

Regulating markets in vice

Toby Seddon calls for drug regulation instead of decriminalisation.

Let me begin with a confession. I do not support calls for the legalisation of drugs. For many Criminal Justice Matters readers, this will immediately place me on the 'wrong' side of the debate: sitting alongside social conservatives, moralists, and most mainstream politicians. But apart from the dubious policy company I appear to keep, my position might simply look wilfully perverse. Surely the 'war on drugs' is one of the clearest examples of public policy failure of the twentieth century? And can there be a more compelling case for progressive law reform than drug legalisation?

To be clear, my doubts about the claims made for legalisation are certainly not based on any view that current approaches are working well. Indeed, you only have to study drug policy for a very short time before it becomes blindingly obvious that what is called 'prohibition' is not just ineffective, it actually makes matters significantly worse. Given that I have been researching in this field for over 15 years, I have come across innumerable examples of this. But it is here that I part company with the standard critique.

A key to my position is uneasiness about the term 'prohibition'. As the American historian David Courtwright has observed, the concept is ideal for polemics but when it comes to policy analysis it is a blunt instrument. It requires narrow vision to see the matter solely in terms of a binary choice between prohibition or legalisation. For centuries, various forms of taxation and licensing were the primary tools for the regulation of trade in psychoactive commodities.

More recently, over the last 100 years or so, drug policy has emerged across three main axes: regulatory categories, taxation, and sanctions (Courtwright, 2004). The policy challenge is to craft the best mix across these three axes and the legal status of a given psychoactive commodity is only one aspect of this.

Let me give an example. The rise of cigarette smuggling and bootlegging across Europe in recent years can be understood partly as a result of policy shortcomings along the taxation axis—duties generally are too high but, most crucially, the differentials in taxation between different EU countries have become too great. In other words, the regulatory mix has fallen out of balance. This is a good example for another reason: it reminds us that criminality can be associated with markets even where the commodity in question is ostensibly legal.

Reframed in this way, drug policy is about market regulation. How best can we regulate the production, manufacture, distribution, sale, and consumption of any given set of psychoactive commodities? To some tastes, this might appear to be too uncritical in its adoption of the language of the market. This is true

but that in a sense is precisely the point. Our contemporary ideas about drugs and addiction are inescapably capitalist. And it is this that for me flags up what I see as a gaping hole in the drug policy debate. If we are trying to understand markets and their regulation, there is an entire field of inter-disciplinary scholarship on regulation which looks at precisely these types of question. Yet, this is almost totally ignored by the drug field. This literature on regulation is extensive and wide-ranging but I think for starters we can draw out at least three important insights.

1. *The history of regulation.* In their landmark book *Global Business Regulation*, Braithwaite and Drahos (2000) set out an account of the

development of business regulation across different fields. In one chapter, they consider the story of the regulation of pharmaceutical and psychoactive commodities. They argue that today's global illicit drug control system, rather than being a special case, should be understood as a regulatory branch

created at the beginning of the twentieth century out of a wider system for regulating psychoactive and therapeutic substances. In the nineteenth century, opiates, for example, were regulated no differently from a range of other substances, available for sale from pharmacists with very few restrictions. This is a revelatory and potentially transformative idea. It implies that we need to develop an *integrated* account of illicit and licit drug regulation. I have explored this idea a little in my recent book *A History of Drugs* (Seddon, 2010)

Reframed in this way, drug policy is about market regulation. How best can we regulate the production, manufacture, distribution, sale, and consumption of any given set of psychoactive commodities?

but there is much more to be done here. I think in the long run this may prove to be one of the most fruitful lines of development for drug policy analysis.

2. *The limits of law.* Regulation scholars have repeatedly shown that when it comes to the regulation of markets and human behaviour, the law is not the only game in town. In many contexts, in fact, it is a bit-part player. To give an example, Braithwaite (2005) shows how in developing a strategy to address the problem of tax avoidance, tax law reform is only one component within a much wider-ranging approach. The general point then is that if regulatory problems are tackled primarily with a legal toolkit, the chances of achieving the desired outcomes will often be unhelpfully limited or circumscribed. This is a central weakness, in my view, of the standard argument for drug legalisation. The regulation literature leads me to be highly sceptical that the complex, multifaceted, multi-level global drug problem can be tackled effectively by changing the law. I do not mean by this that law reform will not be one element in a solution but the foregrounding of law seems to me to be a mistake.

3. *The limits of the state.* Related to the critique of law-centred approaches is the insight that we should not expect to find all the levers for change, or even necessarily the most important ones, at the level of nation states or supranational bodies like the UN. This is a critical point. A good example is the community dimension, which is one of the most neglected in drug policy debates. In the conventional discourse, communities are largely viewed as sources or bearers of drug-related problems but almost never as points at which solutions might be found. Pioneering and innovative work in South Africa by Clifford Shearing and colleagues has demonstrated that this need not be the case (see Wood and Shearing, 2007). They show that even in

very poor communities there exist pools of knowledge, capacity, and resources that can be mobilised for governance purposes (for example, to enhance security or health).

Beyond the regulation literature, there are other fields in the social sciences which could no doubt also inform drug policy debate. Perhaps the most obvious example is economics, which we might expect to have lots of useful things to say about drugs as commodities exchanged and consumed within markets. Yet, with a few notable exceptions, there appears to have been relatively little interest in exploring this from either side of the fence. One of these exceptions is Harvard economist Jeffrey Miron who has done some interesting work over a number of years on the impact of different regulatory regimes on prices (Miron, 2003) and consumption (Miron and Zwiebel, 1991). Another is the RAND Corporation which has long incorporated economic analysis in its drug policy work. But it seems to me there is a great untapped potential here.

Why does all this matter? In my view, if we are serious about wanting to build alternative policy futures, it is inconceivable that we can do that effectively without engaging with the work of regulation scholars and others. Campaigning groups like Transform are doing increasingly sophisticated work on drug law reform and I have the utmost admiration and respect for their expertise. But when they set out their blueprint for the legal regulation of drugs (Rolles, 2009) without any reference at all to the learning and insights of regulation scholars, I cannot help thinking they are missing quite a big trick.

Let me end with another confession. Despite my reservations about the conventional case for legalisation, I am in fact not pessimistic or cynical about the prospects for positive change. One thing that historical perspectives highlight is that the status quo in this

field, despite its entrenched air of apparent inevitability, is a relatively recent invention, still less than 100 years old. The imaginative and creative ways in which people like John Braithwaite and Clifford Shearing have drawn on regulatory theory to solve the thorniest of problems, from peace-building in post-conflict zones to improving security in poor violence-ridden communities in South Africa, fills me with great optimism for our drug policy future. But to fulfil this hope we must widen our intellectual vision. ■

Dr Toby Seddon is Senior Research Fellow in Regulation and Director of the Regulation, Security, and Justice Research Centre in the School of Law at the University of Manchester.

For more on the history of the regulation of drugs see *A History of Drugs: Drugs and freedom in the liberal age* by Toby Seddon (2010, Routledge-Cavendish) and the book's accompanying microsite: www.ahistoryofdrugs.com

References

- Braithwaite, J. (2005), *Markets in Vice, Markets in Virtue*, Sydney: Federation Press.
- Braithwaite, J. and Drahos, P. (2000), *Global Business Regulation*, Cambridge: Cambridge University Press.
- Courtwright, D. (2004), 'Drug wars: Policy hots and historical cools', *Bulletin of the History of Medicine*, 78, pp.440-450.
- Miron, J. (2003), 'Do prohibitions raise prices? Evidence from the markets for cocaine and heroin', *Review of Economics and Statistics*, 85(3), pp.522-530.
- Miron, J. and Zwiebel, J. (1991), 'Alcohol consumption during prohibition', *American Economic Review* 81(2), pp.242-247.
- Rolles, S. (2009), *After the War on Drugs: Blueprint for Regulation*, Bristol: Transform Drug Policy Foundation.
- Seddon, T. (2010), *A History of Drugs: Drugs and Freedom in the Liberal Age*, Abingdon: Routledge-Cavendish.
- Wood, J. and Shearing, C. (2007), *Imagining Security*, Cullumpton: Willan.