

Applying *Ultima Ratio*: A Skeptical Assessment

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I. INTRODUCTION

We should applaud the sentiment behind Nils Jareborg's decision to examine principles designed to limit the scope of the criminal sanction. Apart from a preoccupation with whether the harm principle should be included in a theory of criminalization, Anglo-American theorists have tended to focus almost exclusively on doctrines in the general part. Although the boundaries of the general part are enormously controversial, issues of criminalization are generally located beyond them.¹ I take Jareborg at his word when he writes that "it is often—in fact, very often—claimed that *criminalization is the legislator's ultima ratio*."² It is noteworthy, however, that Andrew Ashworth is the only scholar in the Anglo-American world who is said to endorse this principle.³ Nearly all of the authorities cited by Jareborg are continental. Why Anglo-American theorists are less likely to defend principles to limit the reach of the criminal sanction than their European counterparts presents a fascinating question in comparative criminal theory I lack the competence to explore.

Without a theory to constrain the scope of the criminal law, rampant overcriminalization (or what Jareborg calls *inflation*) has resulted.⁴ The criminal law has grown far beyond its core, and now includes a plethora of offenses

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¹ But see Douglas Husak, *Limitations on Criminalization and the General Part of Criminal Law* in CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART 13 (Stephen Shute & A.P. Simester, eds., 2002).

² Nils Jareborg, *Criminalization as Last Resort (Ultima Ratio)*, 2 OHIO ST. J. CRIM. L. 521, 523 (2004).

³ Actually, Ashworth does not endorse the last resort principle explicitly, but expresses his commitment to *minimalism* in the criminal law. Although the details of minimalism are sketchy, Ashworth indicates that "the decision [to criminalize] should not be taken without an assessment of . . . the possibility of tackling the problem by other forms of regulation and control." ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 67–68 (3rd ed. 1999). Jareborg also mentions ANDREW SIMESTER & G.R. SULLIVAN, CRIMINAL LAW, THEORY AND DOCTRINE (2000). They write: "[Criminal censures] should not be deployed merely as a tool of convenience, and where possible other forms of social control ought to be used in their stead." *Id.* at 11. Jareborg's remarks have led me to elaborate on the last resort principle at greater length. See Douglas Husak, *The Criminal Law as Last Resort*, 24 OXFORD J. LEGAL STUD. 207 (2004).

⁴ William Stuntz maintains that "anyone who studies contemporary state or federal codes is likely to be struck by their scope, by the sheer amount of conduct they render punishable." See William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 515 (2001).

“undreamed of by the drafters of the Model Penal Code.”⁵ What can be done to reverse this trend? The last resort principle may seem to offer the potential to dramatically narrow the reach of the criminal sanction. Like Jareborg, however, I am pessimistic that this principle would prove very effective in achieving this result. My emphasis throughout this paper is on difficulties that arise in *applying* the last resort principle. In Part I, I will provide a somewhat abstract defense of my skeptical position. In Part II, I will illustrate my general reservations with a specific example—the case of drug proscriptions. I will conclude that the last resort principle is less helpful than theorists might have anticipated in combating the intractable problem of overcriminalization.

II. GENERAL REASONS TO BELIEVE THE PRINCIPLE IS UNHELPFUL

Suppose we try to apply the last resort principle to existing criminal law. Presumably, we cannot begin to do so without understanding the *objective* of penal legislation. Unless we are able to identify this objective, we are in no position to decide whether given alternatives are better or worse at attaining it. This issue plunges us directly into some of the deepest quagmires of criminal theory. Philosophers agree that the criminal law *has* a purpose, but disagree radically about what that purpose *is*.

Suppose we believe that the sole objective of the criminal law is to prevent whatever conduct has been criminalized. This belief gives rise to what might be called the *preventive* interpretation of the last resort principle: the criminal law should be used only as a last resort to prevent given kinds of conduct. If noncriminal means prevent the conduct in question as well or better than criminal sanctions, the criminal law should not be employed. The preventive interpretation of the last resort principle suggests that we perform a thought-experiment in which we compare two jurisdictions that differ in only one respect: the first includes an offense proscribing a given kind of conduct, while the second employs noncriminal means of prevention. If fewer (or as many) instances of the type of conduct occur in the latter world, the penal sanction would not be justified. As so construed, one would expect the implementation of the last resort principle to require a laborious, case-by-case determination of the relative advantages and disadvantages of criminal and noncriminal approaches to given problems.

But the preventive interpretation of the last resort principle is problematic for at least two distinct reasons. First, this interpretation is jeopardized if the criminal law has central functions other than prevention. Many, and probably most, theorists believe that the criminal law has additional objectives. Joel Feinberg has

⁵ Gerald E. Lynch, *Towards A Model Penal Code, Second (Federal?): The Challenge of the Special Part*, 2 BUFF. CRIM. L. REV. 297, 299 (1998). For further thoughts about how this expansion might be retarded, see Douglas Husak, *Crimes Outside the Core*, 39 TULSA L. REV. 755 (2004).

persuasively argued that punishment has an *expressive* function.⁶ Although expressive views are typically advanced as theories of punishment, they also have profound implications for the content of the substantive criminal law itself—for issues of criminalization. The reason should be clear.⁷ Punishments must be justified, and justified punishments must be deserved. Persons deserve the censure inherent in punishment only if their conduct merits this response.⁸ If so, expressive theories have implications for criminalization as well as for punishment.

Expressive theories are incompatible with the preventive interpretation of the last resort principle. This version of the principle states that noncriminal alternatives should be employed when they are as good or better at preventing given kinds of conduct. Once we understand that the criminal law has both preventive and expressive functions, we need to provide a new interpretation of the last resort principle. Even though other modes of social control may do a better job reducing the incidence of criminality, they may fail to achieve an indispensable objective of the criminal sanction: expressing censure. To decide whether alternatives to the criminal law are equally effective, we would have to evaluate not only their ability to reduce crime, but also their efficacy as expressions.⁹

Of course, the last resort principle could be applied to the expressive function of the criminal law as well as to its preventive function. According to this suggestion, conduct should be criminalized only when no alternative device conveys condemnation as well or better. If punishment were the *only* way to express censure, we could agree that criminalization would be the sole means to attain this function of the criminal law. On this assumption, the last resort principle would never provide a good reason to repeal (or not to enact) an offense designed to stigmatize. The last resort principle would not become *false*; it would become trivial and unimportant in a theory of criminalization, and could not retard the trend toward enacting too many offenses. Its application to the criminal law would achieve nothing that was not already accomplished by insisting that crime

⁶ Joel Feinberg, *The Expressive Function of Punishment*, in *DOING AND DESERVING* 95 (1970).

⁷ Although the reason *should* be clear, philosophers who have struggled to justify punishment have not always traced the implications of their views for the substantive criminal law. For further thoughts, see Douglas Husak, *Reflective Equilibrium between Punishment and Crime*, in *FLORES JURIS ET LEGUM: FESTSKRIFT TILL NILS JAREBORG* 345 (Petter Asp et al. eds., 2002).

⁸ The greatest difficulty with this claim is to account for *malum prohibitum* offenses. For a recent attempt, see R.A. Duff, *Crime, Prohibition, and Punishment*, 19 *J. OF APPLIED PHIL.* 97 (2002). For a reply, see Douglas Husak, *Malum Prohibitum and Retributivism*, in *DEFINING CRIMES: ESSAYS ON THE CRIMINAL LAW'S SPECIAL PART* (R.A. Duff & Stuart Green eds., 2005).

⁹ Thus it is odd that Feinberg, who famously defends an expressive theory of punishment, appears to accept a preventive interpretation of the last resort principle. For a discussion of some of the tensions between these two elements of Feinberg's thought, see Bernard Harcourt, *Joel Feinberg on Crime and Punishment: Exploring the Relationship Between The Moral Limits of the Criminal Law and The Expressive Function of Punishment*, 5 *BUFF. CRIM. L. REV.* 145 (2001).

and punishment are expressive—a less controversial (but hardly indisputable) piece of conventional wisdom about our criminal justice system.

Punishment, however, is *not* the only *possible* way to stigmatize. It is a contingent fact about contemporary societies that the hard treatment imposed on persons who violate the criminal law is the conventional means by which expressive functions are attained. One can certainly *imagine* rituals other than hard treatment to express condemnation.¹⁰ In closely-knit societies, devices other than punishment (understood to include hard treatment) may have succeeded in stigmatizing.¹¹ Most sentencing theorists, however, oppose alternative modes of punishment that clearly express stigma but do not involve deprivations, such as “shaming sanctions.”¹² In any event, it is important to remember that these sanctions are alternative modes *of* punishment, not alternatives *to* punishment. If these unusual kinds of punishment are deemed unacceptable, it is hard to believe that stigma could be expressed effectively if punishment were abandoned altogether. In the diverse liberal societies of today, the criminal sanction seems uniquely suited to condemn. No formal mechanism is able to convey censure as forcibly and directly.¹³ Although we should remain open-minded that other forms of social control may do a better job than criminal sanctions at preventing given forms of conduct, it seems less likely that alternatives could be more effective at expressing condemnation.

More precisely, it seems less likely that alternative means of social control *that are acceptable* may be more effective at expressing condemnation. It is crucial to recognize that the foregoing conclusion—that the last resort principle is of little significance in reducing the scope of the criminal sanction—is defensible largely because we would never dream of invoking noncriminal alternatives that might serve as well or better at preventing given kinds of conduct while expressing condemnation. The fact that the criminal law strikes most of us as the only acceptable means for the state to convey stigma indicates the moral progress we have made as a society.

If we agree that punishments are designed to condemn as well as to prevent, the last resort principle seems to do no significant work in a theory of criminalization. Should we then reject the principle? A different possibility is worthy of consideration. We might try to salvage the preventive interpretation of

¹⁰ Feinberg himself describes such alternatives, but somehow concludes that “the only way” to vindicate the law is “to punish those who violate it.” Feinberg, *supra* note 6, at 104. For a discussion of this apparent inconsistency, see Hugo Adam Bedau, *Feinberg’s Theory of Punishment*, 5 BUFF. CRIM. L. REV. 103 (2001).

¹¹ See R.A. DUFF, TRIALS AND PUNISHMENTS 240–45 (1986).

¹² For a defense of shaming sanctions, see Dan Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996). For a rejoinder, see Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 UCLA L. REV. 1751 (1999).

¹³ At least, no formal mechanism *that is universally available* seems able to convey censure as forcibly and directly. Criminal sanctions have the enormous advantage of being available in virtually all circumstances.

the last resort principle, and thus its potential usefulness in a theory of criminalization, by attempting to limit the scope of expressive theories. Although it is clear that persons who commit core offenses of the criminal law qualify for censure, one might contend that the objective of *some* criminal laws is and ought to be wholly preventive. Of course, the failure of these offenses to include an expressive dimension is precisely what many commentators believe to be objectionable about them.¹⁴ As I have indicated, however, existing criminal law has already expanded far beyond its core, and no longer seems to require moral blame as a condition for liability.¹⁵

Theorists need not resign themselves to this development; they can help to retard it without relying on expressive theories by including the last resort principle in their theory of criminalization. This solution seems especially tempting in the case of many white-collar crimes.¹⁶ It is hardly obvious, for example, that such offenses as money laundering merit censure.¹⁷ Should these crimes be repealed? Theorists who hope to preserve the expressive function of the criminal law will probably answer in the affirmative. Commentators who are less confident about expressive theories might be able to reach the same conclusion by appealing to the last resort principle—assuming, of course, that alternative preventive devices can be found. At the very least, the last resort principle seems more plausible when applied to such examples than when invoked against cases of core criminality. Arguably, then, the importance of the last resort principle might be salvaged for that class of criminal laws that are not designed to give rise to censure or condemnation, but are wholly preventive. At least *some* such laws *may* exist. A few offenses, we might suppose, are nonstigmatizing and wholly preventive. Statutes in this class are jeopardized if the last resort principle is included in our theory of criminalization.

But a second and more straightforward challenge to the practical significance of the last resort principle remains. Noncriminal means to reduce a crime like rape—such as courses in self-defense for potential victims—can always *supplement*, but need not *replace*, the criminal law. In fact, it is barely possible to imagine a world in which *only* criminal prohibitions were used to reduce the incidence of such conduct. What would such a world be like? Would we not

¹⁴ The enormous number of these offenses leads Andrew Ashworth to lament that the criminal law has become a “lost cause.” Andrew J. Ashworth, *Is the Criminal Law a Lost Cause?*, 116 L.Q. REV. 225 (2000).

¹⁵ See Louis D. Bilonis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269 (1998).

¹⁶ But it is hard to be sure. Commentators disagree about the conditions under which conduct merits moral condemnation or censure. See Stuart P. Green, *Why It's a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533 (1997). For further thoughts, see Husak, *supra* note 8.

¹⁷ *E.g.*, 18 U.S.C. § 1957 (2003) (which imposes up to ten years imprisonment on persons who knowingly engage in a monetary transaction, for example, a bank deposit or withdrawal of funds greater than \$10,000 derived from specified unlawful activities).

impose tort liability on rapists or educate our students to believe that rape is wrongful? The criminal law can hardly be an effective deterrent unless it works in tandem with other mechanisms of social control. In other words, the relevant thought-experiment for testing the last resort principle must include a *third* possible world for our consideration: a world in which *both* criminal and noncriminal means are used. In most cases this third possible world, which combines criminal and noncriminal strategies, would probably reduce the incidence of the conduct in question more effectively than either of the previous two.¹⁸ No sensible interpretation of the last resort principle would call for the repeal of a criminal law that contributes to the prevention of harmful conduct, just because criminal and noncriminal alternatives would be equally effective when used alone. When preventing given kinds of conduct is imperative, we have good reason to utilize *all* means at our disposal, including both criminal and noncriminal devices. If I am correct, the last resort principle offers little hope of alleviating the problem of overcriminalization.

III. AN APPLICATION: ILLICIT DRUG POSSESSION

The test of any principle is its implementation in practice. The difficulties I have described are better appreciated by attending to particular cases than to abstract generalities. I propose to consider a specific example—the crime of illicit drug possession—to examine how the last resort principle might be applied.¹⁹ As one might anticipate, no simple conclusions will be drawn. Each of the foregoing problems in applying the last resort principle will resurface here. Our drug policy urgently needs drastic reform. But anyone who believes that fundamental change can be achieved by including the last resort principle in a theory of criminalization must be prepared to address the hard questions I will raise here.

I select this example for several reasons. First, the application of the last resort principle to drug proscriptions would seem to have the potential to bring about enormous improvements in our system of criminal justice. At the present time, drug offenses constitute the single most important manifestation of our tendency to criminalize too much and to punish too many. Approximately 460,000 drug offenders are in jails and prisons across the country—about the same number as the entire prison population in 1980.²⁰ Nearly one of every four prisoners in America is behind bars for a non-violent drug offense.²¹ Moreover, drug policy

¹⁸ Of course, this conjecture requires empirical support. For a possible counterexample to this generalization, see my discussion of the forbidden fruit phenomenon in Part II *infra*.

¹⁹ 21 U.S.C. § 841(a) (2002): “It shall be unlawful for any person knowingly or intentionally to possess a controlled substance” State laws proscribe the same conduct.

²⁰ U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS tbl.6.1 (27th ed. 2000).

²¹ *Id.* at tbls. 6.14, 6.23.

has attracted increasing numbers of critics.²² Some of these critics have appealed (implicitly or explicitly) to the last resort principle to challenge the status quo.²³

How would this principle be likely to alter our drug policy? Not much, I fear. If my preceding conclusions about the last resort principle are correct, basic reform is most likely to occur if proscriptions of drug possession are wholly preventive, and lack an expressive function. I have suggested that those offenses with an expressive dimension, which arguably comprise the entire universe of the criminal law as it ought to be, are effectively immunized from change by the last resort principle. No alternative state mechanism to censure drug users is likely to prove acceptable.

But *is* the offense of illicit drug possession wholly preventive and nonstigmatizing, or is it partly designed to convey condemnation? Unfortunately, this is one of the most hotly contested points of debate between contemporary prohibitionists and their critics. A number of commentators strongly denounce illicit drug use in *moral* terms. Consider, for example, the perspective adopted by James Q. Wilson: "If we believe—as I do—that dependency on certain mind-altering drugs is a moral issue and that their illegality rests in part on their immorality, then legalizing them undercuts, if it does not eliminate altogether, the moral message."²⁴ William Bennett and Barry McCaffrey, the country's most prominent drug czars, concur.²⁵ Public opinion appears to support these views.²⁶ Even those commentators who are less vocal in their moral reservations about illicit drugs frequently oppose decriminalization on the ground that it would "send the wrong message."²⁷ I assume these commentators should be understood to claim that the criminalization and punishment of illicit drug possession is partly expressive, communicating censure and reprobation.

²² The most concise challenge is posed by Ethan Nadelmann, *Drug Prohibition in the United States: Costs, Consequences and Alternatives*, 245 SCIENCE 939 (1989). But the most common complaint is not that criminal sanctions are applied, but that punishments for drug offenders are too severe. See Douglas Husak, *Desert, Proportionality, and the Seriousness of Drug Offenses*, in FUNDAMENTALS OF SENTENCING THEORY 187 (Andrew Ashworth & Martin Wasik eds., 1998).

²³ See, e.g., JONATHAN SCHONSHECK, ON CRIMINALIZATION: AN ESSAY IN THE PHILOSOPHY OF THE CRIMINAL LAW (1994).

²⁴ James Q. Wilson, *Against the Legalization of Drugs*, COMMENT. Feb. 1990, at 21, 26 (1990). More recently, see JAMES Q. WILSON, THE MORAL SENSE 94 (1993).

²⁵ See William Bennett, *The Plea to Legalize Drugs Is a Siren Call to Surrender*, in DRUGS IN SOCIETY: CAUSES, CONCEPTS, AND CONTROL 339 (Michael D. Lyman & Gary W. Potter eds., 1991); William Raspberry, *Prevention and the Powers of Persuasion*, WASH. POST, July 8, 1996, at A15.

²⁶ Roughly two-thirds of Americans agree that illicit drug use is morally wrong. See the several surveys described in Robert J. Blendon & John T. Young, *The Public and the War on Illicit Drugs*, 279 J. AM. MED. ASS'N 827–32 (1998).

²⁷ Two authors describe this as "the most frequent objection to harm reduction." See ROBERT J. MACCOUN & PETER REUTER, DRUG WAR HERESIES: LEARNING FROM OTHER VICES, TIMES, AND PLACES 388 (2001). President George W. Bush has remarked, "legalizing drugs would completely undermine the message that drug use is wrong." See his announcement of the new head of the Office of National Drug Control Policy (May 10, 2001).

On the other hand, many drug policy critics emphatically reject the moral condemnation expressed by Wilson. Some argue that illicit drug use is protected by a moral right.²⁸ Others prefer to understand drug abuse as a *medical* problem.²⁹ These disagreements about the moral status of drug use are important. If no censure for drug possession is warranted, we do not need the last resort principle to object to impositions of criminal liability. Expressive theories do the job more simply. I am unsure how we should decide whether the criminalization of illicit drug possession is partly expressive or wholly preventive. Thus I remain uncertain about the important question of whether the offense of illicit drug possession serves an expressive function. Commentators who answer this question affirmatively will remain convinced that our *only* (and not just our last) resort is to continue to criminalize possession.

For several reasons, however, little progress is forthcoming even if we assume that this offense *is* wholly preventive. The first problem is to identify exactly *what* this offense is designed to prevent. This question raises yet another area of intractable disagreement among drug policy theorists. In the case of core offenses with an obvious expressive dimension, the nature of the harm to be prevented is beyond dispute; the conduct to be prevented is identical to the conduct proscribed. Clearly, arson is the conduct to be prevented by the crime of arson. When an offense is *inchoate*, however, the conduct criminalized is *not* identical to the conduct to be prevented. When the state criminalizes attempted murder, for example, it is not really interested in decreasing the incidence of attempts—the conduct actually proscribed—but rather the incidence of successful murders.

Which offenses are inchoate?³⁰ This question cannot be answered without a catalogue of consummate harms the criminal law is designed to prevent.³¹ Although some existing offenses are very difficult to categorize as consummate or inchoate, one point seems clear: the offense of drug possession *cannot* be a consummate offense. Merely possessing something is almost never harmful. No one would want to criminalize drug possession unless it created an unacceptable risk of some subsequent harm, either to the user or to others.

What consummate harm *is* the offense of drug possession designed to prevent? This question is also difficult. It is tempting to assume that the answer is drug *use*.³² Most commentators gauge the success or failure of various policy

²⁸ See THOMAS SZASZ, *OUR RIGHT TO DRUGS: THE CASE FOR A FREE MARKET* (1992); DOUGLAS N. HUSAK, *DRUGS AND RIGHTS* (1992).

²⁹ See generally Alan I. Leshner, *Addiction Is a Brain Disease, and It Matters*, *SCIENCE*, Oct. 3, 1997, at 45.

³⁰ For further thoughts, see Douglas N. Husak, *The Nature and Justifiability of Nonconsummate Offenses*, 37 *ARIZ. L. REV.* 151 (1995).

³¹ See GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 133 (1978).

³² Remarkably, few jurisdictions actually punish drug *use*. I assume that this failure is due to the fact that possession is easier to prove. See Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 *J. CRIM. L. & CRIMINOLOGY* 829 (2001).

initiatives by examining their effects on rates of drug consumption.³³ In other words, the objective of drug proscriptions is what might be called *use-reduction*. Of course, no one purports to curb use solely by relying on the criminal sanction. Earlier, I suggested that noncriminal means to reduce given forms of conduct—such as education—can always *supplement*, but need not *replace*, criminalization. Why doubt that a combination of criminal and noncriminal strategies is the most effective means to achieve the ultimate goal of drug policy—a reduction of the consummate harm of drug use?

In fact, there are at least two plausible grounds for entertaining this very doubt. The first challenge is the more basic. Can it really be true that *use* is the consummate harm that drug proscriptions are designed to prevent? How can drug use *itself* be a harm? Approximately 80 or 90 million living Americans have tried an illicit drug at some point in their lives; as a group, they are not readily distinguishable from the slightly larger population of abstainers.³⁴ No harm need occur on the literally tens of billions of occasions in which drugs have been consumed. Drug use might increase the risk that some subsequent harm will occur, but almost certainly is not harmful *per se*. In other words, a proscription of drug use, no less than a proscription of drug possession, is an inchoate offense, designed to reduce the risk of some *other* harm that use may cause. This train of thought assigns a new and different objective to drug policy. The more appropriate goal is *harm-reduction*.³⁵ The best way to minimize harm may not be to proscribe the use and possession of drugs.³⁶

The existence of *substitution effects* provides powerful evidence that use-reduction should not be endorsed as the ultimate objective of drug policy. Suppose that punishment reduces the use of drug X. This conclusion would not demonstrate the success of our drug policy if those persons who had been deterred from X simply switched to an even more dangerous drug Y. The substitution effects of drug prohibitions are unknown.³⁷ But several commentators have speculated that the development and popularity of hazardous substances like PCP

³³ The Office of National Drug Control Policy (2002) lists “stopping use before it starts” as the “number one priority” of national drug control strategy. See www.whitehousedrugpolicy.gov/policy/ndcs.html.

³⁴ Longitudinal studies of drug users provide the best evidence for this claim. The most well-known such study is Jonathan Shedler & Jack Block, *Adolescent Drug Use and Psychological Health: A Longitudinal Study*, 45 AM. PSYCHOLOGIST 612 (1990).

³⁵ But *which* harms? Among the most frustrating aspect of contemporary drug policy is that no clear rationale in its favor has ever been articulated by legal authorities. See Douglas Husak & Stanton Peele, “*One of the Major Problems of Our Society*”: *Symbolism and Evidence of Drug Harms in U.S. Supreme Court Decisions*, 25 CONTEMP. DRUG PROBLEMS 191 (1998).

³⁶ Needle exchange programs are an example of a harm-reduction initiative that does not penalize use.

³⁷ According to one commentator, “one of the silver linings on the black cloud of greater drug use under different legalization regimes is the prospect that less dangerous drugs would drive out the more dangerous ones.” Ethan A. Nadelmann, *Thinking Seriously about Alternatives to Drug Prohibition*, in HOW TO LEGALIZE DRUGS 578, 590 (Jefferson M. Fish ed., 1998).

and crack would not have occurred but for the criminalization of less dangerous drugs.³⁸ The very real possibility of substitution effects demonstrates that use reduction should not be accepted as the appropriate goal of drug policy.

Thus far, I have questioned whether use-reduction should be regarded as the objective of our drug policy, and have proposed that harm-reduction might be a more sensible goal. But even if we concede that use-reduction *is* our ultimate objective, we still can challenge the claim that a combination of criminal and noncriminal strategies is the most effective way to attain it. Perhaps drug proscriptions provide an exception to my earlier generalization that criminal and noncriminal strategies prevent given kinds of conduct more effectively than either alternative alone. First, consider the *forbidden fruit phenomenon*. Many individuals, most notably adolescents, are attracted to a kind of conduct precisely *because* it is forbidden.³⁹ These individuals are more likely to engage in given behaviors that have been criminalized. Although all drug policy theorists acknowledge the importance of the forbidden fruit phenomenon in explaining the prevalence of drug use, its true extent is unknown.⁴⁰ Next, notice that the majority of drug users quit voluntarily after a relatively brief period of experimentation—typically, within five years of initial use.⁴¹ But millions have been arrested and convicted, and punishment itself may raise the probability of subsequent drug use by exacerbating criminogenic tendencies in the long run. Although sentences for drug offenses are severe, no one proposes to keep users behind bars indefinitely.⁴² Because of their criminal records, drug offenders who have been incarcerated are less likely to find housing or employment, to re-establish ties with families, or to regain self-esteem.⁴³ As a result, they may resume their use of drugs. If the increase due to these factors were equal to or greater than the decrease due to deterrence, criminal sanctions may actually bring about a net increase in use.⁴⁴

³⁸ See, e.g., Randy E. Barnett, *Curing the Drug-Law Addiction: The Harmful Side Effects of Legal Prohibition*, in DRUGS: SHOULD WE LEGALIZE, DECRIMINALIZE, OR DEREGULATE? 155 (Jeffrey Schaler ed., 1998).

³⁹ The phenomenon is well confirmed in cases of ratings for sexual content and violence in television and film. See Brad J. Bushman & Angela D. Stack, *Forbidden Fruit Versus Tainted Fruit: Effects of Warning Labels on Attraction to Television Violence*, 2 J. EXPERIMENTAL PSYCHOL.: APPLIED 207 (1996).

⁴⁰ “The drug research literature has no systematic research on the forbidden fruit hypothesis.” MACCOUN & REUTER, *supra* note 27, at 89.

⁴¹ See *id.* at 16.

⁴² The Constitution, however, creates no barriers to life imprisonment for drug possession. See *Harmelin v. Michigan*, 501 U.S. 957 (1991).

⁴³ The probability of many of these results is increased by the collateral consequences of drug convictions. See Nora V. Demleitner, “*Collateral Damage*”: *No Re-Entry For Drug Offenders*, 47 VILL. L. REV. 1027 (2002).

⁴⁴ In addition, the infliction of severe punishments to deter drug use may undermine social stability by exacerbating the precursors to social disruption, thereby increasing crime and drug use in the long run. See Tracy L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191 (1999).

This result is believable, since threats of punishment do not appear to be especially effective in deterring drug use.⁴⁵ These two hypotheses provide reason to suspect that proscriptions of drug possession may not succeed in minimizing use. These offenses may constitute an exception to the general rule that more prevention occurs when criminal and noncriminal approaches are combined.

In this Part I have raised a number of difficulties in attempts to decide how the last resort principle applies to the offense of drug possession. The issues I have discussed involve empirical and theoretical controversies that are not likely to be resolved anytime soon. We do not know whether proscriptions of drug possession are designed to convey condemnation. Nor do we have much idea whether various reforms would “send the wrong message.” If this offense is designed to stigmatize, the last resort principle will play no role in reforming our drug policy. Arguably, however, the offense of drug possession is nonstigmatizing, but is wholly preventive in function. Even so, however, the last resort principle will prove exceedingly hard to apply, since we are not clear about exactly *what* it is this offense is designed to prevent. In all probability, it is intended to reduce some consummate harm other than use itself—although the nature of this harm has not been clearly identified. In any event, it is hardly obvious that use needs to be punished in order to reduce several of these harms. But even if this offense *is* intended to prevent use, we cannot be confident that criminal sanctions will help to do so. Perhaps more use, or at least more harmful use, occurs simply because punishments are imposed. I have mentioned two mechanisms that might produce this result.

IV. CONCLUSION

We do not have much basis to decide how applications of the last resort principle would affect our drug policy. Although the details would differ from case to case, I suspect that many of these same problems would reappear if the last resort principle were applied elsewhere. These tremendous uncertainties provide concrete reason to doubt that the last resort principle would have a substantial impact on our system of criminal justice. None of these unresolved issues should persuade us that the last resort principle should *not* be included in our theory of criminalization. But they reinforce what I take to be Jareborg’s pessimistic conclusion: the last resort principle would not be especially helpful in retarding the phenomenon of overcriminalization.

⁴⁵ See, e.g., Jeffrey A. Fagan, *Do Criminal Sanctions Deter Drug Crimes?*, in *DRUGS AND CRIME: EVALUATING PUBLIC POLICY INITIATIVES* 188 (Doris Layton MacKenzie & Craig D. Uchida eds., 1994).

