

NOTES

DRUG LEGALIZATION: COST EFFECTIVE AND MORALLY PERMISSIBLE

The United States is more concerned with illicit drug use than any other national problem.¹ The 1988 Anti-Drug Abuse Act ("1988 Act" or "Act") describes the United States government's attempt to control this problem.² The 1988 Act provides for treatment and prevention programs, drug education programs, and a plan for international narcotics control.³ The 1988 Act also places a priority

¹ REPORT ON LEGALIZATION OF ILLICIT DRUGS: IMPACT AND FEASIBILITY, SELECT COMM. ON NARCOTICS ABUSE AND CONTROL, 101ST CONG., 1ST SESS. 3 (Comm. Print 1989) [hereinafter LEGALIZATION: IMPACT AND FEASIBILITY]. The annual number of infants born addicted to crack is between 30,000–50,000. Brill, *Should We Give Up?*, AM. LAW., Mar., 1990, at 47. Crack is a smokeable form of cocaine that produces both shorter and more intense highs than powder cocaine. E. GOODE, DRUGS IN AMERICAN SOCIETY 202 (3d ed. 1989).

With the emergence of new powerful drugs such as ice, public concern continues to escalate. Ice is a smokeable crystalline form of methamphetamine (speed). *Methamphetamine Trafficking and Abuse: Hearings Before the Select Comm. On Narcotics Abuse and Control, House of Rep.*, 101st Cong., 1st Sess. 4 (1989) (statement of David Westrate, Ass't. Adm'r., DEA) [hereinafter *Hearings: Methamphetamine*]. Ice will not receive much attention in this note because, despite widespread concern, there has not yet been an ice epidemic in the United States. See Meddis, *U.S. Drug Users Steer Clear of Ice*, USA Today, Apr. 6, 1990, at A3, col. 1. Thus far, ice has been a problem only in Hawaii and parts of California. *Id.*

² See Anti-Drug Abuse Act of 1988, Pub. L. No. 100–690, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 4181 [hereinafter 1988 Act].

Nonetheless, ten states have de-criminalized possession of marijuana to various degrees. See National Organization for the Reform of Marijuana Laws, State-By-State Comparison of the Marijuana Laws. (Available from NORML, Suite 640, 2001 'S' Street NW, Washington, D.C. 20009). For example, in Colorado, possession of up to one ounce of marijuana in private is punishable by a fine ranging from \$0–100. *Id.* Conviction for the cultivation and sale of marijuana brings much higher penalties than possession and personal use in most states. See *id.*

³ See 1988 Act, *supra* note 2, at 4191; *id.* at 4244; *id.* at 4261. In addition, the Act authorizes the death penalty for drug traffickers whose trafficking results in murder, *id.* at 4387, holds users accountable by denying them public housing grants, *id.* at 4300, appoints a director of national drug control policy, *id.* at 4181, and allows the Secretary of State to make international agreements to prevent money laundering. *Id.* at 4291.

The 1988 Act increased funding authorization for 1989 by 2.7 billion dollars but Congress allocated only about \$500 million in additional funds. CRS Report for Congress, Anti-Drug Abuse Act of 1988: Highlights of Enacted Bill, at CRS 1 (1988). The Graham-Rudman-

on drug education.⁴ The Act funds research, education, and counseling programs for high-risk groups, including youth gang members, runaways, and the homeless.⁵

Legislators of the 1988 Act stated that efforts to reduce user demand for drugs are necessary to win the war on drugs.⁶ The 1988 Act revises previous strategies to reduce the demand for drugs in two basic ways.⁷ First, the Act begins to implement a nation-wide program of treatment on request for both addicts and drug abusers.⁸ Second, the 1988 Act provides civil penalties for users.⁹

Unfortunately, statistics indicate that, although there has been a decline in the use of most drugs, including alcohol and tobacco, the number of heavy cocaine users has increased.¹⁰ Although the number of people who used cocaine once a month or more dropped from 5.8 million in 1985 to 1.6 million in 1990¹¹ and the estimated number of weekly cocaine users in 1990 was 662,000, down from 882,000 in 1988,¹² the number of daily, or almost daily, cocaine users increased from 292,000 in 1988 to 336,000 in 1990.¹³

Hollings Act, the balanced budget bill, has limited Congress's ability to earmark money for fighting the war on drugs. Cloud, *Cocaine, Demand, and Addiction: A Study of the Possible Convergence of Rational Theory and National Policy*, 42 VAND. L. REV. 725, 807 (1989).

⁴ 1988 Act, *supra* note 2, at 4254. Congress allocated \$15 million in the 1989 budget for drug education and prevention. *Id.* at 4254-55.

⁵ *Id.* at 4255-58.

⁶ 1988 Act, *supra* note 2, at 4310.

⁷ Cloud, *supra* note 3, at 803.

⁸ 1988 Act, *supra* note 2, at 4191.

⁹ Cloud, *supra* note 3, at 803.

¹⁰ See generally U.S. Dep't of Health and Human Servs., HHS News press release (Dec. 19, 1990) [hereinafter HHS News] (reviewing major findings of 1990 National Institute on Drug Abuse ("NIDA") Household Survey on Drug Abuse); Green, *Federal Survey Reports Sharp Drop in Drug Use*, Miami Herald, Dec. 20, 1990, at A1, col. 5. Statistics cited by both proponents and opponents of legalization, however, are necessarily imprecise because of the illegal nature of the activity they purport to describe. See Mandel, *Problems With the Official Drug Statistics*, 21 STAN. L. REV. 991, 991 (1969). In addition, the NIDA survey does not sample prisons, dormitories or the homeless. HHS News, *supra*, at 4.

¹¹ See HHS News, *supra* note 10, at 1.

¹² *Id.* at 2.

¹³ *Id.* The democratic staff of the Senate Judiciary Committee has criticized NIDA's figures, and estimates that drug use may be three times as prevalent as NIDA's survey suggests. Isikoff, *Senate Study Triples Cocaine-User Estimate*, Wash. Post, May 11, 1990, at A4, col. 1. The judiciary committee surveys drug treatment centers, the homeless and prisoners but does not survey the general population. Green, *supra* note 10, at A26, col. 1. With respect to crack cocaine, the number of past-year (one million) and past-month (one-half million) crack users did not change appreciably from 1988 to 1990. See HHS News, *supra* note 10, at 2. Crack use among high school seniors reportedly leveled off in 1987. U.S. DEP'T OF HEALTH AND HUMAN SERVS., DRUG USE, DRINKING, AND SMOKING—NATIONAL SURVEY RESULTS FROM HIGH SCHOOL, COLLEGE, AND YOUNG ADULT POPULATIONS 1975-1988, 5-6 (1989) [herein-

Marijuana, however, continues to be the most commonly used illicit substance even though the number of past-month users has been decreasing since 1979.¹⁴ In 1990, approximately 5.5 million people in the United States used marijuana once a week or more, and 3.3 million were daily or almost daily users.¹⁵ Meanwhile, heroin use is reportedly similar to crack use, with about 500,000 regular users.¹⁶

Advocates of continued criminalization of drugs point to this downward trend in drug use, especially evident with cocaine and marijuana over the past two to five years, to suggest that the government is winning the "all fronts" war on drugs.¹⁷ Meanwhile, a government study from 1975 to 1988 closely links the percentage of casual cocaine (which includes crack) and marijuana use to the potential users' perception of the harm that would result from using these drugs.¹⁸ During this thirteen year span, high school and college students, and other young adults reported a consistently high degree of availability of marijuana and cocaine.¹⁹ Nevertheless, use of these two drugs fluctuated greatly in accordance with users' perceptions of the likelihood that great harm would result from regular use of marijuana or use of cocaine one or two times.²⁰ The researchers who conducted the study attribute the increased perception of harm related to crack, cocaine, and marijuana to extensive media coverage.²¹ Another researcher, explaining that alcohol and cigarette use have also decreased, suggests that increased health

after DRUG USE, DRINKING, AND SMOKING]. About 3.1% of high school seniors and young adults had used crack in 1988. *Id.* In all, an estimated 2.75 million people in the United States have tried crack. U.S. Dep't of Health and Human Servs., *Population Estimates of Lifetime and Current Drug Use*, NIDA CAPSULES, at C-83-1(a) (rev. Dec. 1990) [hereinafter *Population Estimates*].

¹⁴ HHS News, *supra* note 10, at 3.

¹⁵ *Id.*

¹⁶ Ostrowski, *Thinking About Drug Legalization*, 12 POL'Y ANALYSIS, 24 (Cato Inst. May 25, 1989); Zinberg, *Breaking the Impasse in the War on Drugs: A Search For New Directions*, 11 NOVA L. REV. 901, 903 (1987). According to NIDA, 1.66 million have tried heroin and 50,000 used heroin in the month preceding their survey. *Population Estimates*, *supra* note 13, at 1. One author estimates that 1.2% of high school students use heroin and .2% of college students are users. Covington, *Addict Attitudes Towards Legalization of Heroin*, CONTEMP. DRUG PROBS. 315, 344 (1987). A government study indicates that the rate of heroin use is .5% for high school students and .2% for college students. DRUG USE, DRINKING, AND SMOKING, *supra* note 13, at 8.

¹⁷ See L. Sullivan, Report for Secretary of Health and Human Services (July 31, 1989).

¹⁸ See DRUG USE, DRINKING, AND SMOKING (figures 23, 24), *supra* note 13, at 132-33.

¹⁹ *Id.*

²⁰ See *id.*

²¹ *Id.*

consciousness explains the downward trend.²² Researchers have attributed the decline in the use of illicit drugs to several factors, including effective enforcement, an increased awareness of the health risk of drug use, and a general emphasis on health consciousness.

Although there appears to have been a decline in drug use, the government's drug policy cannot eradicate drug use for several reasons. First, crack, cocaine, and heroin are potentially addictive drugs. One writer states that cocaine addicts constitute only ten percent of the total population of cocaine users but account for about seventy-five percent of the cocaine used in the United States.²³ Because these addicted users are willing to take large risks to maintain their habits, legal deterrents may be ineffective.²⁴

Next, the economic theory of inelasticity further explains why the criminal law has been only somewhat effective in reducing addicts' demand for certain drugs.²⁵ Normally, as the price of an item rises, the item attracts fewer buyers.²⁶ This phenomenon is called the elasticity of demand.²⁷ Where demand is inelastic, however, buyers are willing to absorb an increase in price because they are eager to consume the same quantity of the product.²⁸ The price of black market drugs rises in response to the increased risk that sellers and dealers experience while conducting business during heightened enforcement.²⁹ These higher prices, however, will deter non-addict drug users from continued drug purchases more than addicts because addicts' demand for drugs is inelastic.³⁰ Thus, an increase in price through greater enforcement reduces the number of non-addict users significantly but has a slight effect on the addict users.³¹

Third, drug enforcement efforts have been less than successful because there are insufficient resources with which to battle the

²² Green, *supra* note 10, at 26A, col. 1.

²³ Cloud, *supra* note 3, at 734.

²⁴ *Id.* at 735.

²⁵ See *id.* at 758-67 (addicts' demand for cocaine relatively inelastic). But see Grinspoon, *A Proposal For Regulation and Taxation of Drugs*, 11 NOVA L. REV. 927, 928 (1987) (citing some evidence of elasticity of demand for heroin).

²⁶ Cloud, *supra* note 3, at 758.

²⁷ *Id.* at 761.

²⁸ *Id.* at 762.

²⁹ *Id.* at 759.

³⁰ Cf. *id.* at 763 (cocaine use and crack use is inelastic).

³¹ *Id.* It is true that heroin demand is not perfectly inelastic because users can and do reduce consumption voluntarily in response to price increases without experiencing withdrawal. See M. MOORE, *BUY AND BUST* 8-9 (1977).

dealers and traffickers.³² About ten billion dollars is spent annually to combat drug use,³³ yet there are only about 2800 drug enforcement agents.³⁴ As recently as 1987, the likelihood that any particular drug user would be arrested in a given year was slight.³⁵

At the same time, drug enforcement has had a profound impact on the criminal justice system. As of 1987, more than one-third of all federal prison inmates and one-tenth of state prisoners were incarcerated for drug law violations.³⁶ One state court judge estimates that eighty to ninety percent of the cases he handles are drug-related.³⁷ In 1988, federal prisons worked at 130% of capacity and many state prisons were also overburdened.³⁸ To cope with overcrowding, courts have begun releasing prisoners before they complete their sentences.³⁹ Because many drugs are addictive and government resources are limited, the government will continue to fight an uphill battle against illicit drug use.

Some people who believe that drug criminalization is ineffective advocate legalizing some or all illicit drugs.⁴⁰ Advocates of legalization believe that criminalization causes more harm than good.⁴¹ Proponents of legalization believe that crime will decrease if drugs are legalized.⁴² They also believe that funds spent on drug enforcement can be earmarked for more beneficial purposes, such as drug

³² *Legalization of Illicit Drugs: Impact and Feasibility, Part I: Hearing Before the House Select Comm. On Narcotics Abuse and Control*, 100th Cong., 2d Sess. 1-2 (1988) (statement of Sen. Rangel, Chairman) [hereinafter *Hearings: Legalization*]. But see, Ostrowski, *supra* note 16, at 29 (failure of drug enforcement not due to lack of effort). Cf. Interview with Arnold Trebach, President of Drug Policy Foundation, *printed in* LAW ENFORCEMENT NEWS, Apr. 30, 1988, at 9 [hereinafter *Trebach Interview*] (no amount of funds can stop use of illicit drugs).

³³ Ostrowski, *supra* note 16, at 2.

³⁴ *Hearings: Legalization*, *supra* note 32, at 2.

³⁵ Cloud, *supra* note 3, at 771. The actual figure is 2.5%. The author notes that most of those arrested are actually caught for trafficking drugs rather than for possession. *Id.* Former National Drug Policy Director William J. Bennett admits that the drug program has experienced setbacks, referring in particular to the inability to get new prisons built. N.Y. Times, Oct. 19, 1989, at A1, col. 3.

³⁶ Nadelmann, *Drug Prohibition in the United States*, SCIENCE, Sept. 1, 1989, at 940.

³⁷ See 129 F.R.D. 217, 251 (1990) (proceedings of the Fiftieth Judicial Conference of the D.C. Circuit).

³⁸ THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY 27 (Sept. 1989) (Presidential report to Congress outlining drug control strategy).

³⁹ See *id.*

⁴⁰ See, e.g., *Hearings: Legalization*, *supra* note 32, at 180 (testimony of Kurt Schmoke, mayor of Baltimore); Friedman, *An Open Letter to Bill Bennett*, Wall St. J., Sept. 7, 1989, at A11, col. 4 (editorial by Milton Friedman).

⁴¹ See, e.g., Ostrowski, *supra* note 16, at 9.

⁴² Church, *Thinking The Unthinkable*, TIME, May 30, 1988, at 14.

education.⁴³ Further, they argue that legalizing drugs and taxing them will provide additional funds for treatment and education.⁴⁴

This note examines several aspects of the drug legalization debate. Section I addresses some of the practical consequences of legalizing drug use.⁴⁵ In particular, this section discusses the connection between drug use, crime and violence, death, and addiction.⁴⁶ In addition to practical concerns about legalization, many opponents of legalization believe that drug use is immoral.⁴⁷ Section II discusses three prominent ethical theories bearing on whether drug legalization is moral, immoral, or amoral.⁴⁸ Section III concludes that drug legalization is a pragmatic and morally defensible solution to the drug problem.⁴⁹

I. PRACTICAL CONSEQUENCES OF DRUG LEGALIZATION

Drug use has a variety of deleterious effects on society. Drug use costs the United States as much as sixty billion dollars a year in lost productivity.⁵⁰ Drug use may lead to crime and/or violence, and users may steal to be able to afford illegal drugs.⁵¹ It may cause users to become irrational and hurt or kill themselves.⁵² Moreover, use of cocaine, crack, and heroin may lead to physical addiction. Many critics of drug legalization offer these aspects of drug use as justification for the drug laws.⁵³

⁴³ *Id.*

⁴⁴ Brill, *supra* note 1, at 48; Nadelmann, *supra* note 36, at 941.

⁴⁵ See *infra* notes 50-125 and accompanying text.

⁴⁶ There are practical issues concerning legalization in addition to those mentioned here. This note focuses on crime, death, and addiction because they have a direct bearing on the moral issues involved in legalization. One argument not discussed in detail here is the likelihood that marijuana use acts as a "stepping stone" to the use of "harder drugs." See E. GOODE, *supra* note 1, at 155-59 (reviewing relationship between marijuana use and use of other drugs); Trebach Interview, *supra* note 32, at 12 (rejecting theory that marijuana use leads to use of other drugs); Slaughter, *Marijuana Prohibition in the United States: History and Analysis of a Failed Policy*, 21 COLUM. J.L. & SOC. PROBS., 417, 429 (1988) (association between use of marijuana and other drugs not proof of stepping stone because the type of person who wishes to experiment with marijuana may wish independently to try other drugs) (quoting Institute of Medicine, *Marijuana and Health*, 36-38 (1982)).

⁴⁷ See, e.g., 1988 Act, *supra* note 2, at 4296 (Congress finds legalization unconscionable).

⁴⁸ See *infra* notes 126-329 and accompanying text. This note does not attempt to persuade anyone that any particular moral theory discussed here is correct. Rather, this note attempts to show that the supposed immorality of drug use is problematic.

⁴⁹ See *infra* notes 356-85 and accompanying text.

⁵⁰ Husak, *Recreational Drugs and Paternalism*, 8 LAW & PHIL., 353, 358 n.15 (1989).

⁵¹ Jarvik, *The Drug Dilemma*, SCIENCE, Oct. 19, 1990, at 387, 389.

⁵² *Id.*

⁵³ See, e.g., Husak, *supra* note 50, at 374, 378.

In contrast, drug legalization proponents argue that the drug laws contribute significantly to these problems,⁵⁴ and claim that legalization will ameliorate the harmful consequences of drug use.⁵⁵ This section of the note examines the connection between drug use and the drug laws, crime, death, and addiction, and concludes with an examination of the licit drugs alcohol and tobacco. This examination provides a basis for evaluating whether the practical justifications for criminalization are persuasive.

A. *Illicit Drug Use and Its Effects on Society*

Many people oppose drug legalization because they fear that crime will increase.⁵⁶ There are at least three distinct types of drug-related crime: crimes committed by drug users because of the influence of the drug (psychopharmacological),⁵⁷ crimes committed by traffickers and dealers on the black market to secure loyalties and resolve disputes (systemic),⁵⁸ and crimes committed by users to support their drug use (economic compulsive).⁵⁹

Psychopharmacological crime arises from the chemical effects of the drug itself. A common perception exists that use of illicit drugs causes users to become violent and criminal.⁶⁰ Marijuana laws, in fact, were originally enacted in response to this perception that its use led to violence and crime.⁶¹

⁵⁴ See Nadelmann, *supra* note 36, at 939.

⁵⁵ Husak, *supra* note 50, at 363.

⁵⁶ Ostrowski, *supra* note 16, at 11. Sources estimate that at least 40 to 50% of all property crime is drug-related. *Id.* In 1980, one estimate is that over 2000 homicides were drug-related as were 460,000 assaults. NARCOTIC AND DRUG RESEARCH INC., DRUG RELATED INVOLVEMENT IN VIOLENT EPISODES (DRIVE), INTERIM FINAL REPORT 10-11 (July, 1987) [hereinafter DRIVE].

⁵⁷ See Goldstein, *The Drugs/Violence Nexus: A Tripartite Conceptual Framework*, 1985 J. DRUG ISSUES, 493, 494; Nadelmann, *supra* note 36, at 941. Goldstein developed the names for these categories. Goldstein focuses on drugs and violence; Nadelmann refers to drugs and crime.

⁵⁸ Goldstein, *supra* note 57, at 497; Nadelmann, *supra* note 36, at 941-42.

⁵⁹ Goldstein, *supra* note 57, at 496; Nadelmann, *supra* note 36, at 941.

⁶⁰ Goldstein, *supra* note 57, at 496; Nadelmann, *supra* note 36, at 941.

⁶¹ Ostrowski, *supra* note 16, at 13. Although marijuana use was linked initially to psychopharmacological crime and violence, researchers no longer make this association. E. Goode, *supra* note 1, at 145; Slaughter, *supra* note 46, at 423. In the Netherlands, where marijuana laws are not enforced, no increase in crime due to marijuana use has been reported. E. Engelsman, Responding to Drug Problems: Dutch Policy and Practice 11 (Oct. 20-23, 1988) (unpublished paper presented at Drug Policy Foundation International Conference on Drug Policy Reform). Marijuana use may occasionally lead to feelings of paranoia in the user. *In re Marijuana Rescheduling Petition*, DEA, No. 86-22 at 60 (Sept. 6, 1988). These feelings are usually due to fears of using an illegal substance and do not have any long-term effects. *Id.*

It is well documented that cocaine can induce aggressive behavior.⁶² Researchers believe that crack use is more likely to induce violent behavior than other cocaine use.⁶³ One researcher, however, points out that scientific research does not yet justify media claims about crack's tendency to cause violence, and reminds us that marijuana was once mistakenly attacked for leading to psychopharmacological violence.⁶⁴

Researchers have not found that use of heroin induces psychopharmacological violence.⁶⁵ More generally, heroin use does not cause crime.⁶⁶ According to studies, heroin users usually interact in

⁶² See Ostrowski, *supra* note 16, at 13. In the mid 1980s, Narcotic and Drug Research, Inc. conducted a study ("DRIVE") of known male drug users and dealers, which charted the number and type of violent episodes reported by users, and noted which drugs were involved in the violence. See DRIVE, *supra* note 56, at 114. In DRIVE, approximately 50% of the violent episodes were drug-related. *Id.* With respect to cocaine, the users reported that the high was generally peaceful or mellow but added that when the drug wears off, users' anxiety and depression can promote violence. *Id.* at 13. Cocaine was singled out as the cause of violence in eight of the 193 recorded violent episodes. *Id.* at 108. In another study measuring drug involvement in 1988 New York homicides (DRCA-H2) psychopharmacological violence from cocaine accounted for just one of 218 drug-related homicides. P. Ryan, P. Goldstein, H. Brownstein & P. Belluci, Drug Related Homicides, New York City, 1988, at 20 (draft of Drug Related Crime Analysis study, available from Narcotic and Drug Research, Inc.) [hereinafter DRCA-H2]. Surveyors collected data on 414 homicides and conservatively estimated that 218 were drug-related. *Id.* at 15. DRCA-H2 and DRIVE are limited to the drug-violence nexus, not the wider drug-crime connection.

⁶³ See *Users of Crack Cocaine Link Violence to Drug's Influence*, Wash. Post, Mar. 24, 1989, at A11, col. 1. Although the title implies the contrary, the poll mentioned in the article does not differentiate between callers who claimed to commit crimes while high on cocaine and those while high on crack. *Id.* at col. 6. Almost 50% of the cocaine or crack users who called a drug hotline in the week of November 1, 1988 admitted to committing violent crimes or aggressive acts. *Id.* at col. 1. Two-thirds of that group said that they performed violent acts while high rather than during the withdrawal stage. *Id.* In another study, surveyors concluded that patients treated for psychiatric emergencies were much more likely to have violent thoughts and actions if they had just used crack than if they had just used other types of cocaine. *Crack Smokers More Violent, Psychotic Than Other Cocaine Users*, NIDA NOTES, Winter 1987-88, at 22 (Nat'l Inst. on Drug Abuse Newsletter) [hereinafter NIDA NOTES]. In a study of 80 patients, these researchers found that cocaine abusers averaged less than one "violent characteristic" while crack users experienced more than one "violent characteristic" on average. *Id.*

⁶⁴ Nadelmann, *supra* note 36, at 941. Available evidence suggests that ice use may be as likely to induce violence as crack. See, e.g., Kuipers, *ICE*, SPIN, Dec. 1989, at 36, 38; *Hearings: Methamphetamine*, *supra* note 1, at 4 (statement of David Westrate, Ass't. Adm'r., DEA).

⁶⁵ DRIVE, *supra* note 56, at 13.

⁶⁶ L. GRINSPOON & P. HEDBLUM, *THE SPEED CULTURE: AMPHETAMINE USE AND ABUSE IN AMERICA* 184 (1975).

a nonaggressive manner,⁶⁷ although users going through withdrawal may become irritable and engage in violent behavior.⁶⁸

Black market crime⁶⁹ is a second type of drug-related crime. Black market crime refers to crimes committed by drug traffickers to protect the area in which they make drug transactions, to retaliate for betrayals to the police, and to collect bad debts.⁷⁰ Crimes that result from the existence of the black market are distinct from drug-induced crimes and thefts committed to support drug use.⁷¹

Advocates of both criminalization and legalization agree that black market violence will diminish if legalization occurs, but the two sides disagree about the extent of the reduction.⁷² Legalization advocates point to statistics in crime-ridden cities to demonstrate how legalization will reduce black market murder.⁷³ For example, in a 1988 study of New York homicides, the police reported that

⁶⁷ RESEARCH & DEVELOPMENT UNIT, INST. FOR THE STUDY OF DRUG DEPENDENCE, *Heroin Today: Commodity, Consumption, Control and Care*, in *A LAND FIT FOR HEROIN?* 14 (N. Dorn & N. South eds. 1987).

⁶⁸ DRIVE, *supra* note 56, at 13.

⁶⁹ See Ostrowski, *supra* note 16, at 12; black market crime is also known as systemic crime. Goldstein, *supra* note 57, at 497-502.

⁷⁰ See Wisotsky, *Exposing the War On Cocaine: The Futility and Destructiveness of Prohibition*, 1983 WIS. L. REV. 1305, 1401. Other types of black market violence include murdering informers, punishing those who sell weak or placebo drugs, and robbing drug dealers. Goldstein, *supra* note 57, at 497.

⁷¹ See Nadelmann, *supra* note 36, at 941. In the DRCA-H2 study, almost 40% of the 414 homicides were systemic and about three-quarters of the 219 drug-related homicides were systemic. DRCA-H2, *supra* note 62, at 20. The one exception was alcohol, in which all 21 alcohol-related homicides were psychopharmacological. *Id.* Of the 162 systemic homicides, 100 involved crack and 45 involved cocaine. *Id.* at 19-20. Marijuana accounted for four systemic homicides and heroin another two. *Id.* at 20. In the DRIVE study, one-quarter of the 193 violent episodes were systemic, and cocaine and heroin were the drugs most often involved in systemic violence. DRIVE, *supra* note 56, at 108.

⁷² Both sides assume that legal drug prices would be lower than current drug prices. See Ostrowski, *supra* note 16, at 15 (legalization advocate); cf. Bennett, *A Response to Milton Friedman*, Wall St. J., Sept. 19, 1989, at A30, col. 4 (criminalization advocate). The black market is more expensive than a free market because black market dealers charge high prices as compensation for the great risks they take. Cloud, *supra* note 3, at 759. If, however, the taxes on drugs in the free market make the price of drugs unnaturally high, the black market may still be a good economic choice for buyers. Church, *supra* note 42, at 18.

⁷³ See Ostrowski, *supra* note 16, at 12; Wisotsky, *supra* note 70, at 1401. Legalization advocates look to the crime rate during and after Prohibition to show that legalization will mark the end of the black market and the violence it engenders. See, e.g., Ostrowski, *supra* note 16, at 12. One proponent notes that the murder rate rose at the beginning of Prohibition in 1920 and remained high until Congress repealed Prohibition in 1933; after repeal, the murder rate declined for 11 consecutive years. *Id.* at 1. The natural inference is that bootlegging and organized crime accounted for much of the increase in murders during the 13 years of Prohibition. See *id.*

29% of those arrested for committing homicide were drug traffickers and 34% of the victims were drug traffickers.⁷⁴

William Bennett, former director of the Office of National Drug Control Policy, admits that legalization might reduce gang and dealer-related crime.⁷⁵ He does not think, however, that the black market will vanish altogether.⁷⁶ He says that the black market will continue to flourish unless the United States gives out drugs both freely and openly.⁷⁷ Another writer cautions that drug legalization will unwittingly create a black market in exporting drugs to foreign markets.⁷⁸

A third drug-crime connection is called economic compulsive, in which drug users commit burglary and robbery to finance their costly habits.⁷⁹ One writer estimates that drug users commit at least forty percent of all property theft in the United States to support their habits.⁸⁰ Heroin addicts⁸¹ and crack addicts very often commit crimes to finance their drug addictions.⁸²

A second justification for the drug laws is the connection between drug use and death.⁸³ By one estimate, in 1985, a total of

⁷⁴ Hawaii State Epidemiology Work Group Conference, Meeting Summary, at 13-16 (Feb. 14, 1990) (Presentation by Paul Goldstein, Narcotic & Drug Research, Inc., regarding drugs and violence). According to one source in Dade County, Florida, about 23% of the homicides that occurred in 1980 were drug trafficking-related. Wisotsky, *supra* note 70, at 1401. Another source estimates that about 70 black market murders occur in Miami each year. Ostrowski, *supra* note 16, at 12. He uses that figure and FBI data to estimate that about 750 black market murders occur nation-wide each year. *Id.*

⁷⁵ Bennett, *supra* note 72, at A30, col. 5-6. *Contra* LEGALIZATION: IMPACT AND FEASIBILITY, *supra* note 1, at 4 (finding that legalization would not decrease crime).

⁷⁶ Bennett, *supra* note 72, at A30, col. 6.

⁷⁷ *Id.* Other opponents add that legalization will not end the black market because users will wish to remain anonymous and a legalization act will not likely permit this. Church, *supra* note 42, at 18.

⁷⁸ Jarvik, *supra* note 51, at 389.

⁷⁹ Nadelmann, *supra* note 36, at 941.

⁸⁰ Ostrowski, *supra* note 16, at 11.

⁸¹ *Id.* (citing Speckart & Anglin, *Narcotics and Crime: An Analysis of Existing Evidence For a Causal Relationship*, 3 BEHAV. SCI. & L. 273 (1985)).

⁸² See Miami Herald, Aug. 5, 1989, at B1, col. 2. Another earlier estimate is that heroin addicts commit one-third to one-half of all robberies in urban areas. DRIVE, *supra* note 56, at 17. An estimated 50-75% of all burglaries and robberies are committed by heroin addicts trying to maintain their habits. Rummonds, *Heroin Decriminalization*, NAT'L L. J., May 3, 1982, at 14, 15. One author points to methadone maintenance programs for heroin addicts to show that less costly drugs reduce an addict's tendency to steal. Nadelmann, *supra* note 36, at 941. The study shows that addicts who received drugs freely or cheaply stole less than other addicts.

⁸³ Richards, *Drug Use and the Rights of the Person: A Moral Argument for Decriminalization of Certain Forms of Drug Use*, 33 RUTGERS L. REV. 607, 646 (1981).

3,562 people died *directly* from use of illegal drugs.⁸⁴ Proponents of continued criminalization argue that legalization would lead to an increase in drug use and thereby an increase in deaths from overdoses.⁸⁵

On the other hand, one researcher estimates that each year black market factors, such as infections and allergic reactions to street mixtures, cause as many as 2,400 deaths of cocaine and heroin users.⁸⁶ He calculates that eighty percent of all drug deaths are caused by prohibition and that only a fivefold increase in use after legalization would create as many deaths as presently occur.⁸⁷ The same authority estimates that 3,500 users die annually from using unsterile needles,⁸⁸ and argues that legalization would allow the United States to fight Acquired Immune Deficiency Syndrome ("AIDS") by providing clean needles to addicts at a reasonable price.⁸⁹ Some legalization proponents also draw parallels to other societies where needles are available and the incidence of AIDS is lower.⁹⁰

A third argument for drug criminalization concerns the addictive tendencies of the illicit drugs.⁹¹ Under one variation of this

⁸⁴ Nadelmann, *supra* note 36, at 943 (citing National Council on Alcoholism statistics). Nadelmann admits that unreported drug deaths may raise the number somewhat above 3,562.

There is some authority for the view that the number of drug-induced car accidents is underestimated. N.Y. Times, Jan. 12, 1990, at A1, col. 6 (report of one of the first studies linking cocaine use to traffic fatalities); *see also* N.Y. Times, Sept. 25, 1989, at A1, col. 2 (describing police efforts to detect drugged drivers).

⁸⁵ Jarvik, *supra* note 51, at 389.

⁸⁶ Ostrowski, *supra* note 16, at 14.

⁸⁷ *Id.* at 46. The author points out that a large proportion of drug overdoses that result in death are accidental, caused by adulterated drugs or drugs of unknown purity. *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *See* E. Engelsman, *supra* note 61, at 10 (8% of all 605 Dutch AIDS patients were drug addicts as of October 1, 1988 whereas 26% of the United States AIDS patients were addicts as of September, 1988); Ostrowski, *supra* note 16, at 14 (author points to Hong Kong where needles are legal and there are no reported cases of drug-related AIDS); F. Ruter, The Pragmatic Dutch Approach to Drug Control: Does It Work? 15 (May 25, 1988) (unpublished paper from Drug Policy Foundation lecture) (3% of the AIDS patients in Holland are addicts while in New York City 17% of the AIDS patients are addicts).

⁹¹ Husak, *supra* note 50, at 374. The term addiction is itself a subject of much contention. *See* L. GRINSPOON & J. BAKALAR, COCAINE: A DRUG AND ITS SOCIAL EVOLUTION 176 (1985). Grinspoon and Bakalar state that practically no consensus exists for determining when a person is addicted to a particular drug. Further, definitions often depend on one's moral, political and social dispositions. Another author adds that there are four separate strands of meaning that are used to define drug addiction. Richards, *supra* note 83, at 655-56 (tolerance, or the need for progressively larger doses to achieve the same result; physical dependence or withdrawal; psychological dependence; and a moral judgment of drug abuse as degra-

argument, addictive drugs should be banned because use of these drugs may be nonvoluntary.⁹² For example, initially, public warnings suggested that a couple of hits of crack would lead directly to addiction.⁹³ One expert estimates that if crack is legalized, seventy percent of those who try it will become addicts.⁹⁴ More recently, however, experts have begun to question how rapidly crack users become addicts and what proportion of those who try crack become addicted.⁹⁵

Estimates of the addictiveness of cocaine, including crack, are also varied. One source asserts that approximately one-fourth of

dation). Satisfying the conditions of one meaning may not and often does not satisfy the terms of the other definitions. *See id.* at 656. Another definition is that addiction is the compulsive, self-destructive, chronic self-administration of a mind-altering drug. G. Velman & V. Haddock, *Brain Chemistry and the Addictions*, 1 *DRUG ABUSE AND THE LAW SOURCEBOOK*, 2-13 (Oct. 1990).

⁹² Husak, *supra* note 50, at 375. According to many researchers, a problem user is a person who uses a drug once a week or more. *See, e.g.*, Nadelmann, *supra* note 36, at 944. An addict is a daily or nearly daily user. *See, e.g.*, Green, *supra* note 10, at A1, col. 5. Other types of addicts exist; namely, the occasional binger, and the addict who uses drugs periodically but obsesses about drugs constantly. Skorneck, *Crack's Power to Addict Challenged*, *Staten Island Advance*, Jan. 29, 1990, at A3, col. 3.

⁹³ Skorneck, *supra* note 92, at col. 1.

⁹⁴ Church, *supra* note 42, at 16. Another author, Director of Research at Fair Oaks Hospital and founder of the Cocaine Hotline refutes the idea that a substantial number of people use crack only occasionally. Skorneck, *supra* note 92, at col. 3.

⁹⁵ Skorneck, *supra* note 92, at col. 1. The director of the pharmacology department at City University of New York Medical School states that "the idea that two hits [of crack] and you're dead or you're addicted is not true." *Id.* at col. 2. Further, two studies support the view that use of crack does not inevitably lead to crack addiction. The first study of 308 heavy drug users ranging from ages twelve to seventeen found that 96% of those surveyed had tried crack one or more times and 30% used it daily. E. GOODE, *supra* note 1, at 203. Eighty-seven percent used crack regularly, and 50% used it once a week or more but not daily. More than one-half of the daily users took one or two hits a day. *Id.*

In a second study, of teenagers and young adults, the Department of Health and Human Services found that although 4.8% of high school seniors admitted they had tried crack, only 1.6% said they had used crack in the month preceding the survey. *DRUG USE, DRINKING AND SMOKING*, *supra* note 13, at 5-6. The surveyors concluded that as many as two-thirds of those who tried crack stopped using it. *Id.* According to a 1988 government survey, 1.3% of the United States population had tried crack, .5% used crack within a year of the survey date, but only .2% had used crack within the past month. U.S. DEP'T. OF HEALTH AND HUMAN SERVS., NATIONAL INSTITUTE ON DRUG ABUSE, NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE 35, table 5-A (1989).

These surveys are bolstered by a study finding that half of those surveyed who had tried crack preferred other forms of cocaine. Skorneck, *supra* note 92, at col. 2 (citing a study by the Addiction Research Foundation in Toronto). Patricia Erickson, who oversaw the study, explained that not all drug users prefer the crack rush, or high. *Id.* She also explained that users' characteristics and friends may limit crack use. Finally, one source estimates that only one of six people who try crack become addicts. Husak, *supra* note 50, at 378 n.60 (citing *N.Y. Times*, Aug. 24, 1989, at B7, col. 1).

those who try cocaine become "repeat users."⁹⁶ A second researcher states that about ten percent of the cocaine-using population are addicts,⁹⁷ and a third authority estimates that relatively few cocaine users become addicts.⁹⁸

Although precise numbers do not exist, statistics reveal that not all heroin users are addicts.⁹⁹ One author claims that the proportion of heroin addicts to nonaddicted heroin users varies in different cities.¹⁰⁰ Some researchers estimate that the nonaddict users equal or outnumber the addicted users.¹⁰¹ Further, studies reveal that heroin addiction is neither continuous nor permanent.¹⁰² Physical dependence (a common definition of addiction) usually occurs, if at all, within approximately six months to a year after initial use.¹⁰³

Marijuana use does not create physical dependence.¹⁰⁴ Marijuana users, however, may become psychologically dependent on marijuana.¹⁰⁵ Only a portion of the twenty million Americans who smoked marijuana in 1982 were heavy users, and one writer concluded that only a fraction of the heavy users were marijuana abusers.¹⁰⁶

⁹⁶ Ostrowski, *supra* note 16, at 48.

⁹⁷ Cloud, *supra* note 3, at 734.

⁹⁸ Nadelmann, *supra* note 36, at 944. This author refers to a 1986 survey conducted by the National Institute on Drug Abuse that found that 250,000 of the 8.2 million young adults who had tried cocaine used it once a week or more on average. *Id.* He concludes that only these 250,000 young adults, comprising three percent of the user population, are "potential problem users." *Id.* Results of a 1990 study based on the United States population indicate that 1.6 million people in the United States used cocaine, including crack, once a month or more, 662,000 were weekly users, and 336,000 were daily or nearly daily users. See Green, *supra* note 10, at A26, col. 1. Using the prior author's reasoning, the 662,000 weekly users are potential cocaine abusers.

⁹⁹ See J. KAPLAN, *THE HARDEST DRUG* 33 (1983).

¹⁰⁰ See *id.* at 33-34.

¹⁰¹ See, e.g., *id.*; M. MOORE, *supra* note 31, at 9 (heroin addicts are a minority of all heroin users).

¹⁰² J. KAPLAN, *supra* note 99, at 34. Kaplan defines "continuous" to mean that a current addict who was an addict a year ago was addicted during that entire year. *Id.* "Permanence" means that a current addict will be addicted ten or more years in the future. *Id.*

¹⁰³ L. HUNT & C. CHAMBERS, *THE HEROIN EPIDEMICS* 12 (1976).

¹⁰⁴ See Wallenstein, *Marijuana Possession as an Aspect of the Right of Privacy*, 5 CRIM. L. BULL. 59, 61-62 (1969).

¹⁰⁵ See *id.*

¹⁰⁶ See Slaughter, *supra* note 46, at 433 n.81. The American Medical Association defines marijuana abuse as "pathological use for at least a month that causes impairment in social or occupational functioning." *Id.* (citing AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 175-76 (3d ed. 1980)). "Pathological use" includes intoxication throughout the day, nearly daily use, and episodes of Cannabis Delusional Disorder. *Id.* In 1988, one-third of high school seniors had smoked marijuana in the past year but only 2.7% smoked marijuana daily. DRUG USE, DRINKING, AND SMOKING, *supra* note 13, at 7.

In summary, there are three significant drug-crime connections: psychopharmacological, systemic, and economic compulsive. With respect to psychopharmacological violence, current evidence suggests that crack, and to a lesser extent cocaine, is somewhat likely to induce violence in users, and heroin and marijuana will rarely cause violent or criminal acts. Systemic violence associated with drug trafficking is substantial. Moreover, a large percentage of all crimes committed in the United States are the result of addicts trying to support their habits. Drug use reportedly causes only about 3,000 deaths annually although criminalization advocates fear that the number of deaths will increase markedly if drugs are legalized. Estimates of the addictiveness of crack, cocaine, and heroin vary although researchers generally agree that marijuana is not addictive but potentially habit forming.

B. Legal Drug Use and Its Effects On Society

Some proponents of drug legalization assert that all drug use, both legal and illegal, must be attacked systematically.¹⁰⁷ They compare the harmful effects of alcohol and tobacco to the effects of illicit drugs,¹⁰⁸ pointing out that the social costs of alcohol and tobacco far outweigh the costs of illegal drugs.¹⁰⁹

Alcohol consumption has long been associated with violent behavior and criminal activity.¹¹⁰ Studies conducted in 1953 and 1968 found a significant correlation between intoxication and murder.¹¹¹

¹⁰⁷ See, e.g., Nadelmann, *supra* note 36, at 943. In 1986, the total cost of alcohol abuse equaled 128.3 billion dollars. U.S. DEP'T OF HEALTH AND HUMAN SERVS., *Preface to SEVENTH SPECIAL REPORT TO THE U.S. CONGRESS ON ALCOHOL AND HEALTH*, at x.

¹⁰⁸ See, e.g., Nadelmann, *supra* note 36, at 943; Ostrowski, *supra* note 16, at 40.

¹⁰⁹ See Isikoff, *Alcohol: The 'Worst' Drug Problem*, Wash. Post, Apr. 2, 1990, at A1, col. 2. Drug legalization proponents point out that alcohol and nicotine may be as addictive or more addictive than their illicit counterparts. See, e.g., Ostrowski, *supra* note 16, at 48; Husak, *supra* note 50, at 378 n.60. About 15 million people in the United States are alcoholics or are alcohol-dependent. Isikoff, *supra*, at A4, col. 1-2. An estimated three million alcoholics are under the age of eighteen. Anderson, *A Child's Dead End Path*, 67 MICH. BAR J. 317, 317 (Mar. 1988). Finally, several researchers claim to have found a genetic predisposition towards alcoholism in some people. E. GOODE, *supra* note 1, at 56. Some studies indicate that adopted children's rate of alcoholism more closely resembles their genetic parents' rate of alcoholism than their adopted parents' rate of alcoholism. *Id.* Finally, the vast majority of people who smoke cigarettes are addicts. Husak, *supra* note 50, at 378 n.60.

¹¹⁰ See E. GOODE, *supra* note 1, at 118.

¹¹¹ *Id.* at 118. The 1953 study found that 60% of all murders were committed by persons who had been drinking. The 1968 study found that 53% of the murders reviewed were committed by people who had been drinking. *Id.* Further, drunkenness has been linked to a large percentage of sexual crimes. *Id.*; see also S. KADISH, S. SCHULHOFER, & M. PAULSEN, *CRIMINAL LAW AND ITS PROCESSES* 955 (5th ed. 1989) (citing Moore, *Legal Responsibility and*

In addition to this correlation between violent crime and alcohol, alcohol leads to hundreds of thousands of deaths each year.¹¹² Tobacco, meanwhile, causes nearly 400,000 deaths each year.¹¹³ Moreover, a government study demonstrated that exposure to passive cigarette smoke significantly increases a non-smoker's likelihood of developing lung cancer.¹¹⁴ Finally, because of the widespread harms that alcohol and tobacco use cause, many legalization proponents suggest that the legal status of these drugs is at odds with the illegal status of other drugs.

With respect to the practical rationale for legalizing drugs, advocates on both sides of the legalization debate use different data to support their arguments. For example, the crucial drug-crime connection breaks down into psychopharmacological crime, systemic crime, and economic compulsive crime.¹¹⁵ Different drugs have varying potential for leading to or contributing to each of these three types of crime, and some of this crime may be caused by the drug laws themselves. Next, the drug-death connection is also susceptible to contrary interpretation. Some advocates assert that legalization will lead to an increase in overdoses while others conclude that, because the black market causes so many overdoses, legalization will diminish the number of drug-related deaths. Finally, the concept of addiction, also critical to any discussion of drug legalization, defies easy description. Most significantly, the addictiveness of the high profile illicit drugs is at issue.

Chronic Alcoholism, 122 AM. J. PSYCHIATRY 748, 753 (1966)) (Cincinnati study showing a high correlation between drinking of alcohol and felonies).

The Department of Justice's 1983 statistics indicate that 54% of all prison inmates convicted of violent crimes admitted they had used alcohol just before they committed their crimes. Nadelmann, *supra* note 36, at 941 (citing BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 398 (1986)). A study released by the Centers for Disease Control ("CDC") found that 46% of the nation's homicides in 1987 were alcohol-related. Isikoff, *supra* note 109, at col. 2-3.

¹¹² The CDC study states that alcohol contributed to over 100,000 deaths in the United States in 1987 alone. Isikoff, *supra* note 109, at A4, col. 1. This statistic is comprised chiefly of alcohol diseases, traffic deaths, and suicides. *Id.* at col. 1-2. Another study places the number of deaths directly or indirectly attributable to alcohol between 50,000 and 200,000 a year. Nadelmann, *supra* note 36, at 943. A third study suggests that alcohol causes 150,000 deaths a year. Ostrowski, *supra* note 16, at 47.

¹¹³ Jonas, *Fight New Enemies in the War on Drugs*, NEWSDAY, Feb. 20, 1990, at 45, col. 2.

¹¹⁴ NATIONAL RESEARCH COUNCIL, ENVIRONMENTAL TOBACCO SMOKE 10 (1986). The report states that the risk of cancer is 30% greater for non-smoking spouses of smokers than couples where neither spouse smokes. *Id.* Another source reports that about 12,000 people each year die from cancer caused by passive smoke. Jonas, *supra* note 113, at 45, col. 2.

¹¹⁵ See *supra* notes 56-82 and accompanying text.

Despite the practical reasons for criminalizing drugs, some criminalization advocates accept *arguendo* that legalization might have a beneficial impact in a vacuum, but doubt whether any legalization scheme can be implemented to resolve the problems that legalization advocates address.¹¹⁶ The criminalization proponents argue that legalization will not eliminate black market violence, and they consider legalization, which will reduce the price of drugs while increasing purity and access, an illogical way to reduce the demand for drugs.¹¹⁷ These critics query whether all drugs will be legal; whether anyone, or only addicts, will be allowed to buy drugs legally; and whether age limits will be imposed.¹¹⁸

There have been a wide range of responses to this type of inquiry. One writer offers no concrete plan but implies that legalization of all drugs is appropriate.¹¹⁹ Other commentators suggest experimenting with legalization, initially decriminalizing marijuana only.¹²⁰ A third proponent, Judge Robert Sweet, suggests that only addicts, who register and give fingerprints, will be able to buy drugs in government-licensed stores. Under Sweet's scheme, however, crack addicts will not receive unlimited doses.¹²¹

Steven Brill, an opponent of legalization, criticizes Sweet's approach by stating that a failure to give unlimited quantities will maintain the black market for crack.¹²² Moreover, Brill generally criticizes all legalization schemes by asking how they will prevent a black market for underage drug users, and whether pregnant women will be permitted to use drugs.¹²³ Brill claims that he cannot envision any legalization scheme that will diminish, no less eliminate, the black market.¹²⁴ In fact, Brill states that legalization's only result will be to increase the availability of drugs while decreasing the moral stigma that currently deters some people from using drugs.¹²⁵

¹¹⁶ See, e.g., Raspberry, *Legalizing Drugs: Let's Get Specific*, Wash. Post, Nov. 1, 1989, at A25, col. 1; Brill, *supra* note 1, at 48.

¹¹⁷ Raspberry, *supra* note 116, at A25, col. 3.

¹¹⁸ See LEGALIZATION: IMPACT AND FEASIBILITY, *supra* note 1, at 2; Brill, *supra* note 1, at 48-50.

¹¹⁹ See Ostrowski, *supra* note 16, at 35-36.

¹²⁰ See, e.g., Trebach Interview, *supra* note 32, at 14; Brill, *supra* note 1, at 49.

¹²¹ Brill, *supra* note 1, at 49.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* A common response to the claim that the so called war on drugs is not being won is that the United States has not even begun to fight such a war. See, e.g., LEGALIZATION: IMPACT AND FEASIBILITY, *supra* note 1, at 1 (statement by Sen. Rangel); Brill, *supra* note 1, at 48 (statement by Manhattan District Attorney that "we haven't tried enforcement, so how do

II. ETHICAL THEORIES AND DRUG LEGALIZATION

Beyond these practical arguments against legalization, many commentators claim that moral beliefs help explain societal opposition to drug legalization.¹²⁶ For example, in the 1988 Anti-Drug Abuse Act, Congress stressed that legalization would constitute an "unconscionable" surrender in the war on drugs.¹²⁷ This note now examines three well-known ethical theories to evaluate whether it is morally permissible for society to declare drug use illegal merely because it thinks such use is immoral.

The legal moralism theory espoused by Lord Devlin is the first of these theories.¹²⁸ In the *Enforcement of Morals*, Devlin argues that the criminal law is designed to prevent harm to individuals and, more importantly, the public.¹²⁹ Devlin's theory would therefore support continued criminalization of all illicit drugs.

The second major theory is John Rawls's deontological theory of morals,¹³⁰ which David A.J. Richards applied to the drug legali-

we know if it will work"). According to this view, more money is needed to enforce the drug laws and increase drug treatment facilities. Brill, *supra* note 1, at 50. One suggestion for simultaneously improving enforcement and treatment is to drug test all arrestees and make treatment a condition of release. See *id.* at 51. Other suggestions include pilot studies to compare the efficacy of interdiction strategies (that try to reduce drug supply) to strategies aimed at reducing demand for drugs (treatment and prevention), voluntary drug testing for all citizens, and beepers that drug abusers would wear to alert officials if drug use occurs. Jarvik, *supra* note 51, at 390-91.

A second approach, espoused by James Hall, executive director of the Up Front Drug Information Center, suggests that the current level of criminal deterrence be maintained but that it be supplemented by "medical/health, educational, social, community, family, employer, and religious answers." Hall, *Victory in the War on Drugs*, STREET PHARMACOLOGIST NEWSLETTER, May/June 1988, at 1. Hall explains that the government traditionally captures about 10% of all illicit drugs in the United States. Thus, he states that law enforcement represents the 10% solution to drug abuse. Hall maintains that treatment and health responses to reduce demand can and should eliminate the 90% of drug abuse that law enforcement misses. He argues that, with education, treatment, and other non-law-related efforts at the forefront, and law enforcement as the backstop, the war on drugs can be won. *Id.*

¹²⁶ See Richards, *supra* note 83, at 608; Wallenstein, *supra* note 104, at 73. Richards notes that it may be necessary to persuade the American public that drug use is not immoral before the public will accept drug legalization. Richards claims that the arguments linking drug use with crime and death are after-the-fact justifications for moralistic and paternalistic beliefs. Richards, *supra* note 83, at 647.

¹²⁷ 1988 Act, *supra* note 2, at 4296.

¹²⁸ See P. DEVLIN, *THE ENFORCEMENT OF MORALS* (1965). Feinberg calls Devlin's theory "legal moralism." J. Feinberg, *Hard Cases for the Harm Principle*, in *MORALITY AND THE LAW* 56 (R. Baird & S. Rosenbaum eds. 1988). Feinberg notes that Devlin's legal moralism theory is one variation of the public harm theory. *Id.*

¹²⁹ Feinberg, *supra* note 128, at 56. See *infra* notes 146-51 and accompanying text for a discussion of Devlin's explanation of the purpose of criminal law.

¹³⁰ See J. RAWLS, *A THEORY OF JUSTICE* (1971). Deontological theorists posit the existence

zation issue.¹³¹ Richards argues that Rawls's deontological theory favors legalizing some drugs that are currently illegal.¹³²

The third theory, John Stuart Mill's harm principle, limits societal and governmental involvement in an individual's decisions.¹³³ In *On Liberty*, Mill states that the law should interfere with an individual's liberty only when doing so will prevent harm to other identifiable individuals of that society.¹³⁴ Mill's harm principle would appear to favor legalization of some currently illicit drugs.¹³⁵

A. Devlin's Public Harm Theory

Lord Devlin devised his version of the public harm theory in 1957.¹³⁶ Devlin's argument has three parts. First, he argues that a shared public morality is *fundamental* to the continued existence of a civilized society and that private immorality can threaten this public morality.¹³⁷ Next, Devlin argues that a society can legitimately prohibit an act merely by showing that the act is thought injurious to society.¹³⁸ Finally, his theory explains how individual rights limit the number of situations in which the criminal law *should* prohibit immoral conduct.¹³⁹

Devlin first explains that a public morality does exist on certain basic subjects.¹⁴⁰ Devlin argues that a society is, by definition, a group of people who share common ideas.¹⁴¹ These ideas are not only political but also moral ideas about how its members should

of inviolable human rights by arguing that humans have autonomy and must be treated as equals. Richards, *supra* note 83, at 617.

¹³¹ Richards, *supra* note 83, at 607. See *infra* notes 218-55 and accompanying text for a discussion of Richards's application of Rawls's theory to drug legalization.

¹³² See *infra* note 221-22 and accompanying text.

¹³³ J.S. MILL, *ON LIBERTY* 68 (G. Himmelfarb ed. 1974).

¹³⁴ *Id.* In using the term "harm," Mill primarily meant physical harm. P. DEVLIN, *supra* note 128, at 104.

¹³⁵ See J.S. MILL, *supra* note 133, at 165.

¹³⁶ See P. DEVLIN, *supra* note 128, at 1. Devlin devised this theory in response to a report by the Committee on Homosexual offenses and Prostitution known as the *Wolfendon Report*. The *Wolfendon Report* suggested that homosexual acts in private between consenting adults should no longer constitute a criminal offense in England. P. DEVLIN, *supra* note 128, at 2. Devlin initially agreed with the *Wolfendon Report* conclusions but reversed his view before he wrote *The Enforcement of Morals*. *Id.* at vi-vii.

¹³⁷ See *id.* at 13.

¹³⁸ *Id.* at 17. It is worth noting that although *The Enforcement of Morals* focuses on homosexuality and prostitution, Devlin intended his public harm theory to articulate the scope of the state's power to legislate against alleged immorality in general. *Id.* at 12.

¹³⁹ *Id.* at 15.

¹⁴⁰ See *id.* at 10.

¹⁴¹ *Id.* at 9.

order their lives.¹⁴² He uses the institution of monogamous marriage to illustrate his point. Marriage, he suggests, is fundamental to the existence of English society. He postulates that if common moral precepts such as monogamous marriage disappear, English society will be in danger of collapse.¹⁴³ The danger of collapse exists, Devlin argues, because the individuals who form a society reach a fundamental agreement about good and evil that allows a society to enjoy health and longevity.¹⁴⁴ If this common understanding of good and evil is not preserved, society dissolves.¹⁴⁵

After trying to demonstrate that a public morality exists on certain subjects, Devlin argues that society can enforce some public morals through the criminal law.¹⁴⁶ If a public morality exists, he thinks it is beyond doubt that society has the right to preserve that moral code by enshrining it in law.¹⁴⁷ Devlin claims that society can legitimately enforce laws against homosexual acts for the same reasons that it can enforce laws against treason—both laws are promulgated to ensure the survival of society.¹⁴⁸

Although Devlin asserts that, theoretically, society's power to preserve its moral code through law can have no limits,¹⁴⁹ he recognizes that certain limits are advisable. For instance, respect for individual freedom and privacy militate against allowing society to force all of its moral views on every citizen.¹⁵⁰ Furthermore, Devlin points out that the criminal law enforces minimum rather than maximum expectations.¹⁵¹

He advocates toleration of the greatest amount of personal liberty that does not threaten the perpetuation of the public morality.¹⁵² Devlin contends that only immoral acts that are *intolerable* threaten the public moral code.¹⁵³ Devlin asserts that an act or

¹⁴² *Id.*

¹⁴³ *Id.* at 10.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *See id.* at 11.

¹⁴⁷ *Id.* Devlin makes a related point about how society knows what its moral views actually are on a given subject. *See id.* at 14. Legislators discern the moral sentiments of their constituents by using the reasonable or right-minded person standard. *Id.* at 15. Devlin envisions a jury coming down with a verdict about whether a particular act violates the public morality. *See id.*

¹⁴⁸ *See id.* at 13.

¹⁴⁹ *Id.* at 12.

¹⁵⁰ *Id.* at 15.

¹⁵¹ *Id.* at 19.

¹⁵² *Id.* at 16.

¹⁵³ *Id.* at 17.

practice is intolerable and may be outlawed if the public views that act with "intolerance, indignation, and disgust."¹⁵⁴

Philosophers have criticized Devlin's theory. H.L.A. Hart, for example, agrees with Devlin that a society's morality and criminal law ought to mirror one another regarding matters such as murder and theft.¹⁵⁵ Hart asserts, however, that certain immoral acts might lie beyond the scope of the law because although they prompt public "intolerance, indignation, and disgust," they do not threaten society.¹⁵⁶ Hart also repudiates Devlin's conception of the moral fabric by denying that all of morality forms a "seamless web," so that those who disobey any part of the popular code, be it ever so slight, are likely to transgress the rest as well.¹⁵⁷

Hart discusses the comparison Devlin made between the criminalization of treason and homosexual acts to prove his point about the lack of connection between certain immoral acts and the dissolution of society.¹⁵⁸ Hart argues that to accept, on moral grounds, Devlin's analogy between the need to enforce treason laws and the need to enforce laws against private homosexuality is to accept the statement that non-compliance with any part of the public moral code leads to the code's destruction rather than its revision.¹⁵⁹ Hart stresses that the evidence does not support this viewpoint.¹⁶⁰ He argues that people will not begin to condone murder, lying, and theft merely because the homosexual acts that they abhor escape criminal sanction.¹⁶¹

Hart's final criticism of the public harm theory encompasses a discussion of what he calls moral conservatism.¹⁶² Moral conservatism, Hart says, suggests that the unchanging nature of a moral code, whatever that code may be, is itself a moral value that justifies the legal enforcement of that code.¹⁶³ Hart denounces moral conservatism because he thinks that using coercion to perpetuate a

¹⁵⁴ *Id.*

¹⁵⁵ Hart, *Immorality and Treason*, in *MORALITY AND THE LAW* 50 (R. Baird & S. Rosenbaum eds. 1988).

¹⁵⁶ *See id.*

¹⁵⁷ H.L.A. Hart, *LAW, LIBERTY, AND MORALITY* 50-51 (1963). Hart invented the term "seamless web" to describe Devlin's theory about how people create moral beliefs.

¹⁵⁸ *See* Hart, *supra* note 155, at 51.

¹⁵⁹ *Id.* at 51.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² H.L.A. Hart, *supra* note 157, at 72.

¹⁶³ *Id.*

moral code hinders the process of moral modification that gives social institutions their value.¹⁶⁴

In *The Enforcement of Morals*, Devlin responds to Hart's critique of his theory.¹⁶⁵ He argues that it misinterprets his view to say that any deviation from the common morality threatens a society's existence.¹⁶⁶ Rather, Devlin says that deviation may potentially threaten society and is therefore within the purview of legal enactments.¹⁶⁷ He points to history to show that the dissolution of "moral bonds" is often the first step to the destruction of a society.¹⁶⁸

In addition, Devlin says that Hart's "seamless web" terminology inaccurately describes his understanding of how people maintain their moral beliefs.¹⁶⁹ Devlin states that "for most people morality is a web of beliefs, rather than a number of unconnected ones."¹⁷⁰ Although he acknowledges that this interconnected understanding of morality may be irrational, he thinks people actually do comprehend their moral beliefs as a whole.¹⁷¹

Devlin also rejects Hart's suggestion that the legal enforcement of public morality means that moral values remain static.¹⁷² He claims that a sufficient number of strongly voiced opinions will tend to bring about a change in the law.¹⁷³ He recognizes that changing the popular view on a subject, such as homosexuality, requires zealous advocacy and entails a willingness to fight and perhaps to suffer.¹⁷⁴ The law reflects society's changing moral opinions,¹⁷⁵ and if a change in opinion by a sufficient number does not cause the law to change, the law will be broken.¹⁷⁶ He adds that in democratic societies like England, the tendency will be for the law to change before it is broken.¹⁷⁷

¹⁶⁴ *Id.* at 75.

¹⁶⁵ P. DEVLIN, *supra* note 128, at 13 n.1.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 13. Devlin does not give any specific historical examples.

¹⁶⁹ *Id.* at 115.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *See id.*

¹⁷³ *Id.* at 116. John Stuart Mill referred to this method of moral reform as both uneconomical and ungenerous. *See* Feinberg, *supra* note 128, at 57-58.

¹⁷⁴ P. DEVLIN, *supra* note 128, at 116.

¹⁷⁵ *See id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* One author suggests that under Devlin's conception of law mirroring morality, moral opinion changes only by first breaking the law. Feinberg, *supra* note 128, at 57.

Ronald Dworkin also criticized Devlin's public harm theory.¹⁷⁸ In his critique, Dworkin assumes that Devlin is correct—that society can protect the public environment from what the preponderance of its members condemn on moral principle—but finds that Devlin's argument still fails because it misconstrues the meaning of morally principled disapproval.¹⁷⁹ Dworkin criticizes Devlin's explanation of how the criminal law and public morality should coincide because he finds this idea at the heart of many theories that relate law and morals.¹⁸⁰

Dworkin altogether excludes from the realm of moral reasons prejudice, personal emotional reactions, factually incorrect rationalizations, and attempts to create a moral reason merely by showing that others have a similar belief.¹⁸¹ Dworkin asserts that feelings and emotions *cannot* alone create a moral position on any subject.¹⁸² Dworkin attacks Devlin's argument precisely because Devlin wants legislators to rely on society's moral consensus on an issue, which is to be formed primarily by that society's *feelings*.¹⁸³ Dworkin recalls Devlin's statement that "the ordinary man whose opinions we must enforce is not expected to reason about anything and his judgment may be largely a matter of feeling."¹⁸⁴ Dworkin asserts that Devlin's understanding of morality is wrong because it fails to separate truly moral reasons from mere prejudice, irrational factual assumptions, and personal hatred.¹⁸⁵

In summary, Devlin argues that a public morality exists. Society has the right to enforce this morality, he claims, when it feels that a failure to do so might lead to its own destruction. He asserts that society's moral code, and therefore its very existence, is endangered when private immoral acts instill in its citizens feelings of "intolerance, indignation, and disgust." When these feelings do not exist, Devlin says that respect for individual freedom and liberty allow private immoral acts to be unaffected by the criminal law. Even so, Devlin points out that laws may change to reflect new limits of moral

According to Feinberg, only by practicing one's illegal moral beliefs in public can the moral minority effect change of the law. *See id.*

¹⁷⁸ R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 240 (1977).

¹⁷⁹ *Id.* Dworkin acknowledges that there is much room for quarreling with each of Devlin's subarguments but he chooses to bypass them. *Id.*

¹⁸⁰ *Id.* at 248.

¹⁸¹ *Id.* at 249-50.

¹⁸² *Id.* at 252.

¹⁸³ *Id.* at 253-54 (quoting P. DEVLIN, *supra* note 128, at 15.)

¹⁸⁴ *Id.* at 254.

¹⁸⁵ *Id.*

toleration after citizens display earnest attempts to influence society's opinion.

B. *Rawls's Deontological Moral Theory and Richards's Application of that Theory to Drug Legalization*

In 1971, John Rawls provided a unique explication of contractarian moral theory in *A Theory of Justice*.¹⁸⁶ According to Rawls, justice is the foundation of any social institution.¹⁸⁷ Rawls's goal is to devise a systematic theory of justice apart from and superior to utilitarianism.¹⁸⁸ Rawls creates his moral theory by hypothesizing human beings who must agree on fundamental rules of justice that will govern all future disputes.¹⁸⁹ Rawls calls this formative point of social creation the "original position."¹⁹⁰ In the "original position," a "veil of ignorance" covers the individuals who vote on these rules of justice.¹⁹¹ In other words, they do not know whether they are aristocratic or working class, wealthy or poor, intelligent or dim-witted.¹⁹² The voters' sole factual knowledge in the "original position" is that their society is governed by the principles of justice they choose and the implications of those rules.¹⁹³ Because none of the voters know their place in society, Rawls asserts that all voters will find it is in their self-interest to choose rules of justice that are the result of fair bargaining.¹⁹⁴

Having established that the "veil of ignorance" is likely to produce rules of justice in a fair manner, Rawls tries to envision the reasoning that the voters will employ.¹⁹⁵ Based on this reasoning, he formulates the rules of justice themselves.¹⁹⁶ Rawls argues that, although members of a society have unique rational plans, each

¹⁸⁶ J. RAWLS, *supra* note 130.

¹⁸⁷ *Id.* at 3.

¹⁸⁸ *Id.* at viii. For a definition of utilitarianism, see *infra* note 258.

¹⁸⁹ *Id.* at 13. Rawls's premise is a form of the social contract theory espoused by Locke, Rousseau and Kant. See *id.* at 11. According to Rawls's understanding of social contract theory, individuals create the basic structure of society with the rules of justice as the aim of the original contract. *Id.*

¹⁹⁰ See *id.* at 17.

¹⁹¹ *Id.* at 12.

¹⁹² *Id.*

¹⁹³ *Id.* at 137. Voters are expected to know general facts about human society such as economic theory, politics and anything else that their choice of principles of justice will affect. *Id.*

¹⁹⁴ *Id.* at 12.

¹⁹⁵ See *id.* at 60.

¹⁹⁶ See *id.* at 60-61.

person requires a basic amount of the "primary goods" to attain his or her more complex ends.¹⁹⁷ Rawls loosely defines these primary goods as "rights and liberties, opportunities and powers, income and wealth."¹⁹⁸ Rawls claims that, regardless of their specific plans, all people prefer more of these goods than less.¹⁹⁹ Rawls supposes that more primary goods increase people's chances of achieving their larger, more diverse plans.²⁰⁰

Rawls stresses that self-respect is a critical primary good.²⁰¹ Self-respect, for Rawls, exists when individuals believe that their rational goals are worth carrying out and that they are capable of achieving those goals.²⁰² Persons in the "original position," Rawls maintains, will likely vote to ensure that the principles of justice protect self-respect.²⁰³ Rawls claims that because his moral principle better justifies the need for self-esteem than other moral principles, voters in the "original position" have good reason to adopt it.²⁰⁴

Because people desire the maximum number and amount of primary goods but do not know their position in life, each person, Rawls believes, votes for rules of justice that ensure equal liberty, equal opportunity, and equal distributions of income and wealth for all individuals.²⁰⁵ On further reflection, though, after voters apply the rules of justice, they realize that unequal distributions of such things as wealth and income should be tolerated as long as every individual is comparatively better off than he or she was before the unequal distribution.²⁰⁶

Thus, Rawls states two principles of justice that he thinks voters covered by the "veil of ignorance" in the "original position" will adopt. First, "[e]ach person is to have an equal right to the most

¹⁹⁷ *Id.* at 93.

¹⁹⁸ *Id.* at 92.

¹⁹⁹ *Id.* at 93.

²⁰⁰ *Id.* at 92.

²⁰¹ *Id.* at 440.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 150-51.

²⁰⁶ *Id.* at 151. Rawls describes the "maximin" rule for choice under uncertainty to create a more systematic proof of the reasoning that will lead to the fundamental principles of justice. *See id.* at 152. The maximin rule says that when outcomes are uncertain, it is logical to choose a course of action whose worst possible outcome is preferable to the worst possible outcome of other possible courses of action. *Id.* at 152-53. Although Rawls admits that the maximin solution is not the optimum way to make choices that have uncertain outcomes, in certain settings, such as where the "veil of ignorance" exists, the maximin rule is attractive. *Id.* at 153.

extensive total system of equal basic liberties compatible with a similar system of liberty for all."²⁰⁷ Second, "[s]ocial and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, consistent with the just savings principle,²⁰⁸ and (b) attached to offices and positions open to all under conditions of fair equality of opportunity."²⁰⁹

Further, Rawls states that the first principle of justice must be satisfied before the second can be applied.²¹⁰ In accordance with the first principle, liberty can be restricted only for the sake of other types of liberty.²¹¹ This restriction might occur in two situations: when a less extensive liberty strengthens the system of liberty enjoyed by all; and when less than equal liberty for all is accepted by those with lesser liberty.²¹² In the first situation, the individual in the "original position" must find that this reduction in liberty increases his or her overall freedom.²¹³ The second situation arises when those with less liberty are satisfied because their remaining liberties are better protected.²¹⁴

In 1981, David Richards analyzed Rawls's theory to explain why criminalization of some drugs is immoral.²¹⁵ According to Richards, Rawls's deontological theory stems from an understanding of autonomy as the right to choose and revise one's own ends.²¹⁶ Richards interprets autonomy as a primary good—a good worth pursuing for its own sake.²¹⁷ Richards maintains that Rawls's theory, by accepting that human beings as rational agents can plan and

²⁰⁷ *Id.* at 302.

²⁰⁸ Rawls describes the just savings principle as the requirement that, in addition to each generation maintaining society's gains, and maintaining its just institutions, each generation must also put aside a sufficient amount of real capital investment. *Id.* at 285. In brief, the just savings principle addresses the problem of justice between generations. *Id.* at 284.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 302.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.* at 244.

²¹⁴ *Id.*

²¹⁵ See Richards, *supra* note 83, at 617 (citing J. RAWLS, *supra* note 130.) Richards also uses the views of Alan Gewirth to explicate the basic deontological framework of morality. *Id.* at 622-23.

²¹⁶ *Id.* at 617.

²¹⁷ *Id.* at 617. Rawls defines the good as the system of ends that is rational for an individual to pursue under reasonably favorable circumstances. J. RAWLS, *supra* note 130, at 395. Furthermore, Rawls specifically disassociates his deontological moral theory from the definition of the word deontological, which entails characterizing the rightness or wrongness of actions independent of their consequences. *Id.* at 30. His theory definitely takes consequences into account. See *id.*

achieve their goals, treats all human beings as equals.²¹⁸ Treating people as equals consists of treating the goals of each person with equal concern and respect.²¹⁹ Richards argues that deontological theory permits interference with an individual's rational plans only when those plans conflict with the autonomy of another person.²²⁰

Using deontological moral theory, Richards seeks to demonstrate that use of some drugs is moral. He argues that much drug use that is currently illicit should be legalized.²²¹ The deontological understanding of autonomy, he argues, allows individuals to act to further their rational goals and to assume responsibility for the realization of their ends.²²² Richards insists that the only moral values that ought to be enforced by the criminal law are those that protect the higher-order rational interests at little cost.²²³ Higher-order rational interests include non-maleficence (not harming or doing evil to others), mutual aid (when it is safe to provide aid), and respect for others' privacy.²²⁴ Richards claims that, under the deontological theory, drug legalization is appropriate because treating persons as equals imposes limits on society's right to enforce public morality.²²⁵

In light of the deontological conception of morality, Richards analyzes several arguments against drug legalization and finds each one unpersuasive.²²⁶ First, Richards analyzes the argument that

²¹⁸ Richards, *supra* note 83, at 619. Explicit in Rawls's understanding of rational agents is that all such agents will try to further their own self-interest. J. RAWLS, *supra* note 130, at 142.

²¹⁹ Richards, *supra* note 83, at 619. Rawls denies that a loss or reduction of freedom of one individual can be justified by increasing the good of other individuals. J. RAWLS, *supra* note 130, at 3-4.

²²⁰ Richards, *supra* note 83, at 625.

²²¹ See *id.* at 609. Richards never explicitly states which drugs should be legalized. He implies that marijuana and LSD should be legal and remarks that speed should perhaps be illegal. He is silent on the status of cocaine. (Crack was not a problem in 1981 when Richards wrote this article.) Richards also explains that a moral right to use drugs does not imply that people should take drugs. *Id.* at 677.

²²² *Id.* at 622. Richards suggests that drugs that lead to violent behavior can be outlawed. See *id.* at 671 n.418. He mentions methamphetamine as a likely candidate for continued criminalization because he has been told that speed users sometimes experience violent and hyperactive episodes. He does not include cocaine in his footnote of violence-inducing drugs that he perceives as potential candidates for continued prohibition.

²²³ *Id.* at 654.

²²⁴ *Id.* at 654 & n.313.

²²⁵ *Id.* at 673-74.

²²⁶ *Id.* at 643. Richards criticizes four practical arguments that favor criminalization: 1) drug use increases crime; 2) drug laws control illness and injury; 3) drugs or the effects they have on society are intrinsically immoral; and 4) drugs are self-destructive. *Id.* For a detailed analysis of the first argument, see notes 56-82 and accompanying text. The second argument

drug use is degrading.²²⁷ Proponents of this argument state that human beings should maintain a high level of self-control.²²⁸ Richards defines degradation as falling below some applicable standard of self-control.²²⁹ He states that those who favor this argument underestimate the human propensity for self-control; he notes that, applying the same reasoning, sexual intercourse for any reason other than procreation is improper.²³⁰ The oversight in this argument, he maintains, is the failure to realize that just as people have sexual intercourse for varied reasons, individuals choose to use drugs for a variety of reasons including therapy, recreation, relaxation, stimulation, and imaginative exploration.²³¹ Richards argues that the deontological argument suggests that humans rationally choose their actions to achieve their goals and desires.²³² To suggest that a drug user is degrading himself is to assume that his decision to use drugs is irrational.²³³ Richards considers this conclusion erroneous.²³⁴

Richards next analyzes a variation of the moral degradation argument that focuses exclusively on the addictive tendencies of some drugs.²³⁵ According to this argument, addictive drugs should be outlawed because addiction causes the individual to lose certain fundamental abilities that all moral beings possess.²³⁶ Richards points out that researchers have postulated at least four different definitions of drug addiction and that it is no simple task to categorize a user as an addict.²³⁷

Because physical dependence on a drug does not always lead to or include psychological reliance on a drug, Richards questions whether it is possible to be certain that use of a particular drug *in itself* leads to addiction.²³⁸ He points out that social and psychological

is indirectly discussed. See notes 83-90 and accompanying text for a discussion of drugs and crime. Only the third and fourth arguments are discussed in this note. See *id.* at 647.

²²⁷ *Id.* at 648.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.* at 649.

²³¹ *Id.* at 649-50.

²³² See *id.* at 619.

²³³ *Id.* at 650.

²³⁴ *Id.*

²³⁵ See *id.* at 654. See *supra* notes 91-106 and accompanying text for a discussion of addiction.

²³⁶ *Id.* at 654.

²³⁷ *Id.* at 655-56. See *supra* note 91 for a discussion of the four different definitions of addiction.

²³⁸ *Id.* at 657.

factors affect individual drug experiences and overall use patterns.²³⁹ He suggests that these factors contribute to the addiction of users.²⁴⁰

Lastly, Richards criticizes the paternalistic rationale for drug criminalization.²⁴¹ Richards's description of the paternalistic argument is that drug use is irrational and that laws should be enacted to protect people from their irrational ends.²⁴² Richards begins his critique of paternalism by pointing out that when conduct traditionally seen as immoral begins to gain moral support, those who retain the traditional moral understanding often argue as a last resort that the new view is irrational.²⁴³ Those who make the paternalism argument against drug use, Richards continues, substitute their own ends for the ends of those who choose to use drugs.²⁴⁴ Richards maintains that paternalism aimed at drug use occurs because it is easier for people to impose their personal views on others than it is to see how others look at a situation.²⁴⁵ Deontological theory supports the idea that individuals' own motives for actions are presumed to be rational.²⁴⁶

Richards acknowledges that some circumstances might justify paternalistic laws.²⁴⁷ When individuals are truly acting irrationally, it is permissible to intervene for their own good.²⁴⁸ According to Richards, the intervenor must know the individual's goal and must be able to demonstrate empirically that the individual's chosen course of action cannot achieve that goal.²⁴⁹ Further, intervention is appropriate only when the individual has insufficient time to learn

²³⁹ *Id.* Richards discusses the traits that the majority of heroin addicts possess including low economic status, a lack of occupational skills, and a dependent-type personality. *Id.*

²⁴⁰ *Id.* Notwithstanding these questions about addiction, Richards concedes that if drug use or addiction impairs one's ability to do one's duty, such as a parent's duty to care for his or her child, regulation by law of drug use is proper. *See id.* at 660-61.

²⁴¹ *Id.* at 667.

²⁴² *Id.* at 667; *see* J. RAWLS, *supra* note 130, at 249. Familiar examples of paternalistic laws include seat belt laws, laws against suicide, and laws prohibiting euthanasia.

²⁴³ *Id.* Richards suggests that the paternalism argument aimed against drug use makes just such a proclamation. *See id.* at 668.

²⁴⁴ *Id.* Hart offers a paternalistic concern for the well-being of people as a possible justification for the laws against the use and sale of illicit substances rather than finding the basis for legitimate enforcement solely on the grounds of the perceived immorality of drug use. *See* H.L.A. HART, *supra* note 157, at 33.

²⁴⁵ *Id.*

²⁴⁶ J. RAWLS, *supra* note 130, at 248.

²⁴⁷ Richards, *supra* note 83, at 668.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

from his or her irrational experience.²⁵⁰ Richards maintains that it is impermissible to interfere with a person's acts to further values that the person is not interested in furthering.²⁵¹

Richards concludes that paternalism cannot justify laws against drug use.²⁵² He claims that drug use is rational in the proper setting and context.²⁵³ At most, Richards accepts that paternalism based on a neutral idea of the good may dictate regulation of drug use to limit the risks that drugs will be used irrationally.²⁵⁴

In sum, Richards analyzes drug legalization from the deontological framework of justice and morality, concluding that some drug use should be legal. Addressing several of the more common moral arguments against legalization, he concludes that the ideal of self-control is laudable but is inappropriate as a model for law. He also uses the deontological model to explain why paternalistic laws about drug use are inappropriate.²⁵⁵

²⁵⁰ *Id.* at 669.

²⁵¹ *Id.*

²⁵² *See id.* at 670.

²⁵³ *Id.*

²⁵⁴ *Id.* at 678. He reviews several legalization schemes to determine which one or ones best ensure that decisions to use drugs are rational and autonomously made. *See id.* at 678-84. He does not offer one definite, comprehensive legalization scheme. He assumes a legalization scheme where all criminal prohibitions are removed. *Id.* at 678.

²⁵⁵ Alan Gewirth raises several objections to the deontological theory that Rawls created and Richards's theory largely depends on. A. GEWIRTH, *REASON AND MORALITY* 108 (1978). Gewirth denies that the "original position" and the "veil of ignorance" accurately portray a rational attempt to arrive at principles of justice. *Id.* He admits that Rawls's "veil of ignorance" allows human beings as rational, self-interested actors to choose egalitarian moral principles. He argues, however, that it is non-rational to deny information to the people in the "original position" concerning their economic and social status. According to Gewirth, not all people are created with equal mental and physical abilities or equal opportunities. For Gewirth, Rawls's "veil of ignorance" creates a situation that irrationally exceeds the uncertain nature of the facts with which rational beings are faced when making uncertain decisions. *Id.* at 108-09.

John Finnis criticizes Rawls's "arbitrary" choice of liberty, opportunity, wealth, and self-respect as the primary goods. J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 106 (1980). Rawls explains that he excludes health, intelligence and imagination because they are natural goods, only indirectly controlled by the basic social structure of a society. J. RAWLS, *supra* note 130, at 62. Finnis uses anthropological studies that suggest that all cultures share certain features to support the proposition that there are a certain minimum number of primary goods and that the number exceeds Rawls's list. J. FINNIS, *supra* at 82-83. The list of primary goods indicates that all societies value human life, procreation, the need for restraint on sexual matters, such as laws against incest, an appreciation of the truth, and an understanding of the need for play. *Id.* at 83.

Finnis argues that Rawls does not and cannot provide a satisfactory reason for limiting the definition of human good in this way. *Id.* at 106. Finnis maintains that those who plan out their lives without considering basic forms of human good such as truth, friendship, or play are justly accused of being irrational. *Id.*

C. Mill's Harm Principle and Drug Legalization

In *On Liberty*, John Stuart Mill enunciates the harm principle, which draws a line between individual conduct that society can rightfully control through law and individual conduct with which the law cannot properly interfere.²⁵⁶ Mill begins his famous text by stating the harm principle, which he promises will establish the proper limits of societal control over individual conduct.²⁵⁷ Mill argues that the harm principle properly judges the extent of social control of human action because, utility,²⁵⁸ based on the "permanent interests of man as a progressive being," is best satisfied when individual freedom is restrained only if such freedom causes harm to another being.²⁵⁹ In Mill's view, society benefits by allowing people to control their own lives instead of allowing others to control them.²⁶⁰

²⁵⁶ J.S. MILL, *supra* note 133, at 68. One commentator noted that Mill mainly was using the harm principle to try to demonstrate that liberty and individuality should be the definitive determinants of social policy more than means to other ends, such as truth or morality. Himmelfarb, *Introduction* to J.S. MILL *supra* note 133, at 31. Himmelfarb points out that some critics think Mill based the harm principle, with its limits on societal intervention in individual conduct, on the premise that to do so would increase individuals' overall utility. *Id.* at 30.

²⁵⁷ *Id.* at 68. Mill states:

[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully 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. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise or even right.

Id.

There are two important addenda to the harm principle. First, the harm principle is not based on a theory of abstract right. *Id.* at 69-70. It is grounded solely by concerns for utility, based on the permanent interests of the individual as an evolving being. *Id.* at 70. Second, the harm principle does not apply to primitive cultures or to those people whom the law considers children. *Id.* at 69. Mill states that people can benefit from the free exchange of contrary opinions only after a certain point of human development.

²⁵⁸ For Mill, utility meant that, in deciding whether to perform an action, one should balance the pleasures and pains that were the consequences of that action and to act to create the greatest pleasure. Schneewind, *John Stuart Mill*, in *ENCYCLOPEDIA OF PHILOSOPHY* 320 (1967).

²⁵⁹ J.S. MILL, *supra* note 133, at 70.

²⁶⁰ *Id.* at 72. Mill explains in great detail why permitting unpopular opinions on all subjects, whether ultimately correct or incorrect, is necessary. *See id.* at 75-118. If the unpopular opinion is in fact correct, it needs to be heard because otherwise, Mill argues, the truth will never emerge. Mill states that acting on the majority opinion is justified only because of the willingness to allow others to contradict that opinion and attempt to prove

Mill acknowledges, however, that a distinction must be made between the type of individual dissent tolerated in opinion and that which is permissible in action.²⁶¹ Aside from barring actions that cause harm to others, Mill nullifies those acts that work a perpetual end to an individual's liberty such as selling oneself into slavery.²⁶² Mill explains that freedom does not include the capacity to rid oneself voluntarily of one's freedom.²⁶³

Apart from these general limitations, Mill argues that individual actions should be as free as individual opinions.²⁶⁴ Mill states that different lifestyles should be permitted, if not encouraged, as long as humankind remains imperfect.²⁶⁵ Mill argues that individuality is not usually seen as an intrinsic value or a requirement of well-being.²⁶⁶ He says that, although people profess that original

that it is mistaken. *Id.* at 79. To refuse to hear the opposing view is to fail to distinguish the certainty that an individual can attain in making a decision from absolute certainty. *Id.* at 77.

If, on the other hand, the unpopular view is incorrect, Mill argues that it should be heard nonetheless. *Id.* at 96-97. If the truth is never contested, people will soon merely memorize the right answer with no knowledge of its foundations. In these circumstances, Mill claims that eventually there will be no point in knowing the truth because it will have no rationally understood underpinnings. *Id.* at 116.

Furthermore, on many questions, including questions of morals, there are usually only degrees of truth, and the whole truth may best emerge from a combination of the popular and the unpopular opinions. *Id.* at 108. Mill argues that these truths emerge only when all opinions that contain any truth are discussed. *Id.* at 116.

²⁶¹ *Id.* at 119. Mill also points out that speech and opinion are not to be used to incite a mob to riot or otherwise initiate violence. *Id.*

²⁶² *Id.* at 173. Douglas Husak points out that drug addiction is often described as a type of slavery. Husak, *supra* note 50, at 375-76 (1989). He considers whether a definition of addiction involving physical dependence and painful withdrawal can be equated with the nonvoluntary nature of slavery. *See id.* at 375-76. Initially, he states that an attempt to justify prohibitions on drug use by using the slavery analogy requires that all drugs be categorized as addictive or nonaddictive; this would mean that a legal drug like caffeine would be addictive but LSD would not. *See id.* at 376. Husak then attacks the alleged similarity between physical dependence and slavery. *See id.* at 376. He distinguishes physical dependency from nonvoluntariness by pointing out that although nonvoluntariness is an affirmative defense in criminal law, drug addiction is not allowed as a defense to criminal liability. Husak admits that the criminal law definition of nonvoluntariness may vary, with good reason, from the voluntariness definition for addiction purposes. He argues, however, that the criminal law's exclusion of addiction as a defense weakens the argument that drug addiction makes drug use nonvoluntary and that drug use can therefore be prohibited. *Id.*

Moreover, Husak offers several reasons why prohibiting the use of addictive drugs is more suspect than outlawing contracts to sell oneself into slavery. *Id.* at 377. Unlike a slavery contract, addiction, he points out, does not arise immediately, not all users of addictive drugs become addicts, and addiction is not or need not be permanent. *Id.* at 378.

²⁶³ J.S. MILL, *supra* note 133, at 173.

²⁶⁴ *Id.* at 119-20.

²⁶⁵ *Id.* at 120.

²⁶⁶ *Id.*

thoughts and actions are admirable, such thoughts nonetheless encounter opposition.²⁶⁷

Aside from allowing individuality to flourish for the sake of greater knowledge and understanding,²⁶⁸ Mill states that originality should be allowed because it is an essential feature of what makes people different from each other.²⁶⁹ Mill claims that people have different tastes and requirements for spiritual and emotional development that produce preferences for different moral climates.²⁷⁰ Mill argues that only by allowing diverse actions can all people attain happiness and the mental, moral, and aesthetic heights of which they are capable.²⁷¹

Elsewhere, Mill notes that the distinction that his harm principle makes between purely private acts and public acts is not apparent to some people.²⁷² Mill says that the objection to this distinction is based on the belief that no person is completely isolated from other people.²⁷³ Mill admits that many actions that appear to affect only the actor actually have significant impact on other parties.²⁷⁴ Mill points out, for example, that some people argue that even when a landowner commits the seemingly private act of damaging his own land, he also commits a public act by damaging those whom he employs on the land.²⁷⁵

Accordingly, he states that moral disapproval and perhaps legal intervention are appropriate whenever an individual breaches a concrete and "assignable" duty to another person.²⁷⁶ Mill uses as an example the man who causes grief to his family because of his addiction to bad habits.²⁷⁷ Put another way, he says that action that causes definite damage or a "definite risk of damage" to another

²⁶⁷ *Id.* at 130.

²⁶⁸ *Id.* at 129.

²⁶⁹ *Id.* at 133.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.* at 146.

²⁷³ *Id.*

²⁷⁴ *Id.* at 148.

²⁷⁵ *Id.* at 147.

²⁷⁶ *Id.* at 148.

²⁷⁷ *See id.* at 148. Mill states that these types of people deserve moral disapprobation for their breach of duty to their family. *Id.* Mill argues that the person is no more morally reprehensible for being addicted to bad habits than he or she would be for having habits less vicious. *Id.* The moral blame attaches to the person for breach of duty and does not, Mill claims, emanate from the cause of the breach or the circumstances that caused the breach. *Id.* at 149.

individual or society in general deserves moral and legal reproach.²⁷⁸

According to Mill, however, conduct that causes only "contingent" or "constructive" damage to society without breaching any particular duty to the public, and that fails to cause noticeable damage to any particular individual cannot be controlled by society.²⁷⁹ Mill says that society should bear this slight burden because it is outweighed by the greater human freedom that results.²⁸⁰ Mill supports this conclusion by reasoning that the public is more likely than not to impose an incorrect opinion on the person who engages in only self-regarding conduct.²⁸¹

Mill concludes *On Liberty* by discussing concrete situations that demonstrate how the harm principle works. For example, he argues that prohibiting the importation of opium into China is an unjustified restraint on the liberty of the potential buyer.²⁸² Similarly, public drunkenness should ordinarily be excluded from legal restraint.²⁸³ Mill concedes, however, that the criminal law can prohibit drinking by anyone who has been known to commit prior violence even once while drunk and to impart a severe penalty for anyone who commits subsequent violence while drunk.²⁸⁴ Mill also notes that certain acts that are acceptable in private become objectionable

²⁷⁸ *Id.* at 149. At this point in his argument, Mill distinguishes the drunk individual who should not be punished from the police officer who is drunk on the job who should be punished. The breach of the duty is the determinative factor. *See id.*

²⁷⁹ *Id.* Hart interprets "constructive" to mean that the offense is neither serious nor likely. H.L.A. HART, *supra* note 157 at 42-43.

²⁸⁰ J.S. MILL, *supra* note 133, at 149.

²⁸¹ *Id.* at 151.

²⁸² *Id.* at 165.

²⁸³ *Id.* at 167. Mill also discusses the proper role of the police in controlling trade of certain items such as poison that can lead to crime or accidents. *See id.* at 165. He states that when the police see an individual preparing to commit a crime, intervention is appropriate. *Id.* If people purchase poisons solely to commit murder, complete prohibition of the sale and use of poison is appropriate. *Id.* But because, he concludes, poison has innocent as well as useful purposes, prohibition to prevent murder would also prevent the legitimate use of poison. *Id.*

²⁸⁴ *Id.* Mill also discusses whether society is justified in placing limits on the number of places where alcohol can be obtained, in taxing alcohol at high rates that exclude certain classes of people from being able to procure it legally, and in licensing places that serve alcohol. *Id.* at 170-71. He finds a tax to discourage alcohol consumption unjustified but a tax to increase state revenue acceptable and often necessary. *Id.* He notes that laws concerning hours of operation are appropriate because public places that serve alcohol require state provided police protection. Likewise, licensing laws are wise because trustworthy bar owners help minimize public disputes. *Id.* at 171.

if performed in public.²⁸⁵ These acts, which Mill describes as offenses against decency, can be made illegal if performed in public.²⁸⁶

Many commentators have criticized Mill's harm principle and its ramifications.²⁸⁷ H.L.A. Hart defended Mill's *On Liberty*, but not without qualification.²⁸⁸ Hart criticizes Mill's harm principle because it unjustifiably narrowed the guidelines upon which law should be based by postulating that harm to others is the only sufficient justification for legal involvement.²⁸⁹ In particular, Hart disagrees with Mill's idea that legislators cannot enact laws against drug use for paternalistic reasons.²⁹⁰

He finds Mill's description of free will outdated, pointing out that individuals do not always or usually know what is in their best interest.²⁹¹ According to Hart, paternalistic drug laws aimed at protecting individuals from themselves are justified because humans are not as free to choose their actions as they would like to believe.²⁹² He states that human choices may be made without adequate reflection on consequences, when judgment is clouded, or when others exert subtle pressure, such as peer pressure.²⁹³ All of these possibilities affect the free decision-making process.²⁹⁴ Finally, Hart objects to Mill's opposition to paternalism because it is incorrectly based on the idea that all people have fixed desires and complete knowledge of how to satisfy them.²⁹⁵

Douglas Husak disagrees with Hart and concludes that a paternalistic justification for drug laws is problematic and depends on unanswered empirical questions.²⁹⁶ Husak introduces the topic of paternalistic drug laws by suggesting that society is willing to debate the efficacy of mandatory seat belt and motorcycle helmet laws but

²⁸⁵ *Id.* at 168.

²⁸⁶ *Id.* Mill does not list which acts he has in mind.

²⁸⁷ See *infra* notes 288-95, 319-26.

²⁸⁸ See H.L.A. HART, *supra* note 157, at 5.

²⁸⁹ See *id.* at 32.

²⁹⁰ See *id.* at 32-33. Mill mentions only opium and alcohol. J.S. MILL, *supra* note 133, at 165, 167.

²⁹¹ See H.L.A. HART, *supra* note 157 at 32-33.

²⁹² See *id.*

²⁹³ *Id.* at 33.

²⁹⁴ *Id.* Another philosopher makes a similar point in his analysis of Mill's reason for exempting children from the limits placed on society by the harm principle. S. LEE, *LAW AND MORALS* 24 (1986). Mill does so, he says, because children do not fully realize the consequences of their actions. Lee asks, who does? *Id.*

²⁹⁵ H.L.A. HART, *supra* note 157, at 33. Hart claims that Mill's idea of the typical human being more closely resembles the psychology of a middle-aged man. *Id.*

²⁹⁶ Husak, *supra* note 50, at 353-54.

refuses to analyze paternalistic drug laws with equal vigor.²⁹⁷ Husak attacks drug paternalism using the deontological moral theory based on the principle of human autonomy.²⁹⁸

Husak begins his discussion of the deontological argument against paternalistic drug laws by stating the principle of autonomy: autonomy encompasses the right to make choices and decisions, and foremost among these choices is the decision whether to put a substance in one's body.²⁹⁹ Husak asks whether the autonomy principle can be framed so that harmful decisions such as the right to eat fried foods are protected but the decision to use illicit drugs is not protected.³⁰⁰ Husak suggests that the degree of harm that results from the action may provide a discriminatory mechanism.³⁰¹ Husak doubts, however, whether such a principle can explain the status of all drugs today, asks how the degree of harm should be calculated, and denies that any standard of harm could be created that would properly compare the risks of drug use, fried foods, driving without seat belts, and so forth.³⁰²

Notwithstanding this rejection of the "degree of harm" principle as a paternalistic guide, Husak acknowledges that some paternalistic laws are acceptable despite the principle of autonomy.³⁰³ Specifically, Husak first describes soft paternalism, which permits the state to "prevent self-regarding harmful conduct when but only when that conduct is substantially nonvoluntary."³⁰⁴ To explicate the concept of voluntariness, Husak describes one philosopher's definition as a "variable concept," replete with cut off points determined by the circumstances, the interests at stake, and the purpose of the law.³⁰⁵

Husak reviews three situations involving drug use to distinguish voluntary from nonvoluntary conduct. In scenario one, A wrongly

²⁹⁷ *Id.* at 354.

²⁹⁸ *Id.* at 363; see *supra* text accompanying notes 241-54 for Richards's discussion of paternalism.

Husak lists several initial problems with *any* paternalistic argument in favor of drug criminalization. See *id.* at 357. These include: 1) the distinction to be made between acceptable and unacceptable paternalism; 2) the difficulty in separating "harm to others" justifications from paternalistic reasons for drug laws; and 3) the need to discount the illegal nature of drugs when calculating whether paternalistic drug laws are warranted. *Id.* at 357-60.

²⁹⁹ *Id.* at 367.

³⁰⁰ *Id.* at 366-67.

³⁰¹ *Id.* at 367-68.

³⁰² *Id.* at 369.

³⁰³ *Id.* at 357.

³⁰⁴ *Id.* at 370.

³⁰⁵ *Id.* at 370-71.

believes that drug Z does not cause physical harm; in scenario two, A knows that Z is harmful but A uses the drug because he wants to harm himself; and in the last scenario, A knows that Z may harm him, and does not want to be harmed, but takes Z because he thinks the pleasure it will bring is worth the risk of harm.³⁰⁶ Typical drug use, Husak notes, is most similar to scenario three, and is definitely a voluntary act.³⁰⁷ As such, Husak finds little reason to support paternalistic drug laws on the assumption that drug use is nonvoluntary.³⁰⁸

Husak also discusses hard paternalism, which allows paternalistic laws in situations other than where nonvoluntary conduct is found.³⁰⁹ Other theorists embracing this type of paternalism acknowledge that people's short-term actions do not always further their long-term goals, and may be the result of "carelessness, unreflectiveness, short-sightedness, or foolishness."³¹⁰ Husak expresses an attraction to hard paternalism because he finds certain circumstances in which a person's short-term acts clearly clash with that person's long-term priorities.³¹¹ In these instances, he says, paternalistic laws actually help individuals attain their own ends.³¹²

Ultimately, however, Husak thinks hard paternalism cannot justify drug laws.³¹³ First, it is difficult, if not impossible, to separate a person's permanent long-term goals from other goals.³¹⁴ Moreover, no general law could account for different people's long-term goals and the extent to which drug use hinders realization of those goals.³¹⁵ Finally, paternalistically driven drug laws will prevent drug use not only by those individuals whose long-term goals would be frustrated, but also by those whose permanent interests are not affected by drug use.³¹⁶ A deontological theory of paternalism, based on individual autonomy, Husak concludes, should not permit drug laws based on the gains seen by some, where the autonomy of

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 371-72. Husak admits that this illustration of voluntariness is unhelpful to legislators who do not have the luxury of personally interviewing constituents before passing paternalistic legislation.

³⁰⁸ *Id.* at 373.

³⁰⁹ *Id.* at 379.

³¹⁰ *Id.*

³¹¹ *Id.* at 379-80.

³¹² *Id.* at 380.

³¹³ *Id.* at 381.

³¹⁴ *Id.* at 379.

³¹⁵ *Id.* at 380.

³¹⁶ *Id.*

others is diminished.³¹⁷ Husak decides that there are currently no valid paternalistic justifications for drug laws.³¹⁸

Richards also criticizes Mill's theory. He observes that the harm principle does not describe the American system of law and morality and that the principle enunciated in *On Liberty* cannot help lawmakers make proper decisions concerning how to enact law.³¹⁹ In addition, he questions whether the harm principle supports Mill's search for maximizing utility.³²⁰

Richards's first objection is based on the deontological theory of morals. He points out that the United States Constitution is based on a theory of human rights, especially the right to privacy.³²¹ Richards states that Mill's harm principle and his theory of utility are not based on rights of any kind.³²² As a result, Richards argues that Mill's theory offers no relevant guidance to United States lawmakers and cannot adequately challenge the arguments made by those who favor drug criminalization.³²³

Richards's second objection is that Mill's harm principle, which allows governmental interference with individual actions only when these actions harm others, does not lead inexorably to the maximization of societal utility over time.³²⁴ Richards envisions a large majority of the members of a hypothetical society who *enjoy* knowing that the law forbids the minority citizens from practicing their deeply felt beliefs.³²⁵ Richards argues that Mill's overarching goal of maximizing utility requires that the criminal law enforce the

³¹⁷ *Id.* at 381.

³¹⁸ *Id.*

³¹⁹ See *infra* notes 321–23 and accompanying text.

³²⁰ See *infra* notes 324–26 and accompanying text.

³²¹ Richards, *supra* note 83, at 616. See *Roe v. Wade*, 410 U.S. 113, 163 (1973) (the right to privacy allows a woman and her physician to have complete discretion to effectuate an abortion up to approximately the end of the first trimester); *Griswold v. Connecticut*, 381 U.S. 478, 485 (1965) (the right to privacy allows use of contraception in the home).

³²² Richards, *supra* note 83, at 611.

³²³ *Id.* at 613. Lord Devlin makes a related point about the efficacy of Mill's harm principle. P. DEVLIN, *supra* note 128, at 104–05. Devlin claims that Mill's doctrine has been around for a long time without ever having been put into practice. *Id.* at 125. He says that he does not believe that the law will ever correspond with Mill's doctrine. See *id.* In short, Devlin states that the debate over the efficacy of the harm principle has nothing to do with contemporary social reality.

Devlin says that the problem with the harm principle is that it assumes, unrealistically, that the minority will pose no trouble for the majority. See *id.* at 105. If 90 citizens think employment is good whereas 10 find idleness to be good, the 90 suffer at the expense of the 10. *Id.* at 106.

³²⁴ Richards, *supra* note 83, at 615.

³²⁵ *Id.*

majority will against the minority. In other words, Richards argues that satisfying utility may conflict with the dictates of the harm principle.³²⁶

In summary, three distinct ethical theories have been discussed that propose to explain when society may intervene in the individual's state of affairs. According to Devlin, society has a right to enforce its moral views against nonconforming individuals whenever society fears that the continuation of this particular type of private immorality threatens, or is capable of threatening, its existence.³²⁷ According to Rawls, human autonomy ensures that people have a minimum number of rights. In applying Rawls's theory, Richards argues that human beings' intrinsic rights dictate that rational drug use that does not interfere with the autonomy of others must be permitted.³²⁸ Finally, Mill states that the harm principle requires that mature individuals be permitted to use certain drugs as long as they do not inflict harm on others in doing so.³²⁹

III. PRACTICAL AND MORAL BENEFITS OF DRUG LEGALIZATION

The United States' goal to eliminate illegal drug use by 1995 through the imposition of criminal sanctions is illusory.³³⁰ The combination of the inelasticity of demand for cocaine, crack, and heroin, and inadequate anti-drug funding make effective prohibition of drugs impossible without turning the United States into a police state.³³¹ Advocates of continued criminalization point to the declining use of illicit substances as proof that the stringent drug laws are working effectively.³³² In light of declining use of alcohol and tobacco,³³³ however, health concerns and increased education and awareness about the potential dangers of drugs also clearly account for the decline in the use of marijuana and cocaine.³³⁴ Furthermore, although casual drug use is down, high volume and addictive use

³²⁶ *Id.*

³²⁷ See *supra* notes 136-85 and accompanying text for a discussion of legal moralism.

³²⁸ See *supra* notes 215-55 and accompanying text for a discussion of Richards's deontological theory.

³²⁹ See *supra* notes 256-326 and accompanying text for a discussion of Mill's harm principle.

³³⁰ See 1988 Act, *supra* note 2, at 4310.

³³¹ See *supra* notes 25-31 and accompanying text for a discussion of inelasticity; see *infra* note 371 for a discussion of methods that might enhance enforcement.

³³² See Church, *supra* note 42, at 18.

³³³ Ostrowski, *supra* note 16, at 26.

³³⁴ See *supra* text accompanying notes 18-22.

is not.³³⁵ Because this latter type of use causes most drug-related crime, violence, and death, one cannot rightfully conclude that criminal sanctions are working effectively.

Arguments against legalization of drugs are two-fold. First, the United States resists legalization because it fears increased violence, crime and death.³³⁶ Second, this society believes drug use is immoral.³³⁷ Both premises are mistaken.

A. Fallacies of Practical Justifications for Drug Criminalization

The first of the practical reasons for criminalizing drugs is that a connection supposedly exists between drug use and crime.³³⁸ In actuality, drug legalization will reduce two types of drug-related crime—systemic and economic compulsive—but the third type—psychopharmacological—may be a legitimate bar to legalization. In contrast, drug criminalization causes systemic, and to a large extent, economic compulsive crime.³³⁹

To the extent that drug legalization eradicates the black market, systemic crime and homicide will significantly diminish if not disappear. Although economic compulsive crime will not disappear if heroin, marijuana, and cocaine are legalized, by definition such crime will diminish greatly. Heroin addicts, for instance, commit many nonviolent property crimes,³⁴⁰ including theft, to meet the high prices that the black market demands, but not because of the effects of heroin. By artificially raising the price of drugs, the drug laws *themselves* cause a large proportion of the property theft in the United States.³⁴¹ Because legalization of heroin and cocaine would reduce their price, addicts would have less need to steal to afford these drugs. Although some addicts who temper their use because

³³⁵ See *supra* text accompanying notes 11 - 13.

³³⁶ See *supra* notes 16-125 and accompanying text.

³³⁷ See *supra* note 47.

³³⁸ See *supra* notes 56-60 and accompanying text.

³³⁹ In the DRCA-H2 homicide study, systemic violence, exclusively related to the realities of doing business in an illegal market, accounted for 40% of the homicides in New York City in 1988, and a full 75% of the drug-related homicides. See DRCA-H2, *supra* note 62, at 20. Crack and cocaine were the primary drugs involved in almost 90% of these drug-related homicides. *Id.* at 19-20. By comparison, use of alcohol led to many drug-related deaths, but none were described as systemic. *Id.* When a drug is legal, no disputes arise over price, or who has a right to sell the drug in which areas, nor are there dealers who kill their couriers when they suspect these couriers are skimming profits off the top.

³⁴⁰ See *supra* notes 79-82 and accompanying text.

³⁴¹ See *supra* notes 86-90 and accompanying text for a discussion of drug law-related deaths.

of exorbitant black market prices will purchase larger quantities of heroin and cocaine in a legal market,³⁴² theft for drug purchases will decrease.³⁴³

Given the close connection between systemic and economic compulsive crime and the current drug laws, legalization advocates need only confront psychopharmacologically induced crime. Because the psychopharmacological properties of each drug are unique, we can distinguish those drugs that should be legalized from those that should remain illegal. For example, existing literature, though scant, suggests that users high on crack and those "coming down" from its effects may act violently.³⁴⁴

In contrast, current data on the causal nexus between cocaine use and psychopharmacological violence, though also surprisingly sparse, indicates that cocaine users are less likely to be induced to violence than crack users.³⁴⁵ Furthermore, a large amount of cocaine-related psychopharmacological violence occurs when users are "coming down," not when they are high on the drug itself.³⁴⁶ Cocaine's moderate tendency to cause this type of violence is an insufficient reason to criminalize its use and sale. If further research uncovers a closer association between cocaine use and psychopharmacological violence, legislators should review the merits of legalizing cocaine.

The threat of psychopharmacological violence fails to explain to any degree, however, why heroin and marijuana are illegal and alcohol is legal. Neither heroin nor marijuana use leads users to behave violently.³⁴⁷ Heroin addicts in withdrawal account for the small amount of reported heroin-related psychopharmacological violence.³⁴⁸ On the other hand, alcohol use is strongly linked with

³⁴² See M. MOORE, *supra* note 31, at 8-9 for a discussion of heroin addicts' ability to reduce use.

³⁴³ Ostrowski, *supra* note 16, at 11. Heroin and cocaine sell on the black market for as much as 100 times what they cost to manufacture. In a legal market that allows for substantial taxes, heroin and cocaine could sell for one-fifth as much as they cost on the black market and still be cheap enough to deter users from continuing to make black market purchases. Based on this figure, users would have to increase consumption fivefold before economic compulsive thefts for legal drug purchases would be as frequent as thefts to finance black market drugs.

³⁴⁴ See *supra* notes 62-63 and accompanying text.

³⁴⁵ See *supra* notes 58-62 and accompanying text.

³⁴⁶ See DRIVE, *supra* note 56, at 13.

³⁴⁷ See L. GRINSPOON & P. HEDBLUM, *supra* note 66, at 184 (heroin); see *supra* note 61 (marijuana).

³⁴⁸ See RESEARCH & DEVELOPMENT UNIT, *supra* note 67, at 14; DRIVE, *supra* note 56, at 13.

psychopharmacological violence.³⁴⁹ In fact, alcohol is more closely linked with violence than crack.

Thus, psychopharmacological violence alone cannot justify the criminalization of heroin and marijuana. Moreover, one must doubt whether it explains the illegality of crack and cocaine. Despite its high association with violence, alcohol remains legal for other reasons. The comparison between the psychopharmacological tendencies of alcohol and illegal drugs compels one to look elsewhere to explain why advocates of continued criminalization consider legalization of the illegal drugs inappropriate.

The second justification for the criminalization of drugs is that legalization will precipitate an increase in drug-related deaths. By one estimate, however, a very large percentage of the 3,500 annual deaths that are labeled drug overdoses are actually the result of such factors as dirty needles and accidental overdoses due to unknown purity levels of drugs.³⁵⁰ These causes of death could be reduced, or even eliminated, by selling clean needles at low cost, labeling purity levels, listing ingredients, and providing other safety measures, all of which could be implemented through drug legalization.³⁵¹ Apart from the fact that drug legalization, coupled with appropriate precautionary measures, could reduce drug-related deaths, the argument that criminalization is justified by concern about drug-related deaths seems disingenuous in light of the approximate 500,000 Americans who die each year because of legal alcohol and cigarette use.³⁵²

In sum, the drug laws have not deterred heavy and addicted users from using drugs. Consequently, drug-related economic compulsive and systemic crime remain largely unaffected by the current drug laws. In contrast, legalization will reduce these two types of crime dramatically by reducing both the black market and addicts' need to steal for drugs. Justifying criminalization by pointing to drug-related deaths is unpersuasive because many of these deaths are caused by black market factors that legalization would largely eradicate.

³⁴⁹ See E. GOODE, *supra* note 1, at 118; S. KADISH, S. SCHULHOFER, & M. PAULSEN, *supra* note 111, at 753.

³⁵⁰ See Ostrowski, *supra* note 16, at 14.

³⁵¹ See *id.* at 46.

³⁵² See Raspberry, *Legalizing Drugs: Let's Get Specific*, Wash. Post, Nov. 1, 1989, at A25, col. 1.

B. *Moral Justifications for Drug Legalization*

The moral theories discussed in this note demonstrate that it is difficult to create a coherent moral theory that supports criminalization of drugs. Richards's deontological theory and Mill's harm principle favor legalization of at least some drugs. Of the three primary theories discussed, only Devlin's public harm theory favors continued criminalization, although paternalism also attempts to justify criminalization.

Devlin's public harm theory, which advocates the use of the criminal law to prohibit private immorality that society deems injurious, supports criminal sanctions against illegal drug use. Devlin's theory supports these sanctions because United States society regards drug use as the most pressing problem facing this country today.³⁵³ Presumably, this concern means that the public considers private drug use to be intolerable. As long as private drug use provokes "intolerance, indignation, and disgust"³⁵⁴ in the public at large, Devlin would say that the public ought to be able to prohibit the sale and private use of drugs.

Devlin's argument, however, is seriously deficient. First, the state, in enacting legislation against intolerable private acts of immorality, cannot determine clearly the public will. Devlin's adoption of the right-minded person or jury may explain how a jury will decide whether a particular individual has violated a law designed to enforce the public moral code, but does not explain how Congress originally ascertained the public will.³⁵⁵

Second, Hart's criticism of Devlin's "leap in logic" is accurate. Devlin misses a step when he shifts from the idea that the public sometimes feels intolerant towards an individual's private immorality to the idea that, if left unchecked, this intolerance may lead to the collapse of society.³⁵⁶ According to Devlin, feelings of "intolerance, indignation, and disgust" justify the legal enforcement of public morality because these feelings signify that society fears it is on the brink of collapse.³⁵⁷ It remains unclear why such feelings are indicative of a rational fear of society's collapse. Society may fear

³⁵³ See LEGALIZATION: IMPACT AND FEASIBILITY, *supra* note 1, at 3 (recent opinion poll cited).

³⁵⁴ See *supra* note 157 for a discussion of this language.

³⁵⁵ See *supra* note 147 for a discussion of the right-minded person.

³⁵⁶ See *supra* notes 158-61 and accompanying text.

³⁵⁷ See P. DEVLIN, *supra* note 128, at 17.

its own collapse is imminent, but, if this fear is unfounded, no good reason exists for enforcing morality through the criminal law.³⁵⁸

Despite its limitations, Rawls's deontological theory is generally more defensible than Devlin's public harm theory. Rawls states that if individuals are to attain their full humanity, they must be allowed to act autonomously, provided they do not interfere with the autonomy of others.³⁵⁹ Because David Richards's drug legalization argument relies on deontological moral theorists such as Rawls, criticisms of Rawls's theory are applicable to Richards's theory as well.

Alan Gewirth, another deontological moral philosopher, criticizes Rawls's use of the "veil of ignorance" in the "original position" because it is nonrational.³⁶⁰ Rawls replies that the "veil of ignorance," which prevents those people voting on the rules of justice from knowing the particulars of their wealth, status and intelligence, is rational because it is designed to produce just principles.³⁶¹ Rawls explains that if individuals' knowledge of their status enters into the process of selecting rules of justice, these rules will not treat all persons as moral equals. As such, Rawls seems to devise the "veil of ignorance" to provide a theory that confirms how our moral sentiments about rights and obligations can be verified.

Gewirth acknowledges that the imposition of the "veil of ignorance" facilitates the creation of fair rules of justice.³⁶² He is correct nonetheless to maintain that the "veil of ignorance" is not rational because people do, in fact, know the particulars of their status, wealth and power. Because the "veil of ignorance" is irrational, Gewirth properly concludes that it is impossible for Rawls to justify rationally that real people forget their knowledge when making the rules of justice. As such, Rawls's criterion that the "veil of ignorance" blankets those voting in the "original position" is illogical.

³⁵⁸ Dworkin's critique of the argument he attributes to Devlin is also correct. Devlin bases his moral theory on the idea that society's feelings, without a great deal of reason, can prevent individual action it abhors. Dworkin correctly points out that reason must be involved before anyone can claim to make a moral judgment. Thus, Devlin's view that society makes a moral judgment based on feeling, which it is then entitled to act upon, is fallacious.

³⁵⁹ See *supra* text accompanying notes 186-255 for a discussion of deontological moral theory.

³⁶⁰ A. GEWIRTH, *supra* note 255, at 108-09.

³⁶¹ J. RAWLS, *supra* note 130, at 141.

³⁶² A. GEWIRTH, *supra* note 255, at 108.

Despite the irrationality of the "veil of ignorance," Rawls's deontological theory is compelling. It attributes dignity to the human being by acknowledging that people are autonomous and by ensuring that they have a base level of rights. If deontological theory is correct, Richards properly applies that theory to drug legalization and provides an appropriate resolution of the drug controversy. Further, for the most part, Richards successfully attacks the moral arguments against drug legalization.

Richards first addresses the moral argument that drug use is degrading because it leads to a loss of self-control. Richards correctly notes that people use illegal drugs for a variety of reasons, including perhaps to lose control. Moreover, drug use need not lead to loss of control if users choose to limit their intake. Most importantly, proponents of the degradation argument fail to realize that self-control is not the ultimate goal for all drug-users at all times.

Richards is less successful in addressing the argument that use of addictive drugs is immoral because addiction prevents individuals from acting in fundamentally human ways. Although deontological moral theory focuses on individual autonomy, Richards fails to address adequately the fact that a drug addict has little option to refrain from drug use. His statements that phenomena besides the drugs themselves, such as poverty, contribute to drug addiction, do not rebut the claim that drug addicts lose the ability to determine whether they wish to take drugs.

Richards's failure, though, is not fatal to his theory. As Douglas Husak points out, addiction is a gradual process, not all users of potentially addictive drugs become addicted, and active addiction need not be permanent.³⁶³ At the very least, deontological theory protects an individual's decision to try addictive drugs where the individual may not become addicted. Stretched to its limit, this theory might justify an addict's continued use of drugs, because that addict could decide to seek treatment or otherwise curb use.³⁶⁴

Mill provides yet another moral perspective on the issue of drug legalization. One can draw an analogy from drug addiction to Mill's prohibition on selling oneself into slavery³⁶⁵ to mean that he thinks addictive drugs should be illegal. Yet Mill favored legalization of alcohol and opium. Perhaps he was not aware that some drinkers

³⁶³ See Husak, *supra* note 50, at 377-78.

³⁶⁴ See *supra* notes 296a-318 and accompanying text for a full discussion of Husak's response to the paternalistic argument against drug use.

³⁶⁵ See J.S. MILL, *supra* note 133, at 173.

become addicted to alcohol. On the other hand, Douglas Husak's explanation of the difference between drug addiction and slavery may explain why Mill favored legalization of alcohol and why the addictive properties of cocaine and heroin would not cause Mill to outlaw them.³⁶⁶

Mill stated that acts that *always* lead to violence should be outlawed, but acts that may be used for good or bad purposes should be allowed. He used poison as an example of a substance that could be used for malevolent or beneficial purposes.³⁶⁷ Similarly, Mill might not outlaw use of drugs such as cocaine, marijuana or heroin, despite their potential for inducing violence and crime.

H.L.A. Hart's paternalistically based response to Mill's assertion that harm to others is the only justification for interference with an individual's private conduct is compelling at first blush. If Hart is correct, paternalism may justify laws against drug use, even though Devlin's theory, which sometimes allows the legal enforcement of morality *per se*, does not. Hart stresses that paternalistic drug laws are justified because private human actions are not as free as Mill thought they were. Hart maintains that peer pressure and other psychological dynamics often interfere with the autonomous decision-making process.

Hart's statements are sound. Still, hard paternalism,³⁶⁸ which Hart seems to espouse, fails to explain how society is more qualified to determine the individual's "true" goals than the individual. Without proof that society can determine what is actually best for an individual, paternalistic laws merely replace the individual's desires with the legislators' wishes.

Husak's criticisms of Hart's theory reinforce the belief that hard paternalism cannot justify drug criminalization. Husak properly admits that in certain situations individuals take short-term courses of action that conflict with their long-term goals. Hard paternalism attempts to prevent precisely these types of irrational acts. Husak exposes a flaw in this theory, however, because hard paternalism can work in specific cases but could not work as a general criminal law. Drug laws cannot and do not separate incidents of drug use that are irrational from drug use that is consistent with a person's

³⁶⁶ See *supra* note 262 for a discussion of Husak's comparison of drug addiction to slavery.

³⁶⁷ J.S. MILL, *supra* note 133, at 165.

³⁶⁸ See *supra* text accompanying notes 304-318 for a comparison of hard and soft paternalism.

long-term goals. Thus, although hard paternalism can justify particular efforts to prevent drug use, it cannot justify nation-wide drug laws.

Husak also properly disposes of soft paternalism, which prohibits private acts that are deemed nonvoluntary, as a justification for the drug laws. Husak admits that soft paternalism might be appropriate but determines that most drug use is voluntary. Husak is probably right that most drug use is voluntary in that users choose to use drugs despite awareness of the risks of physical harm and addiction. Thus, soft paternalism, even if justified, cannot explain drug criminalization.

In contrast to Hart's criticisms, Richards's criticisms of Mill are not problematic. Although Richards's comment that society has never embraced Mill's harm principle is true, it is irrelevant. That is, society does not currently use Mill's theory as the model for criminal legislation. Richards's criticism, however, does not address whether Mill's theory *ought* to be used.

There is some support for Richards's second objection to Mill's harm principle—that it does not guarantee maximum utility for humankind in the long run. His depiction of a society that enjoys imposing its views on the minority through law provides a good example. There is, however, some doubt whether Mill wrote *On Liberty* to justify his theory of utility. It seems likely that Mill wrote *On Liberty* to champion individual liberty, independent of its ramifications on long-term societal utility.³⁶⁹ Otherwise, as one critic points out, Mill never would have written the harm principle in such a way that society is prohibited from interfering with private individual conduct even when such interference would make the individual happier. Therefore, it is an open question whether this objection carries any weight. Assuming that it does have merit, it does not reach the justifications for legal drug use that the harm principle creates. At best, it demonstrates an inconsistency between Mill's belief concerning appropriate moral constraints on the individual and his view, expressed elsewhere, on how to attain the most beneficial society.

In sum, Devlin's public harm theory, which opposes legalization of drugs, fails for several reasons. Devlin explained that the criminal law should reinforce public morality only when the public fears that

³⁶⁹ Himmelfarb, *Introduction* to J.S. MILL, *supra* note 133, at 31. But see note 258 for Mill's explanation that utility, based on the permanent interests of man, is the goal of the harm principle.

a particular immoral act has placed society on the verge of collapse. He fails to explain how lawmakers are to know when this fear exists. Another flaw in the public harm theory is that it does not require that society's fear of collapse be rational before the criminal law will be invoked on its behalf. History is replete with examples of irrational societal hysteria. Devlin's theory should require some proof of imminent collapse before the criminal law enforces public morality.

Richards's application of deontological moral theory to drug legalization is compelling and innovative. What is lacking is a specific plan for implementing legalization and a list of the drugs to legalize. Although his work suffers from the general deficiencies of deontological moral theory, it adequately handles many of the common arguments made against drug use including loss of control, addiction and paternalism. Where Richards's arguments are deficient, Husak's deontological arguments fill in the gaps. In particular, Husak skillfully handles the addiction argument and the argument that concerns for the drug users themselves justify drug criminalization.

Mill's harm principle is also compelling. Mill's principle is concrete enough to suggest that legalization of marijuana, heroin and cocaine are appropriate because harm to others appears to be less likely with these drugs than with alcohol, which Mill specifically sanctioned.³⁷⁰ Richards's assertion that the harm principle clashes with Mill's utilitarian moral theory is intriguing but, even if true, does not weaken the harm principle. This claim merely points out that the two theories may be inconsistent.

C. *Legislative Framework for Drug Legalization*

Legalization of marijuana, heroin and perhaps cocaine seems preferable to criminalization for both practical and moral reasons. To this end, Congress should develop a workable legalization framework.³⁷¹ Such a framework must be morally acceptable and must

³⁷⁰ Until researchers provide further scientific evidence, it is unclear whether adoption of the harm principle would require legalization of other drugs, such as crack, that might create a great probability of harm to others.

³⁷¹ It is true that with unlimited funds, the United States could greatly reduce the current level of drug use and abuse. It is unlikely, however, that the requisite amount of funding is politically possible, and if it were, the United States would eventually resemble a totalitarian state reminiscent of George Orwell's *1984*. It is difficult to determine how much more than the current \$10 billion spent annually is needed to make serious additional inroads in the prevalence of drug use. Although fewer people are using drugs now than in the 1980s, the number of cocaine addicts and crack addicts seems to be stable or increasing slightly.

incorporate provisions to reduce drug-related crime, violence, death and addiction, and limit or prevent an increase in use. What follows is a proposal that attempts to meet these criteria:

1) Use of all drugs, including cigarettes and alcohol, except prescription drugs, is illegal for anyone under twenty-one years of age.³⁷²

2) Use of legal drugs will not be permitted in public, although an individual may be under the influence of legal drugs in public.³⁷³

Assuming that as little as an additional \$10 billion would greatly curtail drug use, where is the source for this extra money? The balanced budget amendment reduced additional federal drug allocations from over \$2.5 billion to \$500 million in 1989. The current United States political climate makes it unlikely that additional funds will come from taxes or by borrowing from other planned governmental outlays. Furthermore, it may take more than \$10 billion to achieve significant change in heavy drug consumption.

Despite this economic reality, the predominant reason for eschewing such a plan is that it will wreak havoc on individual freedom in the United States. Consider that the most effective suggestions for using increased funding to decrease drug use include urine testing and/or blood testing of all citizens or perhaps just arrestees, and using beepers and other sophisticated devices designed to monitor unwanted actions. These intrusive devices run counter to the moral, historical, social, and perhaps constitutional fabric of the United States. Although it is debatable whether the Supreme Court has already gone too far to accommodate drug legislation, it seems clear that more extensive enforcement will lead our country down an undesirable path. The amount of public funding needed for truly effective enforcement does not now exist and is not likely to exist in the near future. More importantly, this enforcement would be improper, if not inhumane.

A second possibility, espoused by James Hall, is to maintain the status quo law enforcement efforts and to augment the use of treatment, education, family, religious and work-related efforts to eliminate drug abuse. Hall, *Victory in the War on Drugs*, STREET PHARMACOLOGIST NEWSLETTER, May/June 1988, at 1. See *supra* note 125 for a discussion of Hall's view. Hall is correct to emphasize non-force-related attempts to reduce the demand for, and consequently, the use of drugs. Hall's solution sidesteps the evils of heightened governmental intervention into people's lives and has the benefit of treating drug abuse as a health problem, which should encourage addicts to seek treatment. Like the increased funding solution, however, additional treatment, education, and other nonenforcement solutions require money that does not exist. Furthermore, under this strategy, the 10% of the drug-using population that is caught by enforcement techniques continues to suffer for doing what, under discrete circumstances, it should be allowed to do.

³⁷² The age of twenty-one is arbitrary. Any sufficiently high age is acceptable. This section is based on Mill's and Richards's moral theories, both of which acknowledge that only mature individuals, who are likely to understand fully the risks of using drugs, should be free to risk harm to themselves and to make autonomous decisions of this type. See *supra* text accompanying notes 353-70 for an analysis of the moral theories.

³⁷³ For example, even those twenty-one or older will be prohibited from smoking marijuana in public although they may smoke at home and then go out in public. The purpose of this section is to counter the claim that legalization, despite education and advertising about the harms of drug use, will suggest that the United States promotes or condones drug use. Although children will inevitably come into contact with adults under the influence of legal drugs, such as marijuana, they will not be forced to encounter drug use itself. Alcohol would be the exception because the United States is not likely to tolerate a law that prohibits consumption of alcohol at bars and restaurants.

3) Government-funded testing will determine whether anyone under the influence of any particular legal drug will be permitted to drive a motor vehicle or perform other similar mechanical activities that might be dangerous to pursue while under the influence. Some drugs might be legal for some purposes, e.g., smoking a cigarette while driving a car, but not for others.

4) Legal drugs will be taxed, but prices will remain substantially below prior black market prices.³⁷⁴ Otherwise, if legal prices approach black market prices, users may be tempted to use the black market to remain anonymous.

5) Taxes generated from drug sales will be used for extensive education programs, including advertising, that objectively explain the definite and potential dangers of drug use, and the more severe consequences of using black market drugs.³⁷⁵ These taxes will also subsidize treatment facilities for drug addicts.

6) The primary criteria for determining which drugs will be legal include risk of addiction and incidence of psychopharmacological violence.³⁷⁶ In the end, Congress will

³⁷⁴ By one estimate, black market heroin and cocaine sell for about 100 times more than they cost to make. See Ostrowski, *supra* note 16, at 11.

³⁷⁵ Awareness of the risk of addiction, physical harm and death from drug use is the best way to reduce drug use. Crack has been less problematic in Hawaii than elsewhere in the United States in part, at least, because all Hawaiians had been hearing about the dangers of crack for about two years before it was available in Hawaii. See *Select Comm. on Narcotics Abuse and Control: Hearing on the Reemergence of Methamphetamine*, (1989) (statement of Daniel Akaka) (explaining that education of the harms of crack reduced crack consumption in Hawaii). Young people on the mainland have also shown that their drug consumption is shaped a good deal by their perception of the degree of harm tied to drug use. DRUG USE, DRINKING, AND SMOKING, *supra* note 13, at 5-6.

³⁷⁶ These two factors are derived from the ethical theories of Mill and Richards. Mill opposed human actions that led to a subsequent loss of choice such as selling oneself into slavery and allowed prohibition of action that was likely to lead to harm to another. Richards's argument in favor of legalization is that the potential user should have the autonomy to make that decision. If use of a drug leads to physical dependence such that the user can no longer voluntarily decide not to use the drug, there is good reason to prohibit use of that drug.

At present, addiction to cigarettes is viewed differently than addiction to heroin or cocaine largely because cigarettes are legal but heroin and cocaine are not. Cigarettes are as, or more, addictive than heroin, cocaine, or even crack. See Husak, *supra* note 50, at 377-78, n.60. Heroin addicts may experience withdrawal, whereas cigarette addicts may become edgy, tense, and nervous between cigarettes. Nonsmokers increasingly regard smokers with disapproval but few think that the cigarette addict is dangerous or mentally sick. If heroin and cocaine are made legal, addictions to these drugs will eventually provoke similar sentiment—strong disapproval but no fear or loathing.

Thus, the degree to which a drug causes psychopharmacological violence, namely violence resulting purely from use of a drug, provides a better justification for criminalizing that drug than its rate of addiction. Richards supports laws against use of drugs that leads

need to determine the appropriate parameters for these criteria.³⁷⁷

Using the guidelines identified in section 6 of this note's legalization proposal, the determination of which drugs should be legalized is as follows. Alcohol will remain legal despite its significant correlation with psychopharmacological violence and its highly addictive nature because Prohibition was unsuccessful and drinking is widely accepted in our culture. Alcohol, however, should not be the measure of the legality of other drugs that are less prevalent in society.

Marijuana is not commonly considered addictive; the proportion of heavy users to casual users is low.³⁷⁸ Moreover, marijuana's tendency to create psychopharmacological violence is slight.³⁷⁹ As a result, marijuana should definitely be legalized.

Although a sizeable but unknown proportion of heroin users become addicts, heroin should be legalized because there is a slight or nonexistent correlation between heroin use and psychopharmacological violence.³⁸⁰ If a twenty-one year old willingly chooses to purchase heroin, knowing the risk of addiction, that person should be allowed to do so. The risk of addiction after one or even a few uses is not as great as people commonly think.³⁸¹ Furthermore, improved drug education will make it unlikely that heroin use will increase after legalization.

Cocaine presents a unique problem. If crack did not exist, cocaine should probably be legalized because current evidence suggests that use of powder cocaine is neither so addictive nor so likely to lead to psychopharmacological violence to justify its criminalization. The problem is that powder cocaine is easily converted into crack cocaine, and presently, crack is associated with a higher rate

to violence, because use of such drugs interferes with another's autonomy. Both Mill and Richards acknowledge that a substance should be outlawed if it can be shown that the substance leads to harm to others.

³⁷⁷ Certain parameters, however, can be sketched out. For example, if drug X causes addiction in 90% of those who try it and causes 80% of its users to become violent, drug X would be outlawed for all age groups. Legislators, however, should bear in mind Richards's presumption that human decisions to use a particular drug are rational and that almost all legal activities such as driving a car have at least some propensity for causing harm to another. Legislators should also consider the high rates of addiction and psychopharmacological violence associated with alcohol and the high rate of addiction associated with cigarette use.

³⁷⁸ See Wallenstein, *supra* note 104, at 62.

³⁷⁹ See *supra* note 61.

³⁸⁰ See DRIVE, *supra* note 56, at 13.

³⁸¹ See J. KAPLAN, *supra* note 99, at 33; M. MOORE, *supra* note 101, at 9.

of addiction than cocaine, and is more likely to lead to psychopharmacological violence than cocaine.

Although some studies have been conducted to determine crack's precise rate of addiction and tendency to cause violence,³⁸² there is insufficient evidence thus far to establish firmly these correlations. After careful evaluation, the United States may decide that the connection between crack and addiction and violence has been exaggerated and that crack should be legalized. It is quite likely, however, that this connection will be great enough to justify the criminalization of crack.

Thus, the dilemma is whether to legalize powder cocaine but criminalize crack, knowing that crack users and addicts will buy legal cocaine and convert it to crack, or to criminalize all types of cocaine to prevent such conversion. If both powder cocaine and crack remain criminalized, the large black market for these two drugs, which accounts for much of the drug-related systemic and economic compulsive crime and violence in the United States,³⁸³ will remain intact. Furthermore, criminalization of both drugs will punish powder cocaine users who would otherwise be permitted to use cocaine under the proposed legalization scheme.

Assuming the legalization of cocaine but not crack, one way to limit the conversion of legally purchased cocaine into illegal crack is to limit the daily amount of powder cocaine that each person can purchase. This procedure would prevent cocaine purchasers from having a crack black market because they would have little cocaine to convert into crack for illegal use or sale. Thus, powder cocaine would be legal but it would be illegal to convert powder cocaine into crack cocaine.

There are obvious drawbacks to this option. First, the illegality of converting cocaine into crack will do little to stop crack users from ritually performing this conversion. Further, individuals will have different consumption desires and needs and it will be difficult to place a limit on per diem cocaine purchases that will maximize the benefits for those who wish to use powder cocaine and minimize the amount of legally purchased cocaine that is converted into crack. Finally, any legalization scheme that continues to criminalize crack, retains the black market for crack. To the extent that crack dealers cannot satisfy their customers through the conversion of legally

³⁸² See *supra* text accompanying notes 63-64 (violence) and 93-98 (addiction).

³⁸³ See, e.g., DRIVE, *supra* note 56.

purchased cocaine, importing and selling crack will continue as before.

Despite these drawbacks, cocaine should be legalized, daily purchases should be limited to a reasonable amount to accommodate users without supplying the black market, but crack should remain criminalized. Because the large majority of cocaine users use powder cocaine rather than crack,³⁸⁴ legalizing cocaine, but not crack, will eliminate most of the volume of the cocaine-related black market. To prohibit use of all types of cocaine unnecessarily ensures that a high percentage of the drug-related black market, and the economic compulsive and systemic violence that it engenders, remains intact.

Overall, there are many benefits to a legalization scheme such as the one outlined above. First, it is morally acceptable, placing some limits on use while respecting the rights of persons as much as possible. Second, systemic crime and violence will decrease markedly because the black market for those twenty-one or older will diminish significantly for any legal drug. Moreover, deaths attributable to impure drugs will largely disappear, and AIDS contracted by sharing needles will also decline.³⁸⁵ Third, economic compulsive crime will decrease because legal drugs will cost less than black market drugs. Fourth, taxes on legal drug sales will raise substantial revenues for education, advertising and treatment. Fifth, addicts will be more likely to seek treatment because their drug use will not be illegal and increased funds will improve the availability of treatment. Sixth, prison populations will decrease because fewer drug users will be incarcerated, and the number of black market dealers will lessen. Lastly, the revised law will eradicate the United States' current hypocritical dichotomy between alcohol/cigarettes and illegal drugs. Citizens will respect the remaining drug laws because they will know that good reasons exist for the illegal status of certain drugs.

To be sure, this legalization scheme has its drawbacks. It will not remove the black market entirely because persons under twenty-one will still be unable to purchase drugs legally. Legalization may reduce the black market for those under twenty-one, however, because teenagers will be more cognizant of the risks in using black market drugs. The black market in crack will also remain, as will the systemic and economic compulsive crime that it engenders.

³⁸⁴ See Cloud, *supra* note 3, at 734.

³⁸⁵ See *supra* text accompanying notes 88-90.

Finally, there may be an increase in drug use, despite enhanced education and advertising about the dangers of drug use. Nonetheless, this legalization scheme, or one similar to it, should be adopted because it reduces crime and violence, and offers a moral solution to the drug problem.

CONCLUSION

The war on drugs continues to be problematic. Progress in one area is offset by problems in other areas. If certain drugs are legalized, crime should decrease. Although use of legalized drugs may increase, this conclusion is not definite. Proper education can minimize an increase in legal drug use.

This note suggests that, at the very least, marijuana and heroin should be legalized. Cocaine should also be legalized but if the difficulties in preventing cocaine from being converted into crack prove too great, all types of cocaine should remain illegal. Legislators should determine the legal status of other drugs based on their potential for addiction and propensity to induce violence. Of course, ongoing research and study will help ensure that legislators make proper decisions. The practical justifications for legalization already exist but need to be more widely disseminated. In addition, we need to reevaluate the moral issues in order to convert drug legalization from a scholarly debate into political reality.

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