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NOTES FROM THE FRONT:
A DISSENTENT LAW-ENFORCEMENT
PERSPECTIVE ON DRUG PROHIBITION

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Arthur McBride**

“They that can give up essential liberty to obtain a little temporary safety, deserve neither liberty nor safety.”

- Benjamin Franklin

I. INTRODUCTION

As America’s “war on drugs” continues, children, law enforce-
ment personnel and civilians caught in the crossfire will die in
America and elsewhere. Continuing our current policy forces us to
live with the violence, dislocation and suffering generated by drug
trafficking and the enforcement of criminal drug statutes. If America
is sincere in its resolve to fully suppress illegal drugs, then we owe
police officers and other likely victims of drug trafficking violence a
thorough consideration of the policies we undertake. Press confer-

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New York metropolitan area who specializes in narcotics cases.

1. T. SZASZ, LAW, LIBERTY AND PSYCHIATRY xvii (1989 ed.).
2. Drug traffickers will die as well. For the purposes of this Article “traffickers” are
defined as those who are knowingly involved in the illegal drug economy, including children
used as lookouts and runners for major traffickers. With the exception of the children, drug
traffickers’ welfare is of less concern, because they have volitionally placed themselves in the
line of fire.
3. “Take my word for it, . . . This scourge will stop.” Weinraub, Money Bush Wants for
Drug War is Less Than Sought by Congress, N.Y. Times, Jan. 25, 1989, at A1, col. 4, col. 5
(quotting President George Bush’s 1989 Inaugural Address).
4. The term “police officer” is used throughout this Article to refer to all law enforce-
ment personnel.
5. For an overview of these policies see infra notes 20-59 and accompanying text.
Despite apparent widespread support for prohibition, some leading figures have acknowl-
ences by politicians at the funerals of law-enforcement officers and bland assurances that the serious social issues will be addressed are not sufficient.

In a democratic society, a decision involving the conscious sacrifice of human lives should be earnestly and painstakingly arrived at and justifiable to those who risk their lives. This choice must not be made by default. Decision makers must ask themselves if there are other courses of action that have not been addressed which require fewer risks and costs.

Until the social consequences of the various available policies are examined, choices which at best give the appearance of being a "quick fix" or "magic bullet" should not be embraced. The cost of achieving our goals must be considered. For example, eliminating the availability of illegal drugs might also result in an abandonment of the commitment to a number of constitutional values. Would the societal price paid for such a level of drug suppression be fair?

A utilitarian analysis of the "drug problem" would have as its edged the futility of our current policies and have encouraged meaningful debate on decriminalization. These include former Secretary of State George Schultz, see Shultz on Drug Legalization, Wall St. J., Oct. 27, 1989, at A16, col. 4; United States District Court Judge Robert Sweet, see Labaton, Federal Judge Urges Legalization of Crack, Heroin and Other Drugs, N.Y. Times, Dec. 13, 1989, at A1, col. 5; University of Chicago Professor and Nobel Prize recipient Milton Friedman, see Church, Thinking the Unthinkable, TIME, May 30, 1988, at 12, 14 (quoting Friedman as saying "[t]he harm that is done by drugs is predominately caused by the fact that they are illegal."); William F. Buckley, Jr., see Corcoran, Legalizing Drugs: Failures Spur Debate, N.Y. Times, Nov. 27, 1989, at A15, col. 4.; and Mayor of Baltimore, Kurt. L. Schmoke, see Schmoke, An Argument In Favor of Decriminalization, 18 HOFSTRA L. REV. 501 (1990).

Prohibitionists have argued that decriminalization proponents are "not dealing with reality" and are "making the case for slavery." Rosenthal, On My Mind: The Case for Slavery, N.Y. Times, Sept. 26, 1989, at A31, col. 5. William Bennett, Director of the Office of National Drug Control Policy, stated that proponents of decriminalization are "intellectually bankrupt," NBC NIGHTLY NEWS (NBC Television Broadcast, Dec. 13, 1989), and that the idea of decriminalization is "morally scandalous." Labaton, supra, at B10, col. 4.

The ad hominem attacks made by prohibitionists mask their fear of decriminalization and personal autonomy and their suspicion that the public will actually examine the intellectual underpinnings of the consequences of America's narcotics prohibition.

Although a persuasive case can be made for rejecting narcotic prohibition as a violation of personal autonomy, the analysis in this Article is independent of such reasoning.

6. See infra note 19 (listing a diverse and wide variety of proposals for dealing with the drug problem).

7. See, e.g., U.S. CONST. amend. IV (the right to be free from unreasonable search and seizures); see also U.S. CONST. amend. V (the right against self-incrimination).

8. For purposes of this Article, it is assumed that the most serious consequences of illegal drugs are concentrated in America's inner cities. Although drugs present problems for suburban and rural areas, the Article's focus is on urban areas because the effects of drug use and prohibition are more extreme and visible in inner cities.
central inquiry: how best to reduce the suffering caused by drugs and drug trafficking?

Efforts to prohibit illegal drugs have required us to pay an enormous price in violence,\(^9\) and yet drugs are more plentiful today\(^{10}\) than when Ronald Reagan declared war on drugs prior to the midterm Congressional elections in 1982.\(^{11}\) The social cost of enforcing drug prohibition will continue to accumulate. The level of violence and social disintegration of neighborhoods is going to leave scars for generations.\(^2\) Police conduct investigations and continue to make arrests, while prosecutors persevere in indicting and trying cases for narcotics sales and possession,\(^{13}\) weapon offenses\(^{14}\), as-

This Article focuses primarily on crack because it is the most widely used, visible and problematic drug today. See A. TREBACH, THE GREAT DRUG WAR 5-15 (1987) (discussing the tremendous increase in the use of crack in recent years). Although other illegal drugs will also be discussed, their effects, and the users' attitudes towards them are complex and, at best, imperfectly understood. Therefore, such wide-ranging discussions are beyond the scope of this Article.

9. See, e.g., Molotsky, Capital's Homicide Rate is at a Record, N.Y. Times, Oct. 30, 1988, at 20, col. 4; Madden, Stunned by 3 Killings in 5 Days, Stamford Cites Growing Drug Crisis, N.Y. Times, June 9, 1988, at B4, col. 3; James, Murders in Queens Rise 25%; Crack is Key Factor, N.Y. Times, Apr. 20, 1988, at A1, col. 2; see also Letwin, Report from the Front Line: The Bennett Plan, Street-Level Drug Enforcement in New York City and the Legalization Debate, 18 HOFSTRA L. REV. 795 (reporting on violence associated with drug prohibition); infra notes 40-77 and accompanying text (discussing violence).

10. See OFFICE OF TECHNOLOGY ASSESSMENT, THE BORDER WAR ON DRUGS 1 (1987) (reporting that "the quantity of drugs smuggled into the United States is greater than ever.").


12. See Ayres, Drug Wars Scar Capital's Children, N.Y. Times, May 15, 1989, at A12, col. 1 (reporting the increase in "instances when young people act irrationally or need counseling after witnessing or experiencing the drug-related violence in Washington."); Treaster, In Bogota, Fear Invades the Streets, the Nights, the Dreams, N.Y. Times, Sept. 12, 1989, at B9, col. 1 (describing a child's difficulty sleeping due to a recurring image of a popular presidential candidate being shot down at a campaign rally).

13. Between 1978 and 1987, there was a 54.5% increase in the number of persons arrested in the United States for drug abuse violations. BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1988, at 489 (1989) [hereinafter SOURCEBOOK 1988]. The total number of people arrested in the United States for drug violations in 1987 was 737,094. Id.

14. Between 1978 and 1987, there was a 23.5% increase in the number of arrests for weapons offenses in the United States. Id.
assaults and homicides. Judges continue to incarcerate drug defendants for long prison terms. However, even under the best of circumstances, law enforcement will never remotely approach a "drug-free" society, nor will it substantially reduce the violence. Indeed, enforcement may increase profits for many drug traffickers, and often operates to increase the levels of violence.

The future is bleak. If a new approach to the "drug crisis" is not adopted, the problems will proliferate and overwhelm our ability to address them, to the extent that we've not been overwhelmed already. Given the terms we've set we have failed and will continue to fail.

II. INNOVATION AND RESPONSE

The traditional law enforcement and societal response to the drug problem has always been to get tougher: more cops, prosecu-

15. Between 1978 and 1987, there was a 37.3% increase in arrests for aggravated assault in the United States, and a 69.7% increase in "other assaults." Id.
16. In 1987, there were 15,064 arrests for murder and nonnegligent manslaughter, a 4.2% increase over 1978. Id.
17. See id. at 549-63 (detailing the statistics on the sentencing of drug offenders).
18. See infra notes 40-65 and accompanying text (discussing the violence attributable to prohibition); Letwin, supra note 9, at 811-12.
19. There is no shortage of voices advocating more "toughness" in narcotics enforcement. See, e.g., Legalization of Illicit Drugs: Impact and Feasibility, Part I: Hearing Before the Select Committee on Narcotics Abuse and Control, House of Representatives, 100th Cong., 2d Sess. 86-88, 133 (1988) [hereinafter Hearings on Legalization, Part I] (statement of Hon. Charles B. Rangel, U.S. Congress) (stating that "I am not ready to give up when we have yet to begin the fight. We have not even fired the first shot, so how can we honestly call for an end to a war we have not started?"). This sort of rhetorical hysteria is not helpful. A visit to the families of police officers killed in the course of enforcement, or a visit to any of the nation's courthouses or prisons might disabuse Congressman Rangel of the notion that the United States has "not even fired the first shot." See also WHITE HOUSE CONFERENCE FOR A DRUG FREE AMERICA, FINAL REPORT: JUNE 1988, at 1 (urging that the war on drugs "cannot be a war of words or containment, but rather action and victory.").

A wide variety of specific proposals have been made to "win" the war on drugs. See, e.g., Hearings on Legalization, Part I, supra, at 165 (remarks of Congressman Roy Dyson) (arguing for statutes "which would prevent a person convicted of drug-related offenses from obtaining federal grants, loans, contracts and housing . . . ."); Pentagon Said to O.K. Plans to Seize Foreign Drug Bosses, N.Y. Times, Dec. 15, 1989, at B7, col. 1 (referring to capital punishment for drug traffickers); Koch, For Anti-Drug Boot Camps, N.Y. Times, May 24, 1989, at A31, col. 2 (arguing for the establishment of large internment camps for drug offenders, including first offenders); Safire, Essay: Washington’s War, N.Y. Times, Mar. 2, 1989, at A27, col. 5 (advocating the use of federal troops to "break the back of [Washington, D.C.’s] lucrative drug racket"); Berke, Among Mayors, a Tide of Drugs Brings Forth Desperation and Ideas, N.Y. Times, Feb. 12, 1989, § 4 (Week in Review), at 6, col. 1, col. 2 (advocating the use of troops along U.S. borders for interdiction); Id. at col. 1 (Washington, D.C. Police Chief Maurice Turner proposing the creation of a "vaccine that the Government could admin-
tors and judges to make it more likely that guilty persons will be arrested, and longer sentences imposed as a greater deterrent to ille-

ister to young drug users to blunt the euphoria from cocaine, heroin or PCP.

); Whipping Post is Proposed for Drug Dealing, N.Y. Times, Jan. 29, 1989, §1, at 21, col. 1, col. 2 (citing a proposed Delaware bill which "mandates a public whipping of five to 40 lashes "well laid on" for trafficking in hard drugs."); Mohr, In the Politicians' War on Drugs, The Rhetorical Guns Are Blazing, N.Y. Times, Sept. 11, 1988, §4 (Week in Review), at 1, col. 1, col. 1 (citing the revocation of driver's licenses for convicted drug users); Toner, Dukakis Outlines His Drug Program, N.Y. Times, Sept. 17, 1988, at 9, col. 1, col. 1 (reporting the recommendation of 1988 presidential candidate Michael S. Dukakis that the number of federal drug enforcement agents be doubled); Barron, Drug Suspect Evictions Set for Civil Court Section, N.Y. Times, July 31, 1988, §1, at 31, col. 1 (reporting on a plan to evict persons accused of narcotics dealing). For a literary examination of similar policy decisions, see W. BURROUGHS, THE WILD BOYS (1971).

The defoliation of source countries has been proposed as a means of efficient supply control. See, e.g., Mills, The Simplest Way to Fight Drugs, N.Y. Times, Sept. 5, 1986, at A27, col. 1, editorial. Mills proposes defoliation as the most efficient mode of combatting illegal drugs. Id. Mills does not explain how consent of the target countries would be obtained, nor deal with the potential liability problems for the defoliant manufacturers for any genetic or other damage done to residents either directly or through toxification of the ecosystem. Chemical manufacturers have, in fact, refused to supply the U.S. government with herbicides for use in drug eradication without assurances of indemnification, which have not been forthcoming.

See Riding, In War on Coca, U.S. Weapon is Bogged Down in a Dispute, N.Y. Times, June 28, 1988, at A1, col. 1; May, U.S. Secretly Grows Coca to Find Way to Destroy Cocaine's Source, N.Y. Times, June 12, 1988, §1, at 1, col. 4; Sciolino, Ambitious Eradication Goals and Withering Obstacles, N.Y. Times, Apr. 10, 1988, §1, at 10, col. 1; see also Witosky, supra note 11, at 1334-47 (describing problems with the international drug enforcement and eradication).

More disturbing is Mills' reliance on eradication efforts in Turkey and Mexico as evidence that eradication has "worked." Mills, supra, at col. 1. For a thorough rebuttal of those premises, see E.J. EPSTEIN, AGENCY OF FEAR (1977) (discussing Turkey) and E. SHANNON, DESPERADOS (1988) (discussing Mexico).

Nor do draconian punishments promise great results. Malaysia's anti-drug program, adopted in 1983, includes a mandatory death sentence for narcotics trafficking; possession of 15 grams of heroin or morphine, 200 grams of cannabis or 1 kilo of opium is considered trafficking. See BUREAU OF INT'L NARCOTICS MATTERS, U.S. DEP'T OF STATE, INTERNATIONAL NARCOTICS CONTROL STRATEGY 205 (March 1989) [hereinafter INTERNATIONAL NARCOTICS CONTROL STRATEGY] (proclaiming Malaysia's drug laws as "among the world's most severe."). It has been reported that this policy has accomplished no reduction in the rates of addiction. Erlanger, Intensive War on Drugs by Malaysia and Singapore Shows Mixed Results, N.Y. Times, Dec. 15, 1989, at A12, col. 1. From 1975 to September, 1988, Malaysia hanged 73 drug offenders and by March, 1989, 136 more were on death row. INTERNATIONAL NARCOTICS CONTROL STRATEGY, supra, at 205. During December, 1988 and July, 1989, between 700 and 800 alleged drug smugglers were executed in Iran, although "opposition figures assert that several hundred among those executed this year as drug criminals were in fact members of opposition groups already in jail for political charges that include favoring a secular government over the ruling clergy and plotting to overthrow the Government." Ibrahim, Iran Puts Addicts in its Labor Camps, N.Y. Times, July 22, 1989, at 3, col. 1. By international standards the United States already has fairly harsh punishment. See UNITED NATIONS SOCIAL DEFENCE RESEARCH INSTITUTE, PUBLICATION NO. 30, DRUGS AND PUNISHMENT: AN UP-TO-DATE SURVEY ON DRUG-RELATED OFFENSES (1988).
gal conduct. This response makes an enormous amount of sense on its face, but fails under close scrutiny.

No amount of innovation will make a substantial difference in the availability of drugs over time. The financial rewards of the underground narcotics economy are too great. There is an endless supply of people who want more money than they have, both the poor and the avaricious. Cleverness and creativity are rewarded in narcotics trafficking as in any competitive enterprise.

Any individual trafficker or organization, once identified, can be arrested and prosecuted given the time and commitment by the government. The problem is that no individual or group is indispensable. Once a major trafficker is arrested, market forces appear to fill the vacuum created almost immediately, often with no discernible changes in drug availability or price. While it is true that once identified, any given trafficker or group can be successfully prosecuted, it is not a corollary that all trafficking groups can be prosecuted.

When one trafficker is arrested, others familiar with that person

20. Even if a drug becomes unavailable or excessively expensive as a result of enforcement efforts, it is probably true that other drugs, perhaps more dangerous, will replace it.

21. See Letwin, supra note 9, at 813-14.

22. See C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 66 (1978). "Some delinquents turn to crime as a means of supplementing their families' meager incomes; parents for whom every day is a struggle to survive may make a point of not asking the source of the money their child contributes." Id.


24. See, e.g., Ayres, Aftermath of a Capital Drug Raid: Cocaine and Crime Flourish Still, N.Y. Times, May 9, 1989, at A1, col. 1 (reporting that the void apparently left when a trafficking organization believed to supply twenty percent of Washington D.C.'s cocaine consumption was broken up that "may have been filled almost immediately because since at no point since the raid have undercover agents detected any fluctuation in the street price of cocaine or crack."); see generally National Narcotics Intelligence Consumers Comm., The NNICC Report 1988: The Supply of Illicit Drugs to the United States (April 1989) (reporting on availability, pricing and trafficking patterns for various illicit drugs).

25. See infra notes 87-129 and accompanying text (discussing the impossibility of complete prohibition and prosecution).
learn what not to do. Unlike impulsive street criminals, who seize opportunities with no planning, drug traffickers—even the less intelligent ones—plan in order to avoid arrest and to avoid successful prosecution if arrested. In certain circumstances, the Canons of Ethics notwithstanding, this planning may be done with the aid of counsel. As Gary Marx observed:

If the relation between police and criminals (especially the highly skilled) is viewed as a continuing struggle, with one responding to the other's temporary tactical advantage, then there will be diminishing returns with respect to innovative practices. Committed criminals will realize they must be more clever; this will result in the arrest of an increasing proportion of less-skilled offenders.

This suggests that there are no innovations in law-enforcement techniques which are immune to counter-innovation by defendants. It also means that any innovation or increase in the level of enforcement will predominantly affect the least intelligent, resourceful, and committed traffickers. More experienced and skillful traffickers may, in fact, profit from heightened law-enforcement activity.

Nowhere is this more true than in the area of narcotics trafficking, which requires a high degree of planning and invites preventive measures. In New York City, for instance, many low-level retail dealers have become aware of Police Department rules which forbid

26. "Others, whose personalities may be too disorganized to commit themselves to anything, continue in a state of drift. These 'disorganized criminals,' as the criminologist John Erwin calls them, 'pursue a chaotic, purposeless life, filled with unskilled, careless, and variegated criminal activity' as well as occasional stints at casual, unskilled labor." C. SILBERMAN, supra note 22, at 68-69 (quoting J. IRWIN THE FELON 24 (1970)).

27. See, e.g., R. SABBAG, supra note 23 (providing a detailed account of drug trafficking from an insider's perspective).


30. See, e.g., P. ADLER, WHEELING AND DEALING 33 (1985) (explaining that increased Mexican border patrols in the early 1970's caused more professional drug smugglers to emerge at the expense of small-time operators).

31. See J. CAVE & P. REUTER, supra note 23, at 11 (noting that interdiction efforts fall largely on inexperienced traffickers, thereby preserving the experienced traffickers). Once detected, inexperienced smugglers or traffickers cannot be ignored by law enforcement officials, and thus divert law enforcement resources. "If law enforcement officers can be 'kept busy' arresting novices, they pose less risk to experienced smugglers." Id. at 28.

32. Id.
officers, including undercover narcotics officers, from using narcotics. Dealers exploit this rule by making a point of offering a sample to prospective buyers. Anyone who refuses a "taste" is not allowed to make a purchase and is viewed with hostility. A number of officers are thus forced to use cocaine at gunpoint. Many dealers, aware of the probative value of prerecorded buy money in court, "off-load" money more than once an hour, so that if arrested, the buy money will not be found.

A central characteristic of enforcement is that any innovation by traffickers yield a response by law enforcement. This in turn is met by another innovation by traffickers, thus creating an endless cycle. Likewise, any enforcement innovation made by police officers yields an adaptive response by traffickers. The least skilled and the least informed members of the trafficking community are not able to respond to those innovations quickly, if at all, and thus are more likely to be arrested. This hypothesis is not provable because it as-

33. See, e.g., NEW YORK CITY POLICE DEPARTMENT, NARCOTICS DIV'N, MANUAL OF PROCEDURES, Procedure No. 40-40 (1985) (stating that "[t]he policy of the Narcotics Division prohibits undercover officers from using or simulating the use of Controlled Substances or Marijuana in furtherance [sic] of an investigation."). The Narcotics Division stresses that there are only two limited exceptions to this policy: safety threatening situations and life threatening situations. Id.

34. See Sullivan, Officer Tells of Partner's Slaying in Drug Operation, N.Y. Times, Oct. 20, 1989, at B6, col. 1 (reporting the testimony of slain officer Christopher Hoban's partner that he and Hoban "refused to sample cocaine they were buying from three men").

35. See FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUST., UNIFORM CRIME REPORTS: LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED 1988, at 33 (1989) [hereinafter LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED 1988] (noting that a drug dealer killed a police officer after he became suspicious once the officer refused to sniff cocaine); see also Sullivan, supra note 34, at B6, col. 1.

36. Prerecorded buy money is cash whose serial numbers have been recorded, generally by photostat. This money is then issued to undercover police officers for use in making narcotics purchases. "Marked" money—cash treated with dyes or inks—has the disadvantage of being discoverable by traffickers, and thus presents a risk to undercover officers when used. See DRUG ENFORCEMENT ADMINISTRATION, DRUG ENFORCEMENT HANDBOOK 110 (1987).

37. The cycle operates at all levels of narcotics trafficking, including large-scale importation and distribution. Ravio, Couple Sought in Record Drug Seizure in Queens, N.Y. Times, Nov. 6, 1989, at B1, col. 2. For example, in November, 1989 a major cache of cocaine was discovered in a warehouse in Queens, New York, packed in barrels marked "poison" and covered with a layer of sodium hydroxide, a toxic and highly caustic agent (the active ingredient in lye). McKinley, Drug Agency Faults Customs in Cocaine Case, N.Y. Times, Nov. 12, 1989, at A48, col. 1. This was apparently intended to make the packages less suspicious in appearance and to deter inspection of the packages. Id. at col. 3. It took fire fighters and police officers wearing special protective suits, air tanks and facemasks two days to remove the cocaine from the sodium hydroxide. Id.

38. See P. REUTER, G. CRAWFORD, & J.A.K. CAVE, SEALING THE BORDERS: THE EFFECT OF INCREASED MILITARY PARTICIPATION IN DRUG INTERDICTION 109-21 (RAND Corpora-
sumes a substantial number of traffickers have not come to the attention of law-enforcement agencies. The sheer volume of available drugs, however, supports this reasoning.

Thus, the "war on drugs" is an endless, spiralling conflict in which the participants are constantly improving their techniques and raising the stakes. 39

III. VIOLENCE: A CONSEQUENCE OF PROHIBITION

The violence related to illegal drug trafficking is an inescapable consequence of prohibition. 40 Decriminalization will not eliminate all...
the violence in inner-city neighborhoods where brutality has been a central element for generations, manifesting itself in child abuse, domestic violence, and other brutal forms. What decriminalization can do is stop financing and feeding trafficking-related violence. It will prevent drug traffickers from being the primary successful role models in neighborhoods where poverty and unemployment make affluent and unafraid drug traffickers people to emulate.41

"Drug-related" violence can be separated into three broad categories: intramural violence between drug traffickers,42 violence intended to hinder law-enforcement efforts, and violence ascribed to the consumption of illegal drugs.43 This Article will address only the
first two categories.

for crime to support a drug habit leading to decreased crime rates. For a discussion of the link see Moore, Controlling Criminogenic Commodities: Drugs, Guns, and Alcohol, in CRIME AND PUBLIC POLICY 125-44 (J. Wilson ed. 1983).

The "causal theory" holds that when people take illegal drugs, they lose their free will, their power of choice, and thus become instruments of the drug itself. In this view, illegal drugs by themselves cause people to do bad things: to become assaultive or otherwise violent. See, e.g., Bronstein, Study Shows Sharp Rise in Cocaine Use by Suspects in Crimes, N.Y. Times, Feb. 19, 1987, at B1, col. 2, col. 4 (quoting James K. Stewart, director of the National Institute of Justice as stating, "The use of drugs is the accelerator to criminal activity."); see also WHITE HOUSE CONFERENCE FOR A DRUG FREE AMERICA, FINAL REPORT: JUNE 1988 at 1-2 (asserting that "[d]rugs alter normal behavior. The use of illicit drugs affects moods and emotions; chemically alters the brain; and causes loss of control, paranoia, reduction of inhibition, and unprovoked anger.").

Both views share the common fallacy that drugs remove responsibility from the user. Both seem sensible on their face, because each has elements of the truth. However, people who steal to obtain money to buy drugs are doing so because they want money to buy a commodity—drugs. Teenagers, for example, often steal clothes, and cars, because those are commodities in high demand among teenagers. Many teenagers without other resources will sell drugs in order to acquire the money to buy the commodities they want. See, e.g., Sack, The Short Life of 'Little Man,' A 14-Year-Old Drug Peddler, N.Y. Times, Nov. 29, 1989, at A1, col. 4 (recounting the death of a marijuana peddler); see supra note 22 and accompanying text.

Much is also made of correlations between drug use and arrest. Many of those arrested are found to be users of illegal drugs. The fallacy of this reasoning as "proof" of a causal connection is that it tells you that many criminals use drugs; it does not tell you how many non-criminals use drugs. If urinalysis were done on the membership of the House of Representatives, and the House were found to have a high level of illegal drug use, we doubt that anyone would suggest that illegal drug use causes membership in the House of Representatives. Without knowing what the rate of drug use is in the general population it is difficult to determine whether the high percentage of arrested criminals who have used drugs is an indication of a clear causal relationship between the drug use and their criminal behavior. It does not tell us whether arrested persons belong to broader groups that have high rates of illegal drug usage. It does not tell us whether the drug contributes to their criminal behavior in more subtle ways; for example, "disinhibiting" the person, giving the person a way to rationalize their socially unacceptable behavior, or providing them with the temporary "courage" to risk doing something they otherwise would not. Of course, as long as certain drugs are illegal, the category can in one sense be self-defining: the act of possessing the drug is itself illegal, so therefore many of those arrested for its possession are likely to test positive for its presence (unless they possessed it purely for sale, and not for their own use). The question remains, however, of what causal inference, if any, can or should be made from, for instance, the datum that a person arrested for robbery also tests positive for recent cocaine use. If we accept the hypothesis, however, that drug use leads to criminal behavior, then we must also accept it with respect to alcohol, which is highly correlated with violent crime. It makes little sense to accept the high rates of social chaos caused by alcohol use, and then at the same time to attribute a negative social stigma to, or prohibit the use of other drugs when there is no clear evidence that the use of those drugs in and of itself leads to violent or anti-social behavior. This is particularly true for marijuana. See, e.g. L. GRINSPOON, MARIJUANA RECONSIDERED 302-12 (2d ed. 1977).

If we believe that drugs cause crime, more than we believe that criminals use drugs, then our strategy should be to promote the use of drugs which are believed to promote passivity such as marijuana, methaqualone (Quaalude), and heroin. See, e.g., E. BRECHER & THE EDITORS OF CONSUMER REPORTS, LICIT AND ILICIT DRUGS (1972) [hereinafter E. BRECHER]; A.
Violence intended to hinder law-enforcement efforts takes a number of forms, in categories which overlap: (1) assassinations, force, or threats intended to intimidate or eliminate public officials, 44 (2) avoiding apprehension during an arrest; 45 (3) intimidating or


The problem with both these arguments is that they make drugs, and not people, responsible for criminal, tortious, and otherwise undesirable conduct. This flies in the face of the basic premises of Anglo-American criminal law, and if we are to retain the latter with some sense of jurisprudential consistency, perhaps the former needs examination.

It is argued that decriminalization will result in increased irresponsibility. This is not true. An increased emphasis on responsibility is an essential component of decriminalization. By placing responsibility in its traditional role, that is, on the actor, the role of the drug and its enhanced importance in the current scheme of prohibition is deemphasized. One of the serious flaws in the arguments is that the drug is always the crucial factor, rather than the actions and behavior of the actor. A crucial distinction must be made here since there are two general groups of crimes associated with illegal drugs. The first is violence or anti-social behavior committed by someone who may have an illegal drug in their bloodstream. The second is the crime of possessing the drug itself. This discussion is concerned not with the second category, since under decriminalization this category would cease to be a crime, but with the first category.

Decriminalization must have as a cornerstone the premise that while individuals may have the liberty to choose what to put into their bodies, they do not have a right to violate the criminal law; that is, they do not gain the right to engage in anti-social behavior. Citizens do not have the right to kill or injure one another, whether they are under the influence of alcohol, cocaine, methamphetamine, or whether they are sober. They do not have the right to operate a motor vehicle while under the influence of alcohol, or a variety of other substances. Our current regulatory and criminal scheme for alcohol is based on the premise that adults have the right to use alcohol (even if they are alcoholics), but they do not acquire the right to drive, or to rob a store, or murder an acquaintance.

By carefully examining the data available about prohibited drugs it becomes clear that these drugs do not cause the enslavement the popular media portrays. See Rosenthal, supra note 5. Instead they cause a variety of reactions and behaviors in their users, just as do legal but regulated drugs. Our current prohibitory plan does not acknowledge this, and that is one of the most serious philosophical flaws in that plan. In fact, it can be argued that the current approach undermines any coherent plan to impose a duty of responsibility on users of illegal drugs, since the drugs so-called addictive properties grant the user an excuse for his behavior. The addict can argue that his addiction made his actions beyond his control. This is not an excuse that has commonly been accepted by our judicial system for driving while intoxicated or under the influence, or for any number of crimes where alcohol has played a role. It should not be acceptable for any crimes committed under the influence of any psychoactive substance. Until we put the emphasis on punishing behavior, whether drugs are a contributing factor or not, rather than on the uses people may put those drugs to, we will continue to be plagued by the crisis which is commonly blamed on those drugs themselves.

In the event that America does in fact decriminalize drugs, greater resources (including revenues, if excise taxes are imposed on illegal drugs) will be available to address other destructive behavior, such as driving under the influence. See Kleiman & Saiger, Drug Legalization: The Importance of Asking the Right Question, 18 Hofstra L. Rev. 527 (1990).

44. See infra notes 66-67 and accompanying text (refering to this phenomenon in Colombia).

45. See, e.g., Applebome, Agent's Slaying Points Up Rise In Border Drugs: Dealing in
eliminating prospective, past or potential witnesses and (4) intimidating citizens, often neighborhood activists or public figures, who speak out against drug dealers. Intramural violence has variations. Such violence is also intended to hinder law enforcement efforts: one trafficker kills or threatens an associate or former associate because of the victim's perceived cooperation with the authorities. This can either be anticipatory, or retaliatory in order to set an example and deter others from cooperating.

Other drug-related violence among criminals involves wars over markets, usually over a geographical area, often as small as one block on a city street. A portion of intramural violence involves the


46. Endangered witnesses may include former associates, see Raab, Brutal Drug Gangs Wage War of Terror in Upper Manhattan, N.Y. Times, Mar. 15, 1989, at B1, col. 4 (describing the killing of a murder witness where the defendants were part of a drug-dealing gang); uninvolved civilian eyewitnesses, see James, Crack-Den 'Secretary' Tells How a Murder Was Planned, N.Y. Times, June 9, 1988, at B7, col. 1 (reporting that a witness was murdered by drug dealers after grand jury testimony concerning the attempted murder by a dealer); informants, see D. Goddard, Undercover 308-09, 314 (1988) (noting the killings of children and the mothers helper of an informant); G. Guigliotta & J. Leen, supra note 23, at 234-37 (describing the death of Adler Berriman "Barry" Seal, DEA informant and witness); E. Shannon, supra note 19, at 161-62 (same); Ayres, Drug-Ring Suspect Guilty in Capital, N.Y. Times, Dec. 7, 1989, at A25, col. 1 (reporting that despite heavy protection, the home of a witness' mother was firebombed and a prosecution informer was shot when his name was accidentally mentioned in court); and enforcement officers, see, e.g., E. Shannon, supra note 19 at 321-22 (reporting the shooting death of a Customs Patrol officer in Arizona, near the Mexican border); Blair, Man Found Guilty in Narcotics Officer's Death, N.Y. Times, Dec. 2, 1989, at 30, col. 4 (reporting the conviction of a drug dealer charged with the murder of a New York City narcotics officer); Sullivan, Officer Tells of Partner's Slaying in Drug Operation, N.Y. Times, Oct. 20, 1989, at B6, col. 1. (reporting an officers recounting of incidents that led up to the slaying of New York City narcotics officer Christopher Hoban); see also Fed. Bureau of Investigation, U.S. Dep't of Just., Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted 1987, at 26-27 (1988) (reporting the slaying of an off-duty officer to prevent testimony in a pending drug trial).

47. See Perez-Rivas & Arce, Drug Fighter's Wife Killed, N.Y. Newsday, Aug. 9, 1989, at 3, col. 4 (reporting that after death threats, a Brooklyn housewife was shot and killed in retaliation for community activism against drug dealers); 3d Arrest Made in Miami Grocer's Slaying, N.Y. Times, Apr. 9, 1989, at 27, col. 5 (reporting the arrest of a convicted cocaine dealer for arranging the shooting death of a grocer who led a local campaign against drug trafficking).

48. See supra notes 40-46.

49. The opening of a vacuum in a given market can be the impetus for a war between rival groups or factions trying to seize territory. In those cases, the violence subsides once the turf dispute has been resolved. See Capital Official Sees Crime Drop Once Pushers Divide Markets, N.Y. Times, Mar. 26, 1989, at 20, col. 1 (quoting Washington D.C. Police Chief Maurice Turner stating "I think it's going to dissipate, as it has in other communities . . . . Eventually the turf will be divided. They will go out and sell their drugs. People will pay their drug bills on time. And we're not going to have all of these shootings we have now.").

In a marketplace where practically anyone with a bit of ambition can be a crack entrepre-
avoidance of paying debts. Some violence involves one individual, group, or trafficker, robbing or kidnapping drug traffickers or their families. These last two actions are often interrelated: one group kills the members of another group, and at the same time steals money and drugs. This serves several goals at once: it eliminates a competitor, serves as a warning to other potential competitors, and also provides the spoils of conquest. Some violence is merely retaliation for past injury, such as selling “beat” drugs, larceny, past attacks, or is meant to serve as a show of force.

There are also “non-combatants;” unintentional victims, often children, who are mistakenly killed or maimed either by stray bullets, or because they are standing near a target. It is characteristic
of much drug violence that bystanders do not matter. It is also an inevitable, if horrific, fact of criminal law enforcement that police officers and investigators will sometimes accidently harm innocent persons or each other. Finally, there are killings of private attor-

right age, and they spoke good Spanish with American accents. Caro Quintero's men fell upon the strangers like a pack of jackals. They used fists, ice picks, knives, and finally guns. When the strangers stopped moving, Tejeda and the others wrapped their bodies in tablecloths, drove out to the Bosques de Primavera, and dumped them in shallow graves.

E. SHANNON, supra note 19, at 274. The Americans were, in fact, a medical student and a U.S. military veteran who had moved to Mexico to write. Id. at 273.


There are other instances which are not directly the result of violence, but which can best be described as industrial accidents. See, e.g., R. WARNER, supra note 55, at 47-48 (noting an elderly man nearly killed when a bale of marijuana was dropped from a plane by smugglers burst through the roof of his residential trailer); Officials Weigh Murder Case Over 3 Deaths in Illegal Lab, N.Y. Times, Oct. 8, 1986, at A29, col. 6 (noting three deaths caused by fumes in clandestine methamphetamine laboratory); Man Dies in Blast From Pipe Bomb, N.Y. Times, Apr. 9, 1986, at B4, col. 3 (reporting a death by explosion of a man, believed to be a drug dealer, while constructing a pipe bomb for use against other dealers).

These occurrences are clearly attributable to prohibition, since the absurd and inefficient "business methods" which caused the danger here would make little sense in the context of a licit market.


59. See, e.g., Rangel, supra note 58, at 30, col. 3 (reporting that a New York City police officer was shot accidentally by a DEA agent during the execution of a search warrant); Police Chief Details Death by Shooting of an F.B.I. Agent, N.Y. Times, Oct. 7, 1985, at A13, col. 1 (noting that the first female FBI agent to die in the line of duty was shot to death by other FBI agents); see also LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED: 1988, supra note 35, at 38 (reporting that from 1978 to 1987 43 law enforcement officers were killed in accidental shootings, including crossfires, and cases of mistaken identity mishaps).

Plainclothes officers are especially at risk because they have no easy way of quickly identifying themselves to other officers. This is even truer for undercover officers, who, to preserve their covers, will ordinarily not carry any identification whatsoever which would identify them as police officers. Thus, the precaution which may preserve their lives with respect to drug dealers may be deadly in unplanned encounters with other officers. See S.G. CHAPMAN, COPS, KILLERS AND STAYING ALIVE 105-06 (1986).
neys, which are hard to categorize.\textsuperscript{60}

Drug-related violence imposes an enormous burden not only on the criminal-justice system, but on health-care delivery systems as well.\textsuperscript{61}

These levels of violence should not be unexpected. James Bakalar and Lester Grinspoon have observed:

It is certainly hypocritical to pretend to indignation and alarm about the murderousness of drug trafficking itself, since we have in effect deliberately tried to shape it in a way that makes it attractive to the most reckless and callous people and as nerve-racking as possible for everyone involved.\textsuperscript{62}

One of the primary purposes of criminalizing an activity is to forbid people from participating in that activity. Not only is the goal to subject them to the risk of state force, but also to place them outside the protection of the law, in a world which by definition is very dangerous. Drug traffickers cannot complain to the authorities if they are robbed, assaulted, defrauded or the victims of theft.\textsuperscript{63}

Violence is not only the clear result of prohibition, but also the consequence of prohibition; it is the natural and probable result of the use of criminal sanctions.

Criminal sanctions alone do not make violence a \textit{sine qua non}. Increased sanctions together with serious enforcement attempts create the necessary conditions for violence to flourish—both intramural violence and violence against others. When the risk of apprehension (or the expected punishment when apprehended) increases, the most risk-averse and relatively law-abiding amateurs leave the business, and the more aggressive and anti-social "professionals" remain in or

\footnotesize{60. When defense attorneys are killed, discerning the motive is difficult, if not impossible. See, e.g., G. Guagliotta & J. Leen, supra note 23, at 280 (reporting that Jorge Ochoa's favorite attorney in Miami was machine-gunned to death); Waldman & Miller, supra note 28, at 44 (stating that an attorney was "gunned down outside his office in 1980 in what most lawyers assume was a hit ordered by a disgruntled client.").


63. \textit{See id.}}
enter the business. Similarly, individuals unwilling to engage in violence may enter the field of drug trafficking, but will not remain unless they acquire a capacity for intramural violence engaged in by the professionals, or at least acquire the ability to give the appearance of that capacity, or ally themselves with others who will provide them with protection.

A. Violence: Prospects

The situation now prevailing in Colombia and other countries, where cocaine-trafficking cartels murder government officials they cannot corrupt, may yet come to pass in the United States if we do not change the terms of the battle.

There is no reason that the Medellin Cartel—or any other sizable trafficking group—cannot inflict similar levels of violence within the United States as in their own countries. In fact, if the enforcement tactics against them are increased, it is likely that violence will be the cartel's response as a last option to protect their own interests. Indeed, the Colombian cartels (and other trafficking groups) have advantages over political terrorist groups since they enjoy, indirectly, the tacit support of the millions of Americans who purchase and use illegal drugs. Unlike political groups, trafficking groups are profit-making enterprises in no need of subsidy from foreign governments. In fact, there is evidence that the phenomenon of intimidatory and retaliatory violence against government officials has already begun in

64. Cf. J. Cave & P. Reuter, supra note 23, at 2-12 (describing the effects that law enforcement has on experienced and non-experienced smugglers).
65. See, e.g., P. Adler, supra note 30, at 95, (stating that "'muscle' in the drug world refers to one's perceived capacity for violence more than its continued demonstration." (citing M. Moore, Buy and Bust 43 (1977)).
66. This Article cites Colombia as its example since that is the country where trafficking-related violence and corruption are perhaps most widespread and best known.
67. See America's Watch Comm., The Killings in Colombia 17-22 (1989) (reporting incidences of violence and corruption and that "local and regional authorities, including some elected officials, are controlled by the drug mafias.").
68. There have already been intimations of the Medellin cocaine cartel's violence extending to the United States. In June, 1988, the Drug Enforcement Administration (DEA) received intelligence indicating that the Medellin cartel was planning the assassinations of four DEA agents, one agent's wife, a prosecutor in Miami, and Sterling Johnson, Jr., New York City's Special Narcotics Prosecutor. Esposito, Medellin Drug Cartel Marks City Prosecutor for Death, N.Y. Newsday, June 29, 1988, at 3, col. 3; see also Kerr, Cocaine Glut Pulls New York Market Into Drug Rings' Tug-of-War, N.Y. Times, Aug. 24, 1988, at B1, col. 2 (reporting the Medellin Cartel's planned assassination of Robert M. Stutman, Special Agent-In-Charge of the DEA's regional office in New York); Slaying Leads Florida Leader To Consider Bulletproof Vest, N.Y. Times, Dec. 19, 1989, at D20, col. 6.
The United States is not prepared to deal with the sort of widespread retaliatory violence which Colombia now suffers. If it hap-
pens here, it would in all probability cripple our criminal-justice system, as Colombia's system has been paralyzed,\textsuperscript{71} if not crippled.\textsuperscript{72}

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\textsuperscript{1} Stating "[w]e declare absolute and total war in the Government . . . . We will not respect the families of those who have not respected our families."); \textit{Mourning Latest Victim, Colombia Will Seek to Extradite Drug Figures}, N.Y. Times, Aug. 20, 1989, at A14, col. 1 (reporting a presidential candidate slain and the Medellin cartel believed responsible). For instances occurring prior to the assassination see, e.g., G. GUGLIOTTA & J. LEEN, \textit{supra} note 23, at 117, 188-89 (discussing the murder of two Colombian security agents responsible for the arrest of Pablo Escobar Gaviria, a leading member of the Medellin Cartel which resulted in the dismissal of the charges against Escobar and the assassination of a security chief also responsible for the prosecution of Escobar); \textit{Riding, Colombian Grow Weary Of Waging the War on Drugs}, N.Y. Times, Feb. 1, 1988, at A1, col. 4, A14, col. 2 (summarizing major Colombian drug-related assassinations, including one Minister of Justice, one Attorney General, 12 Supreme Court justices, the editor of Bogota's second-largest newspaper and other political figures and noting the former Minister of Justice as being seriously wounded in an assassination attempt in Budapest, where he had been appointed Ambassador to avoid possible attacks).

\textsuperscript{71} As two commentators have noted:

In short, by 1985 the cartel had correctly identified the criminal justice system as the weakest link in Colombian drug enforcement. The judges were badly overworked, badly paid, badly protected, and horribly maligned in the newspapers and by public officials. They were resentful of the treatment they received, and they were defenseless - easy targets for intimidation and murder.

G. GUGLIOTTA & J. LEEN, \textit{supra} note 23, at 244.

\textsuperscript{72} "In Colombia, democracy still exists, but many of its institutions have been reduced to near impotency. The Colombian judicial system, for instance, has been effectively neutralized as the government has proven incapable of arresting or prosecuting the major traffickers, much less extraditing them to the United States." \textit{Senate Subcomm. on Terrorism, Narcotics and International Operations of the Comm. on Foreign Relations, 100th Cong., 2d Sess., Report on Drugs, Law Enforcement and Foreign Policy} 26 (Comm. Print 1988). One Colombian Justice Minister was, in effect, run out of the country by the Medellin Cartel. \textit{See Treaster, Medellin Banks Bombed; Justice Chief Said to Be Near Quitting, N.Y. Times, Aug. 28, 1989, at A10, col. 1.} (noting that during a trip to Washington, Justice Minister De Greiff was threatened and "not expected to return to Colombia."); \textit{Brooke, Bogota Justice Chief Was Ousted by President Barco, Aide Reports, N.Y. Times, Sept. 23, 1989, at A24, col. 1.} (noting an unidentified Colombian presidential aide reported that Justice Minister de Greiff's resignation was requested by President Virgilio Barco Vargas because concerns for her family's safety led to her "dragging her feet" on signing extradition papers); \textit{Judges in Medellin Strike After 2 Slayings, N.Y. Times, Nov. 3, 1989, at A14, col. 4.} (stating 1,600 court workers and 42 judges in Colombia were on strike protesting inadequate security and the assassinations of a judge and a legislator, both of whom had bodyguards); \textit{Treasler, Colombians Hail Bush's Drug Plan, N.Y. Times, Sept. 7, 1989, at B15, col. 1.} (reporting the Mayor of Bogota, Colombia banned large public meetings because they might become terrorist targets); \textit{Riding, Cocaine Billionaires: The Men Who Hold Colombia Hostage, N.Y. Times, Mar. 8, 1987, \S 6 (Magazine), at 27, 28.} (noting that "[t]he very weapons needed to fight the war against drugs have been virtually neutralized by violence or bribery."); \textit{Treasler, In Bogota, Fear Invades the Streets, the Nights, the Dreams, N.Y. Times, Sept. 12, 1989, at B9, col. 1, col. 3} [hereinafter Treaser, \textit{Fear Invades the Streets}] (noting that "[m]any people carry pistols, and at Government buildings and most offices clerks give visitors numbered tags in exchange for their weapons, just as many stores in the United States do with briefcases and bags.").

Traffickers have also made much use of electronic surveillance, a phenomenon which has
Continuing to battle the drug war on its present terms will continue to result in real costs. If we are not willing to pay these prices, then we must reconsider our objectives. If we are not going to decriminalize, and intend to enforce our laws, then it must be made clear that violence against law enforcement officers, witnesses, or any “non-combatants” will not be tolerated. This does not appear to be not yet appeared, to our knowledge, in the United States. See G. GUGLIOTTA & J. LEEN, supra note 23, at 80, 241-43 (noting electronic surveillance of the DEA attache office in Medellin and of a Colombian Supreme Court Justice); see also Treaster, Fear Invades the Streets, supra, at B9, col. 1 (noting “[i]n daily conversations businessmen and homemakers often say they believe their telephones are tapped by Government security forces or the drug traffickers or the half-dozen leftist guerrilla groups.”).

If it were necessary to protect the judges who sit in the Southern District of New York, for example, the resources required would consume the entire capacity of the U.S. Marshals Service for the Southern District. To provide a minimal level of security, at least two trained security personnel would be needed around the clock. Assuming a five day work-week, and eight-hour shifts, this would require the equivalent of four and two-fifths persons for each judge, without taking into account vacation time, sickness, and the fact that in a serious situation, two guards may be substantially inadequate. See UNITED STATES MARSHALS SERVICE, OUTLINE OF U.S. MARSHALS SERVICE ACTIVITIES (1986).

73. Contrary to one’s expectations, even the murder of a police officer often does not arouse the passions of government leaders—when it is not politically convenient.

In February, 1985, Enrique Camarena, a DEA agent assigned to Guadalajara, and Alberto Zavala, a Mexican contract employee of the DEA, were kidnapped on the street in Guadalajara. Both were murdered, but before his murder, Camarena was tortured, and interrogated about his knowledge of Mexican corruption. After an initial response by the Reagan Administration which was shamefully passive, some of the parties directly responsible were later brought to the United States and convicted of trafficking offenses. See Rohter, Mexican Drug Leaders Guilty In the Killing of a U.S. Agent, N.Y. Times, Dec. 13, 1989, at B10, col. 5 (noting that Rafael Caro Quintero and Ernesto Fonseca Carrillo received sentences in excess of 100 years each). Thereafter, “[a] scandal erupted . . . when it was disclosed that the two men had been permitted to build private suites in the jail, complete with elaborate video and stereo systems, private kitchens and bedrooms, luxurious furnishings, telephones, a sauna and the right to overnight visits by female friends.” Id. at col. 6.

There is no question that the Reagan Administration, particularly the Department of State, was far more concerned about not upsetting Mexican government officials than about seeking justice in the Camarena and Zavala murders. However, William Von Raab, Commissioner of Customs, placed the interest of justice ahead of U.S.-Mexican relations. While the Reagan Administration made only pro forma protests to the Mexican government, Commissioner Von Raab virtually shut down the U.S.-Mexican border. This was the first action in the Camarena affair to generate a substantial reaction from the Mexican government in the investigation. Von Raab’s orders were quickly countermanded by the Reagan Administration in response to pressure from banking and southwestern business interests. See E. SHANNON, supra note 19, at 213-17. The Mexican government, apparently trying to protect influential politicians, police and military officials, obstructed the investigation at every turn, not cooperating until the Mexican border was closed, and threats of a State Department travel advisory were made. Id. at 215.

The Camarena kidnapping was not the first against DEA agents abroad. In February, 1982, two DEA pilots were kidnapped in their hotel in Cartagena, Colombia. Both escaped and survived, despite being wounded during their escape. Id. at 92-97.
a likely possibility.\textsuperscript{74} Focusing on the violence would require, among other things, allocating scarce police and prosecutorial resources to homicide and weapons possession cases since those are the types of cases which can be brought against violent traffickers without relying on the less-than-ideal trial testimony of other drug dealers.\textsuperscript{76}

Such commitment would necessarily mean spending less time and energy on low and mid-level trafficking cases, which have a more visible impact on neighborhoods, and are the sort of investigations that are the most politically popular.\textsuperscript{75} An enforcement and prosecution strategy focused on violence, rather than trafficking cases, is not likely to yield the "numbers" that bureaucrats require, and it will be harder to execute. Narcotics sellers are not scarce, and most investigations and prosecutions are prospective. When an undercover police officer goes out in search of a narcotics seller, the crime has not occurred yet, and the officer is present for the criminal transaction. In homicide or attempted homicide cases, the crime has already happened, and the useful evidence—for instance the crime scene—may be destroyed or unavailable before the crime is reported.\textsuperscript{77} Thus, a strategy which focuses on violence is not going to make any police administrator look successful, because it means an enormous diversion of resources toward activities which have no impressive indicia of productivity, or any visible effects on drug markets, such as clearing a street or a park of dealers and users, with the attendant media attention which follows a big drug raid. Guns, money, and bags of drugs displayed on a table for the cameras generate positive stories on television news programs.

\section*{IV. Corruption}

When narcotics enforcement is tightened and the stakes are

\begin{itemize}
  \item \textsuperscript{74} The lack of political will to honestly confront issues related to violence is obvious given the controversy in the United States surrounding gun control and bans on handguns or assault weapons. For a discussion of this issue which has not become dated, despite its early publication, see R. Sherrill, The Saturday Night Special (1973). This does not constitute an endorsement of a ban of any type of firearms, merely the observation that there are political limits on what can and will be done to curtail violence.
  \item \textsuperscript{75} G. Gugliotta & J. Leen, supra note 23, at 298 (quoting Baton Rouge prosecutor Premila Burns on the use of witnesses with less than exemplary backgrounds: "If you try the devil, you take your witnesses from hell.").
  \item \textsuperscript{76} They are perhaps the most politically popular because they get the most visible "results," at least in the short-term, because they get low-level retail dealers off the streets. For a discussion of such street level enforcement programs, see Letwin, supra note 9, at 801-16 (1990) (describing in particular the effectiveness of the TNT program in New York City).
  \item \textsuperscript{77} See generally V. Gebert, Practical Homicide Investigation (1983).
\end{itemize}
made higher through increased punishment, or the odds made less advantageous for traffickers through increased enforcement, the incentive to avoid detection and prosecution is increased. There are four sets of responses available to traffickers: leave the business, respond with increased violence, respond with increased innovation, or attempt to subvert the process itself by corrupting those who enforce the law and can aid traffickers in avoiding detection and punishment. Corruption is a concomitance of narcotics enforcement.

78. Reuter and Cave correctly note that corrupt officials should be seen as a resource for traffickers similar to a route of entry, a good customer or a good supplier. J. Cave & P. Reuter, supra note 23, at 6.

79. For examples of such corruption, see R. Daly, PRINCE OF THE CITY (1979); P. Maas, SERPICO (1973). Additionally, stories of corruption are abundant in the newspapers. See, e.g., Daly, The Crack In The Shield: The Fall of the Seven-Seven, N.Y. Mag., Dec. 8, 1986, at 50 (reporting a case study of corruption in a New York City police precinct); Berke, Corruption in Drug Agency Called Crippler of Inquiries and Morale, N.Y. Times, Dec. 17, 1989, §1, at 1, col. 1 (summarizing recent cases involving corruption of federal DEA agents); 2 Investigators Are Convicted In Jersey Trial, N.Y. Times, Dec. 9, 1989, at A29, col. 6; Ex-Party Chief in Florida Is Indicted in Bribe Case, N.Y. Times, Nov. 23, 1989, at A21, col. 1 (reporting that the former chairman of the Florida Democratic Party was indicted under the Foreign Corrupt Practices Act, after he was "accused of conspiring to bribe officials in the Dominican Republic to release airplanes confiscated for drug trafficking."); Prial, Judge to Admit Tax and Drug Charges, N.Y. Times, Sept. 19, 1989, at B1, col. 2 (reporting charges against a state supreme court justice for federal tax evasion and the use and possession of cocaine); Former Lawmaker Given Year in Jail, N.Y. Times, Aug. 29, 1989, at A16, col. 1 (reporting the sentencing of a politician for lying to a grand jury investigating laundering of money obtained from drug profits); U.S. Agent Pleads Not Guilty in Drug Case, N.Y. Times, Aug. 27, 1989, §1, at 24, col. 3 (noting that a Federal drug agent, the former supervisor of DEA office in Springfield, Massachusetts, and his brother were indicted for cocaine trafficking); Corruption is Charged in Chicago Sheriff's Office, N.Y. Times, Aug. 20, 1989, §1, at 30, col. 1 (reporting that Cook County, Illinois deputy sheriffs were accused of robbing drug dealers); Lubasch, 9 Jail Guards Are Arrested In Drug Case, N.Y. Times, Feb. 17, 1989, at B1, col. 5 (noting the arrest of New York City correction officers for attempting to smuggle cocaine to inmates); Purdum, Drugs Seen as an Increasing Threat to Police Integrity, N.Y. Times, Nov. 12, 1988, at 29, col. 2 (detailing the threat of corruption as a result of drugs in the New York City Police Department); F.B.I. Agent is Held on Charge of Selling Cocaine in Chicago, N.Y. Times, Oct. 22, 1988, at 9, col. 1; Pitt, New Drug Unit Checks Police On Corruption, N.Y. Times, Sept. 30, 1988, at B1, col. 5 (reporting a decorated veteran police officer was arrested after stealing money from an undercover officer he believed to be a drug dealer); Pitt, Officer Arrested in Robbery of Bronx Drug Dealers, N.Y. Times, June 20, 1988, at B3, col. 1 (reporting the arrest of a New York City policeman as a result of an investigation into what was described as "a small ring of officers who robbed drug dealers ... "); Florida Drug Ring Reported Broken: 7 Accused of Being in Group That Smuggled Marijuana for at Least 10 Years, N.Y. Times, Dec. 17, 1987, at A32, col. 1 (discussing that in Key West, a Florida deputy police chief accepted bribes from other corrupt police officers in return for silence concerning their activities); Volsky, 7 Former Officers On Trial in Miami: Ex-Police- men Are Accused of Cocaine Possession and of a Role in 3 Drownings, N.Y. Times, Oct. 12, 1986, §1, at 35, col. 1 (reporting the trial of former police officers accused of possession of cocaine and racketeering); McAlary, Probe of 77th Pct. Reveals Cops' Break-Ins and Thefts, N.Y. Newsday, Oct. 9, 1986, at 3, col. 3 (reporting that investigative documents in connection
An inevitable cost of criminal law is that violators will attempt to evade those laws. However, murderers, car thieves, shoplifters, and drunken drivers are generally in no position to offer compensation which is worth the risk of capture to persons in a position to be corrupted. Drug traffickers, because of the large amounts of money available in the market, are more likely to be able to absorb the costs of corrupting law enforcement officials.

Corruption has all the characteristics of other “victimless” crimes which make those offenses hard to detect and prosecute.81

with corruption in the precinct “have painted a picture of a precinct gone haywire, where officers smashed down doors . . . shaking down drug dealers . . . .”); Officer Said to Steal from Crack Dealers, N.Y. Times, Sept. 17, 1986, at B6, col. 6; Hamill, White Line Fever: How Cocaine Corrupted A City, Village Voice, Aug. 26, 1986, at 21 (noting that ten Miami police officers were accused of robbing drug dealers and causing the deaths of several); Ex-U.S. Prosecutor Indicted, N.Y. Times, Oct. 29, 1985, at D26, col. 5 (stating that a former Assistant United States Attorney was accused of selling information to drug dealers, such as the identities of informants, locations of tapped telephones, and the status of ongoing investigations).

The instances cited above in no way represent a complete list of known cases, nor do they reflect purposeful research. They are merely the result of more or less daily reading of some of the daily newspapers of the New York metropolitan area.

Corruption also includes members of the bar. See, e.g., D. GODDARD, supra note 46, at 298 (noting a prominent Atlanta trial attorney implicated in cocaine trafficking); Waldman & Miller, supra note 28, at 44 (noting an attorney and former judge, after serving an 18-month term after pleading guilty to charges of misleading a grand-jury investigation, was readmitted to practice).

For the most part, these individuals include law-enforcement personnel, including support and maintenance staffs in law-enforcement agencies and facilities. However, narcotics traffickers can make ample use of corrupt employees in utility companies—especially telephone companies, offices of vital statistics and motor vehicles offices. Anyone working in the transportation and shipping industries also possesses resources which would be of interest to traffickers. For example,

[the U.S. rose-growers' association once tried to bring an action against its Colombian competitors for illegal subsidies in violation of GATT (the General Agreement on Trade and Tariffs), arguing that the cocaine smugglers were subsidizing the shipment of roses for purposes of concealment. The International Trade Commission correctly pointed out that any such subsidy was a private one, hence beyond the reach of the GATT rules.]

P. REUTER, CAN THE BORDERS BE SEALED? 5 (A RAND Note, Aug. 1988). However, the cases of most concern involve sworn law-enforcement personnel. It should be noted that police officers, investigators, and intelligence personnel are particularly suited, by training and experience if not by temperament, to avoid detection and evade capture. See, e.g., P. MAAS, MAN-HUNT (1986).

81. Drug-related corruption, like narcotics trafficking, is “victimless” in the sense that none of the participants in a given transaction has any reason to report the transaction to the authorities. This alone makes such cases difficult to detect, investigate and prosecute. What is more threatening is that in virtually any corruption case, at least one of the parties is either a law-enforcement officer, or works with a law-enforcement agency. This imposes difficult requirements on those managing public corruption investigations. See, e.g., Condon, Managing Investigations Into Public Corruption, in CRIMINAL AND CIVIL INVESTIGATION HANDBOOK 8-
None of the parties to the transaction has reason to complain (unless to later offer the information as part of a plea bargain), and the crime leaves little if any physical evidence which triggers an investigation or supports a prosecution. And where the corrupted person is a law-enforcement professional, one or more of the parties is an expert in avoiding detection and prosecution. Consequently, as in narcotics investigations, those detected and prosecuted will tend to be the least intelligent and resourceful, the neophyte, and the unlucky. Clever and unscrupulous public officials are more likely to remain undetected and prosper.

There is no reliable way of measuring corruption, although corruption arrests and indictments can be counted. We can, however, posit several premises which may shed some light on the interplay between drug laws and corruption:

- Higher profits in narcotics trafficking, coupled with higher penalties for being caught, give traffickers an incentive to spend whatever it takes to successfully bribe public officials.
- Cynicism and low morale among police officers, while it may not directly create corruption, certainly provides a fertile environment for corruption to flourish.


82. See, e.g., R. DALEY, supra note 79. Daley's account of investigations of police corruption in New York City in the early- and mid-1970's is replete with examples of corrupt police officers who were constantly on guard for recording and transmitting devices concealed on other persons, a standard investigative technique in such situations.

83. For example, three DEA agents indicted in December 1988 frequently took first-class international flights, and applied for frequent-flyer discounts; two of these agents each paid one-half-million dollars up front for houses, and drove expensive cars. Berke, Corruption In Drug Agency Called Crippler of Inquiries and Morale, N.Y. Times, Dec. 17, 1989, §1, at 1, col. 1. Such displays of wealth were clearly amateurish and were bound to attract suspicion given government pay scales.

84. J. Edgar Hoover resisted the FBI's entry into narcotics investigations for decades. Hoover's position was reportedly based on an unwillingness to enforce a crime which could not be dealt with "successfully," and a fear that the opportunities for corruption would tempt FBI agents, thus exposing the Bureau to unfavorable publicity.

In 1964, FBI Director Hoover strongly resisted a Congressional plan to integrate the Federal Bureau of Narcotics into the FBI. [T]hey [the FBN agents] were willing and prepared to get their hands dirty and tended to be earthy, streetwise who could blend in well with the people they had to investigate. But it also meant they were more vulnerable to corruption. . . . After working so hard for decades to build the FBI into a paragon of honesty and expert performance, he [Hoover] argued publicly and privately, he could not be expected to absorb into the Bureau's ranks what he considered a motley crew of questionable character.

S. UNGAR, FBI 422 (1975); see also R.G. POWERS, SECRECY AND POWER: THE LIFE OF J. EDGAR HOOVER 403 (1987); S. UNGAR, supra, at 421-25.
The concern over corruption can cause mutual distrust and fear among law-enforcement personnel and, after corruption is disclosed, frequently causes a paralysis in law-enforcement agencies.

V. CRIMINAL JUSTICE SYSTEM: CAPACITY

If prohibition continues, the headlines will probably not change: there will still be reports of large seizures, flashy arrests and trials, occasional reports of public officials arrested or indicted for drug-related corruption, and reports of the deaths of people who get in the way of drug traffickers, such as neighborhood activists, police officers, other drug dealers, and people caught in the cross-fire.

The sale and purchase of illegal drugs will continue, and if we build more prisons, they will be filled as soon as they are completed. In some jurisdictions, there have been pleas for more police officers, which, even if acted upon, are not always followed by commensurate plans to expand the rest of the criminal system, such as the prosecutors, judges, public defenders, court-appointed counsel, or the support staff necessary to stop the system from grinding towards

85. According to a psychotherapist who treats DEA agents in Los Angeles, "some agents have told her they sometimes feared they could be put in danger by colleagues who have 'divided loyalties.'" Berke, supra note 83, at 42, col. 5.

86. See, e.g., S. LEINEN, BLACK POLICE, WHITE SOCIETY 210 (1984) (describing how the potential for an internal investigation tends to restrict the activities of police officers).

87. See, e.g., DIVISION OF CRIMINAL JUSTICE SERVS., NEW YORK STATE, GOVERNOR'S ANTI-CRIME ACTION AGENDA 48 (July 1989) (noting that in terms of jail space, "[p]roposed capacity increases will not keep pace with the projected growth in demand for bed space."); OFFICE OF THE NAT'L DRUG CONTROL STRATEG, NATIONAL DRUG CONTROL STRATEGY 118 (Sept. 1989) [hereinafter BENNETT PLAN] (proposing federal expenditures of $1.477 billion in 1990 on the federal prison system to "reduce the congestion and overcrowding that . . . exist in the courts and prisons."); Malcolm, From Overcrowded to Overflowing: More and More, Prison Is America's Answer to Crime, N.Y. Times, Nov. 26, 1989, § 4 (Week in Review), at 1, col. 1 [hereinafter Malcolm, America's Answer to Crime] (reporting that California's state prison system, for example, routinely operates at 175% of capacity); U.S. Prison Population Sets Record For a Year, in Six Months, N.Y. Times, Sept. 11, 1989, at A18, col. 2 (quoting Attorney General Dick Thornburgh as saying that the 7.3% increase in prison inmates for the first six months of the year was "an indication that more criminals; many convicted of drug-related offenses, are being caught and punished."); Dionne, Jr., Study Says Prison Spending Is Fastest-Growing Part of State Budgets, N.Y. Times, Aug. 8, 1989, at A16, col. 1 (noting that spending for prisons was the fastest-growing part of state budgets while state welfare spending had decreased drastically); Malcolm, Florida's Jammed Prisons: More In Means More Out, N.Y. Times, July 3, 1989, at A1, col. 1, col. 1 (quoting Doyle W. Kemp, central prison transfer coordinator for the State of Florida: "We're always at capacity . . . . So 955 new prisoners coming in the front door pretty much means 955 prisoners going out the back door. And some of those we must release are not very nice folks."); Bohlen, Number of Mothers in Jail Surges with Drug Arrests, N.Y. Times, Apr. 17, 1989 at A1, col. 4 (noting that the female population in New York's jails has increased fourfold since 1981).
a halt. Although some jurisdiction have massively expanded their prison capacities, there is no sign that capacity is moving ahead of the supply of cases awaiting disposition and convicted defendants awaiting incarceration.

The natural response to the "drug problem"—especially for elected officials—is to hire more police officers. This facile response can produce a result which is the opposite of that intended: "log-

88. See, e.g., Dionne, Jr., supra note 87, at col. 1 (reporting on increases in New York); Malcolm, America's Answer to Crime, supra note 87, at col. 1 (noting increases in California's correctional system).

89. See, e.g., U.S. Marshals Conferring on Overcrowded Prisons, N.Y. Times, Jan. 5, 1990, at A19, col. 1 (discussing overcrowding in federal prisons); Kerr, Crack Burdening a Justice System, N.Y. Times, Nov. 24, 1989, at A1, col. 5, B2, col. 4 (quoting the executive director of [New York City's] Legal Aid Society, Archibald Murray, stating: "[t]he system is under enormous stress. If there is a continued increase in cases, you could bring the system to the edge of collapse.").

90. This is, generally, without immediate impact. Apart from recruitment, testing, background checks, and physical and psychological screening, police officers have to be trained, in most jurisdictions for at least three and often for as many as six months. At that stage, police officers are still considered "rookies," and are not yet ready to replace more senior patrol officers, who would then be free for positions in any expanded narcotics enforcement commands. Hence, any jurisdiction which attempts to increase its police forces in order to expand narcotics enforcement capacity will have to wait at least a year in order for the impact to be felt on the street. One of the costs of such rapid increases in personnel is that the proportion of young and inexperienced police officers rises, often with unfavorable results. See, e.g., 1 Mayor's Advisory Comm. on Police Management and Personnel Policy, Final Report 27-40, 72-86 (1987) (discussing recommendations and findings with respect to recruiting and training new police officers in New York City); 2 Mayor's Advisory Comm. on Police Management and Personnel Policy, Final Report 112-62 (1987) (setting forth an overview of the recruiting and training procedures for new New York City police officers); see also James, Ward Is Critical Of Police In Clash: Asserts Poor Supervision Led to Crowd-Control Failure, N.Y. Times, Aug. 11, 1988, at A1, col. 3; Carmody, Police Dept. Getting More Youthful Aura as Its Rolls Increase, N.Y. Times, May 8, 1983, §1, at 1, col. 1.

91. New York State's Chief Judge, Sol Wachtler, has argued persuasively that greater numbers of arrests in a court system whose other components remain static can produce grave results:

It does absolutely no good to widen the mouth of a funnel if the neck remains narrow. The more people you arrest, the fewer you can take in.

... There's also the problem that our ability to extract a favorable plea for the people is diminished. When there's a threat of a trial, there's always the ability to extract a better plea. ...

But if that defendant knows that we're not going to be able to set a trial date, he'll say, "No - no deal."

... [I]f every defendant in this system pleaded not guilty, what do you think the consequences of that would be?

We'd have to close up the entire system. ... So when you have a system that only functions when people plead guilty, then you have to say, "Well, how do you get them to plead guilty to the highest count?" So that you can at least punish the people who have been arrested for committing a crime. But you can't threaten them
jams" at each stage of the disposition process subsequent to arrest. Such a response is eloquent testimony to the symbolic role police officers play in our society, and to the great demands we place on the police to resolve social conflict. The conflict of those demands and the realities of the criminal justice system can exact a toll on police officers.

VI. CRIMINAL JUSTICE SYSTEM; COURT OVERCROWDING

Narcotics enforcement is driven more and more by the public's demand for results, and by the need of elected officials to appear to be providing those results. Law enforcement agencies, like all bureaucracies, will respond with what bureaucrats in every society respond with: numbers. This invites police and investigative agencies to focus on the numbers of arrests, and the amounts of drugs and assets seized. All of these factors add to the pressure at the mouth of Judge Wachtler's metaphorical funnel. Our public officials emphasize the need to increase caseloads for our criminal justice system, but, unfortunately, less often discuss the importance of the rest of the system's role in handling that expanding caseload.

with a trial if you don't have the space or the judges to try them. So this is the kind of paralysis that sets in.

If it were just a matter of getting rid of cases, I could clear the entire backlog tomorrow; just let everyone go home. Say to them, 'Plead guilty to disorderly conduct and go home.' So it's not just a question of disposing of the cases. It's a question of disposing of them in such a way as to allow the system to function, to do what it has to do.

[T]he public sees the police on the street, and the public sees the arrests and the public sees the arrest figures. And this is very satisfying, because for the moment you can say to yourself, "Well, somebody's doing something about the drug problem."

But the other parts of the system operate in buildings and behind closed doors; the public is not exposed to it. And when you talk to the public about getting more judges, when you talk about the need for more probation officers, or more district attorneys, that's not a political platform on which you want to run.


92. See infra note 95 and accompanying text.
93. See, e.g., E. SHANNON, supra note 19, at 112 (stating "DEA headquarters made a religion of arrest-and-seizure stats," thus diverting attention from more significant cases: "[t]he agents could not set up arrests of dozens of little guys and have time left to trace the big boys.").
94. See supra note 91.
95. For instance, prosecutors, discussing a special court established exclusively for drug cases say that "[d]efendants . . . are pleading guilty at a far swifter pace," but "acknowledge that a 'trade-off' for the quicker guilty pleas has been that far fewer of those now entering the
Concern with the arrest numbers on the part of police managers tends to encourage a lot of low-level street cases,\textsuperscript{86} and provides no incentive for even those cases to be properly investigated and prepared.\textsuperscript{97} This in turn leads to the litany of complaints which have been made for decades about the state of the criminal justice system: overcrowded court dockets, and overburdened prosecutors and public defenders. Whether or not this is truer now than in the past is for the most part irrelevant. The conditions in the criminal justice system in most, if not all of our major cities are deplorable, and those conditions relate in large part to the volume of cases.

\textbf{VII. DISRESPECT FOR THE LAW}

This Article does not suggest that our drug problem will be solved if capacity in the criminal justice system is increased so that all cases can be thoroughly and rapidly prosecuted, even with adequate prison space for all drug arrests. The problem with court congestion is that it diminishes respect for the legal system, and particularly diminishes respect for the system's deterrent capacity.\textsuperscript{98}

The large volume means that cases are handled as fungible. The need to dispose of cases may outweigh the goal of just dispositions of cases. Careful examination of each case in order to avoid convicting the innocent is sacrificed. These practices can only promote disrespect for the legal system, not only by the rare outside observer, but also by police officers, practitioners, judges, and defendants as well.

\textsuperscript{86} If summonses are counted as "arrests," it's easy to inflate numbers of arrests. Under those circumstances, for instance, police managers may be tempted to order that officers conduct operations where marijuana is smoked in public and write summonses in order to generate higher numbers of "arrests."

\textsuperscript{87} Officers and . . . administrators feel pressure to produce and show results to the public and the higher administration in the department. The organization's products are essentially ill-defined, the public disagrees about what they expect, and the agencies mystify what it is they are attempting to do, so certain measures are selectively reified to show results.

P.K. Manning, \textit{The Narcs' Game} 77 (1980).

\textsuperscript{97} This may be less true in police agencies where there is some concern with post-arrest conviction rates as well as arrest and seizure numbers and other-indicia of "productivity." However, the authors are not aware if any such agency actually exists.

\textsuperscript{98} \textit{See Drug Arrests and the Courts' Pleas for Help}, supra note 91, at col. 4 (Chief Judge Sol Wachtler observing that "[w]hen the word out on the street is, 'It doesn't matter what you do or what you're arrested for or what you're charged with, you're going to be tried for something else, usually a reduced charge, and you're going to walk out free' - that makes a mockery of the system."); \textit{see generally} J. Wilson, \textit{Thinking About Crime} 117-44 (1983) (discussing the effect of actual penalties on the American justice system).
This is ironic; for it is among criminal defendants that we most hope to instill respect for the legal system. As Charles Silberman has noted:

In a large and complex society such as ours, respect for law—the willingness to obey the law because it is the law—is a more effective instrument of social control than is fear of punishment.99

In the short run, shabby courtrooms and shoddy legal practices may be the only way to deal with a crisis caused by a surfeit of cases. In the long run, those conditions foster the circumstances which underlie and have lead to the crisis in the first place. “Crisis” has become a permanent state of affairs— it has become normalcy.

Despite the hyperbolic rhetoric, there is little to indicate that the United States has the political will to increase all of the criminal justice resources devoted to enforcing narcotics laws.100 Even if we had the political will to radically expand the criminal system, we would probably be in the same place five years from now with respect to the availability of drugs.101 There will always be new deal-

99. C. Silberman, supra note 22, at 256.
100. For instance, in the fall of 1989, far more money was appropriated for the savings and loan “bailout” than for drug enforcement. See Berke, Public Enemy No. 1: A War on Drugs Is a Necessary Risk for Bush, N.Y. Times, Sept. 3, 1989, §4, at 1, col. 1, col. 2 (noting while first-year Reagan Administration expenditures on drug enforcement were $1.1 billion, and President Bush’s proposal for anti-drug programs for fiscal year 1990 is $7.8 billion, the “Pentagon has proposed to spend $8 billion a year on the B-2 bomber program alone.”) Congressman Charles Rangel, commenting on the indictment of Panamanian dictator Manuel Antonio Noriega stated: “We have ignored everybody’s drug-trafficking activity as long as they would support our foreign-policy objective, which is to fight communism . . . .” E. Shannon, supra note 19, at 439.
101. This Article is not the appropriate place to fully discuss the futility of attempts at narcotics enforcement where “success” is defined as making illegal drugs unavailable. However, the question of whether or not effective prohibition is possible without imposing martial law is critical to understanding the debate about decriminalization and/or deregulation. No American law-enforcement effort to eliminate illegal drugs has ever been completely successful. See, e.g., E. Epstein, supra note 19; L. Goberman, Operation Intercept (1974); D. Musto The American Disease (1973); C. Silberman, supra note 22.

There is a significant body of reports of enormous narcotics seizures and successful prosecutions of large traffickers and organizations. Many of these cases have generated attention in the press and popular culture, and may have contributed to an impression that making narcotics unavailable is merely a question of enough cops and prosecutors making good cases, and “tough” judges prepared to impose stiff sentences. See generally S. Alexander, The Pizza Connection: Lawyers, Money, Drugs, Mafia (1988); R. Blumenthal, The Last Days of The Sicilians—At War With The Mafia: The FBI Assault on the Pizza Connection (1988); S. Del Corso, B. Erwin & M. Fooner, Blue Domino (1978); D. Durk, A. Durk & I. Silberman, The Pleasant Avenue Connection (1976); R. Moore, The French Connection (1969); see also P.K. Manning, supra note 96, at 253 (stating that “policing is a marginal activity with a limited impact on drug markets.”); Buder, From Dropout to Drug
ers, either U.S. citizens and residents, or new immigrants from other countries. The bottom line is that as long as demand exists,

Baron to Prison Term, N.Y. Times, Dec. 15, 1989, at B5, col. 4, (stating that “a 26-year-old high school dropout who became a millionaire by running a Queens cocaine ring was sentenced yesterday to 35 years in prison and fined $1 million.”); Ayres, Jr., Drug-Ring Suspect Guilty In Capital, N.Y. Times, Dec. 7, 1989, at A25, col. 1 (noting that a 24-year-old Washington man was convicted of operating a drug ring that prosecutors said “distributed up to one-third of the cocaine in the nation’s capital.”); Buder, A Drug Dealer Gets a Sentence of 7 Life Terms, N.Y. Times, Dec. 2, 1989, at 30, col. 1 (reporting on the sentencing of a 30-year-old drug dealer “who ran one of the largest and most violent drug rings in Brooklyn and who was responsible for 6 murders, 17 assaults, a kidnapping, a maiming and other crimes . . . .”); Drug Kingpin is Found Guilty of Cocaine Smuggling in Los Angeles, N.Y. Times, Sept. 7, 1989, at B14, col. 1 (reporting on the conviction of a Honduran billionaire who “was accused of overseeing a ring that distributed $72 million worth of cocaine in Los Angeles.”); Hays, Chinatown Shopkeeper, 71, Called ‘Elder of Heroin Trade’, N.Y. Times, Feb. 28, 1989, at B1, col. 2 (reporting 19 people arrested and 820 pounds of heroin seized, the largest such seizure in the United States); Blumenthal, Dozens Are Seized in New U.S.-Italian Drug Sweep, N.Y. Times, Dec. 2, 1989, at A1, col. 4 (reporting arrests of 82 traffickers believed to have schemed to ship drugs into the United States in shipments of wines and roses).

In fact, individual cases have little impact on the narcotics supply. See, e.g., Wines, Traffic in Cocaine Reported Surging Weeks After Colombian Crackdown, N.Y. Times, Nov. 1, 1989, at A22, col. 4 (quoting federal narcotics experts as stating, “weeks after the Colombian Government’s crackdown reduced illicit cocaine shipment to the United States to a trickle, smuggling has climbed back to near-normal levels.”); Kerr, Colombia’s Cocaine Lords: Conviction In U.S. Poses Little Threat to Power, N.Y. Times, May 21, 1988, at A5, col. 1 (stating that the “dominant Colombian groups that control the world’s cocaine trade . . . are unlikely to be deterred by the conviction of one of the cartel’s founders . . . .”). Even government officials have acknowledged this, see, e.g., Berke, Among Mayors, a Tide Of Drugs Brings Forth Desperation and Ideas, N.Y. Times, Feb. 12, 1989, §4 (Week in Review), at 6, col. 1, col. 3 (noting that “[e]ven if his agency’s budget swelled from $500 million to $2 billion, Thomas Kelly, deputy director of the Drug Enforcement Administration, said, ‘We’d spend the $2 billion, but it wouldn’t have any impact. . . . [P]ouring more and more money into law enforcement is not going to solve the problem.’”); Colombian Tied to Drug Empire is Found Guilty, N.Y. Times, May 20, 1988, at A1, col. 5, A32, col. 1 (noting DEA Chief of Operations David L. Westrate “expressed doubt that the conviction would hinder the flow of drugs”).

Professor James Q. Wilson has advocated enforcement of narcotics laws, despite acknowledging that they cannot be fully successful, in the interest of “prevent[ing] the creation of new addicts.” J.Q. WILSON, THINKING ABOUT CRIME 220 (1983). We find this “containment” rationale unpersuasive. The reason people use or don’t use a given drug has far more to do with social controls and individual desires than with shallow limits on availability. See infra notes 137-41 and accompanying text (discussing the benefits of prohibition).

102. See, e.g., Sack, supra note 43 at A1, col. 4 (discussing the reasons for the increasing number of young drug dealers); ‘Mob Yuppies’ Said to Reshape Organized Crime, N.Y. Times, Apr. 23, 1988, at 32, col. 1 (noting that “[y]oung Mafia members and immigrant drug traffickers are changing the face of organized crime); Blum, U.S. Helps Detroit to Attack Drug Rings That Use Young, N.Y. Times, Jan. 28, 1984, at 6, col. 1 (citing the increased role of juveniles in drug trafficking).

103. See, e.g., U.S. Indictment Links Mafia and Medellin Group, N.Y. Times, Nov. 3, 1989, at A14, col. 4 (noting the first hard evidence of a link between the drug smuggling activities of the Sicilian Mafia and the Medellin drug cartel); Blumenthal & Bohlen, Soviet
someone will try to satisfy it. The criminal sanction can only achieve a “holding action” against traffickers. It is also of limited utility in any efforts to end demand.

VIII. CRIMINAL JUSTICE SYSTEM: WHAT CAN WE EXPECT?

What are the limits of the criminal sanction insofar as drug use and misuse are concerned? No one would seriously suggest that


104. As law and morality are not identical and congruent sets of values, nor are law and socially acceptable conduct. Law, morality and conduct are three separate concepts. While they overlap, and while morality and conduct, and to some extent the law, may be defined differently by persons of different views, they should not be thought of as congruent. For example, at a party, a guest who drinks to excess and is rude to other guests may have engaged in unacceptable social conduct in one view, and may have violated the moral standards of some by drinking to excess or by drinking at all. But they have committed no crime, and under one widely accepted view, have engaged in no moral transgression. See generally N. MORRIS & G. HAWKINS, THE HONEST POLITICIANS' GUIDE TO CRIME CONTROL (1969); H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968); D.A.J. RICHARDS, SEX, DRUGS, DEATH AND THE LAW (1982).

For the same party-goer to then operate an automobile is behavior which falls into all three categories. It may be, then, that most behavior which is criminally illegal or immoral falls into the category of generally socially unacceptable conduct, but the reverse is certainly not true. All unacceptable social conduct is not necessarily illegal or immoral.

“Our kids have been told that what [sic] illegal is wrong and what [sic] legal is right. Now if we tell them it's legal they'll be confused and we will be sending a mixed message to them.” Hearings on Legalization, Part I, supra note 19, at 86-88 (quoting statement of Scott McGregor, representative of “Athletics Against Drugs - Join Our Team”). Mr. McGregor is incorrect. Citizens have no obligation to save the drowning, or to be polite to their neighbors, or to not use alcohol, tobacco or unhealthy foods. The fact that the law does not forbid something does not require it, nor does it give that conduct or substance the moral imprimatur of the state.

And perhaps this is as it should be; one of America's great virtues is its heterogeneity, and the range of opinions as to socially acceptable conduct is great.

This is, in fact, part of the drug dilemma, for in many circles, the use of illegal drugs is perfectly acceptable, and in many others, it is anathema. Sometimes, these two groups live in the same neighborhoods—or in the same households—which leads, understandably, to a certain level of social conflict. This Article's thesis, in part, is that the criminal arena is not suited for the settlement of this sort of social conflict.
the legal system, using criminal remedies, solve all of the problems associated with alcoholism. Our society can and does expect police and prosecutors to take action against licensed premises which serve underaged drinkers, and to prosecute persons who operate motor vehicles while intoxicated. The police and criminal-justice system are not expected to stop people from drinking too much at parties, or spending the rent money in bars and liquor stores. America’s policies regarding licit drugs are based upon the premise that it is beyond our capacity to stop people from wasting their money on drugs, or to stop people from doing things which are unwise or unhealthy. We can expect no more from our criminal justice system when it comes to the use of any drug, whether it is cocaine, or alcohol. The best we can do is deter people from doing things which are destructive to other people in connection with their drug use.

IX. POLICE CYNICISM

Among police officers, there is profound cynicism about prosecutors, judges, defense attorneys, elected officials, and their own ranking officers. This cynicism is the result of a sense that

105. Of course, we also expect civil government agencies with jurisdiction to take parallel civil action with respect to license revocation, for example.

106. Prosecutions have been initiated against women who used cocaine while pregnant, see, e.g., Chavkin, Help, Don’t Jail, Addicted Mothers, N.Y. Times, July 18, 1989, at A21, col. 2, col. 2 (noting that a woman in Florida was convicted of “having delivered drugs to a minor—via the umbilical cord.”); Mother Charged in Baby’s Death From Cocaine: Illinois Prosecutor Cites Rise in Similar Cases, N.Y. Times, May 10, 1988, at A18, col. 1 (reporting another Florida woman facing similar charges and that a prosecutor in Butte County, California “announced his intention to prosecute mothers whose newborns have illicit drugs in their urine”).

107. Bill Coonce, a veteran DEA agent, discussing the aftermath of the death of Enrique Camarena, stated:

It really lets you know how the system will eat you up . . . . Big government will prevent you from doing a job when other interests are at stake. The life of an agent is secondary to other interests. No one will say so. You get a lot of lip service, but things just get undone and you don’t get backed. You’re told you’re supported, but after a few months of not getting a straight answer from anyone, you look back and you realize you’ve been had.

E. SHANNON, supra note 19, at 451-53; see also Lewis, The Czar’s New Clothes, N.Y. Times, Dec. 14, 1989, at A39, col. 1. (noting that “officials who try to deal with the drug menace . . . know that our policy does not work,” and urging that alternative policies be discussed).


The young prosecutor of today may well be the high-paid defense attorney of tomorrow, attempting to hamstring police witnesses on the stand, and occasionally making unfounded accusations against officers in the hopes of throwing a wrench in the works of a prosecution.

From 1981 to 1984 Washington lawyer Michael Abbell helped run the U.S. Justice
the public has asked them to do an impossible job: to stop violent traffickers from catering to a lucrative drug market. This cynicism is far from unjustified. It is police officers, after all, who take the greatest risks for the fewest rewards of all those in the criminal justice system. Police officers bear the highest personal burden of those within the legal community and in the enforcement of narcotics laws. The burden is paid in mortality, injuries, and stress.

Department office that tries to extradite Colombian drug kingpins. Now Abbell represents the reputed bosses of the Cali cartel, advising them on such matters as avoiding extradition. At a 1985 hearing in Spain he testified as an 'expert witness' for an alleged cartel leader. Abbell's task: to pick apart an extradition request prepared by the same office he had headed just six months earlier.

Waldman & Miller, supra note 28, at 44.

Not only does this lead to cynicism, it also means that prosecutors are often outmatched by the skill and experience of their opposition. See R. Warner, supra note 55, at 60-61 (noting the problem of inexperienced prosecutors facing experienced defense attorneys).

110. See, e.g., id. at 142-47.
111. DEA Special Agent Michael Levine, speaking at a public meeting stated: The real problem is you. People who wanna do drugs with a clear conscience. People who support all this bullshit about education and counseling. People who go on voting year after year for politicians who expect the DEA to police the whole world with a lousy two thousand agents, while taxpayers - like you and me - go on picking up the tab for more of these bullshit programs. For more psychiatrists and psychologists and therapists and social workers and all the other leeches who make a buck on the back of this fucking disease. Half the sons of bitches I lock up have been through a dozen programs.

D. Goddard, supra note 46, at 282 (emphasis omitted).

112. See supra notes 43-50 and accompanying text.
113. See generally, supra note 35, at Law Enforcement Officers Killed and Assaulted 43 (reporting that in 1988 58,752 law enforcement officers were assaulted and of those 21,015 reported having received personal injuries). The FBI does not disaggregate assaults on officers or injuries with respect to narcotics enforcement duties. See id. at 49.
114. See, e.g., Raab, Ex-Officer Gets Injury Pension for Job Stress, N.Y. Times, Nov. 25, 1989, at 25, col. 2. (discussing the emotional breakdown of a New York City undercover police officer). DEA Special Agent Michael Levine stated:

I never knew a good undercover with a happy home life. Or, look at it another way, if a guy's not happy at home then very likely he's good on the job. . . .

Narcotics enforcement is all pressure. Normal police work is varied, but in narcotics it's all-out constant war. You're pushed night and day to get out and make cases, and when you're out there's a million ways to make a mistake. But all you need is one. One mistake, one little error of judgment, and it can cost you everything. Guys crack under that kind of pressure. I knew another guy who blew his brains out in the office. Came in, smiling. Sat at the desk with his gun out - a lotta guys do - and the next thing, boom! No warning. Nothing. A lotta people knew a lotta reasons for it afterwards, but there's no one normal in this job. The divorce rate is 85 percent in the DEA. And the average agent has a life expectancy of fifty-five years, assuming he survives to retire at fifty.

D. Goddard, supra note 46, at 168.
Recently there has been a renaissance of narcotics enforcement via prosecution of illegal drug consumers.\textsuperscript{116} Although there are some justifications for strenuously enforcing narcotics laws against buyers, the adverse consequences of such a policy outweigh the benefits.

Because possession of certain substances is illegal, it can be argued that enforcing the law is good in and of itself. The fact that the law may be ill-conceived or unenforceable does not relieve citizens from their obligation to obey it. For this reason, it may be the obli-

\begin{flushright}
\textsuperscript{115.} \textit{See, e.g., Bennett Plan, supra note 87, at 17-18:}
\end{flushright}

To prevent people from using drugs, drug enforcement activities must make it increasingly difficult to engage in any drug activity with impunity. That deterrent, however, will only remain credible so long as pressure is brought to bear on the entire drug market, dealers and users alike. That's why we need a national drug law enforcement strategy that casts a wide net and seeks to ensure that all drug use—whatever its scale—faces the risk of criminal sanction.

\begin{flushright}
\textit{Id.}
\end{flushright}

"Casual" users who maintain a job and a steady income should face stiff fines—much stiffer than they do now—and, where appropriate, property forfeiture. . . . But such measures can be—and must be—complemented by a host of less formal sanctions aimed specifically at those first-time and occasional users who, because their activities are too often viewed as relatively inconsequential, now avoid any penalty whatsoever. These are the users who should have their names published in local papers. They should be subject to drivers' license suspension, employer notification, overnight or weekend detention, eviction from public housing, or forfeiture of the cars they drive while purchasing drugs. Whatever the extent of their offense, if they use drugs, they should be held accountable.

\begin{flushright}
\textit{Id. at 25.}
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The authors assume that the Office of National Drug Control Policy intends these sanctions to be imposed only after conviction. In any event, it's not clear how the Administration intends to detect, much less prosecute all of these "casual users," and at what point eighth amendment rights become a consideration. \textit{See U.S. Const. amend. viii.} What level of punishment for possession of small amounts of banned substances offends constitutional proscriptions against "cruel and unusual punishment?" \textit{Id.}

With respect to the Bennett proposal regarding "users [who] should have their names published in local newspapers," \textit{Bennett Plan, supra} note 87, at 25, some people are more likely to be deterred than others by the prospect of that sort of public humiliation. Upper-class and professional people, who are more likely to be jealous of the concomitant social status, would seem to be the best targets for this sort of treatment. These people are not likely to be caught in street-level drug sweeps and are more capable of mustering political opposition to narcotic law enforcement. The larger the numbers of people punished by narcotics enforcement, and the harsher the punishment, the more likely it is that new opposition to narcotics laws will emerge.

Moreover, it makes little, if any sense, in a context of limited resources to focus on drug consumers/possessors as long as there are homicide, robbery, rape, assault, and child abuse cases to investigate and prosecute. If there is going to be a crack down on something, it should be violent behavior, not drug users.
gation of drug consumers to speak out against laws that they find unjust or useless and petition for changes in the law.

The prosecutions of buyers are relatively inexpensive and are, from the point of view of the prosecutor, easier to prove than a case against a seller. One problem with minor possession cases is that juries may be more inclined to show compassion through acquittal or hung jury for persons accused of being buyers than for those accused of being sellers. These cases do have the virtue of being generally safer for police officers: the suspects are less likely to be armed. Users have less to lose by being arrested than traffickers because the charges are less serious. Therefore, they have less incentive to resort to violence to avoid arrest.

Although emphasizing buyer arrests may deter some people from drug purchases, the general effect will be towards indoor purchases. Once the trade is driven inside, it's more dangerous for officers. Indoors, people and weapons may be more easily concealed; officers entering a building will also be separated from other officers who can come to their aid. Therefore, one of the unintended con-

116. In a simple possession case there are generally only two elements that must be proven: knowledge that the substance in question is in fact a controlled substance, and actual or constructive possession. In a sale case, the elements that must be proven are: transfer or intent to transfer, through the defendant's conduct or statements, that the substance is in fact an illegal drug, and possession of the substance to be sold. Compare N.Y. Penal Law § 220.03 (McKinney's 1989) (possesion) with N.Y. Penal Law § 220.39 (McKinney's 1989) (sale). Since sale cases are usually made through undercover officers who are not present when suspects are arrested, the question of the defendant's identity is a more hotly contested issue in sale cases than in simple possession cases. In the simple possession case, suspects are more likely to have been arrested by police officers as soon as the contraband is discovered, thus making identity defenses less fruitful.

In many prosecutors' offices, the trial of misdemeanor simple possession cases, which make up the bulk of simple possession cases, is left to junior members of the staff. This is, of course, dependent on local statutes, and at what aggregate or pure-weight level the dividing line between felony and misdemeanor cases is set. New York, for instance, generally uses an "aggregate weight" standard, so that an ounce of cocaine mixed with three ounces of baking powder is, for legal purposes, four ounces "of a substance containing" a narcotic drug. N.Y. Penal Law Art. 220 (McKinney's 1989); N.Y. Pub. Health Law Art. 220 (McKinney's 1989). The concept of aggregate weight is a response to the general practice in narcotics trafficking of not selling substances in their pure form, instead adulterating the expensive drug with a cheaper neutral filler of similar appearance. See R. Sabbag, supra note 23, at 70-71, 105 (discussing methods of "cutting" cocaine); T. Williams, supra note 51, at 35 (noting how the strength of cocaine is diluted at each distribution level).

117. See supra notes 19-39 and accompanying text (discussing innovation and response).

118. See, e.g., Law Enforcement Officers Killed and Assaulted 1988, supra note 35, at 29-30, 33 (1989) (noting the shooting of deputy sheriffs in Sedgwick County, Kansas, who entered a house during the execution of a search warrant). Two New York City undercover narcotics officers entered an apartment to negotiate a narcotics purchase; after the officers refused to sample cocaine, "the drug dealer apparently became suspicious. Suddenly
sequences of prohibition is that circumstances become more dangerous for all law-enforcement personnel in the long-run.

A buyer-focused strategy can be a useful enforcement tool if the aim is to drive a major retail trafficking organization out of business by reducing the customers and potential profits. In the short run, these tactics appear promising if accompanied by substantial media attention. The publicity surrounding these drives doesn’t take away the demand, it merely warns buyers of a particular mode or place of purchasing drugs. The cycle of innovation and response will ensure that other modes or places of transacting business will take the place of the publicized enforcement efforts. Like other enforcement strategies and tactics, buyer-focused enforcement can be effective in the short-term or if implemented to achieve a limited goal, such as the elimination of a given retail organization, or to eliminate trafficking in a particular area.

producing a handgun, he held it to the victim’s head while the partner’s weapon was removed from his waist. Struggles ensued, during which gunfire erupted, and the 26-year-old victim was shot in the forehead and chest with an unknown caliber.” Id. at 33; see generally M.F. Ayoob, Fundamentals of Modern Police Impact Weapons (1978); J.P. Lewis & M. Ayoob, Law Enforcement Handgun Digest (1980).

119. Traffickers often are more upset about losing their businesses than about going to prison.

Thus, dealers fear arrest, but their deepest concern is loss of status, not the possibility of serving time in jail. A dealer who is unable to avoid arrest loses not only his clientele and his main source of income, but his place in his clique and the glory that comes with being the supplier of a much-desired commodity.

T. Williams, supra note 51, at 103. Unfortunately, this can also trigger “turf wars.” See supra notes 48-54 and accompanying text.

120. See, e.g., Pitt, Heavy Drug Use In Middle Class Noted by Ward, N.Y. Times, Mar. 24, 1989, at B3, col. 6 (suggesting that a buyer-focused strategy should pursue upper class drug users more aggressively); Kerr, Police Use New Snare to Deter Drug Buyers, N.Y. Times, Feb. 21, 1987, at S, col. 1 (reporting that Miami police officers posed as drug dealers selling marijuana to buyers and then arresting them); Turner, U.S. Prosecuting Cocaine Customers in Seattle, N.Y. Times, Nov. 9, 1986, §1, at 28, col. 1.

121. See supra notes 19-39 and accompanying text (discussing innovation and response).

122. There is a view, most prominently articulated in the Bennett Plan, that the time and effort it takes for a drug purchaser to locate and purchase drugs should properly be viewed as part of the “cost” of the drug purchase. See Bennett Plan, supra note 87, at 6. While it is true that time and effort should be viewed as part of the cost, such victories in elevating cost are Pyrrhic. At best, the continual use of buyer-focused strategies amounts to playing cat-and-mouse on a grand scale, as police officers on one hand, and retail drug dealers and purchasers on the other, respond and adapt to the innovations of the other side. This cycle, as long as it continues to be demand driven, will always yield a stasis.

It can be argued that “middle-class” (i.e., those who hold jobs and have no criminal records) users are more “deterrable” than sellers because they are not committed to a life of crime and have more to lose and all that they have to gain is the illegal drugs themselves. See,
Enforcement of a buyer-focused strategy fails in direct proportion to the size of the market. The use of such a general enforcement strategy is doomed in regard to drugs with widespread popularity.\textsuperscript{123} If the number of prosecuted traffickers threatens to overwhelm the criminal justice system,\textsuperscript{124} the crisis that would result from enhanced enforcement of buyers would be far greater.\textsuperscript{125} It will never affect the network of generally middle-class "casual" users who sell to each other in their living rooms, however, because they are out of sight.\textsuperscript{126} However, such retail sellers don't sell to people they don't know. Therefore, the only way to get at those people is in effect to infiltrate social networks—a possibility the authors find horrifying, because it also brings with it the need for agent provocateurism and informantism.\textsuperscript{127}

If, as Bennett says, many of these so-called "casual-users" are, apart from their purchase and consumption of illegal drugs, law-abiding productive citizens, it may not make sense to disenfranchise

\\textsuperscript{123} See generally id. at 25 (advocating great or criminal sanctions against first time drug offenders to cause embarrassment and to deter future drug use). However, if this population is punished more severely they are going to have less to lose once it is taken away from them the first time, e.g., employment, job, car, home, federal benefits, etc. For example, one can only lose one's "clean" criminal record once. If, after arrested for drug possession, a defendant loses his or her job, or apartment, or student loan benefits, or all of those things, the only thing which can credibly deter subsequent offenses would seem to be incarceration.

\\textsuperscript{124} The converse is also true, with a caveat. A drug with limited popularity in a given area, like PCP in New York City, has such a small market that the criminal-justice system would not be overwhelmed if a drive were mounted against PCP purchasers. However, this would make little sense, precisely because PCP is a relative rarity in the New York market. The caveat is that law-enforcement agencies must be able to identify the buyer population. Identifying, for instance, crack purchasers in a city like New York is not difficult, as there are far more crack purchasers easily apparent than could ever be apprehended.

\\textsuperscript{125} This conclusion is predicated on the assumption that there are substantially more narcotics consumers than sellers. Since buyer-cases, see supra notes 115-116, require fewer resources, it is assumed that more buyers could be prosecuted if, for instance, all trafficking cases were replaced by simple possession cases. But this would, the authors believe, result in the criminal justice system being overwhelmed if a strategy were employed which focussed on illegal drug consumers rather than illegal drug sellers.

\\textsuperscript{126} See generally R. SABBAG, supra note 23 (discussing retail cocaine dealing to a middle and upper class clientele). Of course, not all middle-class or working-class consumers buy under these circumstances. See, e.g., Farber & Terry, Out-of-Towners Find New York City a Drug Bazaar, N.Y. Times, Dec. 3, 1989, §1, at 1, col. 3 (describing the travels of middle class and blue collar drug users to buy drugs in New York inner-city neighborhoods). However, one of the probable consequences of enforcing open, street-level sales is that sellers and buyers will find other ways of meeting. See supra notes 19-39 (discussing innovation and response).

\\textsuperscript{127} See generally G. MARX, supra note 29, at 152-58 (discussing some of the practical, ethical and legal problems of the use of informants).
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them.128 As Gerassi and Browning have pointed out with respect to the prohibition of alcohol:

The fact that anyone who took a drink - and that included tens of millions - was also a kind of criminal produced a real if vicarious bond between the public and the gangsters.129

The financial and social costs of criminalizing, incarcerating, or stigmatizing so many people are staggering. Moreover, the jurisprudence of such an approach is questionable.

XI. THE JURISPRUDENCE OF BUYER-FOCUSED STRATEGIES

A troubling flaw in the philosophical underpinnings of drug prohibition is that it is based on a profound ambivalence regarding the relationship between individual drug users and society. Is the user a criminal? A medically ill person? A psychologically ill person? If the user is ill, can one be ill and also responsible for “voluntarily” becoming ill? If illegal drug consumers are criminals and responsible for their own behavior, including the voluntary possession of forbidden substances, then why is there such an emphasis on “treatment”130 in the range of sanctioned outcomes for conviction of drug possession? The criminal justice system imprisons rapists, whether or not they are deemed to need “treatment” for any alleged psychological deficit. On the other hand, if users are medically ill, then why should we put them in jail? As a society, we shrink from the thought of imprisoning someone simply because they are depressed, or schizophrenic, or an alcoholic, or suffer contagious medical conditions.

The Bennett plan proposes post-arrest treatment for drug defendants, in addition to work camps, community service, heavy fines, and prison.131 How are we to decide who warrants which outcome? Who gets “punishment,” and who gets “treatment”? Who is “sick,” and who is “evil”? In the Bennett vision, the criminal justice system is apparently intended to function as a sort of triage ward for a

128. People who are arrested and prosecuted, especially those who view themselves as basically law-abiding and who have committed no other crime apart from possessing and consuming an illegal drug, may well harbor feelings of ill will towards the government and the legal system. They may also lose respect for a system which they feel is unjustly imprisoning them. Substantial numbers of law-abiding citizens losing respect for their legal system has political and social consequences far beyond the effects of drug trafficking and misuse.


130. See, e.g., BENNETT PLAN, supra note 87, at 35-44.

131. See BENNETT PLAN, supra note 87, at 35-44 (discussing current and proposed drug treatment programs).
whole range of medical, psychological and social-welfare services. Arrest is what “treatment” and punishment” have in common in this scheme, and both of these things, regardless of what they’re called, are in fact “punishment,” imposed against the will of the recipient.

The criminal justice system is not designed to function as a large emergency room. It is designed to punish people, and works best when it is punishing people for other-regarding conduct. The system is best at punishment because it is most honest when it is doing that, instead of rationalizing at “helping addicts” or pretending that someone other than the user is being hurt.

There is inherent confusion in prohibitory schemes between the roles of victim and victimizer. The justification for punishing narcotics offenders is not that they must be deterred from harming themselves, but to prevent them from “corrupting” the “innocent”—from introducing non-users to narcotics and to deter non-users from becoming users.

In other words, one can only be a potential victim, an innocent person at risk of becoming a drug user. Once this person becomes a drug user, they no longer qualify for the status of victim and regarded with sympathy, but have become the perpetrators. The perpetrator is punished via incarceration to prevent the creation of new users. The user-perpetrator is no longer a victim, but the victimizer, or at least a potential one.

The second strand of logic in the law’s treatment of drug users is the notion of drug use as a “disease.” This also makes little sense, since we don’t punish the sick and people do not become voluntarily “sick.” However, if it is to be viewed as a “disease” which sellers somehow transmit to consumers, punishing consumers for their victimization makes little sense.

If we are not punishing people to “save them from themselves,” it follows that the justification must be that drug use is in fact other-regarding conduct. This reasoning is at best tenuous and can be likened to punishing possessors of pornography in the name of preventing and punishing rape. A causal nexus is alleged, on the

132. For a discussion of the weaknesses of the “disease model” of addiction, see Fingarette, Alcoholism: The Mythical Disease, 91 Public Interest 3, 3 (1988); see also T. Szasz, Ceremonial Chemistry 4-9 (1983).


134. See supra note 43 (discussing behavior and causation).

135. Some who advocate the censorship of “pornography” or otherwise “offensive” materials justify suppression on the ground that pornography “causes” sexual crimes and other acts hostile to women. See generally A. Dworkin, Pornography: Men Possessing Women
evidence of a correlation. Some drug users do bad things. Many people are arrested for a variety of crimes, and are then given urine tests which show indications of recent illicit drug use.\textsuperscript{188} Therefore, drugs have "caused" the behavior which led to the arrest. This, of course, doesn't take into account the unknown number of people who have used drugs and committed no other crime than their drug crime. If punishment is needed for robbery, larceny, and child abuse, which we firmly believe that it is, let's not waste our time with drug buyers. Regardless of whether or not America decides to decriminalize, resources devoted to drug possession cases are wasted and will be wasted, unless we first make serious inroads on violent, white collar and street-level crime.

XII. THE BENEFITS OF PROHIBITION: CUI BONO?

There is no question that prohibition is not without its benefits. It is equally clear that only some of those benefits have anything to do with drugs, drug misuse, or public health. The benefits which do have a connection with drugs and public health are few, mixed and shallow. The other benefits are political, parochial and symbolic.\textsuperscript{197}

Prohibition presumably keeps some people away from drugs.

\textsuperscript{188} See NIJ/WASHINGTON, D.C. STUDY.

\textsuperscript{197} Peter Manning noted that:

Drug enforcement is from a social point of view, a ceremony that celebrates what the powerful segments of society consider appropriate levels and kinds of drug use, proper styles of life and occupations, the correct place to live, and moral commitment. Drug police, like priests, are more important for what they symbolize and stand for than for what they do.

P.K. MANNING, supra note 96, at 253. Similarly, Dr. Karl Menninger stated that:

The crime and punishment ritual is a part of our lives. We need crimes to wonder at, to enjoy vicariously, to discuss and speculate about, and to publicly deplore. We need criminals to identify ourselves with, to envy secretly, and to punish stoutly. They do for us the forbidden, illegal things we wish to do and, like scapegoats of old, they bear the burdens of our displaced guilt and punishment . . . .

And it’s not unreasonable to assume that some of the population, had they used illegal drugs, might have suffered some harm from them. Some or all of that group may be misusing licit drugs now. On the other side of this equation, many of the people who have been harmed by illegal drugs might well have been saved from that injury through labelling, honest public health information campaigns, and regulation of dosage and purity. But the law is now, and will always be, ineffective in deterring anyone who really wants to use or misuse legal or illegal drugs: those who are unaffected by the social opprobrium associated with illegal drug use and feel no internal compunctions about violating the law. The people least likely to violate the law may also be the least problematic drug users. The most reckless drug users—the polysubstance misuser, for instance, are going to be dysfunctional regardless of the licit or illicit status of her or his drugs of choice.

Ironically, the greatest beneficiaries of our commitment to the "war on drugs" are our sworn enemies—drug traffickers. Drug dealers are the last people in the world who want decriminalization and competition from legitimate sources. It is prohibition which creates an illicit market and the profit opportunities that flow from illicit markets. Drug traffickers sell not only a product, but the service of illegal delivery. In a non-criminalized commercial context, they will not have the skills to compete successfully. Traffickers are selling their skills as outlaws. In a legal market, those skills are virtually useless.

Most of the price of illegal drugs is overhead for the illegal delivery of drugs—not cultivation and production. Under decriminalization, this overhead cost would no longer be an ingredient in the price structure.

The "drug war" is clearly good for the "armies" which fight it, including police, prosecutors, drug-treatment centers, prison administrations, antidrug agencies, and for politicians. There is little or

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138. See supra notes 21-38 and accompanying text (setting forth the profits made from prohibition).

139. See generally P. REUTER, G. CRAWFORD & J.A.K. CAVE, supra note 38, at ch. 2, 10-30 (arguing that the increased cost of drug smuggling would raise the price of street drugs and lower demand).

no political constituency which wants to be seen as “for” illegal drugs. This may be, in part, because decriminalization, unlike the “war on drugs” cannot be easily explained in thirty seconds or less. All of the constituencies listed above profit—even if overburdened. Their budgets cannot be cut, and the popularity of fighting drugs will help them in any bureaucratic struggle.

Political leaders also have an interest in the drug issue. A better issue could not have been invented. As Lewis Lapham noted:

To politicians in search of sound opinions and sustained applause, the war on drugs presents itself as a gift from heaven . . . . The war against drugs provides them with something to say that offends nobody, requires them to do nothing difficult, and allows them to postpone, perhaps indefinitely, the more urgent and specific questions about the state of the nation’s schools, housing, employment opportunities for young black men - i.e., the conditions to which drug addiction speaks as a tragic symptom, not a cause. . . . The war on drugs becomes the perfect war for people who would rather not fight a war, a war in which the politicians who stand so fearlessly on the side of the good, the true, and the beautiful need do nothing else but strike noble poses as protectors of the people and defenders of the public trust.141

Maintaining drug prohibition saves face and prevents us, as a nation, from admitting that we may have made a mistake. The mere discussion of decriminalization may be very painful for the families of police officers slain during narcotics enforcement, and for the survivors of others killed during America’s drug wars. America’s overdue reconciliation with those who performed military service in Vietnam may provide us with a guide: our admiration and respect for those who fought in their nation’s service stands apart from our judgment of the wisdom of that war. If we are to decriminalize, there should be no need for a reconciliation, no failure to recognize the sacrifices made—the lives lost—in a fight against profiteering. Decriminalization can be the final, winning salvo in the battle against illegal drug trafficking.

XIII. WHAT DO WE REALLY WANT?

In the authors’ view, the best aspirations we can have regarding drug policy are a maximization of personal liberty, a minimization of

violence for law enforcement personnel and civilians, and better education as to the general and specific nature of drugs. The more we truly know about drugs, the more safely drugs can be used and wiser decisions can be made by individuals about which ones to use and when, the more they can be respected. When drugs are reified as objects of fear and loathing, we are led as individuals and as society to make less rational, rather than more rational, choices about their use.

Our goal should also be to keep children and drugs apart from each other. While this is not the place to determine what an appropriate age of majority is, both small children and adolescents are, in our view, not equipped to make decisions regarding drug use, and often make bad choices. Prohibition and propaganda, however, don't help children make better choices.

Wanting people not to misuse drugs and to stop hurting themselves and their families with their drug use is a good thing. However, it has little to do with criminal law enforcement. Where people who use or misuse drugs also assault family members or others, they should be prosecuted criminally, and the defense or mitigating argument that the defendant has "a drug problem" should be dismissed for the cant it is.

**XIV. DRUG, SET AND SETTING**

One of the greatest risks of decriminalization is that people who have not previously used illegal drugs will carelessly experiment with them. One of the greatest dangers of drug use—legal and illegal—is not use per se, but unknowing, careless and uneducated use. Because initial use is so easily accompanied by a lack of accurate knowledge of the drug's pharmacology, it carries a special danger. The other critical factors which increase or reduce risk are strength and purity of the drug, use of more than one drug at once, pre-existing medical conditions in the user, and the context of the use.

142. For a complete discussion of this issue, see generally N. ZINBERG, DRUG, SET AND SETTING (1984).

143. See, e.g., L. Grinspoon, supra note 43, at 368 (noting the assumption that drug legalization would lead to more widespread use, but arguing that it may not be accurate).

144. In the case of heroin, first use after a period of abstinence is dangerous as well, because heroin users, incorrectly assuming that they have retained their tolerance to the drug, often return to use at their prior dosage level. See Centers for Disease Control, Heroin-Related Deaths - District of Columbia, 1980-1982, Morbidity and Mortality Weekly Report, July 1, 1983, at 321.

145. There are, of course, many published discussions of the risks associated with drug
Decriminalization, although we assume it will expose more people to experimentation, still impacts favorably upon most of these variables. Strength and purity can be regulated in a non-criminal context, such as requiring warning labels on all drugs, including information about hazardous drug combinations and the risks associated with the use by persons with specified medical conditions. Moreover, all of these factors, and especially the context of use, can be affected through honest and accurate public education programs.

Critical to analyzing these problems is understanding the way in which individual drugs, human beings, and society interact—and what makes some combinations of those three factors dangerous. The late Dr. Norman Zinberg and Dr. Andrew Weil have provided the best explanations of these factors, referred to respectively as "drug," "set," and "setting." Set is a person's expectations of what a drug will do to him, considered in the context of his whole personality. Setting is the environment, both physical and social, in which a drug is taken.

Thus, the drug itself is only one variable in a complex equation. As Weil notes, "all drugs are dangerous." Some drugs are more dangerous than others. It is our hope that we can encourage people,
to the extent that they use drugs,\textsuperscript{151} to use them in the least dangerous manner possible, and, all other things being equal, to use the least dangerous drugs. In any case, criminal sanctions are not the most useful tools in encouraging this sort of behavioral and cultural change.

The fact that all drugs are dangerous does not mean that all drugs are equally dangerous, or that there are no differences in the form of drugs, or in the mode of ingestion. There are good public health reasons for encouraging the use of certain drugs as against others simply because some drugs and some forms of drugs are more dangerous than others.\textsuperscript{152} The ideal should be to encourage the wisest combinations of drugs, set and setting.

Realistic drug education, and not scare tactics, is an essential component of any drug decriminalization program.\textsuperscript{153}

XV. Proposals

The most radical decriminalization option would be to immediately repeal all federal and state criminal laws regarding all illegal

\textsuperscript{151} We do not think that it is either a good or bad thing that people use drugs. Drugs, like other tools, are in and of themselves lacking moral properties. Like tools, they can be used in good and bad ways.

\textsuperscript{152} See generally sources cited supra note 145 (discussing the risks involved with drug use).

\textsuperscript{153} The burden of [the task of educating children about drugs] will fall mainly upon parents and secondarily upon teachers; it is not a process that can be mandated by law or accomplished by public policy. . . . The kind of instruction we would like to see will bear no resemblance to what is called "drug education" today. Drug education as it now exists is, at best, a thinly disguised attempt to scare young people away from disapproved drugs by greatly exaggerating the dangers of these substances. More often than not, lectures, pamphlets, and film strips that take this approach stimulate curiosity, make the prohibited substances look more attractive to the audience, and make authorities appear ridiculous.

A. WEIL \& W. ROSEN, supra note 43, at 3.

What is needed, in the authors' view, is not only a more accurate view of the pharmacology and attendant dangers of individual drugs, but also a clearer way of looking at drugs and drug use. The basic premise of any education program—whether or not there is decriminalization—must be that there are a great number of psycho-active substances available in the world, and that all can be dangerous if misused. Some of those substances are legal, some illegal, but all are potentially dangerous. Equating dangerousness with illegality invites the corollary: that use (or misuse) of legal substances is not dangerous. See Morganroth, Medicine: High-Risk Pain Pills, ATLANTIC, Dec. 1989, at 36 (discussing unpublicized mortality risks of over-the-counter pain relievers aspirin, acetaminophen and ibuprofen); see also A. WEIL \& W. ROSEN, supra note 43, at 4 (emphasizing that the only way to avoid problems with drugs is to refrain from using them).
drugs without replacing prohibition with a regulatory scheme.\footnote{154} This would create a chaotic situation which is neither desirable nor necessary. It would forfeit an ideal opportunity to regulate purity, impose excise taxes, and attempt to encourage and discourage various patterns of use.

The most prudent course of action is to start with the least dangerous\footnote{155} and most popular drugs, and encourage a licit market in those drugs that will in the short term, displace some portion of the illicit market. Starting with the least dangerous drugs, in their least dangerous forms, will cut into the eventual licit market in other, more dangerous drugs. Probably, the first drug decriminalized would be marijuana.\footnote{156} At the same time, enforcement of weapons posses-
sion, assault and other trafficking-related violence would be enhanced. The apprehension and prosecution of intoxicated drivers, and of those selling to minors would continue. Given the current political context, it may be all that can be managed in the short term to decriminalize marijuana. The degree of progress that would provide depends in large measure on what the substitution curve of marijuana and other drugs looks like. Marijuana prices have risen over the last decade, as cocaine prices have dropped. A lower legal price for marijuana would draw an unknown number of consumers away from still-forbidden drugs. It is unknown how many current illegal drug consumers are concerned about the illegality of their drug use, and whether that concern would lead them to make a choice of, for example, legal marijuana as against illicit cocaine.

If we are going to do anything less than full decriminalization, newly freed resources must be thoughtfully reallocated. There should be a focus on the drugs which are the most dangerous: PCP, crack cocaine, amphetamines. Direct enforcement and prosecution resources should not be directed towards “soft targets” which make for easy publicity, but on the most violent traffickers—those who corrupt or attempt to corrupt public officials. Where there is a choice between enforcing against street traffic in a commercial or a residential area, resources should be allocated towards residential areas and schools. A path of least resistance for retail dealers should be made to move into areas where they will have the least impact on people’s lives.

If we were to decriminalize drugs, we must immediately regulate labelling, including health warnings and notices of content and strength. Regardless of whether we decriminalize for “recreational” use, at a minimum marijuana, methaqualone, heroin and LSD should be rescheduled for medical use.

A criminal requirement should be imposed that narcotics traffickers label the substances they sell for active ingredients, adulter-


157. See Letwin supra note 9, at 87 n.74 (noting a drastic drop in the price of cocaine).

158. Since this may require political leaders to put the interests of poor people ahead of others with greater political and economic power, we do not think it likely.

159. Some consumer products companies would eventually jump into the market, although there is no way to tell which ones. More established companies might be reluctant, given the stigma. However, given the potential profits, start-up companies would form and would hire staff able to immediately cope with FDA regulation.

160. Cf. Young Opinion, supra note 156 (recommending the rescheduling of marijuana to allow prescription for legitimate therapeutic purposes).
Those people violating labelling laws must be prosecuted harshly, to give a real incentive to all retail traffickers to avoid endangering drug consumers.

An excise tax structure should be imposed, both on the state and federal level, on substances as they are decriminalized. The taxation structure should be such that the least harmful drug, in the least harmful and weakest form, should bear the lowest tax; the more harmful the drug, the stronger the form, the higher the tax.

Distributors of whatever is decriminalized should be licensed, either by the federal government, state governments, or both. This is a question best left to those who already possess expertise in regulating the distribution of drugs, and who will have to do the regulation, such as the Food and Drug Administration, the Treasury Department, and the parallel state agencies. Because the price of illegal drugs represents payment for illegal services, prices would be lower in a decriminalized system. It is, however, unclear which is the most desirable form for such a market to take: an entirely government controlled market; or a relatively free market, like the one for alcohol, that sets its own prices but is subject to government regulation and taxation; or some combination of these two markets.

Also unanswered are questions of who should produce or be allowed to produce these drugs. Like alcohol, there is the option of micro-managing price through the use of excise taxes. These questions, including the pricing of decriminalized drugs, are questions to be answered after debate and experimentation, and are beyond the scope of this Article.

XVI. CONCLUSION

If we are committed to thinking about drug prohibition via the metaphor of the "war on drugs", we should bear in mind that it is a civil war. It is one group of citizens, probably a numerical minority,
defying the dominant group’s command not to purchase or use certain substances. Drug traffickers exploit that defiance to make a profit.

Decriminalization is no panacea—but further prohibition will only lead us to another generation of violence, corruption and a diversion of resources from other problems. Every law-enforcement dollar spent on narcotics enforcement is a dollar not spent on investigating or prosecuting sexual assault, domestic violence, or child abuse. Similarly, every dollar spent on law-enforcement, including imprisonment, is a dollar not spent on national defense, social programs, education, or, a dollar not remaining in the pocket of a taxpayer.

The hallmark of the underground narcotics economy, the intense and seemingly random violence, the constant need for participants to prove their “toughness” are not a pharmacological consequence of using illegal drugs no matter how much or how many public officials wish to accept such a theory. They are consequences of the contraband economy itself. If it is not crack, it will be whatever other illegal substance becomes popular. Prohibition, combined with pervasive poverty, fuels the fire of inner-city violence and social destruction.

But the role of the criminal justice system is of limited utility in controlling the use and distribution of a socially destructive commodity that is in high demand. Increased enforcement merely raises the stakes for the participants: they either get tougher or they get out. Those who remain and the new entrants increasingly appear to belong to two groups: those without other meaningful options; and the avaricious with a capacity or appetite for ruthlessness and violence. Most of those who had a meaningful place to go, or with no stomach for the high stakes of drug trafficking are already gone.

It doesn’t seem to be too strong a statement to say that our preoccupation with “winning the war on drugs” has led us to a point where selling crack in a liquor store or tobacconist could hardly make our city neighborhoods any worse. This may horrify some. Given the choice between a violent, Hobbesian world ruled by drug

167. See supra notes 40-77 and accompanying text (discussing violence).
168. See supra notes 78-86 and accompanying text (discussing corruption).
169. See supra notes 43-64 (discussing the effects of efforts to hinder law enforcement).
170. See supra notes 117-31 (discussing drugs and behavior causation).
171. See supra notes 120-31 and accompanying text.
172. See supra notes 69-72 (discussing the violence that accompanies drug trafficking).
dealers, and the likely alternative of a world with many drug users but no lucrative role for violent outlaws, the latter seems a better choice. At least then the life and death stakes of living in our urban areas would be lowered and, given the proper political will, we could begin to address our social problems.

It would be a disservice to the memories of those who have sacrificed their lives enforcing our laws to embrace tyranny in the pursuit of an unobtainable "drug-free" society. Benjamin Franklin wisely noted that the sacrifice of liberty in pursuit of an illusory safety entitles us to neither liberty nor safety. The best way to honor the memories of those who have already died is to create a world in which it will not be necessary for more people to die enforcing an unenforceable policy.

173. See supra note 1 and accompanying text.