problem that has inevitably arisen from the policy of drug prohibition, meanwhile distracting both the state and society at large from effectively addressing the problem of drug addiction itself.

Persuasive and voluminous research indicates that a public health approach to drug abuse – stressing research, education, prevention and treatment – is far more effective than the use of criminal sanctions. However, the policy of drug prohibition, which has spawned a range of intractable problems, from a flourishing “black market” to the spread of blood-borne diseases to official corruption, has been a major impediment to employing such a public health approach.

PRINCIPLES AND OBJECTIVES

The following principles were set forth by the King County Bar Association in 2001 to guide reform of drug control policies and practices:

- 1) Any public policy toward drug use should seek to result in no more harm than the use of the drugs themselves;
- 2) Any public policy toward drug use should address the underlying causes and the resulting harms of drug abuse instead of attempting to discourage drug use through the imposition of criminal sanctions;
- 3) The state should regulate drugs in a manner that recognizes citizens’ individual liberties while answering the need to preserve public health, public safety and public order, especially providing compassionate treatment to those in need; and
- 4) The state should regulate the use of drugs in a manner that uses scarce public resources as efficiently as possible.²

Using these principles as a guide, a critical step toward improving society’s response to drug abuse would be to establish a state-level regulatory system to control those psychoactive substances that are currently produced and distributed exclusively in illegal markets, where those substances are now controlled by criminal gangs and are readily available to children.

¹ See King County Bar Association (2001), *Is It Time To End the War on Drugs?*, Seattle: King County Bar Association, pp. 59-70; See also King County Bar Association (2005) “Drugs and the Drug Laws: Historical and Cultural Contexts,” *Legal Frameworks Group Report to the King County Bar Association Board of Trustees*, Seattle: King County Bar Association, p. 32.

² King County Bar Association (2001), *op. cit.*, p. 15.

The principle objectives of the King County Bar Association’s broad drug policy reform efforts have been: to reduce crime and public disorder; to improve public health; to protect children more effectively; and to make wiser use of scarce public resources. In accordance with those objectives, the purposes of any new regulatory system to control psychoactive substances that are currently produced and distributed exclusively in illegal markets would be:

- 1) to render the illegal markets for psychoactive substances unprofitable, thereby eliminating the incentives for criminal enterprises to engage in the violent, illegal drug trade;
- 2) to restrict access to psychoactive substances by young persons much more effectively than the current drug control scheme; and
- 3) to open many new gateways to treatment so as to provide prompt health care and essential services to persons suffering from drug addiction.

The King County Bar Association does not presume to set forth every detail of a state-level regulatory system for controlling psychoactive substances, nor any specific, statutory changes required for that purpose. Rather, the Association, along with a broad coalition of other professional and civic groups, has called on the Washington State Legislature to authorize a special consultative body, comprised of experts in pharmacology, medicine, public health, education, law and law enforcement, as well as public officials and civic leaders, to provide specific recommendations for legislative action to establish such a state-level system of regulatory control.³ The following outline of key issues to be addressed may serve as a sketch of the parameters of such a regulatory system:

REGULATION AND CONTROL – ESSENTIAL COMPONENTS

Controversial Terminology

The politically-charged term “legalization” is insufficient to describe how the state would control psychoactive substances that are now exclusively produced and distributed through illegal markets. The concept of *strict regulation and control* of psychoactive drugs is a more accurate and useful concept and this must be very carefully distinguished from the idea of *commercialization* of such drugs.

To some, the notion of “legalization” suggests that addictive psychoactive substances might be available over the counter and more easily accessible by children; that today’s drug dealers would continue to do business but simply be unencumbered by law enforcement; or that the criminal enterprises now controlling the drug trade would become legitimate or that pharmaceutical, alcohol and tobacco companies would “take over the business” and aggressively promote the sale of their psychoactive drugs in the commercial marketplace. That is not a responsible vision for a system of effective drug control. The notion of state-level regulation and control contemplates a more effective means to *reduce* access to and use of psychoactive drugs by young persons, the

³ See King County Bar Association (2005), *Resolution on State Regulation and Control of Psychoactive Substances*, adopted by the King County Bar Association Board of Trustees on January 19, 2005.

prohibition of the private sale of such drugs, the prohibition of advertising and the medical prescription of some or most drugs as a proven means to reduce harm and drug abuse in hard-to-reach populations of addicted persons.

Substances Subject to State Regulation and Control

State regulation and control is needed to control psychoactive substances that are *exclusively produced and distributed in illegal markets*. The most troublesome examples of such illegal markets include those for cannabis and heroin, the use and sale of which are absolutely prohibited under federal law and are deemed to have no medical value, and for methamphetamine and cocaine, for which the law allows medical use only in extremely limited circumstances. Other prohibited substances, such as phencyclidine (PCP, or “angel dust”), are used by so few people that a black market could not be sustained for that substance alone. Where the objectives of the regulatory system are to undercut the black market, to restrict access by young persons and to open gateways to treatment, the most widely used substances, for which black markets continue to flourish, would be the principal targets of regulation.

The Importance of State Control

In order to maintain strict supervision over production and distribution, currently-prohibited psychoactive substances would most prudently be controlled by state-owned or state-controlled facilities. This is especially true of the “hard” drugs that pose serious risks of harm, which might only be provided to medically-certified addicts as part of addiction treatment in state-licensed clinics and/or from private doctors’ offices. The recent track record of such facilities in Europe is encouraging, as prescription drug maintenance programs have brought about meaningful reductions in overdose deaths, reductions in the transmission of disease, reductions in economic crimes related to addiction, reductions in levels of public disorder, reductions in youth initiation rates, reductions in quantity of drug use and even elimination of use altogether for a sizable number of addicts.⁴ Such “win-win” results should also help to reduce the burden on law enforcement, which strongly supports such programs in Europe.

Sources of Production

The state would not have to smuggle or purchase heroin, methamphetamine or cocaine from Latin American or Asian criminal gangs, nor would in-state cultivation of opium, coca or ephedra be necessary to obtain needed supplies. Cocaine and methamphetamine are actually legal drugs under federal law, so the state could obtain a pharmaceutically pure supply for special treatment facilities for registered addicts, accomplished by the state pursuant to its exclusive power to regulate medical practice. Rather than heroin (diamorphine), comparable short-acting opiates that are medically available, such as laudanum (hydromorphone) could be provided, as Canadian clinics are currently doing.⁵

⁴ See review of recent data from European drug prescription programs in King County Bar Association (2005), “International Trends in Drug Policy: Lessons Learned from Abroad,” *Report of the Legal Frameworks Group to the King County Bar Association Board of Trustees*, pp. 22-26.

⁵ See North American Opiate Medication Initiative, *Project Backgrounder*, August 24, 2004.

If the state were to regulate the production and distribution of cannabis, it could obtain a controlled supply of cannabis from licensed producers or cooperatives of producers entirely within the state of Washington, following the example of the British Home Office and the Dutch government, which have already licensed private producers of cannabis for research purposes. Before entering into contracts with the state the producers would be thoroughly screened and their operations would be closely monitored and audited, subject to criminal sanctions for engaging in unauthorized distribution outside the state system, especially to young persons. Disincentives would remain very strong for producers not to violate these terms, as their livelihoods and their personal liberty would be at stake. Further, there would be few incentives for qualified adults to obtain cannabis outside the state system, as a reliable product would be available at a price at, or just below the “black market” price.

Effects on Current Drug Prescription Regime

No changes would be needed to the current federal-state regulatory system for prescription medications. Instead, some of the currently prohibited drugs, or effective substitutes that are not prohibited, might be made available by prescription as part of addiction treatment regimes aimed at reducing the quantity of use and eventually the elimination of use – the approach now proven effective in Europe. Currently prohibited substances might also be approved for other medically-proven purposes, such as for pain relief or for the treatment of mental health conditions such as depression and post-traumatic stress disorder.

Purity, Labeling and Health Warnings

A significant advantage of a regulatory system for psychoactive substances would be better guarantees of purity and safety of those substances under state control. Just as with other prescription medications, accurate labeling and comprehensive information about dosages and contraindications would be provided for those substances administered to addicted persons through state-controlled medical facilities, hopefully more comprehensive than the information provided to consumers at a pharmacy.

Limits on Access to Psychoactive Substances

Currently there are no effective limitations on access to prohibited psychoactive drugs. In fact, young persons today often have greater access to such drugs than adults do.⁶ A regulatory system would establish more effective limits on such access, although no system can be completely fool-proof. Under a regulatory system, there would be differing degrees of control for each substance, depending on their known potential for harm and problematic use. It is possible, therefore, that only registered addicts would have access to the more addictive drugs such as heroin, cocaine and methamphetamine for the purpose of addiction treatment, and only through state-licensed or state-controlled

⁶ Most high school students report that illegal drugs are “easy to obtain,” including “hard” drugs such as heroin and crack cocaine, and more high school students now use marijuana than tobacco. Lloyd D. Johnston *et al.* (2003), *Monitoring the Future National Survey Results on Drug Use, 1975-2002*, NIH Publication No. 03-5375, Bethesda: National Institute on Drug Abuse, v. I, table 13.

medical treatment facilities. By contrast, cannabis might be regulated less strictly, perhaps in a similar manner as distilled spirits are controlled in Washington State.

A wide spectrum of regulatory mechanisms could be employed to limit access to state-regulated psychoactive substances,⁷ including:

Proof of dependence. Under this requirement, an individual seeking to obtain a substance must be assessed by a health worker to be dependent and then allowed to use a carefully rationed amount in a designated space.

Proof of “need.” Beyond the substances on which people are physiologically dependent, other drugs such as LSD and Ecstasy, which have been shown to have potential psychotherapeutic benefits when used in controlled therapeutic environments, could be used with registered and trained psychiatrists and psychologists.

Required training. Training programs could provide information about addiction, treatment services and other public health issues, such as sexually-transmitted diseases and blood-borne illnesses. The programs could provide the knowledge and skills aimed at discouraging drug use, reducing the amount of drug use, and reducing the harm of drug use. Program graduates would receive a certificate which would be required to be shown prior to obtaining a substance.

Required test of knowledge. A short test could be administered at the point of distribution of state-controlled substances to demonstrate to the staff that the individual obtaining the substance has the required knowledge of safe use that is likely to minimize harm.

Registration. This would allow those who obtain substances to be tracked for “engagement” and health education. It might also discourage individuals from substance use as well as reducing problematic use.

Licensing. As with licenses for new motor vehicle drivers that restrict the place and time of driving and who they are permitted to drive with, a licensing scheme could also help to control the time and place of substance use and the associations of new substance users. This would be a graduated program requiring a demonstration of responsible, non-harmful substance use. The licensee could be given demerit points or have the license suspended based on infractions, such as providing substances to non-licensed users, driving under influence or public intoxication. Such licenses could also specify different levels of access to various substances based on levels of training and experience. People in some professions, like airplane pilots or taxi drivers, could be restricted from obtaining licenses to purchase long-acting drugs that impair motor skills.

Proof of residency. Some societies have gone through a process of developing “culturally specific social controlling mechanisms” that form over time a certain amount of relatively healthy, unproblematic relationships with substances. “Drug tourists” who have not been integrated into such a culture may behave in problematic ways that do not

⁷ See Mark Haden (2004), “Regulation of Illegal Drugs: An Exploration of Public Health Tools.” *The International Journal of Drug Policy*, v.15, pp. 225-230.

adhere to the local restraining social practices. Therefore, those allowed to obtain substances could be restricted to residents of a particular jurisdiction. The state of Washington would not become a drug haven for “riff-raff” from other states and countries if only Washington state residents would be eligible to receive substances through the state regulated system.

Degree of intoxication. In many jurisdictions the sale of alcohol is restricted based on the degree of intoxication of the purchaser. Similarly, with other intoxicants the state could refuse to provide substances to individuals perceived to be engaging in high-risk, substance-using behavior.

Volume rationing. Quantities may be limited to a certain amount deemed appropriate for personal consumption so that users would not sell the substances on the black market or use an unsafe amount. Such limits currently exist in those European countries that have normalized cannabis use. As for the addictive drugs provided through medical facilities, carefully controlled doses would be provided by medical professionals, presumably reduced over the course of time, to optimize the treatment objectives of harm reduction, quantity-of-use reduction and eventual abstinence.

Tracking of consumption habits. Registered purchasers would have the volume and frequency of purchasing tracked. This could be used to instigate “health interventions” by health professionals who could register their concerns with the user and offer assistance if a problem is identified. The tracking may be a deterrent to use, as well as a possible trigger for increases in the cost of the substance once the user surpasses certain volume thresholds.

Required membership in group. Users of certain substances may belong to advocacy or union groups that would act similar to existing professional regulatory bodies that provide practice guidelines for their members. If the user acts outside of the norms of the discipline, the group can refuse membership. The norms would be enforced through a variety of peer processes and education.

Private Production and Consumption of Cannabis

As an easy-to-grow weed, cannabis will inevitably be produced to some extent by private citizens on private property. A state-supervised system of home production (not dissimilar to home brewing) and non-commercial exchanges (“gifting”) might actually satisfy the demand for cannabis, thereby reducing the potential harm from excessive availability. The state legislature would need to consider the nature and scope of state regulation of such home production and non-commercial exchanges and, depending on the degree to which that approach would satisfy demand and eliminate the illegal market, would determine whether establishing state-controlled outlets would even be necessary.

The Moral Authority of the State

The state might face an ethical dilemma if it were to become the purveyor of mind-altering substances for profit. It is instructive to note, however, that the Washington State Liquor Control Board, which does an effective job of limiting access by minors to distilled spirits, still brings in about \$100 million each year to help balance the state's budget!

It is important to consider once again the main objectives of the proposal to assert state regulatory control over currently-prohibited substances:

- 1) to undercut the violent, illegal markets that spawn disease, crime, corruption, mayhem and death, not to mention reducing the wasteful public expenditures devoted to continually chasing these problems but never effectively address them;
- 2) to reduce access by young persons to psychoactive drugs and to provide them better education and prevention services; and
- 3) to open new gateways to treatment, particularly finding the hard-to-reach population of addicted persons who consume the bulk volume of drugs, drying up black market demand for those drugs and thereby reducing public disorder, economic crimes related to addiction, transmission of disease, accidental death, quantities of drugs consumed, initiation of use by young persons and drug addiction itself, as well as criminal justice, public health and social welfare costs.

A policy to achieve these objectives could only enhance the moral authority of the state.

PROTECTING YOUNG PERSONS FROM THE HARMS OF DRUGS

Among the public policy objectives to be served by any drug control strategy, the protection of children is arguably the most important. To satisfy this objective, any regulatory system designed to undercut illegal drug markets and to reduce the harm from psychoactive drugs must distinguish between the rights and interests of adults and those of children.

We often hear about “the message we send to children.” Unfortunately, young people today receive many mixed messages, including, “Take a pill to feel better,” “Drink beer and get drunk” and “just say no, except when you’re 21 you can drink.” In a society that purportedly aims to be “drug-free,” young people witness excessive use of both legal and illegal drugs by adults and are bombarded by commercial advertisements promoting a wide variety of mind-altering, pleasure-inducing substances. The most troublesome mixed message we now send to young people is that drugs are bad and dangerous, but we still leave control of drugs up to criminal gangs rather than take control over them ourselves, as with all other hazardous substances.

The attempt to fashion the appropriate parameters of a regulatory system for drug control must address the following threshold issues:

1) Should young persons be legally prohibited from possessing and consuming psychoactive substances?

Recent scientific findings have reformed previous notions about the early development of the human brain and validate a public policy that seeks to prevent the use of psychoactive substances that may impair the development of children and teenagers. Some recent evidence suggests that the use of psychoactive substances before age fifteen may be related to neurological problems, as compared with the initiation of use after age nineteen.⁸ Other recent evidence indicates that *legally-prescribed* psychoactive drugs present undue risks of harm to persons under age eighteen.⁹

⁸ R. Andrew Chambers, M.D., Jane M. Taylor, Ph.D, and Marc N. Potenza, M.D., Ph.D. (2003), “Developmental Neurocircuitry of Motivation in Adolescence: A Critical Period of Addiction Vulnerability,” *American Journal of Psychiatry*, June 2003. Neuroscientists have documented different kinds of development in the adolescent brain, including: a small surge in brain cell development in the hippocampus and amygdala around the time of puberty, after which no new brain cells are formed; the progressive sheathing of neurons, or “myelination,” which occurs throughout adolescence to about age 25 and is thought to be associated with speed and efficiency of nerve cell transmissions; and a synaptic “pruning” and reformation throughout childhood, into adolescence and into adult life. The myelination of neurons appears to correlate with improved judgment in emotionally tense situations. The novelty seeking, “throwing judgment to the wind” nature of adolescent behavior clearly correlates with incomplete myelination of the frontal lobe neurons, although it is important not to presume that alcohol, cannabis or other drugs retard the myelination process or negatively affect brain development in a direct way. See, e.g., Ronald E. Dahl, M.D. and Linda Patia Spear, M.D. (2004), *Adolescent Brain Development: Vulnerabilities and Opportunities*, New York Academy of Sciences; powerpoint presentation available at <http://www.wccf.org/pdf/dahl.pdf>.

⁹ A number of recent teenage suicides have been associated with the use of prescribed anti-depressant medications, giving rise to significant concerns in the medical community and within regulatory agencies about the safety of using such drugs to treat childhood depression. See Erica Goode, “Stronger Warning Is Urged on Antidepressants for Teenagers,” *New York Times*, February 3, 2004, p. A12; Erica Goode, “British Warning on Antidepressant Use for Youth,” *New York Times*, December 11, 2003, p. A1; Erica Goode, “Leading Drugs for Psychosis Come Under New Scrutiny,” *New York Times*, May 20, 2003, p. A1.

Whether or not drugs directly affect the developing brain, children's limited ability to make informed judgments renders them especially vulnerable to the adverse consequences of drug use and preventing or delaying such allows for the development of social competence and resilience to risk.¹⁰ Therefore, where young persons' vulnerability unreasonably exposes them to the potential harms from psychoactive drug use, it is desirable and reasonable that young persons be legally prohibited from possessing and using such drugs.¹¹

As with any form of prohibition, a drug control policy that restricts young persons from possessing or using psychoactive substances should be limited to the reduction of actual harm, as balanced against the often dangerous conditions and counterproductive effects brought about by prohibition itself. For example, it is worth noting that, in our society, young persons are permitted, and often encouraged to use certain psychoactive drugs, such as caffeine and sugar. These substances have been scientifically proven to have deleterious effects on children, but the negative effect of prohibiting their consumption would be viewed as too great to justify prohibition.¹²

2) Should young persons be criminally punished for possessing and consuming psychoactive substances?

The legal prohibition of young persons' possession and use of psychoactive drugs justifies a state sanction for such possession and use. The law should authorize the

¹⁰ Although no cause-effect relationship can be established, the heightened risks associated with early drug use by children is well documented, revealing that early initiation of alcohol, tobacco and marijuana is linked with low academic achievement and school dropout, early pregnancy and parenthood, stealing and other delinquent behavior and the use of predatory and domestic violence. *See, e.g.*, Nels Ericson, *Substance Abuse: The Nation's Number One Health Problem*, U.S. Department of Justice, Washington, D.C. (2001); Bridget Grant and Deborah Dawson, "Age at Onset of Alcohol Use and Its Association with DSM-IV Alcohol Abuse and Dependence," *Journal of Substance Abuse*, 9 (1997); Phyllis Ellickson *et al.*, "Does Early Use Increase the Risk of Dropping Out of High School?" in *Journal of Drug Issues*, v. 28, no.2 (1998).

¹¹ Defining "young persons" in this context and determining the appropriate age limits for prohibiting the possession and use of psychoactive drugs requires the consideration of a number of factors. For example, the brains of children and teenagers between the ages of eleven and about seventeen or eighteen are undergoing striking changes in many areas, including the frontal cortex, the hippocampus, the corpus callosum and Wernicke's area. *See, e.g.*, Paul M. Thompson *et al.* (2000), *Nature*, v.404, pp. 90-3; J.N. Giedd *et al.* (1999), *Nature Neurosciences*, v.2, n.10, pp. 861-3; and F.M. Benes *et al.* (1994), *Archives of General Psychiatry*, 51, June 1994. These changes in the brain are associated with changes in emotional reactions, risk-taking and judgment, especially with the extensive reshaping of the frontal cortex. *See, e.g.*, Scott D. Lane & Don R. Cherek (2001), *Experimental and Clinical Psychopharmacology*, v.9, n.1, pp. 74-82; Linda Patia Spear (2000), *Current Directions in Psychological Science*, v.9, n.4; Abigail A. Baird *et al.* (1999), *Journal of the American Academy of Child and Adolescent Psychiatry*, v.38, n.2, pp. 3195-9; and J.N. Giedd *et al.*, *op cit.*

¹² Conversely, some existing regulatory models should be reviewed in light of the King County Bar Association's core principle that the state's sanction or response to drug use should result in less harm than the use of the drug itself. For example, eighteen-year-olds are legally permitted to use tobacco products, despite the overwhelming evidence that tobacco is more addictive and potentially physically harmful to the user than alcohol (although less intoxicating with each use). This policy reflects the perception that alcohol use has a greater impact on public safety than tobacco. However, there are a number of currently prohibited drugs, for which the mere possession and use is criminally punished, that may have a similarly lesser impact on public safety than alcohol, and even less of an impact on personal health than tobacco.

seizure of psychoactive drugs found in young persons' possession, but the state sanction need not be a criminal sanction.

Voluminous literature supports the notion that criminal punishment for the possession and use of drugs, whether for adults or children, is counterproductive and inappropriate and has brought about severe societal consequences.¹³ Criminal punishment of drug possession and use has not resulted in decreased substance abuse among young persons; in fact, more young persons are now experimenting with more dangerous psychoactive substances, and at even younger ages.¹⁴

Possession and use of psychoactive drugs by young persons should not be subject to criminal punishment. However, any young person who, while under the influence of a prohibited psychoactive substance, causes harm to other persons or to property, should be held accountable under current laws prohibiting those acts. In such cases, acts causing harm to others and to property are the trigger for the criminal sanction, not the actor's use of drugs nor the actor's intoxication.

Any state response to drug use by young persons should directly address the underlying causes of the young person's drug use. A family-oriented and community-oriented approach, stressing the young person's rehabilitation and restoration, would be most appropriate and most effective.¹⁵ A reasonable policy, in the case of a young person found possessing or using drugs, would be a referral to the appropriate local or state agency for evaluation of the young person's needs and provision of services and assistance to meet those needs. Drug use by young persons should be addressed using sound, evidence-based social work practices, not through criminal punishment and stigmatization.¹⁶

The remedial measures used to address a young person's psychoactive drug use should depend on each particular situation and should directly address the causes, the degree and the negative effects of the drug use, not merely the drug use *per se*. The use of drug testing, for instance, may be useful as a guide to clinical intervention but drug test results should not be used as proof of guilt or innocence or as justification for

¹³ See, e.g., the report of the Bar Association of the City of New York (1994), "A Wiser Course: Ending Drug Prohibition," *The Record*, vol. 49, no. 5; and the Joint Committee of the American Bar Association and the American Medical Association on Narcotic Drugs (1961), *Drug Addiction: Crime or Disease?*, Interim and Final Reports, University of Indiana Press, Bloomington, IN.

¹⁴ John M. Walsh (2004), *Are We There Yet? Measuring Progress in the U.S. War on Drugs in Latin America*, Washington, D.C.: Washington Office on Latin America, p. 5, citing National Survey on Drug Use and Health, 2003

¹⁵ One of the nation's premier remedial programs for youth is the Reclaiming Futures project, supported by the Robert Wood Johnson Foundation, which is a new approach to helping teenagers caught in the cycle of drugs, alcohol and crime. The Reclaiming Futures project, which has invested heavily in the Seattle-King County area, embraces the notion of "wrap-around," bringing communities together to improve drug and alcohol treatment, to expand and coordinate services and to find jobs and volunteer work for young people in trouble with the law. See <http://www.reclaimingfutures.org/index.asp>.

¹⁶ Recent studies show conclusively that "get tough" programs for youths do not prevent criminal behavior and may even exacerbate such problems, including the DARE program. See National Institute of Health, *Preventing Violence and Related Health-Risking Social Behaviors in Adolescents*, National Institute of Health State-of-the-Science Conference, October 13-15, 2004, Bethesda, Maryland; transcripts posted at <http://consensus.nih.gov/ta/023/preventviolenceintro.html>

punishment. Recent evidence gathered from surveying over 75,000 American school children persuasively suggests that drug testing of young persons in schools, for instance, does not result in any decrease in drug use.¹⁷ By contrast, evidence-based prevention programs and clinical intervention and treatment have been shown to be much more effective in preventing and delaying initiation of drug use by young persons.

3) Should young persons be criminally punished for selling or otherwise providing psychoactive substances to others?

The demonstrated risks and harms to young persons from the use of psychoactive drugs, as outlined above, dictates that any sale or other transfer of psychoactive drugs by *adults* to young persons should subject such adults to criminal punishment. Providing potentially dangerous substances to an individual who lacks mature discretion can reasonably be viewed as a nonconsensual act that threatens public safety and, therefore, should be treated as a criminal act. Washington state law already provides for criminal punishment in the case of furnishing liquor to minors,¹⁸ and this provision may serve as a useful corollary to establishing similar punishment of adults in connection with furnishing other psychoactive substances to minors.

Circumstances in which adults furnish drugs to young persons should be carefully distinguished from situations where young persons sell or otherwise provide drugs to other young persons. Such young persons are most often in peer relationships and in those situations, the underage provider would be more appropriately subject to the same type of state-sanctioned assessment, intervention and provision of services described in (2) above. In most cases, young persons are presumed to lack the adequate knowledge and discretion to assess the various consequences of drug use, so they should not be criminally punished for providing drugs to their peers, except when the provider is significantly older than the user. Statutory rape laws covering consensual sex between minors provides a useful model.

4) What measures should be promoted to reduce the harm from and to discourage the use of psychoactive substances by young persons?

A federal report by the U.S. Center on Substance Abuse Prevention noted that:

Adolescence is a period in which youth reject conventionality and traditional authority figures in an effort to establish their own independence. For a significant number of adolescents, this rejection consists of engaging in a number of 'risky' behaviors, including drug and alcohol use. Within the past few years, researchers and practitioners have begun to focus on this tendency, suggesting that drug use may be a 'default' activity engaged in when youth have few or no opportunities

¹⁷ Ryoko Yamaguchi, Lloyd D. Johnston and Patrick M. O'Malley (2003), "Relationship Between Student Illicit Drug use and School Testing Policies," *Journal of School Health*, v.73, no.4, pp. 159-164.

¹⁸ See RCW 66.44.270.

to assert their independence in a constructive manner.”¹⁹

Unfortunately, studies have shown that many, if not most, drug education programs for youth are not effective.²⁰ A recent study revealed that illegal drug use by suburban and urban public school students is virtually identical and that well over a third of all students, and over four of ten twelfth graders, have used illegal drugs. The study found that almost one of every seven students in both urban and suburban schools, that about one of every six twelfth graders, have been high on drugs at school and that about one in ten suburban students, and about one in fourteen urban students, have driven while high; and about one in five suburban twelfth graders have done so.²¹

Many programs that solely advocate complete abstinence, or are based on the assumptions that drugs are not a common part of our culture, that drug use is the same as drug abuse, that marijuana is the gateway to drugs such as heroin and cocaine, or that exaggerating risks will deter youths from experimentation, are not effective and, in fact, are often counterproductive to the goal of reducing drug use by young people.²²

Providing activities that keep young people interested in and connected to society is more likely to accomplish the delaying of, or abstinence from, drug use than is the fear of stigmatization or criminal punishment.²³ Examples of such activities include:

- Participation in engaging activities, such as, music, art, performing arts and sports programs;
- Attention to and direction in academic pursuits;
- Involvement with school, religious, community and other organizations;
- Communication with parents and friends; and
- Science based drug education programs in school and the community.

Schools, churches, civic organizations and government all have a legitimate role in helping families teach young persons about the effects and risks of psychoactive substance use. There is an abundance of data indicating that certain types of prevention programs are effective in reducing harmful behaviors that are associated with substance abuse. The current challenge is getting such programs implemented with fidelity in schools and communities.²⁴

¹⁹ Maria Carmona and Kathryn Stewart (1996), *A Review of Alternative Activities and Alternatives Programs in Youth-Oriented Prevention*, National Center for the Advancement of Prevention, Substance Abuse Mental Health Services Administration (SAMHSA), Center for Substance Abuse Prevention, p. 5.

²⁰ See, e.g., Donald R. Lynam, Richard Milich, *et al.* (1999), “Project DARE: No Effects at 10-Year Follow-Up”, *Journal of Consulting and Clinical Psychology*, American Psychological Assoc., v. 67, n. 4, pp. 590-93; Dennis Rosenbaum (1998), *Assessing the Effects of School-based Drug Education: A Six Year Multilevel analysis of Project DARE*, Abstract (April 6, 1998).

²¹ Jay P. Green, Ph.D, and Greg Forster, Ph.D (2004), *Sex, Drugs, and Delinquency in Urban and Suburban Public Schools*, New York: Manhattan Institute for Policy Research.

²² Nancy S. Tobler, Michael R. Roona *et al.* (2000), “School-Based Adolescent Drug Prevention Programs: 1998 Meta-Analysis,” *Journal of Primary Prevention*, v.20, n.4.

²³ Office of Applied Studies, Substance Abuse and Mental Health Services Administration, U.S. Dep’t of Health and Human Services (1999), *Risk and Protective Factors for Adolescent Drug Use: Findings from the 1997 National Household Survey on Drug Abuse*; See also, Carmona and Stewart, *supra*, at pp. 5, 21.

²⁴ The Prevention Working Group of the King County Bar Association Drug Policy Project is examining ways to implement more effective prevention methods in Washington’s schools and communities.

5) What measures are needed to limit the illegal market for psychoactive substances that targets young persons?

Experience with the regulation of adult use of alcohol supports the conclusion that prohibiting psychoactive drugs to a very limited portion of the population (minors) is not likely to support the formation of a substantial illicit market targeting that population. If Washington were to adopt a regulatory system for the control and distribution of psychoactive substances to undercut the illegal markets for those substances, albeit with a prohibition as to young persons, and if the regulatory scheme also encompassed programs for preventive education and, especially, strict limitations on promotional advertising, there would be little incentive for the creation of a “black market” directed solely at young persons.

Under the current, unregulated scheme whereby possession and use of psychoactive substances are criminalized for both adults and young persons, there has been an increase in availability of psychoactive substances to young persons. As long as a profitable illegal market in psychoactive substances exists for adults, there will be no reasonable means to limit how such substances are supplied to young persons.

History has shown that prohibition creates a supply of products at an inflated price and, therefore, a strong financial incentive for criminals to provide drugs to anyone willing to pay, including young persons.²⁵ When products are not prohibited generally - where there is no economic incentive for an illegal market for adults - young persons have less opportunity and pressure to obtain drugs and, therefore, legitimate suppliers have a disincentive to supply drugs to young persons.

CURBING DEMAND FOR DRUGS: LIMITING PROMOTION

One of the most important components of any new system to control psychoactive substances would be severe limits on advertising and promotion, as strict as the law would allow within the constitutional protections of free speech. Any system of regulation and control would have to be designed so as not to foster a commercial market, especially in the manner that alcohol and tobacco have been commercialized. There is compelling evidence that advertising and promotion are more highly associated with increases in consumption of drugs than the mere legal status of the drugs themselves.²⁶

The Harms of Unfettered Promotion

Current “vices” are all aggressively promoted in American society, as alcohol, tobacco, pharmaceuticals and gambling are advertised on television, at sports events, on billboards and in publications. Where advertising is proven to have an effect on consumption, the potential for harm is not remote. Reports have shown, for example, that junk food advertising has been shown to increase obesity in children,²⁷ and alcohol

²⁵ See, e.g., Mark Thornton (1991), *The Economics of Prohibition*, University of Utah Press, 1991.

²⁶ Robert J. MacCoun and Peter Reuter (2001), *Drug War Heresies*, Cambridge University Press, pp.240-1.

²⁷ Kaiser Family Foundation (2004), *The Role of Media in Childhood Obesity*, report, February 2004.

advertising has led to increased alcohol consumption which, in turn, has led to increased motor vehicle fatalities.²⁸

Prescription drug advertising has grown 150 percent since 1997, the year the Food and Drug Administration revised its guidelines to permit more advertisements.²⁹ Pharmaceutical companies are making billions of dollars from their well-advertised products, even when similar products that are cheaper and available over-the-counter may work just as well. Some politicians see the need to limit the advertising because they believe it is driving the spending on expensive drugs which contributes to the inflation of the nation's health care costs. The FDA has no plans to change the rules, however, and is even studying a proposal to loosen the rules more.³⁰ To boost profits, pharmaceutical companies are investing in marginal improvements of their existing drugs rather than invest in riskier, breakthrough drugs.³¹ The large profits that are allegedly for research and development also go toward forms of "education" about the drugs for doctors and all manner of incentives for them to prescribe those certain drugs. According to Dr. Marcia Angell, former editor in chief of *The New England Journal of Medicine*, "Once upon a time, drug companies promoted drugs to treat diseases. Now it is often the opposite. They promote diseases to fit their drugs."³²

Tobacco is another substance with heavy advertising and promotion and a strong lobby. Broad restrictions on the convenience of smoking, such as workplace bans, educational programs and pressure from physicians, have worked to increase the stigmatization of smoking, and tobacco use has decreased in recent years. There have also been more regulations placing restrictions on tobacco advertising and increased taxes, but the tobacco industry has used great influence and legal pressure to make sure that the restrictions and taxes have been limited. Local municipalities have had the most success putting restrictions on where smoking can occur.³³

²⁸ Henry Saffer (1997), "Alcohol advertising and motor vehicle fatalities," *The Review of Economics and Statistics*, 79 (3):431-442, August 1997.

²⁹ Robert Pear, "Investigators Find Repeated Deception in Ads for Drugs," *The New York Times*, December 4, 2002, p. A22.

³⁰ A study from the General Accounting Office found that some drug companies have been repeatedly using deceptive advertising by disseminating misleading information, even after being cited for repeated violations. The same study concluded that drug advertising does appear to have an effect on the increased use of prescriptions, as well as higher drug spending, as an estimated 8.5 million people per year request a certain drug after seeing an advertisement for it. Stuart Elliott and Nat Ives, "Selling Prescription Drugs to the Consumer," *The New York Times*, October 12, 2004, p. C1. For example, Nexium is one of the nation's best-selling drugs, with 2003 sales in the United States of \$3.1 billion, even though many experts say that over-the-counter heartburn remedies such as Prilosec, made by the same company as Nexium, work just as well for most patients. The GAO report blames the prevalence of misleading commercials on delays in the enforcement of federal standards of accuracy in advertising, citing a change in procedure put in place by the Bush administration that lengthens the review process. Often the ads have finished their broadcast cycle before the agency has a chance to reprimand the drug manufacturer. In many cases the companies are overstating the effectiveness or minimizing the risks of medications. Robert Pear (2002), *op. cit.*

³¹ Eduardo Porter. "Do New Drugs Always Have to Cost So Much?" *The New York Times*, Nov.14, 2004, p.C5.

³² Janet Maslin, "Indicting the Drug Industry's Practices," *The New York Times*, September 6, 2004, p. B7.

³³ Robert MacCoun and Peter Reuter (2001), *op. cit.*, pp.7, 176-9.

Gambling, while not as heavily promoted as alcohol and pharmaceuticals, is still an advertised “vice.” States promote their own form of gambling – the state lottery – with commercials but often without any counter-advertising on the harms of gambling. The states have evolved from regulators of gambling to promoters of gambling.³⁴ There are now approximately five million pathological and problem gamblers in the U.S.,³⁵ and the uneasiness of some state legislators with the promoting of gambling has led some states to restrict their own advertising, including Massachusetts which lowered its state lottery budget from \$12 million to \$400,000.³⁶

First Amendment Issues

The weakness of most alternatives to prohibition is that commercial interests generate advertising and other forms of promotion which produce undesirable consequences. The challenge is to combat the “black market” with some form of controlled availability which does not give any commercial interest an incentive for promotion.

Washington State attempted such a program 70 years ago when it legalized alcohol and set up state liquor stores. The theory was that the state government would be the only party legally authorized to buy alcoholic beverages from manufacturers. It would then provide the beverages in state liquor stores run by salaried state government employees who have no incentive to promote sales. However, they forgot to account for the effect of trademarks. Because the state liquor stores resell products marked with trademarks supplied by the manufacturers, the manufacturers are able to advertise directly to consumers and thereby promote their products.

One alternative to prohibition would be a system whereby salaried state government employees purchase only generic products that cannot be identified for promotion as to source by their inherent characteristics, resell them in packaging that gives no indication of the original source that could be used for promotion, and make purchases from a large number of suppliers who contractually agree to refrain from advertising or other promotion and agree to refrain from engaging in cooperative actions so that there is no promotion by a group such as the “Dairy Farmers of Washington.”

The prohibition against advertising and other promotion would face no constitutional problem because it would be agreed to by contract. The state would have the leverage to make such a system work because the state would be the sole licensing authority, custodian and purveyor of the substances in question.

In the United States advertising, or commercial speech, is protected as free speech under the Constitution.³⁷ However, not all commercial speech is protected. There are

³⁴ After New Hampshire started the lottery trend in 1963, lotteries have spread to 38 states. Craig Lambert, “Trafficking in Chance,” *Harvard Magazine*, July-August, 2002, p. 34. Thirty states now allow or plan to allow gambling to help raise money for state expenses like education. Editors, “Lemons in a Row,” *The New York Times*, July 13, 2004, p. A18.

³⁵ Craig Lambert (2004), *op. cit.*, p. 37.

³⁶ Robert MacCoun and Peter Reuter (2001), *op. cit.*, p. 138.

³⁷ See, e.g., *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761-2 (1976).

times when the government has a legitimate reason to put restrictions on the commercial speech. For instance, the commercial speech must concern lawful activity and not be misleading. But if the government does regulate the speech, there must be a substantial government interest. If so, the regulation must directly advance the governmental interest asserted and must do so in a way that is not more extensive than is necessary to serve that interest.³⁸

The U.S. Supreme Court struck down a Massachusetts law banning tobacco billboards from within 1000 feet of schools and requiring tobacco ads at point of sale to be 5 feet off the ground if children under the age of 18 were admitted into the store. The Court held that the statutes were more extensive than necessary.³⁹ The Supreme Court also struck down a Rhode Island statute prohibiting billboard advertising by liquor stores as a violation of the First Amendment,⁴⁰ as was a Pennsylvania law banning advertisements for alcohol in college newspapers. The judge in that case cited the state's heavy burden when restricting free speech, saying the government had not proven that by banning the ads in the school newspapers, underage drinking would diminish, especially when students are exposed to so many other advertisements for alcohol on television, the radio and other non-college newspapers.⁴¹

One way to prohibit advertising is by the state to include in the contracts with its suppliers that they will have no claim of trademark of its product and can not advertise or promote its product. The supplier would have to agree to these provisions in order to enter into business with the state.⁴² Under the Constitution, for the state to place any

³⁸ *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 566(1980).

³⁹ *Lorillard v. Reilly*, 533 U.S. 525 (2001).

⁴⁰ *Liquor Mart Inc. v. Rhode Island*, 517 US 484 (1996).

⁴¹ David B. Caruso, "Court Strikes Pennsylvania Ban on Campus Booze Ads," *Associated Press*, July 30, 2004.

⁴² An example of a contract for cannabis products is as follows:

State government ("Buyer") will contract with suppliers of various forms of pharmacoactive cannabis and will obtain each form of product from at least three suppliers. Each supplier will agree to the following provisions:

1. As used below, "Affiliates" means each party owning an interesting more than 10% of a company's profits or revenues (parent), each party in which a company owns more than a 10% interest (child), and each party where another owns more than 10% of each (sibling).
2. The license granted by Buyer and Supplier to grow, harvest, process, package and transport cannabis products may not be assigned or subleased by Supplier to any of Supplier's Affiliates or any other party.
3. Supplier will place on each package and on each carton of packages only those marks, labels and styles approved by Buyer in writing.
4. Supplier will give the supplied Products no distinctive characteristics that might distinguish Supplier's products from substantially equivalent products supplied to Buyer by others.
5. Supplier shall have no claim of trademark or trade dress rights in any mark of style applied to a package or carton of packages or distinctive characteristics of a supplied product, all of which shall be owned by Buyer.
6. Neither Supplier nor its Affiliates will provide consideration to another, including its own employees, for the creation, display, performance or distribution of advertising or promotional material for pharmacoactive cannabis anywhere in the world other than for creation of packages or cartons approved by Buyer in writing for delivery to Buyer.
7. Neither Supplier nor its Affiliates will contribute money or other consideration to an association or any entity other than an entity which promises in writing that it will not provide consideration to

limitations on advertising, it must serve a legitimate public interest in order to comply with the First Amendment. In addition, under Washington State law, the state can prohibit a trademark on a good or service which “consists of or comprises immoral, deceptive, or scandalous matter.”⁴³

The Importance of Counter-Advertising

Just as important as state restrictions on advertising would be aggressive, state-sponsored counter-advertising. As an essential part of a public health strategy, state-funded education, public service messages and other forms of communication would foster the normative changes needed to reduce problematic substance use. The very best example of such normative change through public service counter-advertisement is the recent success in drastically reducing tobacco consumption over the course of the last three decades in the United States, accomplished without having incarcerating anyone.

The success of counter-advertising regarding tobacco has depended on many factors:

- adequate, long-term funding;
- ability to administer the campaign free from political interference (including prohibiting the tobacco industry from being involved in the planning or administration of the campaign);
- a broad-based focus rather than one exclusively targeting children; and
- ability of the campaign to be complementary of other tobacco control activities conducted at the federal, state and local levels (*e.g.* support for indoor smoking regulations).⁴⁴

The Washington State Liquor Control Board is considering a legislative proposal to promote the counter-advertising of alcohol. The legislation would create an alcohol education advisory council separate from the Liquor Control Board to develop, implement and support statewide public education programs aimed at reducing alcohol misuse and abuse among youth and adults in Washington State.⁴⁵

another, including its own employees, for the creation, display, performance or distribution of advertising or promotional material for pharmacoeactive cannabis anywhere in the world other than for creation of packages or cartons approved by Buyer in writing for delivery to Buyer.

8. In its operations to produce Products for sale to Buyer, Supplier agrees to contract for goods or services from others equal in value to more than 10% of Buyer’s expenses for any period only with sub-suppliers that agree in writing that neither they nor their Affiliates will provide consideration to another, including its own employees, for the creation, display, performance or distribution of advertising or promotional material for pharmacoeactive cannabis anywhere in the world other than for creation of packages or cartons approved by Buyer in writing for delivery to Buyer.

⁴³ RCW 19.77.020 – Registration of certain trademarks prohibited.

⁴⁴ K. Michael Cummings, Ph.D., M.P.H., and Hillary Clarke, J.D. (1998), *The Use of Counter-Advertising As a Tobacco Use Deterrent*, Department of Cancer Control & Epidemiology, Roswell Park Cancer Institute for the Advocacy Institute’s Health Science Analysis Project.

⁴⁵ The bill would amend RCW 66.08.050.

CURRENT SYSTEMS LEFT UNTOUCHED

A new legal framework to control psychoactive substances that are currently produced and distributed exclusively in illegal markets would not require the invention of an entirely new system – only the need to address the problems arising from drug prohibition. The regulation and control of those substances could generally fall within the purview of current systems, including the drug prescription system, although a new state regulatory agency might have to be established.

The Courts and the Justice System

While bringing psychoactive substances that are now controlled by criminal enterprises into a regulatory framework, the law would continue to operate as it does today to regulate *human conduct* that causes harm to others and their property, whether or not individuals are abusing drugs or under their influence at the time.

Holding People Accountable

The civil courts already address conduct that adversely affects others – particularly children. Civil courts are regularly called upon to evaluate and remedy the impacts of drug use in family law cases involving divorce, child custody, child support, and child welfare. Drug use might be addressed in the course of a tort claim, employment law case or civil commitment proceeding. Civil proceedings could adequately deal with the problems arising from substance abuse through the involuntary commitment statute,⁴⁶ the civil commitment statute,⁴⁷ the domestic relations statute,⁴⁸ the child welfare statute,⁴⁹ the child dependency statute providing for orders into substance abuse treatment,⁵⁰ the child dependency statute sanctioning violations of substance abuse treatment orders⁵¹ and the Uniform Controlled Substances Act involving a tort cause of action by a parent for sale or transfer of controlled substances to a minor.⁵²

Continued Utility of Drug Courts

Drug courts are the most promising short-term option, generating cost savings and reducing recidivism and prohibited drug use among their participants. If insightfully and compassionately administered, drug courts can help rehabilitate addicts and reduce crime and help avoid some of the economic and societal costs of unnecessary imprisonment.

⁴⁶ RCW 70.96A.140(1).

⁴⁷ RCW 71.05.040.

⁴⁸ RCW 26.09.191(3).

⁴⁹ RCW 26.44.170(3) (abuse and neglect).

⁵⁰ RCW 13.34.174 (order of alcohol or substance abuse diagnostic investigation and evaluation, treatment plan, breach of plan, reports).

⁵¹ RCW 13.34.176 (violation of alcohol or substance abuse treatment conditions, hearing, notice, modification of order).

⁵² RCW 69.50.414 (tort action for sale or transfer of controlled substance to minor, cause of action by parent, damages).

However, drug courts are fully consistent with the legal framework of drug prohibition, so they embody a difficult conflict between compassion and coercion; there is always the potential for more harm, despite the therapeutic intent. Drug courts may reduce public costs and recidivism and substance abuse among their participants, but they are powerless to abate illegal markets for psychoactive drugs, as incentives remain strong for violent, criminal enterprises to engage in the drug trade. Drug courts are also unable to reduce the easy access by young persons to psychoactive substances, a problem inherent in drug prohibition. Finally, drug courts are not serving the hard-to-reach population of addicted persons who refuse treatment, a population that has responded well in Europe to the type of medical prescription programs that are currently prohibited under U.S. law.

Under a new legal framework to regulate and control psychoactive substances, drug courts would still play a vital role, holding defendants accountable for their *behavior that harms others*, such as theft and crimes against persons, where chemical dependency would be deemed to be linked to such crimes. Many drug courts already receive this type of clientele and would continue to be very useful in regulating human conduct, but not the mere use of certain psychoactive substances *per se*.

Driving Under the Influence

Where sanctions related to drugs should be aimed at reducing the harm directly caused to others by persons using drugs rather than for the mere use of drugs *per se*, driving while intoxicated and doing harm to persons or property while intoxicated would continue to be punished criminally, although with treatment options available.

Drug Use by Professionals

As for the professions and drug use, effective assistance programs are already in place for lawyers, doctors, pharmacists and others, and those programs already embrace the medical model rather than the criminal model. As self-regulating entities, professional associations take disciplinary actions against their members for many causes, including conduct related to drug use or drug addiction.

ADDRESSING PERSISTENT PROBLEMS

The Gray Market

The current proposal for a new legal framework does *not* address the increasingly vexing problem of diversion of legally-regulated pharmaceuticals, such as methadone, Oxycontin, ketamine, Ritalin and benzodiazepines, into the illicit, GRAY market, a problem that law enforcement increasingly finds itself battling. Gray markets, however, are relatively easier to control than black markets, where all production and distribution is illegal. Gray markets also do not spawn the kinds of violence, disorder, disease and death that arise from the operation of black markets; thus, it is important to distinguish between the two. Nevertheless, law enforcement, prosecutors and the courts will continue to play a critical role in reining in the problem of the gray markets in psychoactive drugs.

The Black Market

The vast bulk of “hard” drugs are consumed by a relatively small number of addicted users.⁵³ Certifying and registering as many of those users as possible and bringing them into state-controlled medical treatment facilities would arguably dry up the black market to a great extent in each local area. Other potential users who might want to experiment with such substances would have to obtain them from the “gray” market, which currently exists for other pharmaceuticals and is easier to control, as mentioned above.

The street prices for prohibited drugs are at historic lows – another indication of the failure of current drug policy – yet such prices are still artificially and astronomically above their actual value in terms of their chemical composition and production cost.⁵⁴ Pricing structures for state-controlled substances could slightly undercut black market prices, or in some cases the substances would be provided free of charge or at very low cost (along a sliding scale) to registered addicts at the state-controlled medical treatment facilities. Any revenue to the state would support the administration of the regulatory framework and would maximize funding for prevention, treatment, research and education, while maintaining price levels low enough to render any illegal markets for such substances unprofitable but high enough to deter consumption, especially by young persons.

The greatest concern is to protect young people from the potential harms of psychoactive drug use. Regarding cannabis, most students report that cannabis is widely available and easier to obtain than beer.⁵⁵ If cannabis were regulated like distilled spirits, therefore, it would be much less accessible to young people than beer is today. On occasion, an unscrupulous state-licensed outlet might sell to young people, but looking at the Washington Liquor Control Board model, its age restriction compliance rate is about 95% at its outlets.⁵⁶

Furthermore, the economic laws of prohibition illustrate how a black market could not thrive on the relatively limited demand of minors alone – another lesson learned from the repeal of alcohol prohibition in the 1930s. A gray market would likely arise, however, where adults would illegally divert drugs to young people, which would be criminally punished. In the civil courts, as well, adults would be held accountable, as they are today, for negligent or reckless parental/custodial supervision of minors.

⁵³ Mark A. R. Kleiman, “Controlling Drug Use and Crime with Testing, Sanctions and Treatment,” in Philip B. Heymann and William N. Brownsberger, eds. (2001), *Drug Addiction and Drug Policy: The Struggle to Control Addiction*, Cambridge; Harvard University Press. *See also* Ernest Drucker (1999), “Drug Prohibition and Public Health: 25 Years of Evidence,” *Public Health Reports*, v.114, no.1, January/February 1999.

⁵⁴ Office of National Drug Control Policy (2004), *The Price and Purity of Illicit Drugs: 1981 Through the Second Quarter of 2003*, Washington, D.C.: Executive Office of the President (Publication Number NCJ 207768), November 2004.

⁵⁵ Lloyd D. Johnston *et al.* (2003), *op. cit.*

⁵⁶ Merritt Long, Chair, and Rick Garza, Deputy Administrative Director, Washington State Liquor Control Board, presentation to the King County Bar Association Legal Frameworks Group, February 11, 2003.

Alcohol and Cannabis: The Substitution Effect

Alcohol is associated with more societal problems than any other substance and is linked with many hospital admissions, violent crimes and accidental deaths. Under the new legal framework for controlling currently-prohibited psychoactive substances, most such substances would become *less* available than they are today and certainly less available than alcohol, especially to young persons. The only exception is for cannabis, which might become more available to adults. Compelling research from many countries indicates, however, that cannabis availability brings about a “substitution effect,” which dampens the use of alcohol and tobacco, as well as of other, more dangerous drugs.⁵⁷ Provided that young persons are adequately protected, cannabis availability to adults may actually reduce the health, social and crime problems associated with alcohol. It is also important to remember that this proposal, by seeking to undercut the black market, would help to reduce the health, social and crime problems associated with drug prohibition.

Preventing Increases in Drug Addiction

A system of unfettered availability of all drugs to all adults at local drug stores would certainly lead to increased use and addiction. That is not the system of drug control that is contemplated. Rather, where pure and safe forms of “hard” drugs would be available to addicts through prescribed maintenance regimes aimed at reducing harm, drug use and drug addiction, the medical nature of this approach would not likely encourage many new users to try such drugs for the first time when the drugs are perceived more as medicine for sick people than as a way to have fun. That is what is now happening in Europe.⁵⁸

Preventing Increases in Crime and Violence

Compared with the pharmacological effects of alcohol giving rise to violent behavior, illegal drugs and violence are linked primarily to illegal drug marketing: disputes among rival distributors, arguments and robberies involving buyers and sellers and crimes committed to finance expensive drug habits. The proposal for a new legal framework to control drugs aims to undercut illegal drug markets; thus, levels of violence

⁵⁷ Kenneth W. Clements and Mert Daryal (2002), *The Economics of Marijuana Consumption*, Economic Research Centre, Department of Economics, University of Western Australia; Patricia Morgan *et al.*, “The legacy and the paradox: A comparative study of Methamphetamine in three communities,” in H. Klee, ed. (1997), *Amphetamine Misuse: International Perspectives on Current Trends*, London: Harwood Press; Drug Policy Forum Trust (1997), *Alternative Systems of Cannabis Control in New Zealand: A Discussion Paper*, Wellington, New Zealand, July 1997; Karyn Model (1993), “The Effect of Marijuana Decriminalization on Hospital Emergency Room Drug Episodes: 1975-1978,” *Journal of the American Statistical Association*, v.88, no.423, pp. 737-747; Frank J. Chaloupka and Adit Laixuthai (1992), *Do Youths Substitute Alcohol and Cannabis? Some Econometric Evidence*, University of Illinois at Chicago; John DiNardo and Thomas Lemieux (1992), Are Marijuana and Alcohol Substitutes? The Effect of State Drinking Age Laws on the Marijuana Consumption of High School Seniors. National Bureau of Economic Research. Working Paper No. 4212. See generally the January 2005 issue of *Alcohol and Alcoholism*, v.40, no.1, a special issue devoted to cannabis and alcohol.

⁵⁸ See King County Bar Association (2005), “International Trends in Drug Policy: Lessons Learned from Abroad,” *Report of the Legal Frameworks Group to the King County Bar Association Board of Trustees*, pp. 22-26.

associated with such markets would dramatically decline or even disappear, which was the result of the repeal of alcohol prohibition in the 1930s.

Some drugs, especially stimulants such as cocaine and methamphetamine, are associated with unpredictable and sometimes violent behavior, but cannabis and tobacco have little association with violence and opiates have an anesthetizing effect, making violence less likely – although withdrawal from opiate addiction can lead to aggressive behavior. Where the proposal for a new legal framework would seek to reduce the harm from and addiction to dangerous drugs such as cocaine and methamphetamine, levels of violence would decrease to the extent that the new system is successful in meeting its objectives.

Costs and Cost Savings

The new legal framework for psychoactive substance control would not only pay for itself, but would provide the state with additional funds for effective education about the dangers of psychoactive drugs and for medical treatment for those harmed by drug use. Recent research in Washington State has shown how generous investments in prevention and treatment yield significant savings from avoided costs in medical care, social welfare and criminal justice.⁵⁹ The current proposal would allow for enhanced prevention and treatment to be financed from massive savings that would arise from reduced use of the criminal justice system.

The current approach of drug prohibition and criminalization is costing the taxpayers a fortune, draining state and local coffers as ever-rising criminal justice costs are driving many counties close to bankruptcy. Meanwhile, the addicted cannot get the treatment they need, families are torn apart because of incarceration and non-violent drug law violators cannot rebuild their lives due to the prejudicial effects of criminal convictions, among many other negative effects of the current policy.

IMPLEMENTING A NEW FRAMEWORK

Incremental Reforms and Safety Valves

Any statutory and regulatory changes to implement a new legal framework to control psychoactive substances more effectively will have to take place incrementally, first through clinical trials and then integrated into the public health system. Separate consideration would be given to each substance, probably beginning with cannabis and the opiates (heroin). Meaningful outcome measurements would be established for improvements in public order, public health and public costs and rigorous evaluation would determine the new system's effectiveness, leading to amendment or repeal. Sunset provisions in any legislation could ensure a return to the criminal enforcement model if the regulation-and-control model was demonstrably less effective.

⁵⁹ See, e.g., Daniel J. Nordlund *et al.* (2004), *Methadone and Non-Methadone Treatment of Persons Addicted to Opiates Results in Lower Health Care Costs and Reduced Arrests and Convictions: Washington State Supplemental Security Income Recipients*, Washington Department of Social and Health Services, January 2004.