
January 1970

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Recommended Citation

Michael P. Rosenthal, *Two Problems and a Lesson for the Draftsman of Drug Crimes Legislation*, 24 Sw L.J. 407 (1970)

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TWO PROBLEMS AND A LESSON FOR THE DRAFTSMAN OF DRUG CRIMES LEGISLATION*

by

Michael P. Rosenthal**

FOR SEVERAL years I have participated in the revision of both federal and Texas statutes dealing with narcotic and dangerous drug offenses. During this time I have been exposed to many problems growing out of our efforts to criminally prohibit the non-medical and non-scientific-oriented use and distribution of these drugs. These problems have often presented serious questions of policy for resolution by those engaged in revising or writing criminal narcotics and dangerous drug legislation. This Article discusses two of those problems and also relates a lesson I have learned.

I. THE FIRST PROBLEM: THE VALUE AND PLACE OF DETERRENCE

Among the major problems confronting the draftsman of narcotics and dangerous drug legislation is the proper role of deterrence, both in defining these offenses and in setting the range of penalties that may be imposed upon offenders. This involves two problems. First is the likelihood that, and the extent to which, a particular offense or a particular range of penalties will deter illicit use or trafficking. And second, assuming a given amount of deterrence for a particular offense or range of sentence, should deterrence be the controlling consideration in deciding whether to create the offense or in setting the penalty?

By deterrence I mean two things: (1) The inhibiting effect of the fear of detection, apprehension, conviction, or punishment on (2) the general population. Thus, I am speaking of general deterrence,¹ as opposed to special deterrence or intimidation ("the effect of punishment on the punished"²), and I am, for the moment, excluding other inhibiting effects of the criminal law upon the general population—such as any ability it may have to educate or strengthen moral inhibitions against committing crime or to stimulate habitual law-abiding conduct.³

Lawyers and legal scholars, by and large, tend to take deterrence as a matter of faith, and the deterrence of anti-social conduct is in fact an im-

* This Article is based on a lecture delivered to the Short Course on Drug Abuse at Southern Methodist University, April 9, 1970.

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¹ This analysis is drawn from Andenaes, *General Prevention—Illusion or Reality*, 43 J. CRIM. L.C. & P.S. 176 (1952) [hereinafter cited as Andenaes]. See also Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949 (1966).

² Andenaes at 180.

³ See *id.* at 179-80.

portant goal of our criminal law, and usually the dominant one. On the other hand, many social scientists and psychologists tend to doubt the deterrent efficacy of the criminal sanction.⁴ By and large, both groups are operating in the dark. In contrast to the great deal of talk and speculation about deterrence, there are (leaving to one side research dealing with the deterrent effect of capital punishment) few studies of the deterrent effects of legal sanctions.⁵ There is much we do not know about deterrence, and more study is urgently needed.⁶ Moreover, deterrence may operate differently with respect to different populations,⁷ different offenses, different penalties, and different perceived risks of detection, apprehension, and conviction. Even if it should be true, for example, that the death penalty does not deter capital offenses, it does not follow that if applied consistently it might not deter some other offense, perhaps a minor one. Generalization is impossible.

In addition, crimes involving narcotics and dangerous drugs are particularly difficult to detect. Illicit drug transactions are consensual; there is no complaining victim. Consequently, certainty of detection, apprehension, and punishment is particularly low. To the extent that certainty of punishment is a greater deterrent than severity of punishment,⁸ deterrence may be particularly hard to achieve with respect to these crimes. And, insofar as the informer system may result in decisions not to prosecute those who co-operate, certainty of punishment and perhaps deterrence also are further reduced.⁹ Furthermore, it is often argued that certain persons are attracted to drug use because it is illegal. To the extent this is true, and the forbidden excites interest or efforts to repress cause members of a deviant subculture to stand firm, our laws would be having an anti-deterrent effect.

Even leaving aside such an effect, our drug laws may fail to deter some members of the population, because their loyalty to the values of a drug-using or drug-approving subculture may outweigh their allegiance to legal norms.¹⁰ Certainly, the increases in federal narcotics and marihuana penalties in 1951 and 1956¹¹ have not reduced the use of narcotics, and the use

⁴ See, e.g., H. BARNES & N. TEETERS, *NEW HORIZONS IN CRIMINOLOGY* 338 (2d ed. 1951), and 286 (3d ed. 1959); Schuessler, *The Deterrent Influence of the Death Penalty*, in *CRIME AND THE LEGAL PROCESS* 378, 379 (W. Chambliss ed. 1969). See also the critical discussion of this point of view in Gibbs, *Crime, Punishment, and Deterrence*, 48 *SW. SOC. SCI.* 515-16 (1968).

⁵ Two existing studies appear in Chambliss, *The Impact of Punishment on Compliance with Parking Regulations*, in *CRIME AND THE LEGAL PROCESS* 388 (W. Chambliss ed. 1969), and in F. Zimring & G. Hawkins, *Deterrence and Negligent Behavior: A Preliminary Note* (unpublished). Some of the studies are also discussed in Chambliss, *Types of Deviance and the Effectiveness of Legal Sanctions*, 1967 *WIS. L. REV.* 703 (studies of general and special deterrence).

⁶ In this connection, the Center for Studies in Criminal Justice at the University of Chicago is engaged in empirical studies of deterrence. See Morris & Zimring, *Deterrence and Corrections*, 381 *ANNALS* 137, 146 (1969).

⁷ See Zimring & Hawkins, *Deterrence and Marginal Groups*, 5 *J. OF RESEARCH IN CRIME & DELINQUENCY* 100 (1968), in which the importance of the impact of deterrence on marginal groups (a group not engaging in prohibited conduct but which is "next most likely" to do so) is discussed.

⁸ See, e.g., Cramton, *Driver Behavior and Legal Sanctions: A Study of Deterrence*, 67 *MICH. L. REV.* 421, 427 (1969).

⁹ Skolnick, *Coercion to Virtue: The Enforcement of Morals*, 41 *S. CAL. L. REV.* 588, 634 (1968).

¹⁰ See *id.* at 623-26, 641.

¹¹ Pub. L. No. 82-255, § 1, 65 Stat. 767 (1951), codified as 21 U.S.C. § 174 (1964), amending

of marihuana has risen dramatically. Use of amphetamines, also, has continued to increase despite the enactment of the Drug Abuse Control Amendments in 1965,¹² the increase in federal penalties in 1968,¹³ and similar state legislation.¹⁴

The other side of the coin is that it seems clear that our drug laws do directly deter *some* people. Also, and perhaps at least in the long run more important, they may internalize in the generally law-abiding population negative attitudes toward drug use which are reflected in compliance with the laws. They may do this in two ways. First, they may help to educate people to view drug use as immoral or improper, with the result that people do not use drugs,¹⁵ and second, people may get into the habit of obeying the law without questioning it;¹⁶ they may, in effect, become conditioned to obedience.¹⁷ The proper question is not whether our drug laws deter or whether they influence conduct in these other ways, but rather how many they deter and how many they influence. For, if the number is very few, we would have to place a great value indeed on abstinence from narcotics and dangerous drugs to make the effort worth the return.

Consequently, the first problem that confronts the law maker is that we do not know enough about the deterrent effect of punishment to be able to say that we should set penalties at one level, rather than another, in order to get the maximum compliance for the least suffering, or to say whether we can abandon some of our offenses (*e.g.*, use or simple possession) and still achieve an acceptable level of compliance. Even if we knew much more about the deterrent efficacy of our drug laws, we would still have to face questions about the proper role of deterrence.

Assuming that with a given penalty or range of penalties we can secure a degree of compliance that we deem acceptable, we will still have to determine if this is necessarily what we really want. For example, let us assume, as is likely the case, that marihuana is relatively not a very harmful mood-altering drug. Let us also assume that low penalties will not significantly deter use of marihuana, but that high penalties will. Are the high penalties warranted, or should we say that the conduct of people in distributing and using a relatively mild drug is neither harmful nor blameworthy enough to justify high penalties? It is possible that there may be a number of situations in which high penalties will deter relatively minor offenses where low penalties will not. Can the high penalties be justified in these situations? I think not.¹⁸ Our values do not permit punishment that is out of propor-

Int. Rev. Code of 1939, § 2557(b)(1); Pub. L. No. 84-728, §§ 103, 105-08, 201, 70 Stat. 568-74 (1956), *codified as* 18 U.S.C. §§ 1403, 1407, 21 U.S.C. §§ 174, 176a, 176b, 184a (1964), INT. REV. CODE of 1954, § 7237.

¹² Pub. L. No. 89-74, §§ 3(b), 5, 7, 79 Stat. 227-33 (1965), *codified as* 21 U.S.C. §§ 331(q), 333(a)-(b), 360a (Supp. II, 1967).

¹³ Pub. L. No. 90-639, §§ 2-3, 82 Stat. 1361 (1968), *codified as* 21 U.S.C. §§ 331(q)(3), 333(a)-(b), 360a(c) (Supp. IV, 1969).

¹⁴ *E.g.*, CAL. HEALTH & SAFETY CODE §§ 11901-17 (West Supp. 1969); N.Y. PENAL LAW §§ 220.00-.45 (McKinney Supp. 1969); TEX. PEN. CODE ANN. art. 726d (Supp. 1969).

¹⁵ See Andenaes at 179-80.

¹⁶ *Id.*

¹⁷ See H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 43 (1968).

¹⁸ The British Advisory Committee on Drug Dependence (the Wootton Committee), in its

tion to the harmfulness and blameworthiness of the defendant's conduct. While the deterrence of anti-social conduct is an important goal of our criminal law, it is not its only goal. Ours is a multigoal system, and deterrence may sometimes be outweighed by other significant objectives.¹⁹

II. THE SECOND PROBLEM: THE DISTINCTION BETWEEN DISTRIBUTION AND USE

One of the major questions for the draftsman is how the drug user should be treated as compared to the distributor. Although criminalization of narcotic and dangerous drug transactions is ultimately aimed at discouraging use, most American statutes have been predominantly directed at distribution, in the sense that they usually treat distribution as a more serious crime than use or simple possession.²⁰ My own revision efforts have taken this approach.²¹

There are arguments both for and against treating the distributor and the user in the same way.

In favor of parity of treatment are several considerations. First, the ultimate aim of our narcotics and dangerous drug laws is to discourage use. Second, any attempt to distinguish the user from the distributor is unrealistic, because in the case of most narcotics and dangerous drugs, the two, except at the highest levels of distribution, are usually one and the

report on cannabis, recognized the dilemma and resolved the issue against the claims of deterrence. In his letter to the Home Secretary accompanying transmittal of the Committee's report, Sir Edward Wayne, M.D., the Chairman of the Committee, wrote:

The dilemma is that a maximum penalty on indictment for unlawful possession which might be expected to deter a large-scale trafficker would have to be inordinately larger than the harmfulness of the drug itself would justify. The Sub-Committee felt that if possession with intent to use and possession with intent to supply could not be distinguished in law, the penalties for unlawful possession should be matched more obviously to the known harmfulness than to the potential profitability of large-scale professional trafficking.

ADVISORY COMMITTEE ON DRUG DEPENDENCE, REPORT, CANNABIS vi (H.M.S.O. 1968). Shortly after the Report was released, the British Government announced rejection of the Committee's recommendations. N.Y. Times, Jan. 24, 1969, § 1, at 2, col. 3. Recently, however, the Government has sponsored legislation which would reduce penalties for simple possession, though not to the same extent that the Committee proposed. On the other hand, the bill would also raise penalties for trafficking in marihuana. N.Y. Times, Mar. 12, 1970, at 1, col. 7.

¹⁹ E.g., fostering the senses of justice, fairness, and security, and, also, respect for law, by excluding from criminal condemnation conduct that is without fault or that is trivial and by making the criminal sanction proportionate to the gravity of the offense; rehabilitation; and incapacitation.

²⁰ See generally the distribution and possession provisions of state narcotics legislation as of 1967 in W. ELDRIDGE, NARCOTICS AND THE LAW 177-231, app. B (2d ed. 1967). The proposed federal Omnibus Controlled Dangerous Substances Act distinguishes between distribution and possession. S. 3246, 91st Cong., 2d Sess. (1970) (as passed by the Senate). (Compare § 501(c) (distribution), with § 501(e) (possession).) A similar distinction is made in the Study Draft of the revised federal Criminal Code prepared by the National Commission on Reform of Federal Criminal Law. Compare § 1822-23 (trafficking), with § 1824 (possession).

On the other hand, under the Texas Dangerous Drug Law, both distribution and possession of methamphetamine ("Speed") are punishable on the same level. Compare TEX. PEN. CODE ANN. art. 726d, § 15(b) (Supp. 1969) (distribution), with *id.* § 15(a) (Supp. 1969) (possession). In addition, the British Dangerous Drugs Act 1965, c. 15, § 16, treats all offenses, including distribution and simple possession in the same manner. The British Government, however, is sponsoring legislation which would distinguish between trafficking and possession. The legislation would at the same time increase penalties for narcotics and marihuana trafficking and reduce penalties for simple possession of these drugs. N.Y. Times, Mar. 12, 1970, at 1, col. 7.

²¹ See Study Draft, *supra* note 20, §§ 1821-29.

same.²² While not all users sell or even give away drugs, many do.²³ Hence, enforcement against sellers will in fact most often bear heavily upon users who sell. And to say that use or possession should be punished less than distribution or not punished at all, really is not meaningful as long as distribution is severely punished,²⁴ for many users will still be amenable to severe sanctions for the latter. Finally, the distributor merely fills a demand of the user-buyer. Drug use is usually spread by users rather than "pushers,"²⁵ and without user-buyers there would be no market for distributors. Consequently, to regard distributors as worse or as more harmful than users is inaccurate. The distributor is merely providing people with something they want.

In short, our stereotyped picture of both the seller and the user is distorted. We see the seller as an adult who, for commercial purposes, willfully preys on the weaknesses of others (often the young) and who frequently initiates people into use. While there is some truth in this picture, it is oversimplified. Much distribution is commercial, and adults do distribute to minors. However, many distributors are users and many users distribute. Many sellers are minors. Hard narcotic addicts who sell usually do so to maintain their habits;²⁶ distributing-users of "soft" drugs often do so to accommodate friends (either giving away the drug or charging only enough to cover their expenses), or do so because it is the social thing to do in the subcultures of which they are a part.²⁷ And it is usually other users who initiate people into drug use and who spread it.

Other arguments, however, support differentiating use and distribution.

First, distribution is more harmful than use. Distribution and use may be distinguished. The distributor may be considered both as a more serious affront to the legislator's decision to discourage use and also to pose a more serious threat to his efforts to prevent use than the person who uses drugs but does not distribute them. For even though he does supply a demand, *the distributor by definition makes drugs available to others*; and unless he is an addict selling to maintain his habit, the distributor does this as a matter of choice—that is, with as much choice as is involved in most human decisions. The conduct of the non-distributing user is by contrast essentially self-destructive.

In addition, despite the fact that users often distribute drugs, it is both

²² See, e.g., Blum, *Mind-Altering Drugs and Dangerous Behavior: Dangerous Drugs*, in PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: NARCOTICS AND DRUG ABUSE, app. A-1, at 21, 28 (1967) [hereinafter cited as TASK FORCE] (narcotics); Goode, *The Marihuana Market*, 12 COLUM. F., No. 4, at 4 (1969) (marihuana).

²³ See authorities cited in note 22 *supra*.

²⁴ See Goode, *supra* note 22, at 8.

²⁵ See I. CHEIN, D. GERARD, R. LEE & E. ROSENFELD, *THE ROAD TO H: NARCOTICS, DELINQUENCY, AND SOCIAL POLICY* 149 (1964) (narcotics); Ausubel, *The Case for Compulsory Closed Ward Treatments of Narcotic Addicts*, 31 F.R.D. 58, 69 (1963).

²⁶ See TASK FORCE 10.

²⁷ ADVISORY COMMITTEE ON DRUG DEPENDENCE, REPORT, CANNABIS 9 (H.M.S.O. 1968) (marihuana in England); CALIFORNIA JOINT LEGISLATIVE COMM. FOR REVISION OF THE PENAL CODE, DRUGS, PART I: MARIHUANA 153 (1968) ("Our data indicate that over 20% of the users of marihuana have sold the drug on occasion in small quantity, to friends who tacitly agree they will return the favor if the drug becomes available to them in the future."); Goode, *supra* note 20, at 7.

realistic and proper to compare the distributor (whether he is a user or not) with the *non-distributing user*. Distribution is not an inevitable concomitant of use, and not all users distribute. To the extent distribution and use are distinguished on the basis of the greater harm done by distribution, more severe sanctions for users who distribute are logical. When the user distributes, he becomes a distributor in the eyes of the law.

Second, many people perceive the user as less culpable or blameworthy than the trafficker. They may view him with pity or sympathy (not always, of course, unmixed with less noble feelings), or otherwise see him as a person for whom severe punishment, or even any punishment, is inappropriate. These perceptions may in turn be based on the fact that the user's conduct in use is essentially self-destructive, or on the view that he is alienated, disturbed, misguided, or presents a medical, psychiatric, or social problem (perhaps in part because, again, he is self-destructive). Also, when the distributor acts commercially he will be blamed even more relative to the user, merely because in our culture we tend to blame people whom we perceive as commercializing vice more than we do people whom we regard as victims of vice or people who indulge in a vice. Even if these perceptions do not justify differential treatment, they do go a long way to explain the demand for it.

When the user distributes or sells we may respond in different ways. To the extent that we believe distribution is more harmful than use, we may view the user harshly, despite the fact that he is the same person that we may have viewed benevolently earlier. Perhaps, the user who sells for a profit cannot be too misguided but has fooled us all and now calls down upon himself our wrath. On the other hand, we may realize that if he was misguided or alienated before he sold, he is still so, and continue to view him benevolently. We will then argue that the user-distributor should be treated like a non-distributing user rather than a distributor. To the extent use and distribution are differentiated out of sympathy or other benevolent feelings for the user, there is reason in the argument that to deny leniency to the distributing user defeats the purpose of according leniency to the user. The alienated user is no less alienated because he also distributes.

Law enforcement considerations may be urged in support of either position. On the one hand, it is easier to enforce simple possession offenses against users than to make buys against big sellers. On the other hand, where traffickers are few in number relative to users, it may be more practical to direct enforcement efforts against traffickers. In addition, it is often urged that while enforcement against large-scale traffickers is difficult, there is more to be gained from such enforcement than from enforcement against users. The argument runs that by reaching traffickers—particularly significant traffickers—use is more likely to be decreased (at least temporarily) than by reaching users. This presupposes that enforcement against traffickers is effective enough that some users must reduce use or that traffickers must dilute the quality of the drug (and that users do not, in consequence of this, increase the number of doses they take or switch to other, more

powerful drugs), or that traffickers who would otherwise distribute drugs for which there is a demand are deterred from doing so. If, however, enforcement against traffickers is not this effective, a greater reduction in use might be accomplished by isolating a single user from drugs than by incarcerating a trafficker.

Even if enforcement against trafficking is as or more effective in reducing use than enforcement against users, a report submitted by a consultant to the President's Commission on Law Enforcement and Administration of Justice²⁸ suggests that in the case of some drugs, at least, there may still be more to be gained from efforts to reduce demand (that is, against the user) than from efforts to reduce supply (against the trafficker).

The argument seems to be based on the characteristics of the heroin traffic. It runs approximately as follows. Heroin is a commodity the demand for which is relatively inelastic to price. As price goes up, demand does not appreciably fall off, but addicts pay the increased price. Since addicts often commit fund-raising offenses to maintain their habits, an increase in price will result in increased addict-crime and cost the community more both monetarily and in terms of community security. Activities directed to reducing the supply of heroin will, to the extent they succeed, raise the price and increase addict-crime. (In the case of less harmful drugs, it can also be argued that reduction of the supply may lead users to switch to more harmful drugs.²⁹) On the other hand, activities directed to reducing the demand (for example, imprisoning, jailing, treating, or civilly committing the addict) will reduce use without leading to an increase in price. Of course, whether to act on this analysis by incapacitating the addict would depend on a balancing of the financial and security costs of addict-crime against considerations of personal liberty, and other humanitarian considerations which might weigh against incapacitating the addict for a substantial period of time.³⁰

On balance, some differentiation in criminal treatment between use and distribution is probably proper. However, the considerations, as I have attempted to show, are by no means onesided, and possibly it might be preferable to treat use and small distributions by users in the same way. In any event, even if the distributor engages in conduct that is somewhat more harmful than the user, it can be questioned whether he warrants the typical *high degree* felony penalties provided for him when at the same time the user is treated as a misdemeanor. Some difference there may be, but—especially where large-scale commercial distribution is not involved—it is doubtful whether the difference is great enough to warrant such a

²⁸ ARTHUR D. LITTLE, INC., DRUG ABUSE AND LAW ENFORCEMENT, app. D, at D1-19 (1967) (consultant's report to the President's Commission on Law Enforcement and Administration of Justice).

²⁹ See, e.g., N.Y. Times, Sept. 17, 1969, at 1, col. 1.

³⁰ Cf. Aronowitz, *Civil Commitment of Narcotic Addicts and Sentencing for Narcotic Drug Offenses*, in TASK FORCE app. D, at 148 (1967); Kramer, *The State Versus the Addict: Uncivil Commitment*, 50 B.U.L. REV. 1 (1970); Kramer, Bass, & Berecochea, *Civil Commitment for Addicts: The California Program*, 125 AM. J. OF PSYCHIATRY 816 (1968); Kramer & Bass, *Institutionalization Patterns Among Civilly Committed Addicts*, 208 J.A.M.A. 2297 (1969); Note, *Civil Commitment of Narcotic Addicts*, 76 YALE L.J. 1160 (1967).

great disparity in treatment. In light of the fact that reduction of penalties for use is at times accompanied by an increase in penalties for distribution, one can wonder if the emotional price for some amelioration of narcotics and dangerous drug laws has not been the adoption of a devil theory under which the user is absolved from blame (or nearly so) while all (or almost all) evil is attributed to the nefarious distributor. This is also quite understandable. We are so committed to the view that drug "abuse" is bad that we cannot, despite our new perceptions that users are not always so bad, go so far as to say that the entire drug traffic may not be quite so bad. Therefore, we exaggerate the distinction between user and distributor,³¹ which at least at lower levels of distribution is of molehill size at most, to mountain size. Thus, we can ameliorate punishments for users, safe in the belief that we have not really weakened our efforts to combat the drug problem because we are bearing down harshly or more harshly on the evil pusher. This is the result of recognizing that our sons and daughters are users. What will we do when we recognize that they are also sellers?

While the distinction between use and distribution is not as clear as it might be, I think, nevertheless, that the differentiation of use (often via the simple possession offense) from distribution that has characterized much recent legislation reflects good instincts. Believing as I do, that we have overcriminalized in the drug area and that as a general matter penalties for narcotic and dangerous drug offenses are too high, a distinction that results in some reductions may be desirable even if the line of reduction is not as accurate as it might have been, and even if reduction has not gone far enough. Thus, reducing sanctions for use and simple possession does help to reduce the costs of our drug laws. Half a loaf may indeed be better than none.

III. THE LESSON: THE IMPORTANCE OF THE COSTS OF LAWS

One of the most important lessons I have learned in the course of penal code revision work is that laws have costs as well as benefits. There is nothing new in this lesson, and others have learned it before me.³² But it is

³¹ Exaggeration of this distinction may also be explained in another way. With the great growth in the use of mind and mood-altering drugs in recent years, particularly among the children of the middle class, legislators have been faced with two conflicting demands. Those parents who fear that their children will be exposed to drugs demand harsher penalties. At the same time, the parents of users, and sometimes distributors too, whose children have been convicted or imprisoned or who fear that their children will suffer one of these fates, suffer from our laws, and often call for reduced penalties, usually for the user. Politically, an attempt can be made to accommodate both these demands by at the same time reducing penalties for use and simple possession, maintaining or even increasing penalties for distribution, and blaming the distributor for the bulk of our drug problems. Parents of users are assuaged by the lighter penalties for users. At the same time those who seek higher penalties are relieved by the high penalties for distributors, because they believe that distributors are really the people to blame for the drug traffic and that high penalties for distribution and enforcement concentrated against distributors will reduce or eliminate the traffic.

³² See CALIFORNIA JOINT LEGISLATIVE COMM., *supra* note 27, ch. 1 (by Professor John Kaplan); H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION*, *passim*, and especially Part III and 332-42 (1968); Kaplan, *What the Legislator Should Consider*, in *DRUGS AND YOUTH* 250 (J. WITTENBORN, H. BRILL, J. SMITH & S. WITTENBORN eds. 1969) (from which the instant section of this paper is in part derived); Kadish, *The Crisis of Overcriminalization*, 374 *ANNALS* 157 (1967); Kaplan, Foreword, *Maribuna Laws, an Empirical Study of Enforcement and Administration in Los Angeles*

often forgotten, and I think it is important enough to reiterate. Laws do have costs as well as benefits. Not only are our narcotics and dangerous drug laws no exception, but—regulating as they do consensual transactions between willing buyers and willing sellers, and, therefore, being especially difficult to enforce—they have more costs than do most criminal laws. Professor John Kaplan of the Stanford Law School has spoken eloquently of the costs of laws:

Although most people do not think of it this way, the passage of a law or group of laws is very much like a purchase by society of a package of social effects. In this view, any social action should be judged by the same kinds of criteria which would determine the initiation by the defense department of a new weapons system or the decision by a manufacturer to put out a new product line. The crucial question which should be asked in all of these cases is, What are you paying in total costs, financial and other, for the product, and what are you getting for your outlay? In all these situations a choice may involve a very difficult calculus. First, often the costs, especially the social costs, are difficult to measure with precision. And second, the advantages of the action—what you are buying for your costs—are usually not known except by means of more or less intelligent guesses. The important thing to note, however, is that each social action which is worth talking about, including the drug laws, has its costs. While in some cases the disadvantages of alternative policies or the benefits of a given course of action make these costs bearable—and, indeed, often cheap—we should never lose sight of the costs of a policy in determining its overall wisdom.³³

This is something we too often forget. We tend to assume that if we do not like something we can prohibit it, and that will be that. However, rarely do we receive only benefits. Often we pay large costs, sometimes intolerable ones, and in every situation the rational lawmaker or legislator will ask, do the costs outweigh the benefits, or are the costs likely to outweigh the benefits?

I can suggest a number of the costs we pay for our narcotics and dangerous drug laws. Professor Herbert L. Packer has, in his already classic *The Limits of the Criminal Sanction*, described them as follows:

- (1) Several hundred thousand people, the overwhelming majority of whom have been primarily users rather than traffickers, have been subjected to severe criminal punishment.
- (2) An immensely profitable illegal traffic in narcotic and other forbidden drugs has developed.
- (3) This illegal traffic has contributed significantly to the growth and prosperity of organized criminal groups.
- (4) A substantial number of all acquisitive crimes—burglary, robbery, auto theft, other forms of larceny—have been committed by drug users in order to get the wherewithal to pay the artificially high prices charged for drugs on the illegal market.

County (and the Note itself), 15 U.C.L.A.L. REV. 1501 (1968); Skolnick, *Coercion to Virtue: The Enforcement of Morals*, 41 S. CAL. L. REV. 588 (1968); Note, *Possession of Marijuana in San Mateo County: Some Social Costs of Criminalization*, 22 STAN. L. REV. 101 (1969). See also Rosenthal, *A Plea for Amelioration of the Marijuana Laws*, 47 TEXAS L. REV. 1359 (1969).

³³ Kaplan, *What the Legislator Should Consider*, *supra* note 32, at 250.

(5) Billions of dollars and a significant proportion of total law enforcement resources have been expended in all stages of the criminal process.

(6) A disturbingly large number of undesirable police practices—unconstitutional searches and seizures, entrapment, electronic surveillance—have become habitual because of the great difficulty that attends the detection of narcotics offenses.

(7) The burden of enforcement has fallen primarily on the urban poor, especially Negroes and Mexican-Americans.

(8) Research on the causes, effects, and cures of drug use has been stultified.

(9) The medical profession has been intimidated into neglecting its accustomed role of relieving this form of human misery.

(10) A large and well-entrenched enforcement bureaucracy has developed a vested interest in the status quo, and has effectively thwarted all but the most marginal reforms.

(11) Legislative invocations of the criminal sanction have automatically and unthinkingly been extended from narcotics to marihuana to the flood of new mind-altering drugs that have appeared in recent years, thereby compounding the preexisting problem.³⁴

The marihuana laws in particular have extremely high costs. For example:

(1) They criminalize an ever increasing number of our population,³⁵ many of whom are young and developing, and many of whom have no prior criminal record or at most a minor record only. They criminalize not only those who are arrested and convicted and those who are also incarcerated, but they also criminalize all marihuana users by labelling them as members of a criminal or deviant group. And, to the extent that use of marihuana may be a symptom of alienation, they may compound that alienation and alienate those who were not alienated before.

(2) Many people (rightly or wrongly) view the marihuana laws (and many of our other drug laws) as irrational or unjust. This disrespect for these laws may be translated into a more generalized disrespect for law, for our institutions, and to intransigence in their use of the drug despite our efforts to curtail it.

(3) Although this has not been a major problem to date, our harsh marihuana laws furnish a protected market for organized crime. And, as a number of accounts of the effects of Operation Intercept relate, cutting off the supply of this relatively mild drug may drive users to other, more dangerous drugs.³⁶

(4) Prohibition of marihuana causes users who do not have prior criminal records or who have only minor records to associate with persons who are more involved in and may be more committed to both illegal activities and the drug world in order to obtain the drug. When sale is illegal, the user-buyer must associate with the criminal seller.

(5) Enforcement of these laws may divert needed police manpower and

³⁴ H. PACKER, note 17 *supra*, at 332-33.

³⁵ See the discussions in Kaplan, *What the Legislator Should Consider*, *supra* note 32; Rosenthal, *supra* note 32; Note, *supra* note 32.

³⁶ *E.g.*, N.Y. Times, Sept. 17, 1969, at 1, col. 1; *id.*, Jan. 25, 1970, § 1, at 37, col. 1; Wall St. Journal, Sept. 11, 1969, at 1, col. 4.

financial resources from efforts to combat "crime in the streets"—crimes against the person and property.

(6) Because the marihuana laws—like our laws dealing with narcotics and other dangerous drugs—prohibit consensual transactions, they are difficult to enforce. This has several consequences. Enforcement must be irregular, and law enforcement can hope to discover only a small percentage of violations. There are indications that in at least some parts of the country lower social and economic classes, hippie communities and other unpopular groups, and minorities may bear the brunt of it.³⁷ In addition, undercover agents and informers must be used to help enforce the laws and invasion of privacy and practices that come close to entrapment also occur.

Costs such as these do not *necessarily* mean that our narcotics and dangerous drug laws are misconceived. It may be that the benefits of these laws still outweigh the costs. Then again, they may not. It is possible that the balance will be different for different drugs. Also, the existence of costs does not necessarily mean that only legalization will remedy the situation. Methadone maintenance may reduce some of the costs of our narcotics laws.³⁸ Reduced penalties for sale of marihuana and decriminalization of simple possession and use, for example, may reduce some of the costs of the marihuana laws enough that they become more bearable. On the other hand, it may be that even with these measures, the costs of prohibition of marihuana would be so great that they would still continue to outweigh its benefits; or at least I, for one, so believe.³⁹

Whether or not the costs of our drug laws do outweigh the benefits we receive from them, it is important to remember that we do in fact pay a price for these benefits. And to the extent that it is possible to do so, we should be quite sure that we know what that price is and that the benefits are worth the price before we pay it.

³⁷ See CALIFORNIA JOINT LEGISLATIVE COMM., *supra* note 27, at 16-17; Project, *Marihuana Laws: An Empirical Study of Enforcement and Administration in Los Angeles County*, 15 U.C.L.A.L. REV. 1499, 1539-42 (1968).

³⁸ See generally Note, *Methadone Maintenance for Heroin Addicts*, 78 YALE L.J. 1175 (1969).

³⁹ This represents a change from the position I espoused in Rosenthal, *A Plea for the Amelioration of the Marihuana Laws*, 47 TEXAS L. REV. 1359 (1969). I there took the position that at "the present time" prohibition of marihuana should be continued. *Id.* at 1363. I recognized, however, that if the costs of our marihuana laws continued to increase to the point where they outweighed the benefits of the laws, "legalization" ("much as distribution and use of alcohol is legalized") "might be in order." *Id.* at 1376. Since publication of that article, use of marihuana has continued to increase, and the costs of the marihuana laws (as I see them) have continued to rise to the point where I think that at the least legislation looking to the end of prohibition is desirable. Problems relating to the scope and method of legalization (*e.g.*, the permissible strength of the legal product, and whether to go as far as we have with alcohol or, for other examples, merely to permit the distribution and possession of small quantities or permit use in certain restricted places) and a time table for implementing it (so as to both allow sufficient time to lessen the trauma of people who fear it and to permit its technical aspects to operate smoothly) are beyond the scope of this Article. See CALIFORNIA JOINT LEGISLATIVE COMM., *supra* note 27, ch. 6, at 136-62, and especially at 148-49.