

Controlling the Supply of Weapons to Illicit Owners and Illicit Uses:

Lessons from Efforts to Control the Supply of Drugs to Illicit Users and Uses

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I. Introduction

More than a decade ago, I suggested that one potential approach to controlling crime was to focus attention on "criminogenic commodities;" namely, drugs, guns, and alcohol. Three things seemed important to me about this idea then and remain so today.

First, it seems plausible that these commodities can, indeed, be viewed as "criminogenic;" that either the ready availability, or the widespread possession and use, or (ironically) efforts to control the availability of these commodities, can be important causes of crime. Of course, the causal mechanisms through which these commodities are thought to cause crime vary a great deal.

Drugs, such as cocaine and methamphetamines, for example, are thought to cause crime directly through a chemical effect on a users aggression, self-control, or social inhibition. In this view, ordinary people under the influence of these drugs commit crimes they would not otherwise do. Drugs such as heroin and cocaine are also thought to cause crime, through a second more indirect mechanism -- their addictive or dependence producing effects. In this idea, addiction causes dependent users to need money to fuel their habits. Because drug users are often poor and unemployed, they get the money through crime. Drugs are also implicated in violent crime not through crimes committed by *users*, but through crimes committed by *dealers* who were used violence both for contract enforcement and competitive advantage in lawless markets.

Guns, in contrast, seem causally important not so much in stimulating criminal attacks as in exacerbating the harmfulness of criminal acts that were otherwise motivated -- the so-called "instrumentality effect." While some analysts have suggested that weapons increased the *level* of crime by psychologically suggesting an attack, or making it easier to cross the threshold from reticence to attack, most think that the principal effect of guns on crime is to increase its lethality of crimes, not to increase the level. And while there is some illicit trafficking in guns, the associated violence is generally thought to nowhere near as important as that generated by illicit drug trafficking.

Alcohol, for its part, is viewed as a contributor to crime primarily as an intoxicant that dulls social inhibitions in conflict situations, or makes automobile drivers reckless and clumsy. In the days of Prohibition, of course, the illicit production, distribution and sales of alcohol were closely associated with the emergence of organized criminal groups and the significant amount of violence and corruption that attended "bootlegging." But once Prohibition ended, the important link between alcohol and illicit *markets* essentially ended. What grew up in its place was an important link between alcohol and crime made through alcohol's widespread *use* and intoxicating effects rather than its illicit trafficking. Today, alcohol is the drug most commonly involved in assaults and in domestic violence. It is also closely linked to vehicular homicides. And, alcohol is sometimes linked to crimes through its impact on *victims* rather than offenders: drunkenness can make someone an annoying or vulnerable or target as well as as an angry or reckless offender.

Second, it seems interesting and important that we have adopted much different approaches to trying to control these criminogenic commodities. With respect to drugs, we have adopted what many view as a very stringent control regime analogous to the Prohibition of alcohol. In fact, the regime controlling the manufacture, distribution, and use of psychoactive substances is a regulatory regime which prohibits some drugs entirely, and allows the legitimate use of others. The regulatory scheme for drugs also tries to control drug abuse by distinguishing safe from unsafe uses of the drugs, and by putting MDs in the position of authorizing some to use a drug (by writing a prescription) and denying that right to others. And, we exposed those who manufactured or distributed the drugs illicitly, or possessed and used the drugs illicitly, to more or less harsh criminal punishment.

With respect to guns, in contrast, we have a very permissive regime that essentially recognizes the normative claim that there are important legitimate uses of guns that ought to be protected, and accommodates the fact that there are many guns already circulating. We have banned some kinds of guns because they seem to lack any appropriate civilian use. And we have taken away the right to buy, own, or use a gun from some who have shown themselves or are presumed to be unable to use a gun properly. Improper use of guns is an offense in itself. Use of a weapon in a crime is an aggravating factor. But many guns, many uses, and many users of guns escaped regulation or extra liability.

With respect to alcohol, we once had a very restrictive policy that prevented the commercial production and distribution of alcohol. That restriction lasted for ___ years. During that period, it seems clear that overall levels of alcohol consumption fell significantly as well as some of the other adverse consequences of drinking. But the price was not only the reduction of the pleasure of many who would have liked to continue drinking during this period and could have done so safely, but also the creation of a vicious black market in alcohol which spawned a great deal of violence and corruption, and gave birth to major criminal organizations that acquired significant financial, social, and political power. We then eliminated the controls; alcohol use increased, and so did the adverse consequences. It is now true that alcohol is the criminogenic commodity that is most commonly implicated in violent attacks. And it has become the focus of an intense campaign to create and enforce aggressively against the crime of drunk driving. This, in turn, has contributed no small amount to the growth in prison populations over the last few years.

Third, despite the fact that these commodities could be viewed as roughly comparable, and that we have taken very different approaches to controlling them, we have not fully exploited the opportunities to use our experience systematically in one area to help us understand what is happening in another area. We should not expect that our experience will be identical. The commodities are really quite different in many respects. But it still might be useful to look across these different commodities to help us understand what we might and should expect as we alter the control mechanisms we use to regulated these commodities.

The purpose of this essay is to use our experience with trying to control the supply and use of dangerous and abuseable drugs to inform our discussions of our efforts to control the supply and use weapons -- another commodity that is both dangerous and abuseable, but also potentially valuable in appropriate uses. The method will be to begin with an analysis of what illicit markets for drugs look like -- not only the markets for wholly illicit drugs such as heroin, but also for drugs that have important legal uses as well as illicit uses such as amphetamines, barbiturates, etc. We will then consider the question of what we should expect to be the character of the illicit market in guns given the fact that there are many legitimate uses of guns, and that guns are a consumer durable rather than a consumption item that gets used up. Based on that analysis, we will then try to identify broadly different targets of enforcement in efforts to control the supply of guns to illicit markets and users. In conclusion, we will offer some conjectures about the most effective lines of attack on the illicit market.

II. The Structure, Conduct and Performance of Illicit Drug Markets

When we think about illicit markets in drugs, we are apt to think first about those drugs whose production, distribution and use are almost entirely prohibited -- principally, heroin, but also cocaine. These are the big illegal drug markets. They are also the international drug markets. And they are the markets that we think of as particularly violent. It is worth noting, however, that there are other illicit drug markets which seem quite different in their "structure, conduct, and performance" than the heroin and cocaine markets.

Think, for example, of the illicit market in marijuana. Like heroin and cocaine, this market is almost entirely illicit. It has a significant international component. It is large. Yet, by all accounts, it is more decentralized in its structure, and less violent in its conduct than the heroin and cocaine markets. Why?

Think also of the illicit market in methamphetamines. Unlike the market for heroin and cocaine, this market has some legitimate sources of supply. Moreover, it is a pretty small market. And there is only a limited international component of this market. Yet, there is a wholly illicit piece of this production and distribution system that seems as violent as the heroin and cocaine markets. Why?

Think, finally, of the illicit market in hallucinogens. Like the markets for heroin, cocaine, and marijuana, this market is wholly illicit. Like the market for methamphetamines, the market is relatively small. Yet, the production and distribution system for this illicit drug, like the market for marijuana, seems relatively pacific. Why?

These preliminary observations should be sufficient to warn us that the relationship between the legal status of a drug and the "structure, conduct, and performance" of the supply system that both supplies illicit users and supports illicit uses will not necessarily be a simple one. Still, for analytic purposes, it is probably important to begin with an understanding of the legal regime that is constructed around the production, distribution and use of illicit drugs. It is this regime that creates legal vulnerability (both civil and criminal) to particular persons for particular acts. It is this regime that sets some important activities, transactions, and uses of drugs outside the realm of legitimate commerce and therefore prevents participants from calling upon the courts to settle disputes and enforce contracts.

The Legal Framework for the Control of Psychoactive Drugs

Like many things in the United States, the legal framework governing the importation, domestic production, distribution, possession and use of psychoactive substances is a complex one. It combines federal with (partially overlapping) state and local statutes. It combines civil with criminal liability. And it focuses attention not only on the production and distribution of the drugs, but also on possessors, users and uses of the drugs.

Broadly speaking, one can say that most important statute at the federal level is the Controlled Substances Act of 1970. The most important drug laws at the state level are those that make illicit trafficking and use of the drugs crimes, and expose illicit dealers and users to relatively harsh criminal penalties. The important drug laws at the local level include not only those that make illicit trafficking and use a crime, but that also give localities some additional leverage over some of the supporting infrastructure and ancillary activities of illicit drug markets such as abandoned buildings and "loitering for the purpose of purchasing drugs." Because these laws establish important distinctions and boundaries that one must use in describing different sectors of the market, and because both the mere existence of the laws as well as efforts to enforce them, may have important behavioral effects on the "structure, conduct, and performance" of illicit markets, it is valuable to review their basic structure.

The Controlled Substances Act of 1970

"Dangerous drugs" are regulated by the federal government under the Controlled Substances Act of 1970. While many people view federal drug laws as a new kind of "prohibition" that "criminalizes" the use of drugs, the provisions of the Controlled Substances Act surprisingly have a distinctively "regulatory" character. Basically, the Act gives the federal government the power to regulate "psychoactive substances." The psychoactive substances that are deemed worthy of regulation are those that have shown some potential for encouraging "abuse." This includes drugs such as heroin and marijuana (that have no recognized medical uses, and therefore are all but proscribed), but also drugs such as amphetamines, barbiturates, and minor tranquilizers (which have many recognized medical uses, and therefore are more or less tightly controlled, but not proscribed). To guard against or limit the abuse of these drugs, the Act allows the federal government to take steps to regulate the supply of the drugs: it can set quotas on importation and domestic production; it can require those who manufacture and distribute the drugs to install security arrangements to guard against theft, and to keep records to permit an easy review of their conscientiousness in distributing drugs only to others who are authorized to have them. Violations of these regulations can be punished through both civil and criminal penalties. The aim of these regulations, presumably, is to minimize the danger posed by the drugs.

One of the important "regulatory" features of this Act is that it is not only designed to protect society against the abuse of these drugs, but also that it is designed to protect and allow for the convenient use of these drugs when use is considered valuable. This seems to set up an important trade-off between the desire to control drugs adequately to guard against widespread abuse on one hand, while allowing drugs that have value in proper use to be used conveniently on the other. Even worse, one can imagine that particular drugs represent different combinations of "abuse potential" on one hand, and "value in legitimate use" on the other. Given differences among drugs, it might be important to accommodate these differences by, for example, tightly controlling drugs that have high abuse potential and little value in legitimate use, and more loosely controlling drugs that have little abuse potential and significant medical utility. Drugs that would pose a serious problem in control would be those that had both a high abuse potential and a significant value in medical use (for example, methadone, or barbiturates). In such cases, one would be looking for a kind of control that could create a tight boundary between the legitimate and illicit sectors so that society could have the benefit of the drug without paying the price.

An additional "regulatory" feature of the Controlled Substances Act is that it in fact accommodated the fact that drugs might differ in the particular combination of threat and benefit they offered by establishing five different levels of control. The highest levels of control (Schedule I) was reserved for drugs that were known to have *some degree* of "abuse potential," but also to have "no recognized, legitimate medical use." Schedule I drugs could only be imported, produced, or used for research and experimental purposes. All such uses had to be approved by the Federal Government.

The next highest level of control (Schedule II) was used for drugs that were known to have a *significant* abuse potential, and to have only sharply limited legitimate medical uses. Drugs in schedule II could be legally produced, distributed, and used, but each of these steps was tightly regulated. To keep the supply of these drugs lean, the Federal Government established both production and import quotas. To make sure that drugs weren't diverted from legitimate use, manufacturers and wholesale and retail distributors were all required to keep exact records and to maintain expensive security precautions to guard against theft.

The remaining levels progressively loosened controls over the manufacturing, distribution and use of drugs. Manufacturing and import quotas disappeared. Security requirements were reduced. So were record keeping requirements. Still, an interesting and important feature of this scheme for all psychoactive drugs that had some "recognized legitimate use" (e.g. all drugs in schedules II through V), the burden of deciding whether a particular person should have access to a particular drug was to be made by a physician. The physician would be in a position to judge the value of the medicine relative to the risks for individual patients. They were the ones who could authorize the purchase and use of the drugs, and guide their patients' use of the drug. As "state agents" monitoring the boundary of legitimate users and uses, however, their conduct could be monitored and reviewed by federal authorities, and their license for prescribing these drugs could be revoked if they seemed to be "writing script" too casually.

Several things about this regulatory system are worth noting. First, the system is set up to recognize a potentially important trade-off between the threat that these drugs pose for society on one hand (their "abuse potential") and the value that they might offer to individuals (their "legitimate medical uses"), and to allow society to adjust the level of control to balance these competing concerns. Nonetheless, when one looks closely at the way the regulatory regime allows us to respond to the fact that these drugs both pose threats and hold out valuable opportunities to society, one finds an unusual logical structure.

For one thing, the regime says that the only thing that can go on the scale to balance a psychoactive drug's "abuse potential" is its "legitimate medical use." If a drug has no legitimate medical use, then it will be controlled quite restrictively, regardless of the degree of its abuse liability. The idea that there might be merely pleasureable or recreational uses of these drugs that could be counted in a drug's favor is not considered sufficiently important to justify any easing up of the regulatory burden.

For a second thing, it is only after some medical use is established for a drug that we become interested in how much abuse potential a drug has. If a drug has no legitimate medical use, and some abuse potential (no matter how small) then it does into Schedule I. In contrast, once a drug is shown to have a legitimate medical use, we assign it to a particular schedule according to the magnitude of its abuse potential relative to its value in legitimate medical use.

These features of the Controlled Substances Act lead to what many see as an important anomaly in drug control policy: namely, marijuana is in Schedule I with heroin while cocaine is in Schedule II. Cocaine, of course, has far more "abuse potential" than marijuana. But because cocaine also has a limited medical use (topical anesthesia in dentistry), it is subjected to a lower level of control than marijuana. So, while the regulatory regime recognizes that there is some important trade-off between protecting ourselves from psychoactive drugs and using them effectively for our benefit, it limits the kinds of benefits that can be counted in gauging a drug's value to the society, and allows us to notice and respond to the degree of drug's about potential only after the drug has found some legitimate medical use.

Second, while the federal system was focused pretty much on the supply of these drugs rather than the demand, the regulations reached broadly across suppliers and very far down the supply chain. Both imports and domestic production are controlled. Retailers as well as wholesalers are required to have licenses. And MD's rather than users themselves were the only ones empowered to determine the user's right to have and to use these controlled substances. In principle, the "diversion" of these drugs from legitimate channels to illicit channels, from legitimate users to illicit users, or from legitimate uses to illicit uses were all illegal, though effective control over these transferrals grew less as one went down the supply chain to users, or the problem shifted from mere possession to particular kind of use.

Third, the regulatory regime tended to create two quite different kinds of illicit markets. On one hand, there were what might be called the "wholly illicit" markets in which virtually all the production, distribution, and use that occurred is illegal. On the other hand, there were the "quasi-illicit" markets in which much of the production, distribution, and use that occurred was legal, but some production, distribution, or use that was illegal.

The important difference between these two kinds of markets, of course, is that in the "quasi-legitimate" market, illicit uses of the drugs can be fueled by diversion from the licit portion of the market, as well as from wholly illicit production and distribution. Indeed, one might think that in the quasi-legitimate market, the wholly illicit producers and distributors have to be compete with a potentially important source of supply to the illicit users and uses: namely, those who divert quasi-legitimate drugs from the legitimate side to the illicit side. (Note that this can even happen at the user level. An authorized drug user can decide to take prescribed medication contrary to medical advice.)

[Discuss also the federal statutes designed to allow attacks on organized crime and trafficking activities: e.g. RICO, money-laundering, electronic surveillance, witness protection program, etc. Discuss also the "anti-smuggling" and "tax evasion" laws?]]

2. State and Local Statutes Regulating Drug Supply, Distribution and Use

The federal regulatory scheme has been complemented by state regulatory and criminal statutes which mirrored the federal controls over supply. Most states have legal authority to monitor the production, distribution and use of those drugs that have legitimate medical uses, and exercise control over this activity through regulatory bodies allied with professional associations of manufacturers, pharmacists, and physicians.

But the importance of this regulatory apparatus at the state and local level is overshadowed by the importance of the criminal enforcement efforts focused on wholly illicit but added controls over retail sellers, possessors and users of the drugs. Some retail distributors of drugs were treated as wholly illicit suppliers, and threatened with severe criminal penalties for illegal trafficking. Some possessors who possessed far more than they could use for their own personal consumption were treated presumptively as illicit dealers and exposed to the same harsh penalties as those who were observed to sell drugs illicitly. Unauthorized possession and use of the substances was treated as a crime in itself even if there was no evidence of either illicit distribution or dangerous use of the substance.

It is also worth noting that over the last decade or so, the state laws governing the illicit production, distribution and use of drugs have been made much harsher. The maximum and minimum sentences imposed for violations of these laws have both increased. Many states have established minimum mandatory penalties for violations to rein in what the state legislatures viewed as excessive judicial leniency. And, new truth in sentencing laws are requiring many offenders to serve 80% or more of their term in prison without parole, or time off for good behavior in prison. The consequence is that the nation's prisons have become stuffed with illicit drug dealers and users from many different levels of the distribution system serving long terms for their offenses.

With the benefit of these preliminary observations about the existing laws, we can begin the effort to explore the structure, conduct and performance of several different kinds of illicit markets. We will look first at what can be described as wholly illicit, rigorously controlled drug markets. The prototypes are heroin and cocaine. We will then look at what can be described as wholly illicit markets that are less rigorously controlled. Here, the market for marijuana is the most obvious example. Finally, we will look at "quasi-illicit markets" in which a large legitimate market stands alongside a somewhat smaller illicit market. This is the example of methamphetamines, amphetamines, and barbiturates.

"Wholly Illicit Markets:" Heroin, Cocaine and Marijuana

As noted above, the examples of "wholly illicit markets" that come most quickly to mind are the markets for heroin and cocaine. The reason is that these markets seem to have many of the characteristics we associate with illicit markets. There is illicit *production*, along with illicit distribution, possession, and use. Some of the production seems to occur *outside the nation's borders*, and the product smuggled into the United States. The trafficking networks and firms we confront seem to be relatively centralized and concentrated (at least at some stages of production and distribution). The networks seem to be highly sophisticated in their organization, equipment, and techniques. They also seem to have quite extraordinary capacities for violence and to exercise those capacities often. The important analytic question is what produces these characteristics of the heroin and cocaine markets.

1) The Size of the Licit and Illicit Sectors of the Market

A convenient starting assumption is that it must be the at least partly the wholly illicit status of these markets that makes them the way they are. Yet, that hypothesis is undermined by two important anomalies. First, it is not quite true that the market for cocaine is wholly illicit. As noted above, cocaine appears in schedule II rather than schedule I precisely because there are some recognized uses of cocaine that are legal in the United States. Second, the market for marijuana *is* entirely illicit. Yet, by all accounts, the illicit marijuana supply system looks and behaves much differently than the markets in heroin and cocaine. It is less dominated by international suppliers, less concentrated in its form, and seemingly less violent.

Probably the simplest way to deal with the anomaly that cocaine is not entirely illicit is simply to observe that the legitimate market in cocaine is so small that for all practical purposes, cocaine is, in fact, wholly illicit even though legally there are some recognized uses. Indeed, one can observe that even heroin and marijuana are authorized for some very limited research and medical purposes, so there is really no such thing as a wholly illicit drug. There are drugs whose legitimate uses are very sharply limited and those whose legitimate uses are substantially wider.

A slightly more sophisticated hypothesis might focus not on the existence and absolute size of a legitimate sector in drugs, but instead on the size of the licit sector *relative* to the size of the illicit sector of production, distribution, and use. If the licit market is big enough relative to the illicit market, *diversions* from the illicit market at different stages of production, distribution and use, and in different quantities, might have a profound impact on the structure, conduct and performance of the illicit market. Consider, for example, the structure of the illicit market in alcohol.

Although the supply of alcohol is regulated (in the sense that manufacturers are expected to register as manufacturers and pay federal taxes on their production, that there are some who are prohibited from purchasing or possessing alcohol, and that there are some uses of alcohol which are prohibited for all), the legitimate sector of alcohol production, distribution, and use is so large relative to its "illicit" sector that there is essentially no separate structure for the illicit market in alcohol. There are some illegal producers of alcohol, but their motivation seems to be to avoid taxes and have the fun of keeping a rebellious bootlegging culture alive -- not to supply the illicit users and uses of alcohol, and make a lot of money by doing so.

One of the reasons that these illicit manufacturers do not focus on sales to illicit users and the profits that would bring is that they can't make a lot of money by doing so. There are too many other competing sources of supply to the illicit users. Kids get it from their parents, or by persuading older kids to buy it for them. The diversion from legitimate to illicit uses happens not in the distribution channel but instead among users as they forget themselves and drink too much in public places, or combine reckless drinking with driving.

So, while it is meaningful to talk about illicit production, distribution, users, and uses of alcohol, these are all somewhat separate from one another. That is, the illicit production does not support only illicit uses, but also legitimate uses. (Much bootlegging is for domestic consumption, and that which is sold is often sold to people who are entitled to buy alcohol for uses that are proper -- eg. sitting and sipping on the porch.) And there is much licit production and use which ends up fueling possession by illicit users and illicit uses by both licit and illicit possessors. (Much of the alcohol possessed by minors comes from legitimate production not bootlegging. Much of the alcohol that contributes to domestic assaults, public drunkenness, and drunk driving is both legitimately produced and legitimately possessed by those who use it wrongly.) As a result, the existence of a very large, legitimate sector for alcohol transforms the character of the illicit sector of this market.

2. The Impact of Illicitness on Violence and Concentration

So far, we have observed that the distinctive shape of the markets for heroin and cocaine might be shaped by the fact that, for all intents and purposes, they are wholly illicit markets; or, more precisely, that the illicit part of the market dwarfs the licit part of the market. But this leaves us with the question of why illicitness produces the distinctive characteristics we observe: namely, illicit production as well as illicit distribution and use, international activities, relatively centralized and concentrated networks, sophisticated organizations, significant capacities for violence.

Generally speaking, we can expect "illicitness" to affect the markets for heroin and cocaine in two important ways. The most obvious is this: to the extent that importation, production, distribution, possession, and use of heroin and cocaine are illegal, and to the extent that society spends resources to enforce these prohibitions, those who engage in this conduct will be threatened by the prospect of arrest and punishment. The cops can come and get them; and the courts can lock them up. To guard against this, the illicit importers, producers, distributors, possessors and users will take many different kinds of evasive action. They will try to conceal their activities from the police by hiding their drugs, disguising their drug transactions, screening the people with whom they deal, and so on. They will also try to undermine the will of enforcement agencies by corrupting and frightening them. Such efforts will be at least partially successful in reducing their vulnerability to arrest. But they must also continue to live with some residual vulnerability to arrest that cannot quite be eliminated. And, as importantly, their efficiency and effectiveness in distributing drugs will be undermined by the need to take all the evasive tactics and make all the payoffs. As a result, the costs of getting drugs to illicit users will be higher than it would be in a world in which the production, distribution, possession, and use of drugs was legal.

The second effect of illicitness is less obvious, but potentially as or more important than the first. It is this: if one is engaged in an illicit transaction, one cannot rely on the courts or the police to protect one's property, or to enforce contracts, or to adjudicate disputes. If one is an illicit dealer, and he gets robbed, he cannot complain to the police. If he makes a deal to sell his drugs, and is met by a customer with guns and no money, he cannot go into court and demand that the court enforce the contract to purchase the drugs. If a competitor muscles into his territory and begins terrorizing his distribution network, he cannot ask the police to help him enforce a property right to a particular street corner.

This has huge consequences for the nature of illicit drug dealing. If the financial stakes are high enough, and if there are many who are prepared to use violence in a lawless market, drug dealers will find that the police are the least of their worries. Their bigger concerns are their suppliers, their employees, their competitors, and other criminals who see their wealth and vulnerability. To make themselves less tempting, the drug dealers will have to construct their own capacities to defend their property and enforce contracts. This is expensive in time and energy. It also exposes dealers to the risk of violence and death at the hands of their colleagues as well as the police.

So, by making some parts of the drug market wholly illicit, those who engage in activities that place them in this illicit sector will find that they are not only vulnerable to the police, but also to other criminals. The combined threat from the police and other criminals will cause them to engage in efforts to keep their activities secret, to try to co-opt both the police and the other criminals with various kinds of payoffs, and to develop their own capacities for "irresistible violence" as a method of discouraging attack from outsiders and ensuring discipline among insiders. All this means that their operations will become much more expensive and riskier than they would be if drugs were legal. That, in turn, means that the prices they will charge for the drugs will be much higher than they would be if the drugs were legal, and the availability will be restricted to those who can be trusted to know that a person is engaged in illicit transactions. If drug users do not want the drugs enough to pay a premium that will cover the costs of both guarding against the risks of illicit dealing and living with the risks that cannot be eliminated, then dealers will not stay in the business.

Note that much of the reasoning above is predicated on the idea that "the economic stakes are big enough" to justify the effort that goes into developing the capacities for violence. One can imagine, of course, that the capacity for violence is relatively widespread and inexpensive. Consequently, even relatively low returns will be tempting to those with a capacity for violence, particularly if they have nowhere else to go to make money. In this respect, we can imagine that the illicit markets (no matter how great their financial value) will be relatively attractive to those who are particularly willing and capable in the use of violence, and that that might in itself create both a common culture in the illicit market as well as create the conditions for frequent escalations of the level of violence that characterizes a market.

Moreover, they may have to expect more than the usual amount of cheating, stealing and violence in these "working relationships" for the simple reason that the illicitness of the activities will have produced some "sorting" with respect to the kinds of people who will be involved in the illicit market. One doesn't have to believe in a very sharp distinction between "ordinary people" and "criminals" to nonetheless imagine that those who would engage in wholly illicit markets will have not only less respect for the moral and practical instruction of the law, but also far more experience in stealing, robbery, and fighting than those who stay in licit pursuits. In short, illicit markets create an ecological niche in which those who are willing to rob, cheat, steal, and assault will have a comparative advantage. Violence, and a reputation for violence, help to solve a large number of the problems created by illicitness. If one has a reputation for a long memory and a capacity for irresistible violence, one's employees will become less inclined to co-operate with the police, one's suppliers will be less inclined to stint on quality, and one's customers will be more inclined to show up with money to complete the deal rather than guns to seize the drugs without paying.

So far, I have been acting as though violence and a reputation for violence were the same thing. But it is obvious that they are not. Moreover, the distinction matters for a very simple reason: namely, there is always a substantial price to be paid for the actual use of violence. Violence tends to attract unwanted attention from the police. It exposes one to much greater penalties, including, now, the prospect of a death sentence. And it always has the risks of back-firing if one misjudges his opponent's capacities for violence, or if a mistake occurs. It would be much better for an illicit dealer if he didn't actually have to use violence, but merely threaten it.

It is this fact that makes a *reputation* for irresistible violence much more valuable than the actual exercise of it. If one can merely credibly threaten violence, one can get all the benefits of violence without the costs. The difficulty, of course, is that one must be willing to engage in violence occasionally to demonstrate the will and capacity to use it. One cannot create a "rep" without at least some deeds, but different deeds may have different consequences for one's rep. This may explain why some of the violence that occurs in these markets is so grisly and so brazen. It is one thing to sneak up behind an admittedly weak opponent and shoot him in the back; it is quite another to kidnap a major boss and send back body parts to his close associates.

An important question about violence in illicit markets is the extent to which it is a natural monopoly, or at least something that achieves significant economies of scale. This is important because it may have important implications for how centralized the markets become. If violence and a reputation for violence is a natural monopoly (in the sense that it is most valuable when only one person has it), or produces significant economies of scale (in the sense that once one has a pretty well established reputation for violence it can be used efficiently and effectively to solve many problems of security and contract enforcement), then one might imagine that the need to be able to produce violence would be a centralizing and concentrating influence on the market. On the other hand, if violence and a reputation for violence are not natural monopolies, or don't produce economies of scale, and there is lots of low grade violence available in the market, then violence by itself would not be a centralizing or concentrating force in the market.

It is tempting to assume that the capacity and reputation for violence is, in fact, a natural monopoly. The argument is that violence works best when there is only one supplier. When there are two or more suppliers, none of the violent suppliers can rest assured that they are safe, or that they can provide security to others who want it from them. They are always vulnerable to a successful challenge from one of the competing sources of violence. Gradually, as one group gains prominence as the overwhelming favorite in the market for violence, others gravitate to them, and their power would become greater rather than lesser.

On the other hand, the problems associated with having to use violence in precise and persuasive ways tend to argue against the centralizing tendencies of violence. There may be some limits to a person's willingness to use violence. He might be willing to use it when vital interests are threatened, or his reputation is at stake, but find it not worth the trouble if the stakes are not large enough.

This suggests that there might be a kind of market for violence in which upscale, irresistible violence is wielded by a few when the stakes are high enough, but where their hegemony doesn't extend itself to all segments of the illicit activity, simply because it isn't worth it to them. The risks of exposure become too great. In the spaces which they leave, lesser kinds of violence might show up to perform the same functions, but with smaller returns. At any given moment, the greater capacity for violence could overwhelm the lower grade violence. But because it isn't worth it, or is beneath the dignity of the higher grades of violence, the lesser levels of violence are allowed to carry on. Thus, looking cross sectionally at an illicit market in drugs at any given time, one might well see different parts of that market dominated by groups with varying capacities for violence, and they might well be in equilibrium, with each group happy with its niche.

Problems could arise dynamically, however. If, for example, one of the powerful firms began to weaken for some reason; or one of the lesser firms began to strengthen, one can easily imagine a situation where a once comfortable equilibrium would become unsettled. The once powerful firm might feel that it needed to display its capacity for violence to scotch the rumors that it was getting weak. The emerging firm might think that now was the time to discover whether its real capacities for violence had developed to the level where it could challenge the old power, and gain the reputation that would come from successfully attacking the old firm. In such cases, one can easily imagine that violence would flair up and escalate, and continue until one force could impose a peace on their terms, or until some kind of new agreement could be made that recognized a change in the different capacities for violence.

Thus, while one can imagine that the usefulness of violence and a reputation for violence would have some centralizing influences over the structure of an illicit market, this would not necessarily produce a monopoly. Whether it did or not would depend a great deal on how ambitious the relatively dominant firms were, and whether they thought they could follow a strategy of both backward and forward integration without jeopardizing their operation to the police.

Note that the value of violence in this market will depend a great deal on how much is at stake. This will depend, in the first instance, on how much money can be made. This, in turn, is a function of how many people want the drugs, how much they want it, and how much money they have to pay for it. The more money is at stake, the fewer the alternative sources of supply, the more is at stake in controlling the industry.

How much is at stake will also depend on how much enforcement pressure there is. If there is not much enforcement pressure, many will enter the field and compete. The challenge of scaring them away becomes greater. Each effort to do so becomes more risky. On the other hand, if the enforcement pressure is strong enough to create a barrier to entry, then the challenge of gaining control over the rest of the market will be much less.

This suggests that a drug market that has many users, each of whom is quite committed to the drug, and has a strong capacity to pay, combined with significant enforcement pressure (in both levels of enforcement and magnitudes of punishment) will tend to create markets where there is a great deal at stake: something worth one's life. This may help to explain why the heroin and cocaine markets are as they are. It is not just that they are illicit. The marijuana market is also illicit. And it is not just that they are big (though that is important). It is also that the users are really strongly committed, and that there is stiff enforcement pressure which tends to increase the value of violence in the market that remains after the enforcement pressure has been exerted.

The international piece may come from something as simple as the fact that the raw materials are easily grown overseas. Or, it may be that enforcement pressures are more easily defeated and suborned overseas.

To the extent that sources of supply are overseas, there may be an additional centralizing influence. Getting across the border is something of a barrier. There may well be economies of scale in illegal exporting and smuggling. Investments. Willing to lose loads. Trustworthy networks. A little knot of value that can be exploited is created between drugs on one side of the border and the other.

Thus, the particular characteristics of the heroin and cocaine markets emerge from some unique characteristics beyond illicitness. Total amount of money to be earned. Strength of enforcement pressures. Where raw materials and processing can be found cheaply and risk free. Let's see how this analysis works with another drug: marijuana

Wholly Illicit Markets for Less Dependence Producing Drugs that Are Not So Strictly Enforced: Marijuana and the Hallucinogens

D. Quasi Illicit Markets for Dangerous Drugs: Amphetamines and Barbiturates

Although the structure of the Act is regulatory in the sense that it is designed to recognize and respect some legitimate uses of psychoactive drugs, and to try to protect these while minimizing the bad uses of drugs, to many, the Act is seen as an outright effort to prohibit drugs, and criminalize both the trafficking and use of drugs. The Act can be seen in these ways because it does, in fact, almost entirely prohibit some kinds of drugs, and uses severe criminal penalties to enforce these provisions. But it is important to keep in mind that this statute does not ban all psychoactive drugs -- only those with no legitimate medical uses, and some demonstrated capacity for abuse.

- III. The Structure of Illicit Markets in Guns
- IV. Enforcement Targets, Strategies, and Organizations
- V. Summary and Conclusion

3. The Effects of Making Drug Production, Distribution, and Use Illegal

It is one thing to understand the ways in which the law establishes distinctions among different kinds of drugs and different stages of production, distribution and use; sets up civil and criminal liability for conduct that is inconsistent with the regulatory intent of the law; and creates sanctions that give more or less bite to the civil or criminal liability. It is quite another thing to understand how the existence of those laws will shape the structure, conduct and performance of the illicit parts of the drug markets.

The most obvious thing to note is that there is an important difference between the establishment of some kind of civil and criminal liability for misconduct on one hand, and the actual imposition of that liability on the other. Presumably, the degree to which the theoretical liability is imposed is a function of the effort the society makes to enforce the laws as well as to create them. The natural way to think about the enforcement of the laws is to think about the public funds expended on enforcement agencies. The more money we spend on enforcement, *ceteris paribus*, the greater the vulnerability of being caught doing something wrong, and the greater the risk a drug dealer or drug user accepts when he or she engages in illicit conduct.

It is worth noting, however, that the magnitude of the threat to illicit dealers and users is not only a function of how much money we spend on enforcement, but also on how efficient and effective the "technologies" of enforcement are. It also matters how much help enforcement agencies get from private citizens in doing their work. It is one thing for us to spend money on international enforcement in a world in which bankers are under obligations to report unusual currency transactions and take their responsibilities for doing so somewhat seriously; it is quite another to search for international trafficking networks in a world where financial transactions cannot be easily monitored. Similarly, it is one thing to try to

disrupt local drug markets in a world in which the local community is strongly united behind local enforcement efforts; and quite another to try to accomplish the same goals with the same resources in a community in which drug dealers are paying one of the largest wage bills in the community, and have frightened those not in their employ into silence.

In this regard, it is worth noting that drug enforcement is one of the more difficult enforcement tasks. The reason is that the offenses are largely "invisible" to enforcement agencies, since the transactions produce often produce no victims or witnesses who are willing to complain. Since enforcement generally depends on some citizen raising the alarm to provide the probable cause that enforcement agencies need to intervene, many illicit transactions will go unobserved and unresponded to by enforcement agencies. This also implies that enforcement agencies will have to use some of our most intrusive law enforcement methods to make cases. In a world in which citizens do not come forward to report crimes, we will have to rely on such things as paid informants, under-cover operations, and electronic surveillance to insert a public spirited witness into the middle of an illicit transaction. Moreover, we will have to use these intrusive methods not only in an investigative mode to produce strong evidence in circumstances where we already have probable cause to believe that an offense is being committed, but also in a "patrol" mode where we are generally searching the world trying to find the offense without knowing much about where or when or among whom the offense is occurring.

These observations suggest that it will be hard to spend money to increase the probability that an illicit drug dealer or user will be discovered, arrested, and successfully prosecuted and sanctioned for his crime. This is one of the tougher enforcement challenges.

In gauging the impact of making drug trafficking and use illicit, however, one must recognize that the impact is not limited to the direct effect of exposing them to government sponsored enforcement efforts. There is a second, indirect effect of making some kinds of production, importation, distribution, and use illicit. It is this: if one is engaged in an illicit transaction, one cannot rely on the courts or the police to protect one's property, or to enforce contracts, or to adjudicate disputes. If one is an illicit dealer, and he gets robbed, he cannot complain to the police. If he makes a deal to sell his drugs, and is met by a customer with guns and no money, he cannot go into court and demand that the court enforce the contract to purchase the drugs. If a competitor muscles into his territory and begins terrorizing his distribution network, he cannot ask the police to help him enforce a property right to a particular street corner.

This has huge consequences for the nature of illicit drug dealing. If the financial stakes are high enough, and if there are many who are prepared to use violence in a lawless market, drug dealers will find that the police are the least of their worries. Their bigger concerns are their suppliers, their employees, their competitors, and other criminals who see their wealth and vulnerability. To make themselves less tempting, the drug dealers will have to construct their own capacities to defend their property and enforce contracts. This is expensive in time and energy. It also exposes dealers to the risk of violence and death at the hands of their colleagues as well as the police. There will be struggles to establish a reputation for irresistible violence that will give some drug dealers an advantage in the trade -- at least until someone comes along who wants to test that reputation for violence.

So, by making some parts of the drug market wholly illicit, those who engage in activities that place them in this illicit sector will find that they are not only vulnerable to the police, but also to other criminals. The combined threat from the police and other criminals will cause them to engage in efforts to keep their activities secret, to try to co-opt both the police and the other criminals with various kinds of payoffs, and to develop their own capacities for "irresistible violence" as a method of discouraging attack from outsiders and ensuring discipline among insiders. All this means that their operations will become much more expensive and riskier than they would be if drugs were legal. That, in turn, means that the prices they will charge for the drugs will be much higher than they would be if the drugs were legal, and the availability will be restricted to those who can be trusted to know that a person is engaged in illicit transactions. If drug users do not want the drugs enough to pay a premium that will cover the costs of both guarding against the risks of illicit dealing and living with the risks that cannot be eliminated, then dealers will not stay in the business.

There is a trivial sense in which the relative sizes of the two different markets would matter: namely, that if the markets are wholly distinct from one another, and one sector is much bigger than the other, then when we look at the market for that drug as a whole, we will see more of what looks like an illicit market than what looks like a licit market. Thus, millions of illicit cocaine transactions conducted by thousands of relatively large scale enterprises will form a much more powerful picture of

the cocaine market than thousands of transactions carried on by a large number of dentists swabbing peoples' gums with cocaine.

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