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Drugs: Getting a Fix on the Problem and the Solution

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Everyone agrees that the nation confronts an urgent drug problem. But the problem wears various faces.

Most threatening is drug related violence. Daily, vicious murders are attributed to drug feuds.[1] More rarely, but more frighteningly, innocent citizens are caught in the cross fire between warring gangs, or murdered for their opposition to drug dealing.[2] Statistics show dramatic increases in drug related homicides in New York, Los Angeles, Detroit, and Washington.[3]

Closely related is a second face of the problem: the fear and demoralization spread by flagrant drug dealing. In open drug markets where drug dealers congregate and attract unsavory users, ordinary pedestrian traffic dries up.[4] Shopowners, who anchor these streets, relocate or retire. City sanitation workers hurry through their work. Teachers seek new assignments.

As neighborhoods yield to the drug culture, a third concern arises. Local children become exposed to and then involved in drug use, drug sales, or both.[5] While children from both middle class and poor families are affected, the stakes for society as a whole are particularly great when the youth who are most threatened are among those already most disadvantaged.[6]

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1. *See, e.g., Brutal Drug Gangs Wage War of Terror in Upper Manhattan*, N.Y. Times, Mar. 15, 1988, at B1, col. 5.

2. *See, e.g., A Crack Plague in Queens Brings Violence and Fear*, N.Y. Times, Oct. 19, 1987, at A1, col. 4.

3. *E.g., Cities Move to Curb Summer Crime Increase*, N.Y. Times, May 21, 1989, § 1, at 14, col. 3; *Homicides in District Push Past 300 Mark*, Wash. Post, Aug. 30, 1989, at A1, col. 1; *Murders in Queens Rise 25 Percent; Crack is Key Factor*, N.Y. Times, Apr. 20, 1988, at A1, col. 1.

4. *E.g., Drug-related Violence Erodes a Neighborhood*, N.Y. Times, Apr. 4, 1988, at A10, col. 1.

5. For social science evidence that this fear is justified, see Kandel, Treiman, Faust & Single, *Adolescent Involvement in Legal and Illegal Drug Use: Multiple Classification Analysis*, 55 Soc. Forces 438 (1976).

6. *Cf.* J. Rawls, A Theory of Justice (1971) (public concern for justice should be greatest when the least advantaged are affected).

Widening drug use also poses increased threats to public health and economic productivity. It facilitates the spread of AIDS by occasioning shared intravenous injections and unsafe sexual practices.[7] Inattentiveness or recklessness caused by drug induced intoxication results in serious accidents not only on the road, but also at work and at home.[8] Even when accidents do not result, employers worry that drug use among workers lowers productivity, at a time when American firms are struggling to compete more effectively against foreign firms as yet untouched by drugs.[9]

Finally, drug use, and society's response to it, help undermine key social institutions. Families are destroyed by the disabling effects of drugs on parents, and by the conflicts created in families of drug using or drug dealing children.[10] Schools become less able to teach when there is widespread drug use in the student population, and when they are enlisted in ill-conceived efforts to institute punitive control regimes. The criminal justice system, which has been assigned a prominent role in the war against drugs, may well be overwhelmed and transformed by that effort.[11] The crush of cases may prove so great that it destroys what residual commitment these institutions now have to individualized justice or the hope of rehabilitation. The urgency of the job may lead officials to cut corners in investigating drug dealers. The enormous wealth created through the drug trade may tempt public officials into corruption.

These are society's current concerns about the drug problem—the way it is represented in newspapers, analyzed in legislative hearings, and discussed in radio talk shows. Without doubt, the concerns are somewhat exaggerated. More is being attributed to the drug problem than drug use alone causes. If drug use ceased, crime would not disappear, nor would fear, urban decay, or the AIDS epidemic. Some of our worst fears actually are linked more closely to

7. Des Jarlais & Hunt, *AIDS and Intravenous Drug Use*, Nat'l Inst. of Just. AIDS Bull., Feb. 1988.

8. A notorious example was the Amtrak-Conrail train crash that occurred in 1987. *Drug Traces Found in Two Conrail Workers After Fatal Crash*, N.Y. Times, Jan. 15, 1987, at A1, col. 4. Cocaine use was recently linked to traffic accidents. N.Y. Times, Jan. 12, 1990, at A1, col. 6.

9. DuPont, *Never Trust Anyone Under 40: What Employers Should Know About Drugs in the Workplace*, Pol'y Rev., Spring 1989, at 52-53; Goetz, *High on the Job: A Growing Problem?*, Psychology Today, May 1987, at 16.

10. *See The Crack Legacy: Children in Distress*, Wash. Post, Sept. 10, 1989, at A1, col. 2; L.A. Times, Sept. 14, 1986, § 5, at 3, col. 1.

11. *See New Tactics in the War on Drugs Tilts Scales of Justice Off Balance*, N.Y. Times, Dec. 29, 1989, at A1, col. 1.

efforts to control drugs than to drug use per se.[12] Still, these alarming manifestations signal an important increase in levels of drug use, and suggest that drug use and efforts to control it are producing significant adverse social consequences. The world of drug use has changed over the last fifteen years, and it has changed for the worse.

In this Article, I note that the "drug problem" is primarily a cocaine epidemic, and suggest what we might learn from this fact. I then examine the current legalization debate, and conclude that the current regulatory scheme is more likely to be satisfactory than any of the legalization options. Next I evaluate current supply and demand reduction strategies. I conclude by exploring the tension between our need to mobilize to meet the epidemic in speedy fashion and our need to learn about which policies work and which do not.

I. The Epidemic of Cocaine Use

Today's drug problem is different from the one society faced in the late 1960s and early 1970s. Then, we worried about heroin addiction and street crime in urban ghettos, psychedelic drugs on (and off) university campuses, and marijuana use in the suburbs.[13] Now we worry about crack induced violence on city streets, and the dangers of drug use on the job.

It is not so much that the old problems have disappeared. It is simply that they have been surpassed. Marijuana and heroin use has been fairly stable over the past decade. There have been some movements: for example, marijuana use peaked in 1979 and then declined, while heroin use has climbed slightly over the last peak reached in 1974.[14] But there have been no dramatic changes. Abuse of these drugs, along with alcohol, might now be viewed as the nation's endemic drug problems. Cocaine use, on the other

12. For an argument that virtually all of the worst aspects of the drug problem are consequences of current control efforts, see Wisotsky, *Exposing the War on Cocaine: The Futility and Destructiveness of Prohibition*, 1983 Wis. L. Rev. 1305.

13. *See generally* Strategy Council On Drug Abuse, Federal Strategy for Drug Abuse and Drug Traffic Prevention—1973 6-10 (1973) (describes possible causes of the 1960s drug epidemic).

14. The United States currently relies on four basic statistical systems to monitor levels of drug use in the United States population: 1) Nat'l Inst. on Drug Abuse, The National Household Survey on Drug Abuse: Population Estimates (a survey of the general population that has been conducted every two or three years since 1972); 2) U. Mich. Inst. for Soc. Res., Monitoring the Future: A Continuing Study of the Lifestyles and Values of Youth (a survey of graduating high school seniors that has been conducted annually since 1975); 3) Nat'l Inst. on Drug Abuse, Data from the Drug Abuse Early Warning Network (reports from a selected national sample of emergency rooms and medical examiners of drug involvement by patients); 4) Nat'l Inst. on Drug Abuse, Client Oriented Data Acquisition Process, Annual Summary

hand, has increased dramatically—by more than a factor of ten over the last decade.[15] These statistics make it evident that the United States is not experiencing the growth of a generalized "drug problem." What gives the drug problem urgency today is a far more specific event: the United States is beset by a serious epidemic of cocaine use, including crack.

To a surprising degree, the cocaine epidemic crept up on us. Its first indications probably were reports by enforcement agents in the mid-1970s that they were encountering determined, violent cocaine traffickers from South and Central America.[16] Shortly thereafter, reported levels of cocaine use began to rise in household surveys used to gauge drug abuse trends.[17] Newspaper articles began to appear describing cocaine use by entertainers, sports figures and other celebrities.

These indicators should have set off alarm bells. But other indicators were not so discouraging. Until the early 1980s, the systems that monitored the adverse consequences of drug use (e.g. deaths, visits to emergency rooms, entrances into treatment programs, and arrests for street crimes) did not reveal a substantial cocaine problem.[18] The price of cocaine remained high—well out of reach for

Report (reports from federally supported treatment programs regarding new clients admitted to treatment).

Each system has weaknesses as an accurate indicator of levels of drug use in the general population; thus, they are often used in conjunction with each other. One should keep in mind that descriptions of drug use levels in the general population are based on interpretations of these data—they cannot simply be read. I rely on an interpretation produced by David Boyum, who constructed indices of drug use levels based on combinations of data from the population surveys, the emergency room reports, and the federal treatment program reports.

These indices suggest that marijuana use peaked in 1979 and then declined; heroin use reached an epidemic high in 1975, then declined precipitously until 1978, then increased gradually to end slightly higher than the epidemic level in 1987; cocaine use rose slowly from a small base from 1974 to 1982, and then increased dramatically from 1982 to 1987 with the fastest growth occurring from 1985 to 1986. D. Boyum, A Second Look at Supply Reduction Effectiveness: New Methods and Applications 15-17 (June, 1989) (Working Paper No. 89-01-17, Program in Clinical Justice Policy and Management, Kennedy School of Government, Harvard University).

For a simpler account of trends in drug use, see Nat'l Inst. on Drug Abuse, National Household Survey on Drug Abuse: Summary of Selected Findings—1982 (1983).

15. D. Boyum, *supra* note 14, at 16.

16. This is based on personal experience. I was then the Chief Planning Officer of the United States Department of Justice's Drug Enforcement Administration.

17. Nat'l Inst. on Drug Abuse, Highlights—1985 National Household Survey on Drug Abuse 2 (Press Release, 1986).

18. *See* Nat'l Inst. on Drug Abuse, DAWN Semiannual Report Trend Data (Statistical Series G, No. 17, 1986).

casual use by poor urbanites or teenagers.[19] Cocaine use seemed to be confined to America's upper and middle classes.

Suddenly, in the early 1980s, the cocaine problem mushroomed. The epidemic spread from upper and middle classes to the lower classes.[20] The indicators that registered the adverse social consequences of cocaine use began to escalate rapidly.[21]

In retrospect, the indicators probably were reflecting two distinct trends. Upper and middle class users who had begun using cocaine in the late 1970s had by 1983 become dependent on it, and had been involved with cocaine long enough for its financial and social demands to have depleted their economic and social capital. Bank accounts had been emptied, the tolerance of employers exhausted, and the support of family and friends withdrawn. For the first time, the troubles of upper and middle class users registered not only in intimate private circles, but in public institutions and thus national statistics.

At the same time, cocaine moved into poorer neighborhoods, where the publicly visible effects of cocaine use appeared much more quickly. The financial, psychological, and social demands of cocaine use collapsed the fragile supports of poor families, and the consequences spilled out into public institutions. The combined effect was to thrust the disastrous consequences of cocaine use into the public record and social consciousness.

Shortly thereafter, crack appeared.[22] This cheap form of cocaine facilitated cocaine's spread to poorer and younger consumers. This,

19. *See* D. Boyum, *supra* note 14, at 6, 16.

20. Interestingly, I believe this is the first drug epidemic thought to have spread this way. Other drug epidemics that have crossed class boundaries have moved up the socio-economic ladder rather than down it.

21. Nat'l Inst. on Drug Abuse, Use and Consequences of Cocaine: Trends in Past Year and Past Month Use of Cocaine by Age Category, 1972-1985 (Press Release, October 1986). *See also* NAT'L INST. OF DRUG ABUSE, DAWN SEMIANNUAL REPORT TREND DATA (Statistical Series G, No. 23, 1989); NAT'L INST. OF DRUG ABUSE, DAWN SEMIANNUAL REPORT TREND DATA (Statistical Series G, No. 17, 1986).

22. It is difficult to date the appearance of "crack" as a commonly abused drug. The difficulty is conceptual as well as empirical. The conceptual problem is that smokeable crack has always been present to some degree among the population of cocaine users—it is therefore not clear how we should define "commonly abused." Empirically, it is difficult to get accurate information about when crack abuse crossed this conceptual threshold. It appears that by the summer of 1985 it had become recognized nationally. By the late fall of 1985, crack was apparently being commonly produced and consumed in the United States. Personal Communication with Nicholas Kozell, Chief of the Epidemiology Branch, Nat'l Inst. on Drug Abuse (Jan. 19, 1990).

For a description of the impact of crack on the inner cities, see Johnson, Williams, Dei & Sanabria, *Drug Abuse in the Inner City: Impact on Hard Drug Users and the Community*, in DRUGS AND CRIME (M. Tonry & J. Wilson, eds.) (forthcoming) (Crime and Justice: An Annual Review of the Research, vol. 13, 1990).

in turn, created new marketing opportunities that led to conflicts among those competing to exploit them. Because the cocaine markets were on city streets rather than in hotels or houses, dealer violence spilled over to the general population.

In short, it is cocaine and crack rather than heroin, marijuana and hallucinogens that are now shaping both our conception and the underlying reality of the drug problem. Our long-standing concerns about drug related crime have changed: drug related crime in the 1970s was mostly restricted to robberies and burglaries committed by heroin junkies desperate for a fix, but now it includes street violence committed by warring cocaine-dealing gangs. Similarly, we have long worried that drugs could trap our children, but the availability and low price of crack now make this an even more serious threat. But for cocaine, the drug problem might have remained what it had previously been.

Understanding that we are dealing with a cocaine epidemic makes it somewhat easier to analyze future prospects for growth or control of the problem. As David Musto reminds us, this is only the most recent cocaine epidemic the country has faced. We endured a previous cocaine epidemic around the turn of the century.[23] That experience provides a benchmark we might use to set expectations for the future.

The last epidemic also was widespread. Indeed, cocaine was greeted warmly and enthusiastically, and prescribed for curing many ills, including addiction to opiates. At the outset, few adverse consequences of the growing consumption of cocaine appeared. It was not until about a decade into the epidemic that hints of bad effects began to appear. Careers of prominent people were ruined. The drug began to be linked to crime. As the negative consequences emerged, society's attitudes toward cocaine began to change. As a result, cocaine use began to decline, and public policies regulating drugs became more restrictive and penalties for violation became harsher. Society eventually learned that cocaine was dangerous, and its use gradually declined.

Unfortunately, as society's experience with cocaine receded into the distant past, the institutionalized opposition to cocaine use became more abstract. Opposition was no longer fueled by hard personal experience. Society became ready, once again, to be tempted by the appeal of what is initially an attractive drug.

23. Musto, *America's First Cocaine Epidemic*, 13 WILSON Q., Summer 1989, at 59-64.

In some respect, the last epidemic gives us reason to be optimistic. It indicates that society eventually learns through its collective experience that cocaine is dangerous, and this leads to decreased use. The problems, however, with viewing society's last bout with cocaine as a success story are first, that too many casualties resulted from the epidemic before society learned about the problem, and second, that the public policy measures at the end of the epidemic probably were harsher than they needed to be given that society was learning its lesson the hard way.

There are limits to analogizing the current epidemic to the last one. Features of today's society make it likely that the casualties taken in the upswing of the epidemic may be greater than they were at the turn of the century. By all accounts, crack appears to be a more dangerous drug than powder cocaine.[24] Society as a whole, or in pockets, may be more vulnerable to drug addiction than was American society at the end of the century. AIDS is a far greater threat to drug users than previous diseases spread through drug epidemics.

On the other hand, there are some signs that the scenario is repeating itself. Middle class cocaine use seems to be diminishing.[25] Attitudes toward cocaine use are becoming more hostile.[26] Use may very well be declining—at least among society's better off.

Perhaps the most important lesson to be drawn from the past is that cocaine use is epidemic in society rather than endemic; a sharp increase in use probably will be followed by a sharp decrease. As we wait for society to again learn through hard experience that this drug—cocaine—is a bad one, however, we can make long-term gains by acting aggressively now to stem the reach of the cocaine epidemic. This is the battle we must fight now.

II. Drugs and the Law

A cornerstone of America's drug policy is the law that prohibits the use of some psychoactive drugs and regulates the use of others. Recently, an old debate about whether it is wise social policy to regulate the use of drugs has been re-opened.[27] The issue is whether

24. Verebey & Gold, *From Coca Leaves to Crack: The Effects of Dose and Routes of Administration in Abuse Liability*, 18 PSYCHIATRIC ANNALS 513 (1988).

25. *See Rich Versus Poor: Drug Patterns are Diverging*, N.Y. Times, Aug. 30, 1987, at A1, col. 2.

26. *See generally* The Media-Advertising Partnership for a Drug-Free America, Changing Attitudes Towards Drug Use (1988) [hereinafter Changing Attitudes].

27. *See generally* Nadelmann, *The Case for Legalization*, 92 PUB. INTEREST 3 (1988).

those psychoactive drugs now legally proscribed, such as heroin, marijuana, and hallucinogens, should be "legalized" in the interests of ending moralistic state paternalism, reducing the criminal violence associated with black markets and criminalized users, and encouraging the development of informal social controls to keep drug use within safe bounds.

A. Analyzing Legalization Options

The legalization debate really proceeds at two different levels of analysis. One level focuses on the justice or propriety of using the power of the criminal law to control what is arguably a personal decision to "choose one's own road to hell." The other level focuses on the practical effect of legalization on important social objectives such as minimizing crime and promoting the welfare of the population.

The first level of analysis is an exercise in political philosophy. Indeed, much of the force of the argument for legalization comes from the sense that it is morally improper—or at least illiberal—for the state to impose its view of personal virtue on the citizenry. It is particularly inappropriate to do this with the moralistic fervor that is associated with the passage and enforcement of criminal laws. Thus it is wrong in *principle* for the state to criminalize drug use. This position is little affected by arguments about the societal effects of such laws.

The second level of analysis is more empirical and consequentialist; it is concerned with the effects of prohibition or legalization on society. To engage in the second level of analysis, it is necessary to take three distinct analytic steps.

1. Imagining alternatives. The first step is to specify the nature of the legal regime that is to be substituted for the current one. There are, after all, many possibilities. They include:

1) "total legalization," under which all restrictions on the production, sale, and use of the drugs would be eliminated;

2) "legal for all except minors," under which dealers would be prohibited from selling to minors, and minors would be prohibited from purchasing or using specified drugs, on pain of minor civil penalties for violations;

3) "legal under medical prescription," under which distributors would be allowed to sell only to those who had medical prescriptions, and only those with medical prescriptions would be allowed to possess and use specified drugs;

4) "legal under limited medical prescription," under which physicians would be authorized to prescribe specific drugs only for a limited number of medical indications;

5) "legal under the supervision of governmental clinics," under which the government would assume monopolistic responsibility for distributing the drugs through government-sponsored clinics, and only those enrolled in the clinics would be allowed to possess or use the drugs; or

6) "decriminalization of use," under which the production and distribution of the drugs would remain illegal, but criminal penalties for possession and use would be eliminated.

While all these regimes might be considered "legalization" regimes, they differ sufficiently in terms of their operations and likely social consequences that we must be careful to identify which particular form of legalization we are considering before making predictions about the likely social outcomes of "legalizing drugs."[28] Otherwise, the analysis becomes distorted.

For example, in estimating the impact of "legalization" on the size and nature of the black market in drugs, and on the level of drug use, it matters enormously whether one is discussing the most liberal legalization regimes (i.e. those toward the top of the list presented above) or the more restrictive forms of legalization (such as those toward the bottom of the list). Only the most liberal legal regimes can be expected to eliminate the black market entirely, and these are the ones that have the greatest potential for leading to dramatic increases in levels of use. The more limited legalization regimes provide some protection against the threat of explosive increases in narcotics use fueled by newly created legitimate markets, but only at the price of maintaining conditions that are favorable to a continuation of the black market.

2. Estimating probabilities of consequence. The second analytic step is to predict how adopting one of these legalization regimes would affect the social dimensions of the drug problem. In general, these predictions cannot be precise "point estimates"—for example, one cannot responsibly say that violent crime would be reduced by ten percent over current levels by adopting a given regime. There is simply not enough empirical evidence or actual experience with previous epidemics to justify such precise predictions. At best, one can estimate the likely directions and magnitudes of the changes that would occur under a particular legalization regime for each of the

28. *See generally* Kleiman & Saiger, *Drug Legalization: The Importance of Asking the Right Question* (forthcoming in HOFSTRA L. REV.).

relevant dimensions of the problem (e.g., crime, neighborhood decay, effect on children, public health and safety, and the proper functioning of major social institutions). Even these broad estimates must be regarded only as the most likely ones.[29]

For example, in estimating the impact of legalization on future levels of drug use, one can tell a plausible story that consumption would decrease under a legalization regime because, for instance, the profit motive now animating illegal drug dealers to recruit new users would weaken,[30] and some of the allure associated with "forbidden fruit" would disappear. But one can also envision that under the same legalization regime consumption would increase, perhaps even dramatically: drugs would become cheaper and more widely available across broader elements of the society, thereby making drug use more convenient; the stigma associated with drug use would disappear, thereby encouraging more common use; and legitimate suppliers would have as much reason to encourage wider drug use as the illegal dealers.

Similarly, one can point to evidence that indicates that tight legal restrictions on drugs have been ineffective. In countries such as Singapore even the most stringent regimes have failed to eliminate drug use,[31] and drug use in the United States has increased despite the existence of the current legal regime.[32] But one can also point to evidence indicating that tightening controls has succeeded in reducing drug consumption: when England restricted the prescription of heroin to a small number of physicians in 1968, the rate at which new addicts appeared in England diminished;[33] and when the United States succeeded in breaking up the traffic in heroin from Turkey and France in the early 1970s, creating a heroin shortage on the east coast, the rate at which people began using heroin slowed.[34]

Faced with such divergent reasoning and evidence, one cannot be certain about the impact of legalization on levels of drug use. Uncertainty, however, is not the same as ignorance. Some outcomes are more probable than others. We should let the weight of our observations shift our sense of what is more or less likely in one

29. For an analytic framework for making decisions under uncertainty, see H. RAIFFA, DECISION ANALYSIS (1968).

30. Nadelmann, *supra* note 27, at 23-24.

31. D. Lipton, Drug Control Abroad (Spring 1989) (unpublished manuscript on file with the author).

32. Nadelmann, *supra* note 27, at 3.

33. *See* H. JUDSON, HEROIN ADDICTION IN BRITAIN: WHAT AMERICANS CAN LEARN FROM THE ENGLISH EXPERIENCE 63-64 (1974).

34. *See* Statement of John R. Bartels and Dr. Robert L. DuPont before the Subcommittee on Future Foreign Policy Research and Development, House Committee on Foreign Affairs (April 23, 1975).

direction or another.[35] What makes one estimate better than another is that it is more consistent with what is really known about the problem. Often that means that the good estimates include a wide range of possibilities.

In addition, in calculating the consequences of legalization one must recognize that a shift in the legal regime could produce unanticipated consequences in areas outside the current focus of consideration. For example, it is possible that any of the legalization strategies would undermine the effectiveness of many current treatment programs that seem to depend in part for their effectiveness on legal compulsion and difficult conditions in drug markets.[36] Perhaps a legalization regime would be good for most of the nation's communities but have particularly bad consequences for the nation's poorest communities. Or, perhaps a legalization policy would salvage the criminal justice system but break the back of the nation's medical and educational institutions. Obviously, one cannot anticipate or calculate every consequence. The point is that one must guard against the tendency to analyze the strengths of a given policy in dealing with only a few aspects of today's problem, while ignoring the proposed policy's weaknesses in dealing with the new problems once the legalization policy has been introduced.

3. Valuing uncertain consequences. The third analytic step is to consider what social values we most want to advance through drug policy. It is unlikely that a legalization strategy would be better than the current regulatory strategy for all relevant social concerns. In all likelihood, a legalization strategy would be better in some areas of performance, and worse in others.[37] For example, legalization might reduce criminal violence, but at the expense of reducing the health and social functioning of drug users and their children. Similarly, though legalization might reduce the state's reliance on coercion to achieve its purposes, and protect the criminal justice system from corruption, it might also increase public expenditures for treatment and prevention, and produce unfortunate results for the schools and medical institutions forced to contend with more widespread drug use. Which of these worlds one prefers is a matter of values as well as estimated consequences.

35. H. RAIFFA, *supra* note 29.

36. *See Special Issue: A Social Policy Analysis of Compulsory Treatment for Opiate Dependence*, 18 J. DRUG ISSUES 1 (1988).

37. For a discussion of the role of values in policy analysis, see Moore, *Social Science and Policy Analysis: Some Fundamental Differences*, in ETHICS, THE SOCIAL SCIENCES, AND POLICY ANALYSIS 271-91 (1983).

A complete analysis of the legalization question is beyond the scope of this paper. Before leaving the subject, however, it is worth casting some doubt on the optimistic predictions of those who favor legalization.

B. The Current Legal Regime: Moral Prohibition or Rational Regulation?

One of the most frustrating aspects of the current debate about legalization is that the debaters often seem ignorant about the current legal regime. The system of laws regulating drug use is often painted as moralistic and paternalistic rather than as a rational scheme for regulating the uses of psychoactive drugs.[38] It is true that much of the spirit of drug policy could be characterized as moralistic and paternalistic. It is also true that there are some important prohibitionist features of the current law. There are some drugs, for example, whose use is entirely prohibited in the United States. In addition, there are severe criminal penalties attached to illegal trafficking and use.

Still, the actual federal statute controlling the production, distribution and use of psychoactive drugs in the United States owes much to the spirit of regulation. It does not seek to eliminate all psychoactive drugs from society; it seeks to strike a reasonable balance between society's worries about the potential for drug abuse, and its interest in being able to use the drugs for legitimate medical purposes.

The federal statute pursues these aims by establishing five levels of controls on drugs.[39] The most stringent level—Schedule I—is reserved for drugs that have no recognized legitimate medical uses. Heroin, marijuana, LSD, and other psychedelic drugs are included in Schedule I. Schedules II through V are used for drugs that have legitimate medical uses, but also some potential for abuse. The higher the estimated potential for abuse, the higher the schedule, and the more extensive the controls that are placed on the drug.

Cocaine, for example, is in Schedule II. It is legally manufactured and distributed in the United States as a topical anesthesia. In this sense, cocaine already is legalized, though it is very tightly regulated. Production is restricted to the amount estimated to be necessary to meet the very limited demand for its specialized medical

38. *See generally* Wisotsky, *supra* note 12.

39. For a general description of the Controlled Substances Act, see Quinn & McLaughlin, *The Evolution of Federal Drug Control Legislation*, 1972-73 DRUG ABUSE L. REV. 144-85.

uses. Only licensed physicians distribute it, and only to patients with well-established needs. Manufacturers, drugstores, physicians, and patients are all subjected to close governmental scrutiny.

Benzodiazepams, such as Valium, are in Schedule IV. This reflects the view that these drugs are less vulnerable to abuse than cocaine and that they have far wider medical applications. These drugs may be produced and distributed only by those licensed to do so, but the restrictions are less strict than those regulating cocaine: there are no manufacturing quotas, no special requirements that vendors keep the drugs in safes to guard against theft, and slightly looser record-keeping requirements.

The logical coherence and operational administration of this regulatory scheme can be attacked on several fronts. First, neither alcohol nor tobacco—two of the most widely used and abused drugs in the society—are included within its scope. Second, the schedules do not give weight to the recreational uses of drugs—regardless of how harmless the drugs might be. Only psychoactive drugs with approved medical uses can be used in the society, and only for those approved uses. Third, the methods used to estimate the abuse potential of drugs are flawed, and government decisions are often influenced by commercial manufacturers of psychoactive drugs with legitimate medical uses.[40] Still, despite its weaknesses, this statute is an honest piece of legislation that simultaneously expresses our society's deep concerns about the potential hazards of psychoactive drugs and its desire to harness the medical benefits they can produce. It provides a coherent framework within which to regulate psychoactive drugs.

C. *Legalization and Drug Related Criminal Violence*

The confidence with which proponents of legalization predict large reductions in criminal violence as a consequence of some form of legalization strategy is unwarranted, and is based on a misconception of the connection between drug distribution, drug use, and

40. For a description and critical evaluation of these methods, see M. FISCHMAN & N. MELLO, TESTING FOR ABUSE LIABILITY OF DRUGS IN HUMANS, (Nat'l Inst. of Drug Abuse Research Monograph No. 92, 1989).

criminal violence.[41] In analyzing the impact of legalization on criminal violence, we must distinguish between the violence associated with illegal trafficking, and the violence associated with drug use.[42]

Advocates of legalization may be correct that violence associated with illegal trafficking would decrease under a legalization regime. Creating a legitimate sector of drug production, distribution and use would weaken the illegal distribution system by creating an alternative source of supply for drug users.[43] To the extent that legal competition would drive illegal dealers out of business, and to the extent that the illegal drug business constitutes the only motivation and economic outlet for the criminal violence of the dealers, legalization would reduce the criminal violence associated with drug trafficking. It might also be true that once illegal dealers lost their powerful economic position as the sole source of drugs and as the principal creators of wealth in some communities, these dealers would become much easier to identify and arrest. The community would no longer be dependent on them for drugs and money. Both effects would tend to reduce criminal violence.

But there are reasons to be worried that the pacifying effect of legalization would be smaller than many anticipate. Only the most liberal legalization regime, complete legalization, would entirely eliminate the black market in drugs. The other regimes create conditions for black markets to arise precisely because they impose restrictions on use.[44] Granted, the markets that arise to meet the demand that lies outside the legally tolerated uses might be less violent than those that now exist. After all, depending on the legalization regime adopted, drugs might be supplied by small scale diversion from legal markets, rather than by international criminal cartels.[45] But one should not be too sanguine about this prospect.

41. For a detailed exploration of these relationships, see Fagan, *Intoxication and Aggression;* Chaiken & Chaiken, *Drugs and Predatory Crime;* and Hunt, *Drugs and Consensual Crime: Drug Dealing and Prostitution,* each in DRUGS AND CRIME, *supra* note 22.

42. This is easy to do conceptually, but difficult to do empirically. For a successful effort at making this distinction, and for showing that the distinction matters, see Goldstein, Brownstein, Ryan & Bellucci, *Crack and Homicide in New York City, 1988: A Conceptually-Based Event Analysis,* in CONTEMP. DRUG PROBLEMS (forthcoming) [hereinafter Goldstein].

43. Moore, *Supply Reduction and Drug Law Enforcement,* in DRUGS AND CRIME, *supra* note 22.

44. H. PACKER, THE LIMITS OF CRIMINAL SANCTION 277-82 (1968).

45. Moore, *Drug Policy and Organized Crime,* in AMERICA'S HABIT: DRUG ABUSE, DRUG TRAFFICKING, AND ORGANIZED CRIME, Appendix G at 49-54 (1986).

The black market in amphetamines—a legalized but stringently regulated drug—has involved violent motorcycle gangs as well as patients who divert their prescribed drugs to others.[46] When a profitable undertaking lies outside the law, it always seems to attract some level of violence.

Similarly, it is by no means clear that people with a talent for violence will stop using that talent for economic gains simply because one important opportunity disappears. The Mafia has shown that organizations with a capacity for sustained and disciplined violence can make a great deal of money from enterprises such as extortion, labor racketeering, loan sharking, and gambling as well as drugs.[47] No small amount of violence is associated with struggles over the control and conduct of these enterprises.[48] Consequently, there is little reason to believe that today's drug gangs, now schooled in violence, will fade away, any more than there was reason to believe that the gangs that arose during Prohibition would fade away once Prohibition ended.

It may also be that the portion of criminal violence attributable to drug trafficking is smaller than it now appears to be.[49] The definition of a "drug related killing" is sufficiently loose that one cannot be sure that the apparent increase in drug related homicide has not been inflated by attributing more homicides to this category than would have been attributed several years ago.[50] If this were true, then the elimination of drug related homicides would be less important than one might now assume. All these caveats make one less confident that legalization strategies would produce a marked and significant reduction in violent crimes associated with drug trafficking.

The prediction that legalization would reduce significantly violent crimes committed by drug users is even shakier. This prediction is based heavily on the idea that drug users commit crimes to earn

46. Off. of Intelligence, Drug Enforcement Admin., Project Crystal City: A Survey of Methamphetamine Trafficking and Abuse in the United States 21-22 (1989).

47. *See* Schelling, *What Is the Business of Organized Crime?*, 20 J. OF PUB. L. 73-75 (1971); *see generally* P. REUTER, DISORGANIZED CRIME: THE ECONOMICS OF THE VISIBLE HAND (1983).

48. For a recent discussion of the role of violence in illegal drug markets, see M. KLEIMAN, MARIJUANA: COSTS OF ABUSE, COSTS OF CONTROL 122-33 (1989).

49. *See* Goldstein, *supra* note 42, at 22.

50. For a methodological discussion of the problems in producing and applying an operational definition of drug related homicide, see Goldstein, *Drugs and Violent Crime*, in PATHWAYS TO CRIMINAL VIOLENCE 16-24 (1989).

money to pay for their habits.[51] In legalized markets, the argument goes, drugs would be cheaper so crime would decrease. If users do not commit crimes exclusively to pay for their habits, however, it is less clear that legalization would control crime.

If, for example, drug users commit crimes because criminal enterprise represents the best way that they know to get money, and if users would spend more on other commodities if they spent less on drugs because legalization made them cheaper, there is no reason to predict that legalization would reduce drug user crime. Or, if what links drugs to crime are physiological states caused by drug use that either stimulate excitability or aggression or dull the psychological inhibitions to violence, then crime by users will vary according to consumption and not price. Any increased level of drug consumption associated with legalization actually would produce an increase, rather than a decrease, in drug-related crime.[52]

The first possibility is supported empirically by evidence indicating that criminal activity often precedes drug use, and is sustained even after drug use declines.[53] The second argument seems implausible when discussing heroin, but more likely when considering cocaine.[54] Moreover, alcohol's close relationship to violent crime reminds us that mere intoxication can be strongly associated with violence.[55]

Again, these observations do not prove that legalization would fail to reduce crime; they simply decrease one's estimate of the likelihood that crime would decrease. There is a real possibility that legalization will not produce a large reduction in crime.

51. *See* DRUG USE AND CRIME: REPORT OF THE PANEL ON DRUG USE AND CRIMINAL BEHAVIOR 3 (1976).

52. For a discussion of these possibilities, see Fagan, *Intoxication and Aggression*, in DRUGS AND CRIME, *supra* note 22.

53. *See* Nurco, Hanlon, Kinlock & Duszynski, *Differential Criminal Patterns of Narcotic Addicts over an Addiction Career*, 26 CRIMINOLOGY 407, 418 (1988).

54. Nat'l Inst. on Drug Abuse, *Cocaine Use in America*, PREVENTION NETWORKS, Apr. 1986, at 6-8; NAT'L COMM. FOR INJURY PREVENTION AND CONTROL, INJURY PREVENTION: MEETING THE CHALLENGE 206, 226 (1989).

55. Collins, *Alcohol Use and Criminal Behavior: An Empirical, Theoretical, and Methodological Overview*, in DRINKING AND CRIME: PERSPECTIVES ON THE RELATIONSHIP BETWEEN ALCOHOL CONSUMPTION AND CRIMINAL BEHAVIOR (1981). For another discussion of this relationship, see Gerstein, *Alcohol Use and Consequences*, in PANEL ON ALTERNATIVE POLICIES AFFECTING THE PREVENTION OF ALCOHOL ABUSE AND ALCOHOLISM, ALCOHOL AND PUBLIC POLICY: BEYOND THE SHADOW OF PROHIBITION 203-07, 216-17 (1981) [hereinafter ALCOHOL AND PUBLIC POLICY].

D. Legalization and Levels of Drug Use and Abuse

The most optimistic predictions made by proponents of legalization are first, that drug use would not increase significantly as a result of legalization, and second, that even if drug use increased, the social consequences would not be as severe as those we now face, because drugs would be available in more benign forms, and informal social controls would arise to minimize drug abuse.

The prediction that drug consumption would remain constant or decline under a legalization regime seems to be based on one of three hypotheses. The first is that only the illicitness of drugs makes them attractive to potential users. If the profit motive for illegal dealers were taken away, and the "forbidden fruit" aspect of drugs eliminated, drugs would lose their appeal.[56]

A second theory is that the demand for drugs is perfectly inelastic. There are some people who are predisposed to use drugs who cannot be discouraged from using drugs by price or inconvenience. Others would not be tempted into use by ready access and social acceptability. Under this theory, legalizing drugs would not result in increased use.

The third hypothesis is that people learn from experience which drugs are safe and which are not. Once it becomes clear that some drugs are dangerous, people would voluntarily choose not to use them. In this view, the laws give only redundant protection once society has learned about the different drugs.[57]

There is relatively little evidence to support any of these hypotheses, and, in some cases, the reasoning is quite flawed. The claim that illicitness alone makes drug dealers aggressive marketeers is almost certainly wrong—at least as a general proposition. We know from empirical studies that drug users are rarely recruited into drug use by drug dealers.[58] Indeed, new drug users are among the most dangerous consumers for illegal dealers to recruit.[59] Instead, neophytes are recruited by drug using peers who are themselves just

56. Nadelmann, *supra* note 27, at 12.

57. *See generally* Maloff, Becker, Fonaroff & Rodin, *Informal Social Controls and Their Influence on Substance Use*, in CONTROL OVER INTOXICANT USE: PHARMACOLOGICAL, PSYCHOLOGICAL, AND SOCIAL CONSIDERATIONS 53-76 (1982) (informal controls, as opposed to formal mechanisms, may be more effective policy alternatives for controlling substance use and addiction).

58. *See* Simons, Conger & Whitbeck, *A Multistage Social Learning Model of the Influences of Family and Peers Upon Adolescent Substance Abuse*, 18 J. DRUG ISSUES 293-315 (1988)

59. M. MOORE, BUY AND BUST 18-19 (1977).

starting drug use and show few of the negative consequences of drug use.[60]

Illicitness may increase the appeal of drugs for some potential users who seek "forbidden fruit," but it may well discourage others. Further, it is only the most liberal form of legalization that eliminates the illicit aspect for children and teenagers. And it would be hard in any case to make drug use seem boring and conventional. Drug use is inherently risky and precocious behavior, regardless of its legal status, and thus inevitably appeals to some teenagers.

One must also acknowledge that while legalization weakens the black market in drugs, it establishes a legitimate market that has some of the same internal incentives for expansion as the illegal one. Our experience with legalizing alcohol and gambling shows that legitimated vice industries have a zeal for profits and market development. Remarkably, these motives remain strong even when, as in the case of gambling, the enterprises are run by governments.[61]

The second claim, that there is a fixed number of drug users in society, flies in the face of both common sense and experience. After all, societal drug use has not remained constant. Cocaine use has increased dramatically in the past decade.[62] This increase has not been associated with a corresponding decline in alcohol use among similar age cohorts.[63] There is thus no reason to believe that the demand for drugs is invariant in society.

In fact, experience tells us the opposite: behavior is influenced by opportunities. If the opportunities for drug use are distributed more widely through the population, with less stigma associated with use, more people will exploit the opportunity. It should not

60. Simons, Conger & Whitbeck, *supra* note 58.

61. For a discussion of government controlled gambling, see C. CLOTFELTER & P. COOK, SELLING HOPE: STATE LOTTERIES IN AMERICA (1989).

62. NAT'L INST. ON DRUG ABUSE, EPIDEMIOLOGIC TRENDS IN DRUG ABUSE I-1 (1989).

63. Surveys conducted by the National Institute on Drug Abuse over the past decade indicate a constant level of alcohol use by American citizens; it is neither increasing nor decreasing. *See* O'Malley, Bachman & Johnston, *Period, Age, and Cohort Effects on Substance Abuse Among American Youth, 1976-1982*, 74 AM. J. PUB. HEALTH 682-88 (1984) (alcohol use by young adults age 18-25 and adults over age 25 remained stable in survey years 1979, 1982 and 1985). On the other hand, these surveys also indicate a distinct upward trend in cocaine use by American citizens in general. *Id.* Obviously, this indicates an increase in drug demand in this society. If the idea that drug demand remains constant were true, we would have to see alcohol users "switching" to cocaine, and therefore a decrease in alcohol use, in order to account for the rising numbers of cocaine users. The idea that cocaine is somehow "replacing" alcohol as the drug of preference is simply not true. The simple fact is that the demand for drugs and the absolute number of drug users are rising.

seem surprising that the most widely used psychoactive substances are tobacco and alcohol—drugs that are now legal. Moreover, it seems fairly clear that reducing access to drugs has an impact on levels of consumption: when alcohol was prohibited, alcohol consumption fell by a third;[64] when states have raised taxes on alcohol, alcohol consumption has fallen, apparently even among chronic alcoholics;[65] when England restricted the prescription of heroin to a small number of government supervised physicians in 1968, the rate at which new heroin addicts appeared in England slowed;[66] when Vietnam veterans who used drugs heavily in Vietnam under conditions of ready availability returned to the United States, where drugs were less readily available, many abandoned their use;[67] and when cocaine traffickers arrived in the United States with tons of cocaine, an epidemic of cocaine use was launched.

Such observations do not "prove" that levels of drug use would increase if drugs were legalized, but they certainly influence the betting odds. The bet that drug consumption would decrease seems like a long shot. The bet that drug consumption would increase seems surer. One would even have to put reasonable odds on the chance that drug use would increase significantly.

Probably the shakiest prediction made by advocates of legalization is the third prediction: that informal controls would arise, rooted in personal experience, which then would guide individual users in the proper use of drugs and would shield the population as a whole from dramatic increases in levels of drug use and/or its adverse consequences. This prediction is based principally on a hopeful analogy to what now is occurring with respect to smoking.[68]

To some extent, this prediction seems plausible. If drugs were legal, one would see many more people using drugs in controlled and successful ways than one now sees under the current legal regime. Drug users in a legal regime would be psychologically and sociologically different—generally sturdier—than those who use

64. *See generally* N. CLARK, DELIVER US FROM EVIL: AN INTERPRETATION OF AMERICAN PROHIBITION 146-47 (1976).

65. *See* Cook, *The Effect of Liquor Taxes on Drinking, Cirrhosis, and Auto Accidents*, in ALCOHOL AND PUBLIC POLICY, *supra* note 55, at 256.

66. H. JUDSON, *supra* note 33, at 64.

67. L. ROBBINS, THE VIETNAM DRUG USER RETURNS 78-79 (Special Action Office for Drug Abuse Prevention Monograph Series A, No. 2, 1973).

68. *See generally* U.S. DEP'T OF HEALTH AND HUMAN SERVICES, REPORT OF THE SURGEON GENERAL, REDUCING THE HEALTH CONSEQUENCES OF SMOKING: 25 YEARS OF PROGRESS (1989).

drugs under a prohibitionist regime, and informal controls would, in fact, arise to give them guidance about safe drug use.

While the proportion of drug users who are in trouble with a drug would diminish as a fraction of all drug users, however, the absolute number of users in trouble would increase because the total number of users probably would have increased. Moreover, even those who use drugs relatively safely have accidents. And while the probability of such accidents may be low, due to the fact that they are using drugs safely, the absolute burden on the society would be large because there would be more people now using drugs.

In sketching these possibilities, I am drawing heavily on an analogy with alcohol.[69] Society now exhibits a very broad distribution of drinking practices. Many of these practices are reasonably safe in the sense that they are unlikely to produce a crime, an accident, or a collapse of a social institution. Because there is a great deal of "safe drinking," one might say that society's informal social controls are working well.

On the other hand, a small fraction but a huge absolute number of people are in serious trouble with alcohol—a number that dwarfs our estimates of the number in serious trouble with drugs.[70] Moreover, a significant portion of what society views as the alcohol problem—namely, traffic accidents, domestic fights, even lost jobs—is generated by the large group of drinkers whose consumption patterns are fairly benign, but who cannot entirely eliminate the risks associated with being intoxicated at the wrong place and the wrong time.[71] There is no reason to ignore this pattern in making predictions about patterns of drug consumption and consequences under a legal regime.

E. A Contingent Conclusion

In sum, I am sympathetic to the notion that society should have a rational regulatory scheme for controlling the availability of psychoactive drugs according to reasoned estimates of their potential for abuse and their value in legitimate medical use. I believe that the current statutes create a workable framework for such a regime.

69. ALCOHOL AND PUBLIC POLICY, *supra* note 55, at 16-47.

70. Approximately ten million people are classified as problem drinkers. Gerstein, *Alcohol Use and Consequences*, in ALCOHOL AND PUBLIC POLICY, *supra* note 55, at 208. There are less than a million daily users of heroin and cocaine, however.

71. ALCOHOL AND PUBLIC POLICY, *supra* note 55, at 44 ("[a]lcohol problems occur *throughout* the drinking population").

In answer to the question of whether society would be better off if it widened legitimate access to drugs such as heroin and cocaine, I would say no. My judgment is that consumption would increase substantially, and while that increased consumption would in many ways look more benign than the drug use we now see, this appearance would be an illusion because it would hide significant absolute increases in the damages associated with drug use. Indeed, widening access to cocaine seems like a particularly reckless move at a time when society is trying to cope with dramatic increases in the use of a drug that has proven over the last decade its capacities to attract unwary users and to inflict significant losses on American communities.

III. Supply Versus Demand Reduction Strategies

If legalizing drugs does not solve the drug problem, what is the alternative? The current policy debate generally focuses on the wisdom of relying on supply reduction versus demand reduction strategies. Supply reduction strategies include crop eradication, drug interdiction at national borders, and the immobilization of trafficking networks.

Demand reduction strategies are often divided between treatment programs designed to help experienced users abandon their drug use and prevention programs designed to dissuade non- or novice users from drug experimentation. Specific efforts include broadcast media campaigns designed to alert citizens to the hazards of drug use; counselling programs that train high risk adolescents in methods of resisting peer group pressures to experiment with drugs; and treatment programs, therapeutic communities and methadone maintenance programs designed to reduce users' reliance on drugs.

Each of these approaches has a certain logic. The logic of the supply reduction strategy is simple: if drugs aren't available, people won't use them. In addition, supply reduction strategies have the political advantage of externalizing the problem by focusing public hostility on popular villains.

The logic of demand reduction approaches is equally simple: so long as people want to use drugs, someone will find it profitable to supply them. Consequently, the only permanent solution is to reduce demand and the conditions that create demand. Demand side strategies have the political advantages of focusing society's energies on opportunities for children, and glorifying the efforts of parents' groups.

The question of which approach works best is more difficult to answer. In recent years, we seem to have witnessed some of the important limitations of supply side approaches to the drug problem. We have more than doubled the resources on the supply side efforts, focused them increasingly on cocaine, and yet seen violence rise as the price of cocaine has fallen to historically low levels.[72] One can argue, of course, that the situation would have been even worse but for the heroic supply side interventions, but the argument rings a bit hollow.

Two pieces of empirical data suggest that supply reduction efforts can be successful in reducing the supply of drugs. First, the price of drugs in illicit markets is much higher than the price of the same drugs in legal markets. Heroin is sixty times more expensive than equivalent doses of morphine; cocaine is fifteen times more expensive in illicit markets than in legal markets.[73] The price elasticity of demand for these drugs does not have to be great for such huge price effects to significantly decrease the consumption of these drugs.[74]

Second, an examination of the prices and quantities of drugs consumed by the United States population over approximately the last two decades reveals three periods in which supply reduction efforts appear to have succeeded. Those were periods in which the measured price of drugs increased even as the indicators of the quantity consumed fell. In the early 1970s, crop control efforts in Turkey and enforcement actions against the "French Connection" produced a shortage of heroin on the East Coast.[75] In the late 1970s, crop eradication programs in Mexico seemed to produce a nationwide reduction in the supply of heroin. Recently, expanded interdiction efforts seem to have produced a reduction in the supply of marijuana. These successes must be compared with a clear failure: for the last ten years, the price of cocaine has been falling as the quantity consumed has increased.[76]

Thus, it is unclear whether supply reduction efforts are contributing to the solution of the drug problem. There have been some

72. *See generally* Moore, *Supply Reduction and Drug Law Enforcement*, in DRUGS AND CRIME, *supra* note 22.

73. D. Boyum, *supra* note 14.

74. Moore, *Supply Reduction and Drug Law Enforcement*, in DRUGS AND CRIME, *supra* note 22 (numerical estimates of price elasticities).

75. Statement of John R. Bartels and Dr. Robert L. DuPont, *supra* note 34.

76. Moore, *Supply Reduction and Drug Law Enforcement*, in DRUGS AND CRIME, *supra* note 22.

successes, and some failures. We can only engage in informed speculation as to why some efforts succeed and some fail. Current thinking suggests that the important long run effects of supply reduction efforts operate by making it extremely difficult for dealers to complete risky transactions.[77] This, more than control over raw materials, technology, capital, or labor, reduces the supply of drugs to illicit markets and forces the price well above the prices for equivalent drugs in legitimate markets.

On the demand side, we are accumulating evidence that treatment programs do succeed in reducing drug use and improving the behavior and condition of many drug users who participate—at least so long as the drug users remain in the programs.[78] Drug treatment programs rarely produce "cures" in the sense that those treated reduce their drug use to zero and stay that way for the rest of their lives. Instead, they produce reductions in drug use and criminal conduct, and improvements in health and social functioning while the user remains in treatment.[79] Sometimes these effects last for a period after treatment. While such results are not necessarily cures, they are valuable in the way that successful efforts to manage chronic diseases are valuable: they improve the patient's quality of life and her social functioning.

The fact that drug treatment programs produce important changes in behavior only so long as the users remain in treatment heightens the significance of treatment programs' capacity to retain users. A significant finding now emerging is that legal compulsion—either through court diversion, formal probation, or civil commitment—helps to retain users in treatment without losing effectiveness.[80] This finding is important not only because it suggests ways of increasing the effectiveness of treatment, but also because it widens the range of users who usefully might be treated to include reluctant criminal offenders as well as those users who have simply decided they have had enough. In many ways, coerced treatment programs are superior to prisons and jails as a social response to crime-committing drug users; they seem to provide significant crime

77. *Id.*
78. *See* Anglin & Hser, *Treatment of Drug Abuse*, in DRUGS AND CRIME, *supra* note 22.
79. *Id.*
80. *See* Anglin, *The Efficacy of Civil Commitment in Treating Narcotics Addiction*, in COMPULSORY TREATMENT OF DRUG ABUSE: RESEARCH AND CLINICAL PRACTICE (Nat'l Inst. on Drug Abuse Research Monograph 86, 1988).

suppression results (to say nothing of other therapeutic benefits) at lower economic costs.[81]

The evidence on prevention programs is much harder to come by. It is true that society's attitudes are turning against cocaine, and that this change follows a mass media campaign to alert people to the hazards of the drug.[82] But it is also true that society has been accumulating real, immediate experience with cocaine during the same period. We have seen attitudes toward smoking change dramatically, and this holds out hope that society's ideas about other drugs might change as it learns they are dangerous.[83] As noted above, if history were to repeat itself, attitudes about cocaine use would change as well. It is also clear, however, that society, and individual drug users, pay an enormous price in learning about tobacco and cocaine the hard way. Prevention programs should try to substitute for the hard learning that comes from widespread personal experiences.

With respect to the effectiveness of the more focused drug prevention programs targeted at high risk youth, the jury is still out.[84] It seems that school based programs that focus intensively on teaching resistance skills either alone or in combination with general life-skills do delay the onset of drug use.[85] Achieving greater and more durable preventive effects, however, appears to require programs combining focused efforts on children with mass media appeals and other measures that affect parents and other community institutions.[86] Apparently, the message must be communicated through the broader environment as well as in one's individual life, and individuals must learn how to behave consistently with the message as well as simply hear it.

The conclusion, then, is that there is room for optimism about demand side approaches, but that they do not offer certain success any more than do supply reduction approaches.

81. *Id.*
82. Changing Attitudes, *supra* note 26.
83. REDUCING THE HEALTH CONSEQUENCES OF SMOKING: 25 YEARS OF PROGRESS, *supra* note 68.
84. For an overview of the literature in this area, see Botvin, *Substance Abuse Prevention: Theory, Practice and Effectiveness*, in DRUGS AND CRIME, *supra* note 22. For some experiments with prevention programs, see P. ELLICKSON, R. BELL, M. THOMAS, A. ROBYN & G. ZELLMAN, DESIGNING AND IMPLEMENTING PROJECT ALERT: A SMOKING AND DRUG PREVENTION EXPERIMENT (Rand Corp. Pub. No. R-3754-CHF, 1988); W. DEJONG, ARRESTING THE DEMAND FOR DRUGS: POLICE AND SCHOOL PARTNERSHIPS TO PREVENT DRUG ABUSE 106-20 (Nat'l Inst. of Just., Issues and Practices Series, 1987).
85. W. DEJONG, *supra* note 84, at 106-20.
86. *Id.* at 129-30.

If one analyzes trends in federal spending for supply and demand reduction over the last two decades, two facts stand out. First, overall spending has increased a great deal—by a factor of ten since 1972, and by a factor of forty since 1969![87] Second, the proportion of spending devoted to treatment has declined dramatically, while the proportions devoted to both supply reduction and preventive education have increased dramatically. In fact, the fastest growing component of federal drug abuse expenditures seems to be preventive education.

To a degree, one can see these trends as an appropriate response to the emerging cocaine epidemic. After all, when the epidemic is rising, it is most important that future growth be dampened, and both supply reduction efforts and drug education serve this function. Recognizing that society's current capacity to treat cocaine dependence is quite limited makes the argument even stronger.[88] In theory, spending money on cocaine treatment is desirable; it is just that existing programs have not been particularly effective.

Still, one has the distinct sense that current drug strategy underinvests in treatment efforts. There are, by now, many casualties of the epidemic who need even the limited help that can now be provided but cannot afford it. Furthermore, society urgently must experiment with a wide variety of programs for treating cocaine use. Society, then, should shift its response to the drug problem in the direction of increased treatment. This need is made particularly urgent by the threat that AIDS now poses to intravenous drug users.

To this extent, then, categorizing policy into supply and demand reduction approaches is useful. But this categorization is also problematic. Instead of illuminating opportunities for effective joint action, the categories seem to foster a polemical debate about which approach should predominate. This debate, in turn, tends to obscure the important and valuable interactions between supply reduction efforts and demand reduction efforts.

87. The principal references on which I am relying in making these estimates are the following: STRATEGY COUNCIL ON DRUG ABUSE, FEDERAL STRATEGY FOR DRUG ABUSE AND DRUG TRAFFIC PREVENTION—1975 (1975); STRATEGY COUNCIL ON DRUG ABUSE, FEDERAL STRATEGY FOR DRUG ABUSE AND DRUG TRAFFIC PREVENTION—1979 (1979); and OFF. OF NAT'L DRUG CONTROL POLICY, THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY—1989 (1989).

88. For an overview of treatment effectiveness, see Kleber & Gawin, *Cocaine Abuse: A Review of Current and Experimental Treatments*, in COCAINE: PHARMACOLOGY, EFFECTS, AND TREATMENT OF ABUSE (Nat'l Inst. on Drug Abuse Research Monograph 50, 1984). For a discussion of the opportunities for treating cocaine use, see Rawson, *Cut the Crack: The Policymaker's Guide to Cocaine Treatment*, POL'Y REV., Winter 1990, at 10-19.

For example, drug policy should concentrate on supply reduction and drug law enforcement to create an environment in which it is difficult and inconvenient for potential users to acquire drugs, and in which life for experienced users is sufficiently uncomfortable that they are motivated to seek treatment.[89] In this way, supply reduction and law enforcement efforts support prevention and treatment programs.

Another point: the drug laws are an important educational statement that shapes the public's views of the various drugs. A law does more than create a liability for criminal prosecution; it is a powerful normative statement.[90] That statement may not be particularly influential to those who have already begun using drugs, or who define themselves in opposition to the broader society. Nonetheless, for those who have not yet started using drugs, or for those who have not settled into an oppositional stance, the fact that society has legislated against some drugs may have a useful educational impact.

Finally, at local levels, in the cities where drug use is now producing devastating effects, the opportunity exists for communities to combat drugs by combining law enforcement, preventive education, and treatment. Law enforcement at street levels is needed to help parents maintain control over the environments that their children encounter, and to reinforce the message produced in educational programs that drugs are dangerous, particularly for kids. Street level law enforcement also helps to control drug related crime and improve the condition of drug users by motivating the users directly or indirectly to seek treatment.[91] Treatment programs are valuable because they are more effective, less expensive, and more available than jails in controlling crime and re-integrating offenders into the community. The opportunity to recognize and exploit the synergy of these approaches is obscured by a categorization that seems to reflect the organization and responsibilities of the federal government rather than the opportunities available to state and local governments.

This categorization fosters a polemical debate because it is closely tied to broader political outlooks. Generally speaking, conservatives tend to favor law enforcement and supply reduction over demand reduction and treatment. Liberals tend to prefer demand reduction

89. *See* DOMESTIC COUNCIL DRUG ABUSE TASK FORCE, WHITE PAPER ON DRUG ABUSE 2-4 (1975).

90. *See* M. GOLDING, PHILOSOPHY OF LAW 39-43 (1975).

91. *See* M. KLEIMAN, A. BARNETT, A. BOUZA & K. BURKE, STREET LEVEL DRUG ENFORCEMENT (Nat'l Inst. of Just. Issues and Practices Series, 1988).

and treatment. Such broad political views count heavily in determining policy positions—especially in a world where little reliable information about effectiveness is available.

The categories of supply and demand reduction are also closely, though not perfectly, aligned with professional interests. Supply reduction and law enforcement are often seen as the same thing since it is assumed that enforcement efforts are properly directed at sources of supply rather than users. These measures tend to attract the support of police and criminal justice officials. Demand reduction and the social/medical approach are assumed to be equivalent because they do not appear to rely on the coercive power of the state, and use volunteers, parents, and physicians more than enforcement personnel. Quite naturally, they attract the support of physicians and public health personnel. This alignment with professional interests tends to harden divisions in the war against drugs.

Insofar as the categorization of supply and demand reduction efforts provides a way to track federal priorities, it is a useful analytic device. Insofar as it fosters a continuing political stalemate, or divides the institutions that must deal with the problem, however, the categorization stands in the way of effective governmental action. We must keep clearly in mind that the war on drugs is being fought block by block in cities. We must defend those blocks by establishing effective working partnerships among parents, schools, police, courts and treatment agencies at local levels. That requires us to understand the complementary nature of supply and demand reduction strategies.

IV. Groping Toward an Effective Drug Policy

With respect to drugs, society is now trying to do two difficult tasks simultaneously. It is mobilizing itself to take action against an urgent problem that is probably going to get worse before it gets better, but that would respond to prompt and effective action with substantial long term rewards for the society. As it takes action, however, it is searching for more certain and effective ways of responding to the problem.

This is not unusual, of course. Society often must simultaneously act to confront urgent social problems even as it develops the perspective and knowledge that it needs to address the problems effectively. Problems come upon us unannounced; not everything can be predicted or prepared for.

Moreover, it is not particularly bad that these things occur simultaneously. Necessity does produce inventions. The inventions, if reviewed and analyzed, provide an experiential basis for important social learning.

Unfortunately, our opportunities for learning are usually squandered because the forms of discourse appropriate to mobilization for action are inconsistent with the forms that are appropriate for learning. Mobilizing society to take action seems to require a language of urgency about the problem and certainty about the solutions. Building commitment to the cause seems to require certainty about the direction. On the other hand, the forms of discourse that are appropriate for learning often seem inconsistent with the requirements for action. The social scientists who seek to develop society's perspective on social problems, and organize its learning about what works and what does not, often establish a discourse that seems to require that the world stand still, and that first premises be re-examined before any action is taken. Otherwise, any intellectual inquiry is tainted by the rude requirements of the practical world, and is not to be trusted.

The challenge before society is to see whether it can forge a form of discourse that allows society to learn and adapt even as it acts aggressively to deal with the urgent task of limiting the cocaine epidemic, and with the longer term problem of reducing the endemic social consequences of using heroin, marijuana, alcohol and tobacco. There is much need for more disciplined thought and fact gathering as society confronts these problems. In this dialogue, the question of the proper legal regime has a place. But it would be unwise to waste all our intellectual and political capacity for debate on this question. There are many other important questions, such as the proper role of community self-defense against drug use, the best form of treatment for cocaine use, and whether coerced treatment programs are more or less successful than jails in controlling crime in the short run, and rehabilitating users in the long run.

The question remains: will we be able to create the institutional forms in which that intellectual work can be done even as we are trying to mobilize the society to act? It is an urgent question, for unless we succeed in this, we will be flying blind in fighting the war against drugs, and failing to learn from our accumulating experience.