

# THE ROLE OF THE LAW IN DRUG CONTROL

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## SELF-HARMING CONDUCT AND SOCIETY

The role of the law in drug control is intimately related to the broader problem of the place of the law in preventing an individual from engaging in conduct which can harm only himself. Before considering drug control, then, there will be several advantages in undertaking a lengthy discussion of the broader issue. Not only will this allow appreciation of the problem in a broader perspective, but it will facilitate an approach to the extremely emotional drug area by a less well travelled, quieter, and more rational route. It is, perhaps, a longer journey, but it should be a smoother one.

Typically the use of the law to prevent conduct which harms only the actor himself is distinguished from the use of the law as a means of preventing the individual from harming others, including society at large. In practice, however, this is not an easy distinction to draw, for there are few actions in which one can engage that threaten harm only to himself.

The purest example of laws aimed at such conduct are the statutes which require the driver of a motorcycle to wear a protective helmet.<sup>1</sup> It is true that one can argue that the helmet really protects others,

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1. See, e.g., MASS. ANN. LAWS ch. 90, § 7 (Supp. 1970); MICH. COMP. LAWS ANN. § 257.658(d) (1967); N.Y. VEH. & TRAF. LAW § 381(6) (McKinney 1970); N.C. GEN. STATS. § 20-140.2(b) (Supp. 1967); ORE. REV. STAT. § 483.443 (1969). Approximately two-thirds of the states have now enacted motorcycle helmet statutes. See Note, *Motorcycle Helmets and the Constitutionality of Self-Protective Legislation*, 30 OHIO ST. L.J. 355, 358 (1969).

THE FOLLOWING HEREINAFTER CITATIONS WILL BE USED IN THIS ARTICLE:

E. BLOOMQUIST, *MARIJUANA: THE SECOND TRIP* (rev. ed. 1971) [hereinafter cited as BLOOMQUIST];

R. BLUM, *SOCIETY AND DRUGS* (1969) [hereinafter cited as BLUM];

L. GOODMAN & A. GILMAN, *THE PHARMACOLOGICAL BASIS OF THERAPEUTICS* (4th ed. 1970) [hereinafter cited as GOODMAN & GILMAN];

J. KAPLAN, *MARIJUANA—THE NEW PROHIBITION* (1970) [hereinafter cited as KAPLAN];

H. NOWLIS, *DRUGS ON THE COLLEGE CAMPUS* (1969) [hereinafter cited as NOWLIS];

H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968) [hereinafter cited as PACKER];

A. SINCLAIR, *ERA OF EXCESS—A SOCIAL HISTORY OF THE PROHIBITION MOVEMENT* (Harper Colophon ed. 1961) [hereinafter cited as SINCLAIR];

J. MILL, *On Liberty*, in *ON LIBERTY AND OTHER ESSAYS* (E. Neff ed. 1926) [hereinafter cited as MILL].

since it shields the motorcyclist from thrown pebbles which might make him lose control and injure innocent pedestrians or automobile drivers.<sup>2</sup> Though this approach makes the problem easier, it is disingenuous. As a result, many courts and commentators have refused to take it and have assumed that the helmet protects only the cyclist himself.<sup>3</sup>

Though the helmetless cyclist does not expose others to any appreciable physical danger, he does drive in a society that is committed to preventing people from dying of their injuries. Thus, rather than allowing the cyclist to die unnecessarily, society is prepared to undertake the enormous expense of treating him until he either expires or recovers. In Professor Robert Bartels' apt phrase, the helmetless cyclist exposes others to "public ward" harm—the danger of having to treat him should he not be killed outright.<sup>4</sup> It is on this theory that society feels it has the right to demand that he do his share to protect himself.

The expense and inconvenience that the helmetless driver may cause does not, however, stop at public ward harm. Insofar as his failure to wear a helmet results in his own injury, he may force society to assume the cost of his neglected responsibilities to others. Here the issue cannot be avoided by saying that it is all society's fault for not letting him die in the street at minimal cost, because his responsibilities must still be fulfilled. As an emotional matter, moreover, non-support justifications for laws which attempt to prevent self-harming conduct often command considerably more power than do public ward justifications. Thus, despite the enormous public ward justifications for halting alcohol abuse, one of the most powerful Prohibitionist posters contained a drawing of a saloon with the father drinking at the bar while his clean, but poorly dressed, little daughter stood in the doorway saying, "Father, Father, please come home. Mother needs you." The same public interest which underlies non-support laws, then, can also justify helmetless cyclist laws—at least in the case of those who owe someone a support obligation.<sup>5</sup>

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2. See, e.g., *State v. Fetterly*, 254 Ore. 47, 49-50, 456 P.2d 996-97 (1969).

3. See Note, 30 OHIO ST. L.J., *supra* note 1, at 366-69. See generally Linde, *Without "Due Process"—Unconstitutional Law in Oregon*, 49 ORE. L. REV. 125, 178 (1970).

4. R. Bartels, *Better Living Through Legislation: The Control of Mind-Altering Drugs* (unpublished manuscript).

5. The case of the helmetless cyclist prohibition, however, is both stronger and weaker than the more general non-support laws. It is weaker for two reasons. First, insofar as the law applies to those who do not owe anyone a support obligation or who leave a sufficient estate to meet

In addition to the public ward and non-support justifications for forbidding conduct which on first glance would appear to harm only the actor, a further justification exists which might be called the "modelling" justification. Modelling is the psychological term for the process by which one repeats a type of behavior one sees in others. Modelling of behavior may thus occur where the watcher first learns that the behavior which he had thought impossible can indeed be performed; where the watcher, by observing, learns how to do it; where he simply gets the idea from watching; or where he, for any one of many reasons, imitates the action.<sup>6</sup> It is true, of course, that the same values which underlie the freedom of communication may interfere with preventing the harm caused by modelling.<sup>7</sup> The individual who models the helmetless cyclist does so without coercion, and, apart from the indirect harms discussed, he harms only himself. Nevertheless, where those persons society tries to protect from modelling are children, the fact that the helmetless cyclist in a causal sense may have caused the modelling, which in turn might lead to injury, may be very significant. Children are regarded as much more likely than adults to model dangerous conduct, and we certainly acknowledge a greater responsibility to protect them from harm.

The final justification by which some may find social harm in conduct which appears to harm only the actor might be called the "categorical imperative" justification. This relies on the fact that although an act might harm only the actor if performed by relatively few people, it could cause harm to everyone if it were performed by

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such obligations, it is obviously too broad. Second, the fact is that most helmetless cyclists do not suffer injury for want of a helmet. At most, they take the risk that in some small percentage of cases they will be prevented from fulfilling their support obligations. Even if legislators feel better able to evaluate this risk than the cyclist, it here seems a much weaker case for prohibiting one's wilful default on his support obligations.

On the other hand, the very fact that the helmetless cyclist does not intend to default on his support obligations, but merely takes a risk of not being able to meet them, is perhaps a reason for greater, not less, involvement by the law. There is ample evidence that many human beings discount the likelihood of low-probability harmful events more than does any rational legislature. See W. Edwards & L. Phillips, *Man as Transducer for Probabilities in Bayesian Command and Control Systems* (December 26, 1962) (unpublished paper presented at symposium of the American Association for the Advancement of Science, Philadelphia). The law might then rationally prohibit small risks while allowing greater ones on the theory that in the latter case the risk was sufficiently obvious that it could rely on the rationality of the risk taker, while in the former, intervention of the criminal law is necessary to cause a proper weighting of the risks.

6. A. BANDURA, *PRINCIPLES OF BEHAVIOR MODIFICATION* 118-204 (1969).

7. See generally *Roth v. United States*, 354 U.S. 476, 484 (1957); *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring).

almost all. This justification is not heard in the helmetless cyclist case, but it is heard with respect to some sexual and drug laws.<sup>8</sup> The picture which is called to mind is that of a nation where most of the population is homosexual—in which case there would be an enormous population implosion with consequent economic catastrophe—or where most of the nation is “stoned” on drugs. It is undeniable that society has a strong interest in avoiding the economic disaster of so many withdrawn from productive work. In both cases, however, the justification is often attenuated by two facts. First, there is not generally any reason to believe that, in the absence of laws justified by categorical imperative reasoning, the forbidden conduct would in fact become so widespread—the taste that impels the action may be esoteric. Second, the fact that conduct might produce a social catastrophe if engaged in by almost all does not necessarily imply that the conduct will be in any way harmful to society if engaged in by a relative few. So long as the birthrate is felt to be too high, the practicing homosexuals who thereby reduce it do no harm at all, and the economies of scale in American industry are such that withdrawal of a reasonable number of producers and consumers will similarly have no detrimental effect. The categorical imperative justification, therefore, may be fallacious, or it may simply be one way of dramatizing a harm which actually exists, by multiplying it manyfold.

### *Secondary Harms and the Criminal Law*

Unless it is necessary to distinguish among them, public ward, non-support, modelling and categorical imperative harms can all be subsumed under the heading of secondary harms. It is interesting to note that the majority of efforts to prohibit conduct which, on first glance, appears to harm only the actor himself are rationalized as a means of preventing secondary harms, rather than as efforts to protect people from their own folly.<sup>9</sup> Insofar as the law acts to penalize the actor who has not taken proper care of himself, it hurts rather

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8. See, e.g., Grinspoon, *Marihuana*, 221 SCIENTIFIC AMERICAN 17, 21 (Dec. 1969).

9. That is not, of course, to say that there are not situations where we are willing to invoke the law simply to protect people from self-inflicted harm. The juvenile court will imprison juvenile runaways under a *parens patriae* theory, Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1192-93 (1970), and those who are mentally ill will be civilly committed, even if they are dangerous only to themselves. While the person to be protected from himself is not under age, “ill,” or a member of another group with a similar claim to sympathy, however, society acts for its own benefit rather than his. It must, therefore, still be able to point to a secondary harm to justify the law.

than helps him. To the extent that societal resources are expended to prevent people from simply harming themselves, moreover, a type of public welfare program is initiated. Such use of governmental resources to improve the lot of a minority is never popular and the case in support thereof is weak indeed where the minority is neither regarded as especially worthy nor desirous of the help.

No one argues today that all risks of secondary harm should be prohibited by the criminal law. The obvious secondary harm resulting from such almost universally performed acts as overeating or poor nutrition is the *reductio ad absurdum* of such arguments. The interesting question, then, is whether these types of harm are a sufficient reason for society to intervene in *any* case. The classic statement opposing intervention is that of John Stuart Mill that “[t]he only purpose for which power can be rightly exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.”<sup>10</sup> Mill himself believed that an “indirect” harm, which would include the secondary harms discussed, was not a “harm to others” within the meaning of his statement.<sup>11</sup>

Unfortunately, one can read Mill’s pronouncements again and again without discovering any substantial effort at a utilitarian calculus to support his position, and the closest Mill came to a general reason was a *reductio ad absurdum* argument. This was stated in two forms. First, that:

[s]o monstrous a principle is far more dangerous than any single interference with liberty; there is no violation of liberty which it would not justify; it acknowledges no right to any freedom whatever, except perhaps, to that of holding opinions in secret, without ever disclosing them . . .<sup>12</sup>

And second that:

[t]he doctrine ascribes to all mankind a vested interest in each other’s moral, intellectual, even physical perfection, to be defined by each claimant, according to his own standard.<sup>13</sup>

These arguments both focus on the lack of standards available once society undertakes to prevent a person from harming himself. The standards problem, moreover, is compounded when one attempts to value the incommensurable freedom of the actor to engage in the

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10. MILL 13.

11. MILL 94-99.

12. MILL 106.

13. MILL 107.

conduct of his choice. Merely because protecting the public from secondary harms could logically justify a vast range of governmental interferences with individual liberty, and merely because we could define secondary harms as including anything lessening the full development of an individual's perfection, this does not mean that such interference is always improper. The main deficiency with the *reductio ad absurdum* arguments is actually a practical one. In the great majority of cases, the individual's freedom will not be interfered with directly simply because such regulation would be impossible to enforce without the imposition of an absolute police state.<sup>14</sup> Indeed, the motorcycle helmet example is one of the few prohibitions on an individual's conduct that might be enforced at reasonable cost.

Mill's thesis can perhaps be better defended on a somewhat different ground. When the legislature makes a decision to protect society from secondary harms by criminalizing individual conduct, it generally overestimates the enforceability of its decrees.<sup>15</sup> Where the law's reach exceeds its grasp, it may impose serious costs upon society which can far outweigh the expectable good that complete enforcement might bring. For this reason, it could be argued that, as a prudential matter, we would be better off adhering to Mill's principle as a rule of legislative self-denial. In other words, once protection against secondary harms is begun, the difficulties of knowing which are appropriate occasions for legislative action are so great that it would be better to eschew the effort entirely.

Simple legislative misjudgment as to the enforceability of the law, moreover, is not the only problem. The issue of protecting one from harm to himself usually involves two sensitive political issues—the interrelationship between law and morals and the use of the law to stigmatize unpopular groups. As to the first, few people deny that there is a connection between morality and the law. Probably the majority agree with Professor Herbert Packer that, in general, it is a necessary condition of the proper use of the criminal law that the conduct prohibited be seen as immoral.<sup>16</sup> The words "in general," of course, are quite important. The helmetless cyclist statute, for example, if enforceable, may be a proper use of the criminal law even though there is nothing more immoral in helmetless cycling than in

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14. PACKER 156, 270-72.

15. See Kadish, *The Crisis of Overcriminalization*, 374 ANNALS 157, 169-70 (1967).

16. PACKER 261-69.

mountain climbing. The real problem, however, is with the converse proposition—that the immorality of conduct is a sufficient condition for declaring it illegal. The proposition that the law may be used to enforce morality without any corresponding societal benefit, other than the reduction of that immorality, is complex.<sup>17</sup> The issue does not arise where there is harm threatened to someone other than the immoral actor, because then the reduction of harm to others would simply be regarded as a sufficient social benefit. Where no such harm exists, however, the law must be justified either as a method of protecting against secondary harms or as a means of reducing the frequency of the immorality itself. Both justifications are extremely elastic, and the ingenious legislator can usually find both in any conduct he seeks to proscribe. The significant point is that avoidance of secondary harm can easily provide a rationalization for prohibiting conduct which is widely felt offensive on moral, but not on other grounds. The fact is that most of the situations where the criminal law is used to prevent an individual from harming himself are situations where his conduct is also felt to be immoral. There is thus an ever present temptation to enforce a dominant morality without looking to see whether the conduct to be prohibited is sufficiently harmful in terms of secondary harms, or whether the law is itself enforceable; and it is for just this reason that political pressures may further compound legislative misjudgment. The desire to enjoy the political popularity which comes from opposing sin may push legislators into enacting laws which even further exceed the possibility of enforcement. But, Professor Packer's sage advice that "if a legislator can think of no better reason to proscribe conduct than that he (or his constituency) abhors it, he had better think twice about doing it,"<sup>18</sup> may, as a political matter, be difficult to follow—especially where the legislator has the additional justification of attempting to lessen secondary harms.

The second political factor which may exert popular pressure to extend laws aimed at secondary harms much further than is rationally justifiable in utilitarian terms involves the stigmatization of unpopular groups in society.<sup>19</sup> Studies of the coming of the anti-opium,<sup>20</sup>

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17. Compare P. DEVLIN, *THE ENFORCEMENT OF MORALS* (1959), with H. HART, *LAW, LIBERTY, AND MORALITY* (1963).

18. See PACKER 266.

19. J. GUSFIELD, *SYMBOLIC CRUSADE* 13-19 (1963).

20. T. DUSTER, *THE LEGISLATION OF MORALITY—LAW, DRUGS, AND MORAL JUDGMENT* 10-23 (1970).

alcohol<sup>21</sup> and marijuana<sup>22</sup> laws have, for instance, indicated that in each case the drug prohibition was only part of the story. A major part of the emotional effort to pass these laws was generated by a dislike for the groups which were, in the public mind, associated with the drug. The history of our drug control efforts includes the passage of other laws which had, and were intended—at least by a sizeable number of their supporters—to have, the effect of stigmatizing the Chinese (in the case of opium),<sup>23</sup> the urban Catholic (in the case of alcohol)<sup>24</sup> and the Mexican (in the case of marijuana).<sup>25</sup> The likelihood that in emotional times a legislature will use secondary harm justifications as a cloak for joining in the stigmatization of an unpopular group, as well as demonstrating its opposition to sin, is, perhaps, another reason for the adoption of Mill's view as a prudent self-restraining principle.

The likelihood that a law ostensibly attempting to protect against secondary harm will also be based on a labelling of conduct as immoral and an effort to stigmatize certain groups has one further consequence. Those at whom the law is directed may not agree that their conduct is immoral or that their groups are properly stigmatized and, in a host of ways, may make enforcement of the law even more difficult. Indeed, such laws may lead to resentment even where they are not based on the immorality of conduct or group stigmatization—take, for instance, the helmetless cyclist case. There is, moreover, no doubt that the vast majority of harms which an individual may do to himself—eating too much, exercising too much, not exercising enough, sky-diving or mountain climbing—are in no way forbidden by the law. As a result, in those atypical situations where the criminal law does attempt to make an individual take better care of himself, he will feel that he is unfairly treated as compared to all others who are not forced to take similar precautions. In a sense, he will be right. The laws requiring one to protect himself are little islands of criminal liability in a vast sea of freedom to injure one's self.

It should be noted finally that where the secondary harms with which we are concerned are limited to public ward and non-support

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21. See J. GUSFIELD, *supra* note 19, at 27-29.

22. Bonnie & Whitebread, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 1010-16 (1970).

23. T. DUSTER, *supra* note 20, at 10-11.

24. See J. GUSFIELD, *supra* note 19, at 103, 139.

25. Bonnie & Whitebread, *supra* note 22, at 1012-16.

harms, it might be that a system of taxes or license payments would serve society's purposes better than would a criminal prohibition. These harms are, for the most part, monetarily calculable and actuarially predictable. All that need be done is to require insurance against the threatened harms as a condition of engaging in the proscribed conduct.<sup>26</sup> Where these insurance requirements are enforceable, Mill's principle might be defensible on a wholly different theory. The demands of Pareto optimality,<sup>27</sup> if not a respect for liberty, require that a prohibition not be used where the only harm to society is of the public ward and non-support type, simply because a narrower law could always be enacted preventing these activities only by those who had not made proper financial provision for the risks they were taking.

In any event, even if it cannot be proven that harm to the actor and secondary harms are never a sufficient reason for the legislature to prohibit conduct, it should be realized that the helmetless cyclist counter-example is an anomaly in balancing the advantages and disadvantages of such a paternalistic law. Helmetless driving is done in the open and the presence or absence of a helmet is extremely easy to determine. As a result, one would expect that this law could be enforced with relatively minor expenditures. This might not necessarily be the case. Under some conditions, the expenditures of enforcing the helmetless cyclist prohibition might exceed the saving to society in terms of secondary harm.<sup>28</sup> If this were the case, a rational legislature might repeal the law after a sufficient period of trial. The legislature could well decide that even though a rational calculus would, on first glance, favor forbidding helmetless cycling, the imperfections of the subjects of the law which prevented them from realizing their own best interests, tipped the balance against such a law.

The helmetless cyclist for yet another reason represents the sim-

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26. In the case of the cyclist, he would be allowed on the road without a helmet only with an extra license plate signifying that he had made provision to compensate for any public ward or non-support harms his activity might cause.

27. "Pareto optimality" refers to the view that a change may be seen as desirable in terms of economic welfare only if it benefits someone without injuring anyone else. See J. DUE & R. CLOWER, *INTERMEDIATE ECONOMIC ANALYSIS* 461 (5th ed. 1966).

28. A situation might arise, for example, where the law had not been enforced for some while (and therefore) there were many helmetless cyclists on the road. It might then be fairly expensive to prosecute sufficient numbers of them to deter the remainder, since it would take time for the information that the law was being enforced to sink in. It is also conceivable that some cyclists might regard it a matter of principle not to wear a helmet, or, principles aside, feel that the thrill of going helmetless was worth the inconvenience of apprehension.

plest case where the legislature might attempt to protect an individual from the consequences of his own folly—because the prohibition works against the individual cyclist himself. A considerably different issue exists when legal threats are exerted not against the individual who is himself harmed by his conduct, but against someone else who also is in a position to avoid the harm.

Analytically, the use of seatbelts by motorists presents an issue quite similar to that of helmets by motorcyclists. There are, however, two major differences. First, a law which made criminal a motorist's or passenger's failure to wear seatbelts would obviously be almost impossible to enforce. Whether or not one is wearing seatbelts can only be determined from inside, or at least very close to, the automobile, and the difficulties of checking millions of drivers would be insurmountable. It is true, of course, that after an accident one might be able to determine which of the injured was not wearing seatbelts. It is hard to believe, however, that the criminal law operating at this time could exercise any substantial deterrent effect over and above the effect of the increased injuries.

The second difference is that in the case of the seat belt problem, power can be exerted upon the vehicle manufacturer. Requiring a motorcyclist to purchase a helmet may not help at all in getting him to use it. Indeed, the helmet is so easily separable from the motorcycle that checking to see whether the cyclist had a helmet would be no easier than checking to see that he was wearing one. Although a motorist cannot be made to wear a seatbelt, society can, on the other hand, make sure that he at least has the option to do so.<sup>29</sup> Laws requiring safety equipment are far easier to enforce against the automobile manufacturing industry than against the helmetless cyclist. There are so few automobile companies, what they sell is so public and they are so unlikely to act on principle, that there would be little difficulty in requiring seatbelts to be installed in each car sold.<sup>30</sup>

In all cases where an attempt is made to govern the seller, rather

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29. See, e.g., Act of December 13, 1963, Pub. L. No. 88-201, §§ 1-3, 77 Stat. 361, *repealed with savings provision*, Act of September 9, 1966, Pub. L. No. 89-563, § 117(a), (c), 80 Stat. 718, 727; National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381, 1397-98 (1970). The current regulations under the National Traffic and Motor Vehicle Act are set forth in Federal Motor Vehicle Safety Standards, 49 C.F.R. § 571.21 (1971).

30. If more than the preservation of the opportunity to wear seatbelts were desired, one could also require an airbag apparatus, a buzzer which would make an annoying sound whenever the car was driven with the seatbelts unfastened or even seatbelts somehow connected to the ignition so that the car could not be driven unless the seatbelts were used. Indeed, safety

than the buyer, it can be argued that concern is transferred from the prevention of harm to one's self (including secondary harms) to that of prevention of harm to others. This reasoning, however, would not have placated John Stuart Mill in the least. In referring to a prohibition statute which attempted to protect the consumer by restricting sale of alcohol, Mill said that "the infringement complained of is not on the liberty of the seller, but that of the buyer and consumer; since the State might just as well forbid him to drink wine, as purposely make it impossible for him to obtain it."<sup>31</sup>

It is true that the liberty of the automobile buyer is infringed when it is impossible for him to buy a car without seatbelts. Utilitarians, however, do not regard freedom as an absolute value before which all others must give way. Rather, it would be considered as one value among many and should the balancing of values favor an infringement of the buyer's freedom by a restriction on the seller, the utilitarian will not fail to impose that restriction merely because a direct restriction on the buyer would have been impractical.

#### *Consensual Crimes and the Criminal Law*

Both the one-party case of the helmetless cyclist, where the law seeks to operate directly upon the individual to make him take care of himself, and the two-party case of the factory installed seatbelts, where the law seeks to operate on the seller to force him to make the consumer take better care of himself, are classified under the same heading—"victimless" crimes. This term is somewhat unfortunate. First of all, if secondary harms are considered, there may very well be a victim other than the actor himself.<sup>32</sup> Second, the term victimless crime has a somewhat bad odor in academic circles. It has been used particularly with respect to the crimes of drunkenness, prostitution, abortion, gambling and drug offenses which have contributed so heavily to what Professor Sanford Kadish calls the crisis of over-criminalization.<sup>33</sup> Finally, in a very real sense, the victim of even a

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equipment of this nature will be required in the near future. Passenger cars manufactured from Jan. 1, 1972 to Aug. 14, 1973 must be equipped with a seat belt warning system that activates an audible and visible warning for one minute if seat belts are not fastened. 36 Fed. Reg. 4600-08, 12858-60 (1971). The National Highway Traffic Safety Administration has also proposed regulations requiring that manufacturers install seatbelts with ignition interlocks during the period from Aug. 15, 1973 to Aug. 15, 1975. 36 Fed. Reg. 19254-55 (1971). After Aug. 15, 1975, all passenger cars are to be equipped with a passive restraint system (such as the "air bag"). *Id.*

31. MILL 106.

32. See PACKER 151-52, 267.

33. See Kadish, *supra* note 15.

knowing purchase of an automobile without proper safety equipment may be the purchaser himself if he is subsequently injured. In all probability, the term "consensual" is a better way to describe these crimes.<sup>34</sup> From a law enforcement point of view, the important thing about such crimes is that all parties consent to the transaction, and, regardless of whether they may later regret it, they do not bring the matter to police attention at the time.<sup>35</sup>

In any event, whether one calls the crimes victimless or consensual, it must be admitted that there are both an enormous number of them on the statute books and that most of them are not very controversial. Whenever the law goes beyond requiring mere disclosure—such as in the Flammable Fabrics Act,<sup>36</sup> building codes<sup>37</sup> and the laws against practicing law,<sup>38</sup> medicine<sup>39</sup> or plumbing<sup>40</sup> without a license—it is protecting the buyer of goods or services from himself, regardless of whether it acts upon him directly or upon the seller. Indeed, even those who most often decry victimless crimes in general are those most likely to demand that we do more "to protect the consumer." For instance, regulations requiring automobile manufacturers to add collapsible steering columns,<sup>41</sup> which protect only the buyer, although they would not command his loyalty at their prices in the market, are in fact attempts to add new victimless crimes. It is true that such enactments can often be defended as attempts to force the automobile manufacturers to take advantage of economies of scale in the manufacture of safety devices. In this case, then, the law can be regarded as a kind of subsidy to those who wish the safety equipment to be paid for by those who do not. Interestingly enough,

34. Consensual transactions, thus, are "victimless" in the sense that they are difficult to detect because of the absence of vocal victims. See PACKER 267.

35. See Kadish, *supra* note 15, at 160.

36. 15 U.S.C. §§ 1192-93 (1970).

37. See, e.g., PALO ALTO, CAL., MUNICIPAL CODE ch. 16, §§ 16.04.010 -070 (1971); INTERNATIONAL CONFERENCE OF BUILDING OFFICIALS, UNIFORM BUILDING CODE (1970 ed.); SOUTHERN BUILDING CODE CONGRESS, SOUTHERN STANDARD BUILDING CODE (1969 ed.). See generally Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801 (1965).

38. See, e.g., CAL. BUS. & PROF. CODE §§ 6060, 6062 (West Supp. 1971); CAL. BUS. & PROF. CODE § 6125 (West 1962); ILL. ANN. STAT. ch. 13, § 1 (Smith-Hurd Supp. 1971); N.Y. JUDICIARY LAW § 476-a (McKinney 1968).

39. See, e.g., CAL. BUS. & PROF. CODE § 2141 (West Supp. 1971); ILL. ANN. STAT. ch. 91, § 16i (Smith-Hurd Supp. 1971); N.Y. EDUC. LAW § 6513 (McKinney 1953).

40. See, e.g., ILL. ANN. STAT. ch. 111 1/2, § 116.63 (Smith-Hurd 1966); PALO ALTO CAL., MUNICIPAL CODE ch. 16, § 16.08.090 (1968).

41. See note 30 *supra*.

Mill, in what some might regard as an orgy of consistency, also opposed heavier taxation of dangerous substances<sup>42</sup> and, hence, would clearly have opposed this type of measure to protect the consumer.

Although most people perhaps do not realize it, minimum wage laws<sup>43</sup> also fall under the general heading of consensual crimes. Of course, some may consider the wage-earner who works for less than the minimum wage as himself some kind of victim. The problem with this is that it rests on one of two theories. The first is that he would otherwise work for the higher, minimum wage. If this is true, his own foolishness is to blame, and the essence of victimless crime is protecting people from their own foolishness. The second is that he is working because he needs the money—necessitous men are not free men. The difficulty with this view is that the worker driven by economic necessity to work for less than the minimum wage is no more driven than the compulsive gambler or the drug dependent individual. Nonetheless, although he is willing in this sense to work for, and his employer is willing to pay him that wage, our laws attempt to prevent the bargain just as they would prevent a bargain reached between a prostitute and her customer or a bookie and his.

If one then supports rules outlawing sales of flammable fabrics, laws against practice of medicine without a license or bargains that violate the minimum wage law, he cannot denounce without qualification victimless crime. The real problem with victimless crimes, as Professor Herbert Packer has pointed out so cogently, is that some of them produce such enormous difficulties of law-enforcement that as a practical matter they do more harm than good.<sup>44</sup> In order to determine whether this is the case as to any particular crime, considerable care must be used to look at the effects of the criminal law and to attempt computation of the costs and benefits it brings about.

As an initial proposition, however, a number of generalizations can be made. First, where the law imposes its major burden on the individual to force him to protect himself, it will, in general, involve such difficulties of enforcement as to be unenforceable. Typically, the conduct will be private and will come to light only rarely, and then either because of the most intrusive type of investigation,<sup>45</sup> or after the harm that the law attempted to protect against has already been

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42. MILL 113-15, 119.

43. See, e.g., Fair Labor Standards Act, 29 U.S.C. §§ 203-18 (1970).

44. PACKER 151-52, 273-75.

45. See Kadish, *supra* note 15, at 161.

done—in which case the law will be in the position of compounding that harm with criminal penalties against one already injured. Indeed, the helmetless driving law appears to be the only law designed to protect an individual from himself (or society from secondary harms) that is actually enforceable.

On the other hand, when the law attempts to protect individuals from harming themselves, or from causing secondary harm, by transferring its pressure from the individual actor himself to someone else—typically the seller of some commodity—it may or may not be enforceable at a reasonable cost. Where the law would impinge upon legitimate businesses which are not too numerous to watch and where it does not generate significant economic pressures toward its own violation, it may very well be enforceable. However, as the number of independent businesses which need to be watched increases and the economic incentive to violate the law increases, society comes more and more to the type of victimless crimes that have given the criminal system such a headache.

Finally, as Professor Packer has pointed out, in those areas of victimless crimes where, on the above analysis, the criminal law is most appropriate—it is also least needed.<sup>46</sup> Civil penalties, which are far more efficient to impose, will allow a better deployment of society's coercive resources. Moreover, as they will generally be imposed within the context of a business activity, they will involve far fewer dangers of invasion of the citizen's privacy than may occur if imposed upon individuals.<sup>47</sup>

There is one further objection that should be noted to all the laws thus far discussed. Given the present economic and political institutions, any attempt to protect individuals from themselves may sooner or later be used by the powerful economic interests thereby unleashed to lessen competition and to harm society as a whole. Certainly, a great deal of the recent literature concerning occupational licensing, building codes and the like supports this view.<sup>48</sup> Similarly, although automobile safety requirements are still in their infancy, there are already substantial allegations that the safety standards are being designed to protect American, and politically influential, automobile companies from foreign competition.<sup>49</sup> Finally, it has even been al-

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46. PACKER 253.

47. See, e.g., M. FRIEDMAN, *CAPITALISM AND FREEDOM* 137-61 (1962).

48. P. MOORE, *ECONOMIC EFFECTS OF LICENSING* (1963).

49. Cf. *Washington Post*, Dec. 6, 1970, at A-1, A-14.

leged that the helmet manufacturers have been far more influential than the analysis of secondary harms in securing helmetless cyclist legislation. Although one cannot call the case proven at this point, one can soften any zeal to protect against secondary harm by the realization that, given the apparent weakness of legislators and administrators, it is at least possible that the government itself actually needs the protection from its own folly which only a rigid adherence to Mill's principle could bring.

Discussion thus far has involved the kinds of conduct which are normally classed as protection against harm to one's self. Even where the law makes criminal the action of the seller, it does so as a means of preventing the buyer from injuring himself. Note, however, how all of the arguments previously considered change when attention is turned toward conduct that threatens harm to others. In the automobile case, for example, if concern were with automobiles with defective brakes rather than those without seatbelts, very different issues would arise. There would then be little hesitation to make it a crime to drive a car with defective brakes,<sup>50</sup> even though this might be almost as difficult to enforce, in the sense of catching a high percentage of violators, as would be a law against the failure to use seatbelts. Detection would not, first of all, be quite so difficult, because we would have someone other than the police to bring the matter to public attention—the one injured by a car with defective brakes. Second, it might very well be that after an accident which revealed the defective brakes, the criminal law would actually be able to increase the punishment significantly over that of the accident—at least in those cases where the driver was not himself hurt. Third, it cannot here be argued, as it was in the case of public ward and non-support harms,<sup>51</sup> that insurance could eliminate the need for such a law. It is one thing to say that the helmetless cyclist or seatbeltless driver can insure against the secondary harm caused; it is very different, however, to say that the driver with defective brakes can physically injure people and thrust the insurance on them in lieu of his own preventative measures. Fourth, if one engages habitually in conduct dangerous to others, it may be economical to imprison him, though it would almost certainly not be where the only concern was with reducing secondary harms.

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50. See, e.g., CAL. VEH. CODE § 40001 (West Supp. 1971); ILL. ANN. STAT. ch. 95 1/2, §§ 211, 234 (Smith-Hurd Supp. 1971); N.Y. VEH. & TRAF. LAW §§ 375.1, 375.32 (McKinney 1970).

51. See note 27 *supra* and accompanying text.

Finally, and, perhaps most importantly, where any activity threatens harm to the actor himself, his own sense of self-protection will generally lead him to act so as to minimize the harm to society as well as to himself. Thus, both the helmetless cyclist and the driver with faulty brakes will be restrained by self-preservation, since all that is necessary to make this restraint on behavior effective is that there be, in fact, a danger to the actor. Where an activity threatens harm to others only, however, there may be no such restraint and the criminal law may be the only force that makes the harmful activity unprofitable. This is probably the case in the widest range of criminal prohibitions which protect either the property or the person of others.

#### DRUGS AND CONSENSUAL CRIMES

The interrelations between the felt dangers of drugs and the methods used to control them are, as will be seen, extremely complex. The basic problem, nonetheless, is familiar. The commonly heard argument on behalf of minimal drug control is that "it's my body and I can do what I want with it so long as I don't hurt anyone." This, of course, is simply another way of phrasing Mill's principle. Indeed, the entire problem of drug control is for the most part a special case within the problem of the regulation of conduct which harms only the actor himself. The dangers presented by most drug users are not too dissimilar from those of the helmetless cyclist, and the controls imposed upon sellers of automobiles without safety equipment are not too dissimilar to those placed upon sellers of drugs. Before going into the similarities and differences, however, a definitional problem must be discussed.

#### *What Are "Drugs?"*

A typical pharmacological definition is that a drug is a substance which, when taken into the body, alters the structure or function of any part of the organism.<sup>52</sup> Although this is a very broad definition, it is important to avoid too narrow a focus. Otherwise one incorporates concepts of medical helpfulness—that, for example, an amphetamine used as a diet pill under the supervision of a doctor is not a drug, but that when taken as a pep pill without prescription it is. Similarly, concepts of harmfulness must not be included. Otherwise

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52. Modell, *Mass Drug Catastrophes and the Roles of Science and Technology*, 156 *SCIENCE* 346 (1967). See generally NOWLIS 5-7.

drugs may be classified according to their social utility—alcohol, for example, is often said not to be a drug simply because it is not harmful (which, of course, it is—or can be) and because of its wide social use.<sup>53</sup> Finally, the definition of what is a drug must avoid consideration of the legality of the substance. Legality is merely a social concept which has been applied to nature. To talk in general about how the law treats both legal and illegal drugs will require a discussion of an enormous range of substances—including coffee, tobacco, alcohol, the cyclamates, antibiotics, amphetamines, marijuana and heroin.<sup>54</sup>

### *The Damages Caused by Drugs*

Social concern with drugs arises, of course, because of the feeling that they damage either their user or others. With respect to the damage to others there is a sizeable range of harms to consider. Contemporary scientific opinion implicates alcohol,<sup>55</sup> amphetamines,<sup>56</sup> and barbiturates<sup>57</sup> as playing a causal role in a significant number of assaults by their users by reducing inhibitions, weakening judgment or some other means.<sup>58</sup> Tobacco is another drug whose use poses a danger to non-users<sup>59</sup>—principally through loss of life and property from fires caused by smokers. Heroin also exerts sizable costs upon the non-user, since the addict will typically commit large numbers of property crimes to support his habit<sup>60</sup>—though, as will be seen, the law is itself a contributor to these crimes.<sup>61</sup> Finally, there are

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53. See NOWLIS 6, 87.

54. See generally GOODMAN & GILMAN; Modell, *supra* note 52, at 347-51.

55. BLUM 289, KAPLAN 265-70; Blum, *Mind Altering Drugs and Dangerous Drugs: Alcohol*, in U.S. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: DRUNKENNESS 28, 40 (1967); Wolfgang & Strohm, *The Relationship between Alcohol and Criminal Homicide*, 17 Q.J. OF STUDIES ON ALCOHOL 411 (1956).

56. See Ellinwood, *Assault and Homicide Associated with Amphetamine Use*, 127 AM. J. PSYCHIATRY 1170 (1971), describing the histories of 13 persons who committed homicide while intoxicated with amphetamines. The author speculates whether the reported incidence of amphetamine-induced assaults would be higher if physicians were more fully aware of the problem. *Id.* at 1175. See also BLUM 289.

57. See generally NOWLIS 84-85.

58. See generally Blum, *Drugs, Behavior, and Crime*, 374 ANNALS 135 (1967).

59. See BLOOMQUIST 188-91; GOODMAN & GILMAN 588-92.

60. BLUM 288-89, KAPLAN 240.

61. With respect to heroin, society has adopted a categorical imperative type of reasoning, see note 8 *supra* and accompanying text, and concluded that heroin is such a seductive and addicting drug that if it were freely available the enormous number of its users would produce a national catastrophe. As a policy choice, therefore, the law has been structured so that heroin is extremely expensive. This perhaps lowers the number of addicts in the society, but it considerably magnifies the damage they do to others.

the antibiotics, where danger to others arises because exposure to an antibiotic tends to generate strains of bacteria resistant to it.<sup>62</sup> Others are damaged, then, simply because they are deprived of a valuable—indeed, perhaps life saving—medicine. This may, of course, happen as a result of medical practice as well, but where the antibiotic is used promiscuously—and a conclusive presumption seems to have been adopted that it will be promiscuously used if not under medical supervision, and, perhaps less realistically, that it will not be so used if under supervision—this hazard is considerably increased.

Despite these instances where drug use may damage others, it is fairly clear that the overwhelming danger in drug use is the danger to the user himself. Thus, the number of homicides committed under the influence of alcohol is dwarfed by the death rate of the users themselves from cirrhosis and other alcoholism-related diseases.<sup>63</sup> The dangers of tobacco to its users in terms of lung cancer, emphysema and various circulatory diseases far outweigh the damage done by smoking-caused fires.<sup>64</sup> Even heroin, harmful as it is to society, is, under contemporary conditions, far more destructive to its users than to others.<sup>65</sup> And the cost of the antibiotic-resistant bacterium is typically borne by the first sufferer from the improper use of antibiotics.<sup>66</sup>

With regard then to the damage to the drug user himself, there is a widely used term: drug abuse. Drug abuse means simply the use of a drug so that it interferes with either the user's physical or mental health, or his adjustment in society.<sup>67</sup> It is important to understand that this is a definition which applies to both legal and illegal drugs. A classic example of just how the issue of the legality of a drug can interfere with the understanding of what is meant by drug abuse is provided by the American Medical Association. Until quite recently the AMA defined drug abuse as either the over-use of a legal drug so

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62. See GOODMAN & GILMAN 1157-58.

63. See BLOOMQUIST 180-81; BLUM 284-85; GOODMAN & GILMAN 135-44; T. PLAUT, ALCOHOL PROBLEMS: A REPORT TO THE NATION BY THE COOPERATIVE COMMISSION ON THE STUDY OF ALCOHOL (1967). See also N. KESSEL & H. WALTOM, ALCOHOLISM 30, 32-34 (1967); Moskow, Pennington & Knisely, *Alcohol, Sludge, and Hypoxic Areas of Nervous System, Liver and Heart*, 1 MICROVASCULAR RESEARCH 174 (1968).

64. See KAPLAN 201, 314.

65. See GOODMAN & GILMAN 237-55; KAPLAN 314; Baden, Deaths from Heroin Addiction among Teenagers in New York City (August 18, 1970) (unpublished paper presented at the Second World Meeting on Medical Law, Washington, D.C.).

66. See A. GOTH, MEDICAL PHARMACOLOGY 509-10 (5th ed. 1970).

67. BLUM 230. For a pharmacological definition of drug abuse, see GOODMAN & GILMAN 276-77.

as to impair one's physical or mental health or his adjustment in society, or any use of an *illegal* drug.<sup>68</sup> Such a definition merely incorporates legal standards into medical practice. It does not make a great deal of sense, for example, to define every marijuana user as a drug abuser while insisting that only the alcoholic, but not the social drinker, is an abuser of alcohol. The fact is that, as in the case of alcohol, at least some marijuana users, who use the drug in moderation, use it without any danger to themselves—aside, of course, from that of getting caught.

Indeed, one of the main fallacies in the present societal approach to the drug problem is that the illegal drugs are too often regarded as terribly dangerous and the legal drugs as perfectly safe. It is true, of course, that some drugs have a much greater potential for abuse than others, in that they injure a higher percentage of their users. But an injury produced by drug abuse is typically caused by a complex combination of the drug itself, the way it is used, the disposition of the person using it and the conditions under which it is used.<sup>69</sup> Some people, for instance, can apparently use heroin for quite a while without becoming addicted or otherwise harming themselves, though this would probably represent a very small percentage of users. There are, on the other hand, those who injure themselves with coffee, the "most legal" of our legal drugs. Though we cannot verify whether Honore de Balzac, as is sometimes said, really did die from excessive coffee use, it is indisputable that the coffee user may damage himself in various ways.<sup>70</sup> Some coffee users notice that their stomachs are always upset and that they have great trouble sleeping. Many of them stop using coffee; others just get used to having upset stomachs and insomnia, because coffee can be strongly habit-forming to some people.<sup>71</sup> It should be mentioned also that research on the genetic damage caused by various drugs has in the last five years pointed a considerably more suspicious finger at coffee than at several other drugs far more implicated in the public press.<sup>72</sup> Similarly unconfirmed, but

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68. See E. GOODE, *THE MARIJUANA SMOKERS* 100 (1970).

69. See BLUM 230, 277-80, 284; NOWLIS 17-19.

70. Goldstein, Kaizer & Warren, *Psychotropic Effects of Caffeine in Man. I. Individual Differences in Sensitivity to Caffeine-induced Wakefulness*, 149 *J. PHARMACOLOGY & EXPERIMENTAL THERAPEUTICS* 156 (1965).

71. Goldstein, Kaizer & Whitby, *Psychotropic Effects of Caffeine in Man. IV. Quantitative and Qualitative Differences Associated with Habituation to Coffee*, 10 *CLINICAL PHARMACOLOGY & THERAPEUTICS* 489 (1969).

72. Caffeine has been found to be mutagenic in fungi, bacteria, plants, mice and *Drosophila*. Goldstein & Warren, *Lack of Relationship Between Gastric Carcinoma and Intake of Beverages*

suspicious, findings indicate a possible connection between coffee drinking and cancer of the bladder.<sup>73</sup> Differences of degree and kind are, however, important and a legal system which made no distinction between heroin and coffee would leave a great deal to be desired.

It is possible that if more were known about drugs it could be said that it is not that some drugs are more dangerous than others, but rather that certain drugs are more dangerous to specific types of people. Moreover, with sufficient knowledge about both drugs and people it is possible that they could be matched as accurately as are diabetics and sugar. It might also be possible to define with some precision who will be injured by a given drug. Unfortunately, it transcends the limits of present knowledge to say more than that certain types of people seem more vulnerable to one drug than another, and, as a result, society tends to proceed by making general rules about drugs based in part upon a feeling as to their overall danger.

#### MODELS OF DRUG CONTROL

In order to better understand the control of drug abuse, it will be instructive to note the various models that our society has adopted to control different types of drugs.

##### *Coffee*

Coffee may be sold and used in all nations, although at times its use has been punishable by imprisonment or death.<sup>74</sup> Although in many countries coffee bears a tax that is disproportionate to the taxes on other imported foodstuffs, in this country no legal effort is aimed at discouraging its use.<sup>75</sup> The fact that it is a drug which injures at least some of its users<sup>76</sup> seems to be reflected solely in non-legal, social controls—for example, the sight of an eight-year-old having a cup of coffee is sufficiently remarkable to be remembered for some while.

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*Containing Caffeine*, 15 *CANCER* 1261, 1261 (1962). Kuhlmann, Fromme, Heege & Ostertag, *The Mutagenic Action of Caffeine in Higher Organisms*, 28 *CANCER RESEARCH* 2375 (1968). In one study caffeine induced chromatid breakages in human cells *in vitro*.

73. See Cole, *Coffee-Drinking and Cancer of the Lower Urinary Tract*, 1 *LANCET* 1335 (1971).

74. BLUM 11-12.

75. See NOWLIS 113.

76. The dangers of "coffee abuse" are discussed at notes 72-75 *supra* and accompanying text.

### *Tobacco*

The regulations on tobacco are slightly more onerous than those on coffee. It is taxed far more heavily than most other consumables,<sup>77</sup> its advertising is restricted,<sup>78</sup> and its sale to minors is purportedly forbidden,<sup>79</sup> though in fact no attention is usually paid to this last restriction. Recently, cigarette manufacturers were required to put a notice on the packages saying that "The Surgeon General Has Determined That Cigarette Smoking Is Dangerous To Your Health."<sup>80</sup> Finally, considerable amounts of money are spent to convince users of the harmfulness of this drug though nothing remotely approaching either the amounts taken in through the taxes on tobacco or the amounts spent by the cigarette industry to promote its sale.

### *Alcohol*

To describe completely the present controls on alcohol would take a sizeable book. It is a drug which causes enormous social havoc<sup>81</sup> and is dangerous to a fairly sizeable proportion of those who use it.<sup>82</sup> To prevent its use altogether, the United States and several other western countries have, for brief periods, tried a prohibition which made the manufacture and sale—and in some countries the use—of alcoholic beverages a crime.<sup>83</sup> This type of control, however, has almost everywhere been abandoned and is used today only in certain Moslem countries where it is supported by a strong religious taboo.<sup>84</sup> Present methods of control are less ambitious but are generally regarded as more successful: the drug is sold through either a government monopoly or license,<sup>85</sup> which is restricted to those of good moral character, it is heavily taxed, and there are strong controls on its sale to those under the age of 18 or 21, depending on the state. Moreover, its

77. KAPLAN 313.

78. Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1335 (1970).

79. See, e.g., CAL. PENAL CODE § 308 (WEST 1955); ILL. ANN. STAT. ch. 23, §§ 2357, 2358 (Smith-Hurd 1968); N.Y. PENAL LAW § 260.20-5 (McKinney 1967).

80. Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1333 (1970).

81. "[A]lcohol has probably caused more disease than any other drug in man's history. It is a major cause of social disability. There are at least 2,500,000 socially useless alcoholics in this country and about as many whose productivity is curtailed by alcohol . . ." Modell, *supra* note 52, at 347.

82. See BLOOMQUIST 180-88 (13% of alcohol users are alcoholic); BLUM 42 (7%).

83. See BLUM 34, 37-39; SINCLAIR 335.

84. BLUM 238.

85. For an exposition of the detail of the licensing system, see KAPLAN 335-41. A licensing system for marijuana is discussed at length at notes 131-38 *infra* and accompanying text.

advertising is restricted and sale is forbidden close to schools or churches.<sup>86</sup> Furthermore, several states have "rationing" systems, while others have "posting" laws whereby a public official can determine whether an individual is abusing alcohol and thereby make it illegal for anyone to give or sell it to him. Finally, although in this nation little is spent to warn the public against the dangers of alcoholism, this method of control is not unknown.<sup>87</sup>

### *Cyclamates*

The control of cyclamates exemplifies the next model of drug regulation—though this type of regulation is more commonly applied to conduct other than that associated with supply and use of drugs.<sup>88</sup> This is called the vice model because it is the type of legal regulation best known for its application to vices such as gambling and prostitution.<sup>89</sup> Where the vice model is applied to commodities or services which may injure their user, the seller is made guilty, but not the buyer. The theory behind this distinction is that sufficient control may be exercised over a product by using the criminal law to try to deter suppliers, without attempting to apply the criminal sanction to the far larger number of users.<sup>90</sup> Just as public policy demands the protection of motorists and passengers from traumatic injury caused by automobiles which lack seat belts or padded dashboards, through the exertion of pressure to prevent these dangerous instrumentalities from being sold, so it protects people from cancer of the bladder<sup>91</sup>—which they may get from dietetic soft drinks containing cyclamates (if they turn out to have a metabolism like a rat's and drink enormous quanti-

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86. See, e.g., CAL. BUS. & PROF. CODE § 25608 (West 1964); ILL. ANN. STAT. ch. 43, § 127 (Supp. 1971); N.Y. ALCO. BEV. CONTROL LAW § 64 (McKinney 1970).

87. France, for example, which has an even more acute problem than does the United States, devotes considerable effort to public information on its dangers. BLUM 240.

88. It has previously been discussed in connection with the laws which might make it criminal to manufacture or sell automobiles which were not equipped with seatbelts. See notes 29-30 *supra* and accompanying text.

89. See generally KAPLAN 315-30.

90. The explanation usually given for the differentiation is that the buyer is merely a victim who needs help not punishment, whereas the seller is guilty of the evil of exploiting the weaknesses of others. *Id.* at 316.

91. See 34 Fed. Reg. 17063-64 (1969), where the Food and Drug Administration found that cyclamates were not safe for use in food.

ties).<sup>92</sup> Probably the most interesting thing about the control of cyclamates is that it works.<sup>93</sup>

### *Antibiotics*

The next type of drug control is that used for antibiotics—the medical model.<sup>94</sup> This model seems to be the preferred one for drugs which meet three conditions—drugs that have medical uses, that are capable of harming their user, and that are not especially sought by illegal users. Under the medical model, the medical profession is given control of the right to obtain the drug. The ordinary citizen can purchase it if and only if he has the permission of a physician who is given almost uncontrolled discretion as to whether he will make the prescription. If the physician approves, he will give the drug user a prescription which will allow a licensed pharmacist to sell the prescribed quantity. If the user does not have a prescription, but can still get someone to sell him the drug, he will commit no crime, but the seller will be guilty of a criminal offense—or, more significantly, if a pharmacist, he may lose his license.<sup>95</sup> In short, the cyclamate or “vice” model, punishing the seller, but not the user, is applied to medical drugs used without a prescription.

### *Amphetamines and Barbiturates*

The amphetamines and barbiturates resemble the antibiotics in that they both have legitimate medical uses and can harm a certain percentage of their users. They differ, however, from the antibiotic-like drugs in that they are in substantial demand for non-medical, or recreational purposes. Although jurisdictions differ in how they treat this non-medical use, the modern trend has been to decide that the vice

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92. The methods and results of the study which caused the removal of cyclamates from the FDA's “generally recognized as safe” (GRAS) list of chemical substances used as food additives are detailed in Price, Biava, Oser, Vogin, Steinfeld & Ley, *Bladder Tumors in Rats Fed Cyclohexylamine or High Doses of a Mixture of Cyclamate and Saccharin*, 167 *SCIENCE* 1131 (1970), which also discusses the history of research dealing with cyclamates, and the particular steps leading to their ban. The dispute as to whether the ban was required, or even prudent, has been intense. Compare Letter, Inhorn & Meisner, *Cyclamate Ban*, 166 *SCIENCE* 685 (1969) (expressing alarm that such a beneficial substance would be banned on such inconclusive evidence) with Letter, Epstein, Hollaender, Lederberg, Legator, Richardson & Wolff, *Wisdom of Cyclamate Ban*, *id.* at 1575 (that a substance without demonstrable matching benefits should be banned when it is possible it represents a long-run danger).

93. See p. 1094 *infra* and accompanying text.

94. See generally KAPLAN 330-32.

95. CAL. BUS. & PROF. CODE §§ 4227, 4350, 4363 (West Supp. 1971).

model is not sufficient. As a result, we have tended to treat the non-medical users of these drugs like the helmetless cyclists—that is, to deter them through the threat of criminal penalties.<sup>96</sup>

### *Marijuana and Heroin*

Finally, there are the drugs such as marijuana and heroin which are subject to complete prohibition. Since these drugs have no “recognized” medical use, the medical model cannot be applied, and, because they are considered too dangerous, the vice, or cyclamate, model is also unavailable. As a result both sale and use of these drugs is criminal—without the safety valve provided by the amphetamine and barbiturate model where medical practice diverts a sizeable percentage of the drug use into legal channels.

### *Other Models*

Two things should be noted about the models of legal treatment applied to these various drugs. First, although the differing treatments cover an enormous range, additional legal models could be devised. It has been suggested by some advocates of marijuana legalization who fear commercialization, for example, that the “flower children” model should be adopted.<sup>97</sup> By this model, all taint of commercialization would be removed by a law which permitted anyone to grow the drug for himself and use or give away as much as he wished. The only act that would be forbidden would be sale. Interestingly enough, this is a model which bears some relation to the treatment of prostitution—apparently, there are certain things that can be given away but should not be sold. On the other hand, the fact that the legal treatment of prostitution has not been what could be called one of the law’s greater successes, may be a good reason to be cautious about adopting the “flower children” model.

Second, the assignment of drugs to the various categories, while to a certain extent determined by the dangers of the drug in question, is also subject to a host of other factors. Some forty years ago alcohol in the United States was treated according to a combination of various other models. It was available on prescription from a physician or for religious or sacramental purposes, but the manufacture,

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96. 15 U.S.C. §§ 1261-74 (1970).

97. Aldrich, Notes on Structuring Legal Sale of Marijuana to Minimize Abuse (Aug. 15, 1971) (mimeo publication by AMORPHIA).

sale, or even use outside of these, and a few other narrow exceptions, was criminal.<sup>98</sup> It is interesting to note that at this same time a marijuana extract was treated according to the medical model.<sup>99</sup> The assignment of models of control to drugs varies both from nation to nation and over time. Thus, heroin is treated under the medical model in England<sup>100</sup> today while in Sweden amphetamines are essentially prohibited entirely.

The question, of course, raised by the large variation in the models by which drug use is controlled is how a rational society should allocate drugs among the different methods of legal treatment. Rather than attempting to lay down a systematic decisional process, six principles will be presented which should be kept in mind when deciding which models should be applied to which drugs.

#### PRINCIPLES OF DRUG CONTROL

*Principle I: It is hard, if not impossible, to justify a criminal law which punishes the drug user himself*

As was noted in discussing the helmetless cyclist case, it is relatively rare for the criminal law to force a person to take better care of himself. The drug area is probably the major exception to this rule since with respect to all the commonly used illegal drugs, the user, along with the seller, is subject to the criminal law. However, while the helmetless cyclist case was unusual in that the high visibility of the violation made enforcement of the law a comparatively easy task, the exact opposite is true with respect to drug use. Even though attempts are made to make the proscription of drug use more easily enforceable by outlawing possession as a surrogate for the forbidden drug use,<sup>101</sup> possession of a small amount of a substance is extremely difficult to detect—except through search, which is an expensive, time-consuming and resented police activity. Indeed, possession of a drug by a user is close to the opposite pole of detectability from the case of the helmetless cyclist.

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98. See generally SINCLAIR 410-11; C. WARBURTON, *THE ECONOMIC RESULTS OF PROHIBITION* 67-69 (1932).

99. S. SNYDER, *THE USES OF MARIJUANA* (1971).

100. M. GLATT, D. PITTMAN, D. GILLESPIE & D. HIELS, *THE DRUG SCENE IN GREAT BRITAIN* 100-01 (1967); E. SCHUR, *CRIMES WITHOUT VICTIMS* 152-56 (1965); Stimson, *The Patterns of Behavior of Heroin Addicts* (September, 1971) (unpublished paper, Addiction Research Unit, Institute of Psychiatry, London); Cardner & Connell, *One Year's Experience in a Drug Dependence Clinic*, 2 *LANCET* 455 (1970).

101. CAL. HEALTH & SAFETY CODE § 11500 (West Supp. 1971).

Moreover, since the overwhelming reason for applying the criminal law to the drug user is to protect him from himself, the law is caught in a conundrum. Insofar as the drug itself is dangerous, there is, all other things being equal, a better reason to try to discourage its use. To the extent that the criminal law is expected to deter this use, however, it is obviously least effective against those who are so oblivious to the consequences of their actions as to be willing to use the harmful drug in the first place. Those who can be influenced by the threats of harm imposed by the criminal law, on the other hand, will find such threats unnecessary since they are more likely to be deterred by the danger of the drug alone. Nor is the case for criminal treatment of the drug user any stronger in the case of less dangerous drugs. Here the strictures of the criminal law will be effective in discouraging use by potential users who would not be deterred by the lesser dangers of the drug. As the dangers of drug abuse grow less, however, the case for expending societal resources on the task of protecting users from themselves grows progressively weaker.

The major theoretical case for deterring drug users from harming themselves, then, exists in the case of a drug which is in fact very dangerous but which is not seen to be so by the public. Presumably criminal prosecution might then supplement education. It turns out, however, that the criminal law is an anti-educative device, at least to those who are most likely to use illegal drugs.<sup>102</sup> They tend to oppose law enforcement to begin with and will tend to see such drug education simply as a means of getting them to obey the law. Moreover, the idea that legislators will know more about the dangers of drugs than those who use them has been refuted by every survey that has been conducted on the issue.

Similarly, none of the other purposes of the criminal law argue for its application to the drug user himself. Even assuming that the criminal law can reform drug users—a most unrealistic assumption based on today's knowledge—this is extremely expensive.<sup>103</sup> Even if the imprisonment and consequent reformation of drug users is seen as a method of avoiding secondary harms, any rational calculus will tell us that this is more expensive than enduring the secondary harms themselves. The disparity becomes even greater if it is recognized that

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102. Kaplan, *Drug Laws Handicapping Control and Education* 4, at 1 *CLINICAL TOXICOLOGY* 141, 142-43 (1971).

103. The cost of the marijuana laws, for example, is explored in KAPLAN 21-48.

any proper method of cost accounting will attribute the cost of efforts to arrest and convict all drug users to the "cures" of the relatively few who are actually caught or driven into treatment programs.

The argument for penalizing the drug user himself becomes even weaker when it is remembered that the alternative is not necessarily the allowance of completely uncontrolled sale and merchandising. As has been seen, there is a whole arsenal of other control strategies available.<sup>104</sup> The vice model, for instance, can typically restrict the supply almost as well as a complete prohibition at the considerably lower cost of enforcement which results from concentration on the much smaller number of traffickers, at least as compared with ordinary users.<sup>105</sup>

There are, however, at least in theory, two situations where one might wish to consider a criminal law applied to the drug user himself. First, the drug user could be considered a source of contagion who might be "quarantined" through use of the criminal law. There are, however, several practical defects in such a justification. Though it might make sense where there are few users of the drug, in this country the simple fact is that society is unable to catch nearly a high enough percentage of drug users to significantly impede this kind of contagion. Moreover, when they are caught the drug users are typically placed in a jail and exposed there to those most, rather than least, susceptible to the contagion. The threat of prosecution, furthermore, exerts strong pressure in driving drug users into a distinct subculture from which their recruiting efforts can be most successful. Finally, the mere act of prosecuting drug users gives them a publicity and dramatic appeal which may increase the attraction of the life style for those who are most susceptible to the very contagion against which the law is trying to guard.<sup>106</sup>

Second, it is conceivable that a drug might move such a high percentage of its users to crimes against others that use of the drug would be an accurate predictor of such conduct. In that case, drug use could be treated as an inchoate crime against others, not unlike recklessness on the highway or criminal attempt. Even John Stuart Mill conceded that mere drunkenness itself might be a crime in one

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104. See notes 75-98 *supra* and accompanying text.

105. See KAPLAN 316.

106. This process, of course, is the antithesis of the "modelling" justification often used to justify drug control. See notes 6-7 *supra* and accompanying text.

“who had once been convicted of any act of violence to others under the influence of drink.”<sup>107</sup> If there were a drug which was sufficiently predictive of acts of violence, it might make sense to treat its possession like possession of a sawed-off shotgun. With all drugs known today, except heroin, any rationale based upon the risk of harm to others, let alone violent crime, is challengeable on factual grounds.<sup>108</sup> With respect to heroin, however, it can admittedly be argued that its use is a sufficient predictor of criminal acts, at least in those without any legal source of sufficient income to maintain a drug habit.<sup>109</sup> This is so notwithstanding the irony that it is the law itself that is an equal cause of the addict’s crime. Methadone maintenance programs have, on the other hand, already shown dramatic ability to decrease the criminality of a sizeable percentage of heroin addicts,<sup>110</sup> and, at least until this type of solution is shown to be inadequate, it makes relatively little sense to use the far more expensive and less effective methods of punishing the drug user himself.

*Principle II: Drugs do people good as well as harm*

Because drugs do people good as well as harm, when one considers reducing the abuse of a drug through a legal measure, he should also consider the corresponding reduction of the drug’s beneficial use which the measure will cause. Thus, even if a drug prohibition were effective at preventing all use of a drug, this may not always be a cause for satisfaction because the good the drug might have done may very well exceed the harm prevented by its suppression.

This principle has been most often discussed with respect to medical drugs—even though the medical model<sup>111</sup> seems best adapted to distinguishing between beneficial and harmful use, since it allows physicians to make the determination on a case by case basis. The problem also arises, however, with respect to the “new” drugs that are being tested for approval. It has been alleged that bureaucratic drug administration has imposed unrealistic and expensive testing

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107. MILL 115-16.

108. See generally NOWLIS.

109. BLUM 288-89. See also KAPLAN 240.

110. See Brill & Chambers, *A Multimodality Approach to Methadone Treatment of Narcotic Addicts*, 16 SOCIAL WORK 39 (1971); Dolé & Nyswander, *Rehabilitation of Heroin Addicts After Blockade with Methadone*, 66 N.Y. ST. J. OF MED. 2011, 2012, 2016 (1966). But cf. Vaillant, *A Twelve Year Follow-up of New York Narcotic Addicts: Part I, The Relation of Treatment to Outcome*, 122 AM. J. OF PSYCHIATRY 727, 730, 736 (1966).

111. See notes 94-95 *supra* and accompanying text.

standards which must be met prior to putting a drug on the market.<sup>112</sup> Many observers have felt that although the protection afforded by these standards against another thalidomide disaster is very important, the harm done to society by unnecessarily keeping beneficial drugs off the market may outweigh the more demonstrable harm caused by allowing the prescription of potentially harmful drugs.<sup>113</sup> Whether or not these charges are correct, it must be remembered that the evaluation of medical drugs has been turned over to a bureaucracy and that there is a constant and strong tendency for a bureaucrat to prefer invisible to visible errors. Since he will suffer far less attack if he keeps a valuable drug off the market than if a drug he has passed does harm, the bureaucrat will always tend toward a caution which may be damaging to society as a whole.

It is even possible that this principle may have application to the cyclamates. There might be many people, for example, who should rationally take their chances on the relatively unlikely possibility of bladder cancer caused by cyclamates, rather than face the more certain health dangers of obesity. If the long-term health consequences of putting on too much weight are considered, it may be that the population as a whole would suffer greater injury from being overweight than from the threat of cancer in a small percentage of users.<sup>114</sup>

The cyclamates point up another aspect of this problem. With the possible exception of some medical "wonder" drugs, the good that a drug does will tend to be more widespread, but far less dramatic, than the harm. Even in the case of alcohol where the medical harm clearly outweighs the good, and in the case of marijuana where the issue is subject to acrimonious debate, there is no doubt that there are many people who avoid serious mental problems by relaxing and reducing anxiety with one or the other of these drugs. In the case of both alcohol and marijuana, then, one might still decide that complete

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112. See, e.g., Djerassi, *Birth Control After 1984*, 169 *SCIENCE* 941, 942-43 (1970); Djerassi, *Prognosis for the Development of New Chemical Birth-Control Agents*, 166 *SCIENCE* 468, 469, 471 (1969) (both articles dealing with the questionable requirements of using animals to test oral contraceptives for human use).

113. Djerassi, *Birth Control After 1984*, *supra* note 112, at 949; Djerassi, *Prognosis*, *supra* note 112, at 470.

114. See generally Hatch, *Atherosclerosis Calls for a New Kind of Preventive Medicine*, 109 *CALIF. MED.* 134, 136-37 (1968). See also Dawber, Moore & Mann, *Coronary Heart Disease in the Framingham Study*, 47 *AM. J. PUB. HEALTH* 4 (Supp. April, 1957); M. Duffy, *Obesity and Coronary Heart Disease* (December 9, 1970) (unpublished paper at Stanford Medical Center, Stanford, California).

prohibition is the best social response if it could be made to work at a cost proportional to its benefits. However, one would then have to consider not only the social and financial cost of making the prohibition work, but the restriction of beneficial use as well.

Attention will be later focused on the often neglected point that the greater the number of users who consider their drug use beneficial, the harder it will be to make the prohibition work. At this point it is necessary only to note that prohibition may well discourage the beneficial use much more effectively than the harmful use. The person who is dependent on and desperately needs a drug is likely not only to be the one who will work hardest to get it but also the one most likely to injure himself with it. In some situations the law works well to keep people from using a drug who might benefit from it but is relatively ineffectual to prevent use by those who harm themselves.<sup>115</sup> The marijuana laws today, and, so far as can be told, the prohibition of earlier years, discouraged moderate use by older more stable and cautious members of society far more than they deterred the younger, more unstable and less forward looking, who in fact are much more likely to become abusers.<sup>116</sup>

*Principle III: An important factor in the success or failure of any method of drug control is the degree to which the users want the drug*

This is one major reason why when the government ordered cyclamates off the market they simply disappeared, whereas alcohol during prohibition, and marijuana more recently, did not. The cyclamates could be successfully barred in great part because most users really did not want them very much. They were only used to save calories, and calories could be almost as effectively reduced in other ways. Although cyclamates did not have the bitter after-taste of saccharine, a combination of saccharine and a small amount of sugar was a sufficient substitute for most people. Nor did cyclamates, unlike heroin for instance, produce either addiction or psychological dependence to make its users seek the drug at substantial personal cost. Consequently, the illegal seller of cyclamates did not have a very good market.

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115. See KAPLAN 323-26. See generally R. STEFFENHAGEN & P. LEAHY, A STUDY OF DRUG USE PATTERNS OF HIGH SCHOOL STUDENTS IN THE STATE OF VERMONT (1969).

116. C. Warburton, *supra* note 98, at 233-42; Sinclair 238-41. See generally CHAMBERS, DIFFERENTIAL DRUG USE WITHIN THE NEW YORK STATE LABOR FORCE (New York State Narcotic Addiction Control Commission, 1971).

Compare marijuana or alcohol to the cyclamates. Both cause dependence,<sup>117</sup> though to only a relatively small number of users and they give considerable pleasure to a high proportion of the rest. The users of each of these "social" drugs do not, in addition, seem to recognize substitutes for their drugs, as was the case with cyclamates. They are not, then, presented with easily available alternatives so as to make unnecessary their efforts to procure alcohol or marijuana.

*Principle IV: The technology of drug production and consumption is an important factor in the success or failure of a drug control measure*

Where the technology of drug production and distribution is not difficult to overcome, drug control will be very difficult, but where that is not the case, the control will be far more effective. Take, for example, the cyclamates. Although they do not take a great deal of technology or invested capital, unlike amphetamines they are not easily divertible from normal chains of commerce; unlike marijuana, they are neither grown wild in nature nor produced in less developed countries beyond the effective reach of law enforcement; and, unlike alcohol, they cannot easily be distilled in anyone's basement from completely untraceable ingredients. Moreover, so long as cyclamates are consumed in cans of diet drinks selling for ten or fifteen cents each, it would hardly be economical to transport large quantities of such beverages illegally; a truckload of such diet drinks would be considerably less valuable than a pocketfull of heroin, a small suitcase full of marijuana or a car full of alcohol. Of course, if there were a sufficient demand for cyclamates, and if the technology of production were simpler, it might be that legitimate business would produce non-sweet soft drinks to which the illegal drug user could add his cyclamates—much as large amounts of cigarette papers and water pipes are now sold and which, for the most part, end up being used with illegal marijuana. Until this level is reached, however, the technology of production and distribution helps make the cyclamates an example of effective drug control.

*Principle V: The social cost of a drug control law can be staggering*

Insofar as a drug control law accomplishes its object of preventing drug abuse, it will typically not be very costly. In the case of the

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117. KAPLAN 156-67, 270-76.

cyclamates, the only cost of preventing its harmful use is that a good deal of valuable use is also prevented—which, if more were known, might turn out to be perfectly safe. And where a drug is controlled by the medical model, its major cost is the amount of medical time and effort it takes to run the system which must be paid for by the drug user.

Where the drug control law is widely violated, however, its costs can rise staggeringly. The alcohol trade during prohibition not only led to the vast expansion of organized crime in America and enormous official corruption,<sup>118</sup> but it added a new danger to the health of the nation as well. Although alcohol distillers did not generally sell methyl alcohol mixed with their liquor before or after prohibition, during prohibition many bootleggers did and caused a sizeable number of injuries to the unfortunate people who consumed it.

Even if one supports the present prohibition of the heroin laws because of the fear of vastly greater heroin addiction, he must recognize that in so doing he pays an enormous price in addict criminality. A major effect of the heroin laws has been to create, in Professor Packer's term, a "crime tariff" which raises the price of the drug to many times what it would be in a competitive market.<sup>119</sup> It is the price of the drug rather than addiction itself which requires addicts to turn to crime. Crime is necessary not so much because heroin prevents the addict from holding down a legitimate job, but because only crime can permit the relatively uneducated addict to earn enough to feed his habit. Moreover, heroin is not only a very addicting drug, it is also a drug which causes a "tolerance"—a gradual increase in the amount necessary for the user to gain a constant effect.<sup>120</sup> This gradually socializes the addict into criminality and makes sure that his need increases as he becomes a more experienced criminal. Although many addicts support their habit through the sale of heroin, users cannot make a living by simply selling to each other. Sooner or later the community outside must be victimized through property crimes or the manufacture of new addicts—who in turn repeat the same process. Finally, the cost of the heroin laws in terms of police corruption and erosion of civil liberties is impossible to measure.

The marijuana laws, perhaps, best demonstrate the heavy costs

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118. See PACKER 277-82.

119. PACKER 277-82.

120. Martin & Jasinski, *Physiological Parameters of Morphine Dependence in Man—Tolerance, Early Abstinence, Protracted Abstinence*, 7 J. PSYCHIATRIC RESEARCH 9 (1969).

that may be paid for attempts to control drug use.<sup>121</sup> Some of these costs could, of course, be reduced by substituting the vice model for the present prohibition—and this would be the very least demanded by Principle I. Such a change would vastly reduce the enormous expenditure of resources used in processing users. The great majority, over ninety percent, of the 70,000 marijuana arrests made during 1970 in California were of users possessing only small amounts of the drug, and almost as large a percentage of the cost of processing offenders through the criminal system was spent upon users.<sup>122</sup>

It is hard to prove with equal precision the other costs of criminalizing the possession of marijuana—though we should expect fairly sizeable costs from a law which turns approximately one-third of young Americans into unrepentant criminals.<sup>123</sup> It cannot be proven, but it is suspected that no generation of young people since prohibition has grown up as profoundly distrustful of the police and the law enforcement apparatus as has our present younger generation. It certainly is undeniable that anyone who smokes marijuana cannot possibly consider the policeman as his friend and protector as many Americans were brought up to do. Indeed, if one could somehow graph the hostility of young people toward the police with the increasing use of marijuana, he would find two sharply increasing and probably parallel curves.

The police are by no means the only major institution of our society which has been alienated from the young by the marijuana laws. Examine, for instance, organized medicine. Just a few months ago, the President-elect of the American Medical Association was widely quoted to the effect that the Association had evidence that marijuana use caused impotence and birth defects.<sup>124</sup> Although he later admitted that he knew of no such evidence, he said that he had allowed the misrepresentations to stand because he wished to discourage marijuana use.<sup>125</sup> As he put it, "If I am taken out of context and it does some good, I don't mind." When asked about the loss of

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121. See KAPLAN 21-52. The marijuana laws themselves are extensively discussed in Bonnie & Whitebread, *supra* note 22.

122. See BUREAU OF CRIME STATISTICS, DRUG ARRESTS AND DISPOSITIONS: CRIME AND DELINQUENCY IN CALIFORNIA, 1970 I (1971). See also KAPLAN 29.

123. KAPLAN 22-26.

124. The criminalization of marijuana may, in fact, be the single most unifying and recruiting agent available to the counter-culture of the New Left. See Bonnie & Whitebread, *supra* note 22, at 1098.

125. McCabe, *Clamor in the AMA*, San Francisco Chronicle, April 7, 1971, at 51.

credibility among the young caused by this type of authoritative misrepresentation, he said, "I'm tired of these phrases about credibility gap and such. We're talking about the morality of our country and the loss of respect of law and order and authority and decency."<sup>126</sup> In short, an attempt to support the marijuana laws led directly to the view that it was permissible to mislead young people in order to get them to respect authority and decency. Because of this type of well-publicized incident—as well as the almost equally well known lowering of scientific standards by the Journal of the American Medical Association to print articles exaggerating dangers of marijuana<sup>127</sup>—it is extremely unlikely that organized medicine will ever enjoy again the credibility with young people that it had before the marijuana laws became an issue—even on questions where it is not attempting to compel respect for authority.

These costs, which are for the most part attributable to the decision to make marijuana use criminal, do not exhaust the costs of the marijuana laws. Even the adoption of a vice model would still impose enormous costs upon society. Because of Principles III and IV, the law would almost certainly remain unenforceable and as a result, the marijuana laws would continue in several ways to contribute to the use of drugs which by any standard are far more dangerous than marijuana. Since drug education is the most important long-term solution to drug abuse,<sup>128</sup> the marijuana laws would continue to inhibit educating young people about the dangers of heroin, LSD, amphetamines, and other drugs. Although education as to drugs other than marijuana can be extremely factual and yet effective, the fact that drug education must also support the marijuana laws destroys a great part of its credibility.<sup>129</sup> The reason for this—as grasped intuitively by the President-elect of the American Medical Association—is that the only way to defend to young people the gross disparity between the legal treatment of marijuana and alcohol is to attempt to mislead them about the facts. The problem is that such attempts generally fail,

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126. San Jose Mercury, March 25, 1971, at 17, col. 1.

127. See, e.g., Kolansky & Moore, *Effects of Marihuana on Adolescents and Young Adults*, 216 J.A.M.A. 486 (1971). See generally BLOOMQUIST 225-30.

128. It is interesting to note that the Federal Bureau of Narcotics went to great lengths in the thirties to educate the public as to the purported evils of marijuana. This miseducation has had a lasting effect. See J. FORT, *THE PLEASURE SEEKERS* 69-71 (1969); Grinspoon, *supra* note 8, at 20-22.

129. Kaplan, *supra* note 84.

destroying in the process the factual and honest efforts to educate against the use of other more dangerous drugs.

Second, by forbidding the legal sale of marijuana society will continue, in effect, to give a monopoly on marijuana sale to drug pushers. This will continue to bring all those who would use marijuana into contact with a group which already risks severe penalties for selling it, and, therefore, has every incentive to deal in higher profit items such as LSD, amphetamines or heroin. One can liken this to what would happen if a monopoly of all coffee sales were given to one supermarket chain. Not only would their sale of coffee skyrocket, but so would sales of just about everything else because those who were in the store would be available for a hard sell on other products. It is no different with illegal commodities and, just as prohibition had to be repealed to get the "mob" out of the liquor business,<sup>130</sup> marijuana will have to be sold under license by legitimate businessmen to get the drug pushers out of the marijuana business.<sup>131</sup>

*Principle VI: Marijuana is the key drug, and until substantial progress is made in controlling it, little real progress can be made on the other areas of drug control*

In order to understand why a licensing system for marijuana is necessary, it must be remembered first that marijuana is by far the most widely used illegal drug in the nation; second, that it is typically the first illegal drug used by those who later use more dangerous drugs; third, that the popularity and relative lack of danger of marijuana tends to make all illegal drug-taking somewhat more respectable; fourth, that attempts to defend the legal treatment of marijuana, especially as compared with alcohol, have compromised the educational effort to reduce use of more dangerous drugs; and fifth, that the marijuana market has called into being an elaborate drug-dealing subculture which is instrumental in the sale of, and proselytizing for, other illegal drugs.<sup>132</sup>

One method of ending the central position of marijuana would, in theory, be to enforce marijuana laws and actually stamp out the drug. As previously discussed, however, this simply cannot be accom-

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130. SINCLAIR 229-30, 415.

131. The requirements for such a licensing system are considered at length at notes 132-38 *infra* and accompanying text.

132. KAPLAN 44-45, 224-25.

plished within the constraints imposed by the police resources at hand, and the constitutional rights of privacy guaranteed to citizens. Indeed one can put the matter somewhat more strongly and say that, short of a complete police state, it will be impossible to enforce the marijuana laws sufficiently to change any of the five facts mentioned above.

The application to marijuana, however, of a licensing system similar to that presently applied to alcohol changes all five drastically. First, marijuana would no longer be the most widely used illegal drug in the United States; nor, for that matter, would it be the most widely used legal drug—alcohol and tobacco would still vie for that distinction. Second, marijuana would no longer be the first illegal, or the first legal, drug used by those who later use more dangerous substances. Third, marijuana, once classified with the legal drugs, would no longer reflect its popularity upon the illegal drugs. Fourth, the removal of the disparity between the legal treatment of marijuana and alcohol would allow more honesty in educating about both—while at the same time increasing the credibility of presently honest warnings about the more dangerous drugs. And, fifth, nothing will damage the illegal drug dealing subculture as much as exposure to honest competition by legitimate businessmen.

#### THE REQUIREMENTS OF A LICENSING SYSTEM FOR MARIJUANA

Inasmuch as Principle VI is the most important application of the other five, it will be helpful here to sketch a model of a marijuana licensing system, as an illustration of the progress that may be made if one applies all of the principles toward a rational system of drug abuse control.

The administration of the licensing system would be turned over to an agency similar to the Alcoholic Beverage Control Commission. Indeed, the work of this agency would be so close to that presently performed by the ABC that control of marijuana would probably be added to its jurisdiction—perhaps by renaming it the Social Drug Control Agency (SDCA). The system of control, then, would provide that:

(1) Sufficient marijuana to meet the state's needs could be grown under license from the SDCA by a relatively small number of landowners. The United States National Institute of Mental Health has for several years now grown marijuana for research purposes on a

fairly large scale on its farm in Mississippi, and has been able to protect its crop from diversion and theft.<sup>133</sup> The SDCA would have to require similar precautions.

(2) Even in the early stages of marijuana licensing, it is likely that the competitive market will determine the price paid to the grower. The cost of producing it today is approximately one cent per ounce, while the market price of the same amount is approximately fifteen dollars. If, however, the number of licenses is, for security reasons, kept so low as to prevent a free market from operating, the SDCA should have the power to fix the price per ounce for different grades.

(3) Once the marijuana is grown, it would be sold to a packager-wholesaler licensed by the SDCA to test and mix different strength marijuanas to obtain a standard potency of 1.5 percent tetrahydrocannabinol—on the market today this would be regarded as “good grass.” The mixture would then be vacuum packed (because marijuana loses its potency over a period of months when exposed to the air) in one-ounce containers as is pipe tobacco.

(4) Each one ounce “lid” would bear a tax of twelve dollars and be sold for about eighteen dollars in any store licensed to sell hard liquor. Thus, we would incorporate by reference all of the many restrictions on liquor stores—from the moral character of the seller to the spatial distance between schools and churches.

(5) At least in the early stages of the marijuana licensing, where it is important to proceed slowly and carefully, it would be illegal to sell less than a lid, or to sell marijuana for consumption on the premises.

(6) All advertising would be forbidden except that which is done within the liquor store.

(7) Each package of marijuana would carry a warning drafted by an expert medical committee, fairly stating the dangers, as well as the uncertainties of marijuana use.

(8) Sales to those under age would be prohibited under exactly the same type of regulations that now apply to hard liquor.<sup>134</sup>

(9) It would, of course, remain a crime to drive an automobile

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133. McGlothlin, *The Use and Effect of Cannabis* 3, 4 (1971) (unpublished paper prepared for the Nat'l Comm'n on Marijuana and Dangerous Drugs).

134. The age for consumption of marijuana should be 18 rather than 21. The lower age is coming more and more to mark the line between the child and the adult. Needless to say, the alcohol law might have to be changed as well—though there are signs that this is happening and it is recommended by most authorities on alcoholism.

under the influence of marijuana. Although it is not presently scientifically possible to determine whether one is under the influence of marijuana, it is likely that such a test will soon be developed. If not, the SDCA should have the power to require that a biologically inert material be added to legal marijuana, which can be identified in body fluids during the period when driving might be dangerous. It should be understood, moreover, that while present research indicates that the marijuana intoxicated driver is more dangerous than the driver who has consumed no drug at all, he is much less dangerous than the drunk driver.<sup>135</sup>

(10) It would be a criminal offense to sell or possess marijuana outside the licensing system, and the selling of marijuana to one under age would be regarded as an aggravating factor.

(11) The growing of marijuana for one's own use would be permitted under strict regulation and taxation by the SDCA. Permission would be granted subject to the same types of rights of inspection as apply in the alcohol industry.<sup>136</sup> Violators would be treated as revenue offenders, but this by no means precludes a term of imprisonment in cases where commercial quantities are grown.

(12) The SDCA would be given power to raise or lower the tax on marijuana. It should have the power to lower the tax if it finds that advances in techniques of evading law enforcement have made bootleg marijuana a serious problem at the then present price; and it should have the power to raise the tax should it determine that more revenue can be derived from the sale of the drug without raising the price so high as to bring into existence an illegal market.

(13) This should be regarded as a "stripped down" licensing model. It might turn out for instance that the SDCA would be better off allowing more than one potency of marijuana. This might allow a marijuana user to use a less potent form of the drug if he wishes, while at the same time allowing the SDCA to make available a stronger variety if desire for it had been sufficient to create an uncontrollable black-market.

(14) In order to permit this licensing system to function, a federal law would have to be passed which does not forbid those activities necessary to the furtherance of the system. This would mean, for example, the federal law of possession and sale<sup>137</sup> would provide a

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135. See Crancer, Dille, Delay, Wallace & Haykin, *Comparison of the Effects of Marihuana and Alcohol on Simulated Driving Performance*, 164 SCIENCE 851 (1969).

136. 26 U.S.C. §§ 5202-03 (1970).

137. See, e.g., 21 U.S.C. §§ 841-45 (1970) (possession and distribution of "controlled substances").

specific exception for marijuana marketed according to a state licensing system. In addition, as a matter of international law, the denunciation provision of the Single Convention on narcotics drugs would have to be activated and the United States Government would have to serve notice that it was exercising its option to withdraw from the Convention, at least insofar as the Convention prohibited licensed sales of marijuana.<sup>138</sup>

#### CONCLUSION

Society must not, of course, delude itself into thinking that a marijuana licensing system will solve all of the problems caused by either marijuana or, *a fortiori*, the other, more dangerous illegal drugs. But it will facilitate a beginning toward the application of the rational principles of drug control to the generic problem of drug abuse. By acting upon these principles, of which the marijuana licensing system is the necessary first step, society will not be approving of drug abuse; rather it will merely be demonstrating that there is a limit to the costs it is willing to suffer—notwithstanding a general commitment to save people from themselves. Until the marijuana laws are so modified, other forms of drug abuse legislation will be ineffective and costly, if only because new drug users will be socialized by the drug subcultures as fast as the legal system can cope with present users.<sup>139</sup>

Just as marijuana control is the first step in a more generally effective drug control system, the problem of drug abuse is but one facet of the broader problem of using the law to protect people from their own folly.<sup>140</sup> Preventing self-harming conduct, however, is a basically intractable problem because voluntarily entered activities impose significant secondary costs upon society.<sup>141</sup> The task of drug control laws, then, is to minimize the social costs of both the activities sought to be controlled and the laws enacted to control those activi-

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138. Single Convention on Narcotic Drugs, [1967] 18 U.S.T. 1407, T.I.A.S. No. 6298, 520 U.N.T.S. 151, 204 (Multilateral Treaty Between the United States of America and Other Governments), New York, March 30, 1961, ratified by United States, 1967.

139. Thus, Richard Blum notes that "with pseudo solutions and oversimplifications, the real problems grow worse and nonproblems are increasingly defined as problems, such as cannabis (marijuana) use." BLUM 243.

140. The problem of self-harming conduct and society is considered in depth at notes 1-8 *supra* and accompanying text.

141. The nature of secondary harms associated with drug abuse are discussed at notes 9-31 *supra* and accompanying text.

ties. To say that we as a society have so far done an abysmal job of tackling that task, would be to considerably overstate our success. By turning to somewhat more basic principles, however, it is hoped that in the future we will do better.