

CASUALTIES OF WAR: CRIMINAL DRUG LAW ENFORCEMENT AND ITS SPECIAL COSTS FOR THE POOR

KEITH DONOGHUE*

Over the last three decades, different criticisms have emerged in response to the “war on drugs.” One strain of argument relies on a pragmatic analysis of the costs and benefits to society as a whole of using criminal sanctions. Although the costs associated with drug-related harms and drug enforcement disproportionately burden poor communities, their relationship with poverty has attracted little systematic analysis. In this Note, Keith Donoghue focuses on the particular costs and benefits of the drug war for the poor as a class. Relying on social-scientific theories of drug abuse and criminal law enforcement, he analyzes the effects of the two major drug-enforcement strategies: “top-down,” which seeks to intercept the leaders of drug operations, and “bottom-up,” whose objective is to apprehend retail purchasers of drugs. Donoghue argues that these strategies have imposed unique injuries on the poor, such as more violent crime in poor communities and greater drug abuse among the poor. He concludes that the impact of drug prohibition on the poor is more multifaceted than commonly has been recognized.

After three decades of law enforcement initiatives conceived in the name of a “war on drugs,”¹ critics have advanced a variety of reasons to question this enduring campaign. One prominent argument relies on a pragmatic assessment of the costs and benefits distributed by the effort to deter the use of illicit substances through punitive criminal sanctions.² Rather than invoke the premises of libertarian thought to assert a general right to consume drugs, such pragmatic criticism stresses that contemporary drug enforcement creates distinct

* B.A., 1995, Wesleyan University; J.D., 2002, New York University School of Law. The author would like to thank Professor Jerome Skolnick for his guidance in the original drafting of this Note. Gratitude is also owed the Leslie Glass Foundation for its generous sponsorship of a fellowship through the Center for Research in Crime and Justice at the New York University School of Law, which provided financial support in connection with this piece.

¹ President Richard M. Nixon, in 1971, was the first to invoke a martial metaphor in rallying support for drug-enforcement efforts. See Franklin E. Zimring & Gordon Hawkins, *The Search for Rational Drug Control* 46 (1992) (quoting Nixon announcing creation of new drug policy office with promise to “conquer drug abuse”).

² See, e.g., Jerome H. Skolnick, *Rethinking the Drug Problem*, *Daedalus*, Summer 1992, at 133, 139-40 (identifying “pragmatic position” that assesses existing drug policy from perspective of costs and benefits rather than philosophical commitment to privacy or individual autonomy).

costs far in excess of any corresponding amelioration of drug-related harms.³

Pragmatic criticism of this kind most commonly has evaluated costs and benefits from the perspective of American society as a whole. For example, some commentators have characterized drug-law enforcement as the cause of unprecedented erosion in the protections afforded under the Fourth Amendment.⁴ Others have pointed to the strain the drug war places on the public fisc and have argued that this substantial investment has not yielded any meaningful returns.⁵

This Note aims to refine this pragmatic strain of criticism by adjusting its focus to concentrate on the poor as a class.⁶ The interests of

³ See, e.g., Ethan A. Nadelmann, *Drug Prohibition in the U.S.: Costs, Consequences, and Alternatives*, in *Crack in America: Demon Drugs and Social Justice* 288, 292-301, 308 (Craig Reinman & Harry G. Levine eds., 1997) [hereinafter *Crack in America*] (cataloguing costs of contemporary drug policy and concluding that it has “yielded precious little progress to date”).

⁴ See Dan Baum, *Smoke and Mirrors: The War on Drugs and the Politics of Failure* 178 (1996) (“Every one of the 1980s cases that weakened the Fourth Amendment had one thing in common: they all involved drugs.”); Steven B. Duke & Albert C. Gross, *America’s Longest War: Rethinking Our Tragic Crusade Against Drugs* 122-27 (1993) (describing invasive policing methods sustained by Supreme Court in face of Fourth Amendment challenges and concluding that “the drug war fuels the attack on privacy even in cases not directly dealing with drugs”).

⁵ See, e.g., James P. Gray, *Why Our Drug Laws Have Failed and What We Can Do About It: A Judicial Indictment of the War on Drugs* 34-35 (2001) (“Because of these efforts to build, finance, and staff enough prisons to handle our drug offenders, our governments are going broke. . . . [N]o one is coming out ahead under this system except the people making money in the prison-industrial complex.”); cf. Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War’s Hidden Economic Agenda*, 65 U. Chi. L. Rev. 35 (1998) (characterizing drug war as source of budgetary incentives that have corrupted agendas of local law enforcement).

⁶ Although this Note addresses the impact of drug policy on the poor, the harms considered here are also particularly pronounced among people of color. For example, just as the poor are especially prone to drug abuse, see *infra* Part III.A, statistical evidence shows a heightened rate of drug abuse among people of color. According to the 1999 National Household Survey on Drug Abuse (NHSDA), blacks were roughly 50% more likely than whites to report behaviors generally recognized as indicative of drug abuse; Hispanic persons were roughly 27% more likely to do so. Substance Abuse & Mental Health Servs. Admin., 1999 National Household Survey on Drug Abuse, app. g tbl.G.84, <http://www.health.org/govstudy/bkd376/TableofContents.htm#TopOfPage> (last visited Aug. 16, 2001) [hereinafter 1999 NHSDA] (reporting drug dependence rates of 2.3% among blacks, 1.9% among Hispanic persons, and 1.5% among whites). This higher rate of abuse obtained despite a greater prevalence of drug experimentation among whites. *Id.* app. g tbl.G.13 (indicating that 42.0% of whites, 37.7% of blacks, and 31.2% of Hispanic persons had tried illicit drugs at least once); cf. *infra* note 77 (reviewing statistical evidence that persons whose educational backgrounds and employment correspond with relatively low incomes are less likely to use drugs, but more likely to abuse them, than persons whose educational backgrounds and employment correspond with relatively high incomes).

This Note’s focus on poverty rather than race should not be read to imply a position on whether race or class is the more critical variable in assessing the impact of drug policy. Rather, it simply shows that class is one axis along which current drug policy unevenly

poor people are particularly relevant in the evaluation of contemporary drug policy because many drug-related harms are especially pronounced in poor communities.⁷ Any reform that lessens the negative impact of drugs on the poor therefore would be highly desirable both as a matter of public health and of equity for those who already have suffered most severely.

To date, the relationship between poverty and drug-related problems has attracted much attention but little systematic analysis. Scholars and political commentators have argued that the social and economic circumstances of the inner-city poor are largely responsible for the problems associated with drug use and enforcement.⁸ These arguments usually have focused on the role of broad inequalities in American society: The absence of meaningful educational and employment opportunities, along with the consequences of class- and race-based segregation, are said to render the poor understandably more disposed to participate in the distribution and consumption of illicit drugs.⁹

Proponents of such views, however, have not ventured any assessment of the precise mechanisms through which drug enforcement op-

distributes certain adverse effects. While this inequity is not necessarily any more important than drug policy's impact on people of color, it is of independent normative significance and has attracted less sustained attention. For evaluations of whether drug policy helps or hurts people of color, compare Clarence Lusane, *Pipe Dream Blues: Racism and the War on Drugs* 86 (1991) ("Aggression against people of color, poor people, and the Third World is at the core of the current drug war."), with Randall Kennedy, *Race, Crime, and the Law* 374-76 (1997) (arguing that vigorous enforcement aimed at crack distribution is not necessarily racially discriminatory, despite disproportionate share of black men arrested and prosecuted, because such enforcement protects nonoffenders in predominantly black communities), and Charles B. Rangel, *Why Drug Legalization Should Be Opposed*, *Crim. Just. Ethics*, Summer/Fall 1998, at 2 (criticizing disparity in sentencing between crack and powder cocaine but insisting that "legalization of drugs would be a nightmare" in minority communities).

⁷ See *infra* notes 42, 45-46, 77 and accompanying text.

⁸ Especially notable in this regard is the volume *Crack in America*, *supra* note 3, which offers a range of perspectives on the proliferation of crack use in the mid-to-late 1980s and the public policy response that followed.

⁹ See, e.g., Troy Duster, *Pattern, Purpose, and Race in the Drug War: The Crisis of Credibility in Criminal Justice*, in *Crack in America*, *supra* note 3, at 260, 268-80 (explaining involvement of poor, young, black men in underground drug economy by reference to decline in manufacturing-sector employment as well as prevalence across service-sector employment of discriminatory hiring practices and workplace environments that give rise to "peculiar conjunction of class and race alienation"); Kurt L. Schmoke, *An Argument in Favor of Decriminalization*, 18 *Hofstra L. Rev.* 501, 516 (1990) (

Many [children], especially those living in the inner city, are frequently barraged with the message that selling drugs is an easy road to riches—far easier than hard work and good grades. Drug pushers, with their wads of money, become envied role models for young people seduced into joining the illegal trade. (citations omitted)).

erates against the interests of poor people on the whole, including poor people not involved in drug distribution. This neglect is likely due to the absence of extensive empirical research on the relationship between drug-related problems and social class. While familiar survey methods would make it possible, for example, to estimate the incidence of drug abuse among the poor, no serious effort of this kind has been made.¹⁰ This Note therefore relies on social-scientific theories of drug abuse and criminal law enforcement to argue that existing policy has tended to aggravate two critical maladies among the poor. First, the impact of drug-related crime on poor Americans has become more severe as a result of the enforcement of strict drug laws. Second, the drug war appears likely to have spawned greater drug abuse among the poor even as it has reduced the amount of drug use among Americans generally.

Part I describes two broad drug-enforcement strategies, focusing on their effects generally rather than on the poor in particular. Together, these two strategies—which this Note terms the “top-down” and “bottom-up” approaches—encompass virtually all of the methods currently used to enforce criminal drug laws. On a top-down approach, police and prosecutors aim to identify and arrest the leaders of drug-dealing operations. On a bottom-up approach, police rely primarily on the “buy and bust” operation to interfere with the retail market’s supply of small quantities of drugs.

Part II examines the broad effects of top-down enforcement more closely to assess their particular significance for the poor. From this perspective, the impact of top-down enforcement is twofold. On the one hand, an inflation in drug prices that is caused by top-down enforcement is especially effective in deterring drug abuse among the poor. On the other, a second effect of top-down enforcement—its aggravation of drug-related crime—takes its highest toll in poor communities.

Part III turns to bottom-up enforcement, describing how its immediate effects function over time to aggravate drug abuse among the poor, even as they cause drug use to decline across the population as a whole.¹¹ The Part begins by examining the causes of drug abuse from

¹⁰ The Substance Abuse and Mental Health Services Administration does administer an annual survey, the National Household Survey on Drug Abuse, which assesses the correlation between drug abuse and demographic variables such as education level and employment status. See 1999 NHSDA, *supra* note 6. Inasmuch as these characteristics are serviceable proxies for income or socioeconomic status, they offer some degree of insight into the extent of drug abuse among the poor. This evidence is fully consistent with the arguments presented in this Note. See *infra* notes 42, 77.

¹¹ For discussion of the distinction between drug use and drug abuse, see *infra* notes 51-53 and accompanying text.

a sociological perspective and then scrutinizes the impact of bottom-up enforcement in light of the insights this perspective yields. Part III draws together these observations to conclude that bottom-up enforcement, by prompting demographic changes in the drug-using population that render drug use increasingly stigmatized, ultimately leaves the poor more vulnerable to drug abuse.

Along with the incidence of drug-related violence described in Part II, this conclusion gives reason to suspect that the war on drugs imposes several unique harms on the poor. Whether or not these harms outweigh the positive impact of higher drug prices is a question that is beyond the scope of this Note. The following analysis aspires instead to contribute to this debate by demonstrating that the impact of drug prohibition on the poor is more multifaceted than commonly has been recognized.

I

TWO WORLDS OF DRUG PROHIBITION

The variety of tactics that comprise contemporary drug enforcement share at least one common aspect: All are what might be called "supply-side" approaches, in the sense that all aim to limit the availability of drugs rather than the desire to consume them. This rough congruence does not mean that all supply-side approaches are alike. By dividing enforcement strategies into two broad categories and identifying the general effects of each, this Part lays a basis for assessing each strategy's more particular impact on the poor. That assessment follows in Parts II and III.

The two broad enforcement strategies, proposed here as ideal types, together provide a useful framework for the analysis of the wide range of drug-enforcement methods currently in use.¹² The first of these, which may be termed a "top-down" approach, operates through such initiatives as interdiction of drug shipments overseas and at American borders,¹³ eradication of unharvested crops,¹⁴ and appli-

¹² The discussion in the text draws heavily on the work of several prominent commentators. Stephen Schulhofer previously has expounded a similar binary classification of enforcement strategies. He distinguishes between those that aim at "supply reduction" and those that aim at "demand reduction." Stephen J. Schulhofer, *Solving the Drug Enforcement Dilemma: Lessons From Economics*, 1994 U. Chi. Legal F. 207, 235. Peter Reuter and Mark Kleiman also have closely examined the variable effects of different enforcement approaches. See Peter Reuter & Mark A.R. Kleiman, *Risks and Prices: An Economic Analysis of Drug Enforcement*, in 7 *Crime and Justice: An Annual Review of Research* 289 (Michael Tonry & Norval Morris eds., 1986).

¹³ See Skolnick, *supra* note 2, at 142-43 (reporting seizures of drug-laden cargo ships and planes by U.S. enforcement agencies at domestic ports, at sea, and over Peruvian Andes).

cation of prosecutorial discretion to work upwards through distribution networks toward the punishment of drug "kingpins." Such an approach roughly describes the outlines of federal drug enforcement in the United States today.¹⁵

The second enforcement paradigm, which may be termed a "bottom-up" approach, seeks to interfere with the smooth functioning of the retail drug market. Its usual tactic is the "buy-and-bust" operation,¹⁶ although the rigorous enforcement of parole and probation conditions through mandatory drug testing also plays a role.¹⁷ Local police departments are more likely than their federal counterparts to engage in this form of enforcement.¹⁸

Critically, top-down and bottom-up approaches have different effects on drug markets. One important effect of a top-down approach is an increase in the retail price of illicit substances. The extent of this impact, however, is far from clear. During the 1980s, the price of cocaine fell by as much as one half despite the infusion of new enforcement resources into initiatives designed to reduce its supply.¹⁹ Policy analysts also have concluded that the United States's present invest-

¹⁴ See Karen DeYoung, *Behind U.S.-Peru Pact, a History of Division*, Wash. Post, Apr. 25, 2001, at A28 (reporting that aerial crop eradication is among principal drug-enforcement methods funded by U.S. in Colombia); Ruth Morris, *Farmers Decry Effort to Halt Coca Planting*, L.A. Times, Dec. 20, 2001, at A22 (reporting that 35,000 Colombian farmers have signed pacts to destroy coca plants under \$1.3 billion U.S. initiative).

¹⁵ See Reuter & Kleiman, *supra* note 12, at 315, 331 n.24 (calculating that interdiction of drug shipments at U.S. borders accounted for roughly one-third of all federal drug-enforcement expenditures in 1982 and noting that "federal agencies . . . eschew low-level investigations and arrests"); see also Drug Enforcement Admin., U.S. Dep't of Justice, DEA Mission Statement, at <http://www.usdoj.gov/dea/agency/mission.htm> (last visited Aug. 16, 2002) (identifying one agency objective as "[i]nvestigation and preparation for the prosecution of major violators of controlled substance laws operating at interstate and international levels").

¹⁶ In a "buy-and-bust," an undercover police officer purchases narcotics from a dealer operating on the street or out of a storefront. The dealer is arrested after the sale, often in possession of "prerecorded buy money," or bills of currency that can be traced to the undercover agent through a record of their serial numbers. For a sustained treatment of this law enforcement technique, see generally Mark Harrison Moore, *Buy and Bust: The Effective Regulation of an Illicit Market in Heroin* (1977).

¹⁷ See Skolnick, *supra* note 2, at 149 (attributing growth in prison population during 1980s in part to greater reliance on increasingly sophisticated drug testing of parolees and probationers).

¹⁸ See Mark A.R. Kleiman & Kerry D. Smith, *State and Local Drug Enforcement: In Search of a Strategy*, in 13 *Crime and Justice* 69, 96-102 (Michael Tonry & James Q. Wilson eds., 1990) (reporting undercover intervention in street-level retail markets as enforcement measure common to narcotics operations of New York, Los Angeles, and Detroit police forces).

¹⁹ Reuter & Kleiman, *supra* note 12, at 298 tbl.5 (citing U.S. Department of Justice statistics on cocaine prices from 1980 to 1984). Another researcher reports that the price of cocaine dropped by eighty percent over the course of the 1980s. Nadelmann, *supra* note 3, at 291; see also Jonathan P. Caulkins & Peter Reuter, *What Price Data Tell Us About*

ment in supply restriction is sufficiently high to limit the efficacy of any further investment.²⁰ Nonetheless, it is clear that top-down enforcement has to date raised the price of drugs significantly above those which would obtain in an unregulated market.²¹ By way of illustration, it is notable that the cost of refining, importing, and distributing cocaine is unlikely to exceed three dollars per gram in the absence of all market controls.²²

At the same time, the “successful” execution of a top-down approach actually exacerbates collateral crimes connected with drug distribution.²³ Interdiction, crop eradication, and the successful prosecution of key personnel do not end the supply of drugs altogether; rather, their immediate effect is to spawn instability in the market shares controlled by different distribution networks.²⁴ This

Drug Markets, 28 J. Drug Issues 593, 601 fig.1 (1998) (charting parallel declines in retail prices of heroin and cocaine between 1980 and 1996).

²⁰ See Reuter & Kleiman, *supra* note 12, at 335 (finding that intensified federal enforcement is “not likely” to raise prices of cocaine or marijuana above existing levels); Jonathan P. Caulkins, *Do Drug Prohibition and Enforcement Work?* 5-8 (Lexington Inst., What Works? Series No. 18, 2000), <http://lexingtoninstitute.org/whatworks/whtwrks18.htm> (concluding that “the U.S. is now in a region of diminishing returns” with respect to capacity of further enforcement to raise price of cocaine); cf. Caulkins & Reuter, *supra* note 19, at 604 (“After a certain point, further intensification of enforcement has only modest effects in further raising the price of drugs in the long run.”).

²¹ See Reuter & Kleiman, *supra* note 12, at 335 (noting that illicit drugs are “vastly more expensive than [they] would be if legally available, mostly a consequence of illegality per se and of the enforcement of that illegality”); Caulkins, *supra* note 20, at 5 (“Legalizing cocaine would likely lead to price declines of much more than ten percent.”); Caulkins & Reuter, *supra* note 19, at 603 (“Even though enforcement is directly responsible for only a third of drugs’ prices, it is indirectly responsible for much more by giving force to the prohibition.”).

²² Caulkins, *supra* note 20, at 5-7 (accounting for costs of importing, packaging, and distributing cocaine in absence of criminal sanctions to describe “viable business model” that achieves one hundred percent mark-up by selling product at three dollars per gram). To refer to the price of cocaine “in the absence of all market controls” is not to suggest that the only such controls are criminal sanctions. Rather, it might be possible to inflate the price of cocaine substantially above production and distribution costs through the use of noncriminal regulatory enforcement. See *infra* note 119 and accompanying text. By contrast, the Drug Enforcement Administration reports that a gram of cocaine currently sells in Miami for between \$70 and \$110. Telephone Interview with Joe Kilmer, Spokesperson, Drug Enforcement Administration, Miami, Fla. (Sept. 29, 2002).

²³ See, e.g., Schulhofer, *supra* note 12, at 224 (noting that under condition of inelastic demand, enforcement-driven reductions in drug supply increase aggregate dealer revenues and thus heighten incentives for violence); see also Paul J. Goldstein et al., *Crack and Homicide in New York City: A Case Study in the Epidemiology of Violence*, in *Crack in America*, *supra* note 3, at 113, 123 (concluding that “a large majority” of drug-related homicides can be explained by fact that buyers and sellers must conduct transactions in illicit market).

²⁴ See Reuter & Kleiman, *supra* note 12, at 326 (“It is likely that there are enough potential dealers to keep the removal of the less competent from making a difference in the market.”); Schulhofer, *supra* note 12, at 212 (observing that subordinates and challeng-

the violence that a top-down approach effectively encourages.³⁷ At the same time, since nonmonetary costs cannot be financed in cash, successful bottom-up enforcement does not cause any spread of property crime.³⁸

II

TOP-DOWN ENFORCEMENT:

HIGHER PRICES FOR ALL, MORE CRIME FOR THE POOR

Before turning in Part III to the relationship between bottom-up enforcement and the interests of the poor, the relatively direct impact of top-down enforcement may be assessed in light of its two key consequences: higher drug prices and more drug-related crime. Whereas price increases should have a positive effect on the poor, the spread of violence and property crimes has a negative one.

The primary significance of higher drug prices is their tendency to discourage drug use among persons who are sufficiently sensitive to monetary costs. Lower rates of drug use should, all else being equal,³⁹ cause corresponding declines in drug abuse. While higher prices may have little impact on persons suffering from drug addiction, such costs discourage use among both casual users and nonusers.⁴⁰ Furthermore, the poor are more likely than others to feel the effects of this disincentive because they are typically more sensitive to price.⁴¹

As Part III argues, the poor are generally in greater danger than others of developing abusive drug habits.⁴² As a result, law enforce-

³⁷ See Schulhofer, *supra* note 12, at 225 (observing that lower aggregate revenues lessen "incentives for predatory and organizational crime" among drug dealers).

³⁸ See *id.* at 232 ("Buyers cannot finance higher non-monetary prices, such as search time and expected punishment, by committing more predatory crime."); Reuter & Kleiman, *supra* note 12, at 329 (noting that longer search times discourage property crimes "by making it harder to convert money into [illicit drugs]").

³⁹ In fact, as Part III, *infra*, argues, "all else" is not equal—drug enforcement likely has the perverse effect of encouraging drug abuse among some users, especially among poor ones. Nonetheless, this effect competes with the deterrence caused by higher prices, which have a causal significance independent of the dynamic considered in Part III.

⁴⁰ Economists have generated empirical support for the proposition that demand for addictive substances is significantly more sensitive to price than might be thought. See Michael Grossman et al., *A Survey of Economic Models of Addictive Behavior*, 28 *J. Drug Issues* 631, 635-37 (1998) (collecting studies of demand for cocaine, opiates, cigarettes, and alcohol that consistently "report negative and significant price effects").

⁴¹ *Id.* at 635 ("[T]he poor . . . are more sensitive to changes in money prices of addictive goods, whereas the middle or upper income classes . . . respond more to changes in the perceived or actual harmful consequences that take place in the future.").

⁴² This heightened vulnerability owes in large part to the more despondent circumstances of the poor and the stigma that attaches to any drug use in which they engage. See *infra* Part III.A. Although national survey data do not facilitate direct evaluation of whether poor people are more likely than others to abuse drugs, inferences may be drawn from several proxy variables—educational attainment and employment status—on which

ment that raises prices may be especially welcome as an effective means of encouraging some number of poor people either to abstain from use or to exercise enough caution to forestall the development of an abusive habit.⁴³

Against this benefit, however, must be considered the impact on the poor of top-down enforcement's aggravation of drug-related violence and property crime. Decisive in this regard is the concentration of drug distribution in poor urban neighborhoods.⁴⁴ Since these communities are often the sites for key transactions in the chain of drug distribution, they are also the logical sites for the "organizational violence" prompted by top-down enforcement. The successful removal of kingpins from particular cities gives rise to "turf wars" in which the poor communities where drug sales take place are the contested ter-

systematic data have been collected. Each of these variables is tracked by the National Household Survey on Drug Abuse. See *supra* note 10.

Educational attainment corresponds to a significant degree with income. While the mean yearly earnings among adults with only a high school degree was \$24,572 in 1999, college graduates earned \$45,678 on average, and those with professional degrees took in \$100,987. U.S. Census Bureau, U.S. Dep't of Commerce, Statistical Abstract of the United States: The National Data Book 140 tbl.218 (121st ed. 2001). Employment status at any one point in time may be a less reliable indicator of social class, but higher rates of unemployment among lower-paid, less-skilled workers suggest that it also correlates to some degree with income. In 1999, the lowest rate of unemployment, 1.7%, was among persons who normally worked in either managerial or professional capacities, whereas those working in service occupations had a 5.3% unemployment rate, and workers in skilled and unskilled trades had unemployment rates ranging from 3.5% to 11.6%. *Id.* at 388 tbl.603.

With respect to each of these proxies, the results of the 1999 National Household Survey on Drug Abuse suggest the disproportionate representation of the poor among the ranks of drug abusers. Adult survey respondents over twenty-five years of age who had not completed high school were almost three times more likely to report drug dependence than college graduates. 1999 NHSDA, *supra* note 6, app. g tbl.G.87 (reporting drug dependence rates of 1.4% among persons who had not completed high school and 0.5% among college graduates). Similarly, unemployed respondents over twenty-five years old were seven times more likely than fully employed ones to meet accepted criteria of drug dependence. *Id.* (finding drug dependence rates of 6.0% among unemployed and 0.8% among the fully employed). Inasmuch as race also may be taken as a proxy for income, heightened rates of drug abuse among people of color provide further evidence for the same pattern among the poor. See *supra* note 6.

Although survey respondents' hesitance to answer questions honestly may mean that reported rates of drug abuse underestimate actual rates, the NHSDA does assure confidentiality and privacy by providing respondents with means to record their answers without disclosing them to surveyors. In addition, surveyors later amend any inconsistent answers given by respondents in an effort to achieve the greatest accuracy possible. See 1999 NHSDA, *supra* note 6, § 1.2.

⁴³ In this regard, however, it should be noted that top-down enforcement is not necessarily the only means of raising drug prices. See *infra* note 119 and accompanying text.

⁴⁴ See, e.g., Alex Kotlowitz, *There Are No Children Here: The Story of Two Boys Growing Up in the Other America* (1991) (describing extent and pervasiveness of drug trade in Chicago public-housing project).

rain. Violence generated by efforts to intimidate potential informants is also most likely to occur in these communities.⁴⁵

In the nearly two decades since the emergence of crack cocaine, there has been no shortage of attention directed to the dismal regularity with which drug-related violence terrorizes persons whose only relationship to the drug trade is the proximity of their homes or workplaces to its public markets.⁴⁶ Whether in the form of indiscriminate crossfire, mistaken identity, or simple gratuitousness, the needless killing of these victims has become distressingly familiar. The concentration of this violence in poor neighborhoods makes poor people the usual victims, and its aggravation makes poor neighborhoods more dangerous for all who live there. Like indiscriminate slayings themselves, this psychological injury must be reckoned a burden that top-down enforcement reserves for the poor.

The same pattern also may describe the incidence of the property crime spurred by top-down enforcement. To be sure, inasmuch as drug-related property crimes must be remunerative, the poor are less likely targets; to paraphrase Willie Sutton, thieves target the wealthy because that's where the money is.⁴⁷ But proximity no doubt plays a role in target selection for drug abusers desperate to raise the funds needed to quench a "jones" as quickly as possible.⁴⁸ Since a dispro-

⁴⁵ Phillipe Bourgois offers a disturbing account of the extent of drug-related violence in one such community, New York City's Spanish Harlem. He emphasizes that crack dealers' daily displays of violence ultimately "seep[] into the fabric of the inner city, impinging upon its residents—including the majority of the population who work 9 to 5 plus overtime All who frequent the streets will be exposed to the violence of the underground economy even if they do not participate in it." Phillipe Bourgois, *In Search of Horatio Alger: Culture and Ideology in the Crack Economy*, in *Crack in America*, *supra* note 3, at 57, 68.

⁴⁶ Journalist Alex Kotlowitz provides one of the more moving, and less sensationalistic, accounts of this tragedy in his portrait of life in Chicago's Henry Horner Homes. See Kotlowitz, *supra* note 44, at 17-18, 39-42 (describing residents' practiced, self-protective reactions to recurrent gun fights between gangs battling for control of drug trade in public-housing project); cf. Ansley Hamid, *The Political Economy of Crack-Related Violence*, 17 *Contemp. Drug Probs.* 31, 62 (1990) (noting death of off-duty mailman shot when crack dealers sprayed street corner with machine gun fire).

⁴⁷ "Because that's where the money is," Sutton is said to have replied when asked why he robbed banks.

⁴⁸ See George F. Rengert, *The Geography of Illegal Drugs* 92-104 (1996) (theorizing as to probable concentration of drug-related property crime in area between drug users' residences and sites of drug sales). Anecdotal evidence reported in Goldstein et al., *supra* note 23, provides an interesting, if highly speculative, insight into target selection by thieves seeking funds to purchase drugs. Of eight 1988 New York City homicides that occurred during robberies or burglaries committed to raise money for the purchase of crack cocaine, six involved elderly victims. *Id.* at 116-17. At least in the case of burglaries, this high proportion of vulnerable, aged persons attacked may well be more than coincidence: Users presumably chose premises where they could be confident residents would pose the least threat. Target selection of this kind naturally will be most feasible in the user's own

portionate share of drug abusers are poor,⁴⁹ and since the poor are most likely to find it necessary to resort to illegal means of fundraising, a disproportionate share of drug-related property crime is likely to befall people living alongside impoverished drug abusers—namely, other poor people. Theft driven by drug abuse and proximity may affect the poor directly, should their own property be stolen. Further indirect harm may follow from the robbery of local businesses, which is likely to drive up the prices the poor face as consumers and diminish the job security and safety they encounter as employees.

III

BOTTOM-UP ENFORCEMENT AND THE DEMOGRAPHY OF DRUG ABUSE

Unlike top-down enforcement, the small-scale, retail-market offensives that are characteristic of bottom-up enforcement do not aggravate drug-related violence and property crime.⁵⁰ This is a considerable good from the perspective of the poor. As the following Sections argue, however, bottom-up enforcement takes its own toll among the poor by exacerbating their vulnerability to drug abuse. This effect initially may seem unlikely, since bottom-up enforcement augments the nonmonetary costs associated with drug transactions and therefore should cause some corresponding reduction in drug use. Before turning to the question of how drug abuse among the poor can defy this general trend, it is necessary to note a distinction between drug use and abuse.

Exactly where to draw a line between use and abuse is far from clear.⁵¹ Nonetheless, the two may be usefully distinguished in the abstract by reserving the term “drug abuse” for use that is of sufficient magnitude or frequency to interfere significantly with other aims the user had valued prior to the development of such a habit.⁵² This definition excludes what may be referred to as “controlled” or “recrea-

neighborhood or among the user's personal acquaintances. It seems unlikely that this pattern would be any different in the case of robberies and burglaries that do not culminate in homicides.

⁴⁹ See *supra* note 42; see also *infra* Part III.A.

⁵⁰ See *supra* text accompanying notes 31-38.

⁵¹ See Norman E. Zinberg, *Drug, Set, and Setting: The Basis for Controlled Intoxicant Use* 19 (1984) (remarking that “the greatest problem I faced in studying controlled users of illicit drugs was that of differentiating between drug use and drug abuse”).

⁵² Although Franklin Zimring and Gordon Hawkins employ different terminology, they rely on a similar distinction to differentiate between destructive and benign drug use. See Zimring & Hawkins, *supra* note 1, at 32 (defining drug use as “addictive behavior” when it “assumes a functional importance for the individual concerned, such that it renders his or her other social roles and preferences increasingly unimportant”).

tional" use—use that is sufficiently contained to be reconciled with other important aspects of a user's life.⁵³ Differentiating in this way between use and abuse suggests the possibility of decreasing drug use existing alongside increasing drug abuse.

Section A begins an exploration of how bottom-up enforcement gives rise to a dynamic of precisely this kind by reviewing what is termed here a "psychosocial theory" of drug abuse. This theoretical approach emphasizes the role of social context in structuring the experience of drug use and encouraging or discouraging drug abuse.⁵⁴ Sec-

⁵³ The fourth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) offers a definition of drug abuse that aspires to greater precision than the one offered in the text. The DSM-IV provides four criteria of abuse, which may be summarized in condensed form as use that interferes with "major role obligations at work, school, or home;" use under physically hazardous circumstances, such as before or while driving; use that gives rise to legal problems; and use that remains undeterred despite the "persistent or recurrent social or interpersonal problems" it causes. Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 182-83 (4th ed. 1994) (distinguishing between "abuse" and "dependence").

⁵⁴ A necessary corollary of psychosocial theory's emphasis on social context is its relative neglect of pharmacology, or the physiological effects of the different chemical compounds that are the active ingredients of illicit drugs. For an example of policy analysis that favors a pharmacological explanation of drug use and abuse, see generally Avram Goldstein & Howard Kalant, *Drug Policy: Striking the Right Balance*, 249 *Sci.* 1513 (1990). In relying upon a psychosocial rather than a pharmacological theory of drug abuse, this Note does not presume that psychosocial theories are necessarily better than pharmacological ones. To some extent, no doubt, drug abuse can be understood in terms of chemical phenomena. Yet few, if any, authorities maintain that social variables play no role in the development of compulsive habits of use. Cf. *id.* at 1515 (drawing on "pharmacologic, toxicologic, social, and historical" factors in assessment of contemporary drug policy's effects). The insights to be gained from a psychosocial approach therefore merit at least some consideration in the design of drug policy. Exactly how much consideration to give them is a question that must await further research.

A less prominent alternative to psychosocial theories of drug abuse has emerged in the field of economics. Despite the seeming disharmony of compulsive drug use with the concept of utility-maximizing rationality, one of the discipline's most distinguished figures, Gary Becker, recently has devoted considerable energy to the formulation of a theory of "rational addiction." See generally Gary S. Becker & Kevin M. Murphy, *A Theory of Rational Addiction*, 96 *J. Pol. Econ.* 675 (1988) (constructing mathematical model of rational addiction). At the heart of the rational addiction approach is the premise that drug consumers take account of the effects of present consumption on their future welfare. See, e.g., Grossman et al., *supra* note 40, at 632-33 (distinguishing theory of rational addiction from earlier economic theories of addiction by emphasizing notion that consumers "take account of future effects of current consumption when they determine the optimal quantity of an addictive good in the present"). The rate at which drug consumers "discount" future welfare in assessing its present value therefore becomes a critical variable in assessing how prone they are to drug abuse: Drug users with high discount rates are more likely to be careless in evaluating whether they will be able to maintain a particular level of drug consumption over time. Cf. Gary S. Becker, *Habits, Addictions, and Traditions*, 45 *Kyklos* 327, 330 (1992) ("Since people who heavily discount the future . . . would place little weight on the future consequences of their behavior, they are less likely to be deterred from 'harmful' activities that reduce future utility . . ."). As a result, they are more likely to find themselves in situations requiring the desperate measures constitutive of drug abuse.

tion B applies psychosocial insights to conclude that bottom-up enforcement exacerbates many poor people's vulnerability to drug abuse. It first demonstrates that the manner in which bottom-up enforcement affects the retail drug market—by augmenting the full price or “nonmonetary costs” around which buyers and sellers must negotiate⁵⁵—is of significantly greater efficacy in deterring drug use among the nonpoor than the poor. It then explores how this uneven deterrent effect promotes public attitudes that tend to frustrate efforts on the part of users, an increasing portion of whom will be poor, to develop and maintain moderate styles of use. Finally, in order to illustrate this dynamic, Section B presents the spread of crack cocaine in the 1980s as an example of how changing public attitudes—in this case, attitudes about cocaine smoking—can render an existing form of drug use increasingly harmful.

A. “Set,” “Setting,” and Drug Abuse

Under the psychosocial theory of drug abuse, individual personality and social context are the critical variables in the development of harmful drug habits.⁵⁶ The psychosocial approach does not argue that the metabolic career of psychoactive substances within the human body is irrelevant; indeed, psychosocial theorists readily acknowledge the reality of mood alterations produced by the ingestion of illicit

Although an interesting alternative to the psychosocial approach, the theory of rational addiction does not yield any obvious insights into the relationship between bottom-up enforcement and the interests of the poor.

⁵⁵ See *supra* text accompanying notes 31-35.

⁵⁶ A pioneer in the study of how psychological and social contexts structure the experience of drug use was sociologist Howard Becker. Becker's study of “becoming a marijuana user,” which described a learning process through which marijuana users came to apprehend and enjoy the drug's effects, remains a classic. See Howard S. Becker, *Outsiders: Studies in the Sociology of Deviance* 41-58 (1963). For more recent applications of a psychosocial approach, see, e.g., Sheigla B. Murphy & Marsha Rosenbaum, *Two Women Who Used Cocaine Too Much: Class, Race, Gender, Crack, and Coke*, in *Crack in America*, *supra* note 3, at 98, 110 (accounting for differences in cocaine-using careers of two women by examining how “class and race profoundly shaped the context” of their encounters with drug); Zimring & Hawkins, *supra* note 1, at 11 (describing “specifist” approach that differentiates between substances on basis of their destructiveness “in a social context”); Zinberg, *supra* note 51, at 11-15 (explaining users' experience of hallucinogenic drugs and opiates in late 1960s and early 1970s by reference to contexts in which these drugs were used, namely, within countercultural movements or while serving in Vietnam); Jerome H. Skolnick, *The Social Transformation of Vice*, 51 *Law & Contemp. Probs.* 9, 10-12 (1988) (attributing changing attitudes about relative harmfulness of different “vices” to shifting cultural values).

drugs.⁵⁷ Yet they insist on the insufficiency of these physiological reactions as an explanation for how users experience drugs.⁵⁸

Norman Zinberg, a physician who specialized in the clinical treatment of substance abuse, famously referred to “set” and “setting” as shorthand for the nonphysiological variables that must be taken into account if drug use and abuse are to be understood. By “set,” Zinberg meant the personal expectations and individual personalities that particular users bring to the experience of drug use.⁵⁹ By “setting,” he meant the shared sanctions and rituals that structure users encounters with a drug.⁶⁰ It is this “setting” variable that is most important in the assessment of bottom-up enforcement’s impact on drug use and abuse among the poor.

1. *Accounting for Social Context*

Zinberg’s analysis of setting emphasizes the role of social stigma in making it more difficult for drug users to develop and maintain forms of recreational use that do not interfere with other aspects of their lives. Drawing on detailed interviews with opiate⁶¹ users, he identifies several mechanisms through which stigma may have this effect. First, stigma discourages drug users from disclosing their use to anyone not known to engage in the same practices.⁶² This defensive

⁵⁷ See, e.g., John P. Morgan & Lynn Zimmer, *The Social Pharmacology of Smokeable Cocaine: Not All It’s Cracked Up to Be*, in *Crack in America*, supra note 3, at 131, 135-39 (describing psychostimulant and physiological effects of cocaine while also insisting that “drug consumption must be understood, primarily, as a social-psychological phenomenon”).

⁵⁸ Norman Zinberg uses the example of alcohol to illustrate the insufficiency of purely physiological explanations: “[A]lcohol suppresses the action of certain inhibiting centers in the brain and can have no result inconsistent with this action. Yet the range of actual effects in terms of both behavioral change and psychic state is extremely wide.” Zinberg, supra note 51, at 172-73.

⁵⁹ Id. at 5 (describing “set” as “the attitude of the person at the time of use, including his personality structure”); see also id. at 74-76 (evaluating “set” of different drug users through examination of personality traits, childhood experiences, and motives for use).

⁶⁰ Id. at 5 (describing “setting” as values, rules of conduct, and patterns of behavior associated with drug use); see also id. at 81 (evaluating different settings of drug consumption through “two broad types of . . . variables: the using style of friends and mates and the rules for use”). The distinction between Zinberg’s concepts of “sanction” and “ritual” is discussed infra in notes 65-69 and accompanying text.

⁶¹ The term “opiate” encompasses the family of natural derivatives and synthetic analogues of the resin produced by the opium poppy (*Papaver Somnifera*). Among the better known varieties of opiates are heroin, morphine, codeine, and methadone. See Zinberg, supra note 51, at 152 (summarizing historical development of opium derivatives and synthetics).

⁶² See id. at 129-30 (collecting interviewees’ reports as to necessity of concealing heroin use from friends and acquaintances); id. at 153 (reporting that “[t]he controlled opiate users in our study . . . tended to keep their use a closely guarded secret from everyone except one or two dealers and their opiate-using friends”).

reaction protects users from contempt and discrimination, but it also makes it more difficult for them to meet fellow users who have successfully integrated recreational use with other valued commitments and pursuits.⁶³

As a result, stigma often prevents users from collaborating in the development of rules that structure encounters with a drug and thereby help contain its potential for abuse.⁶⁴ Zinberg refers to moderating controls of this kind by the terms "sanction" and "ritual." Sanctions, which he defines as "values and rules of conduct,"⁶⁵ include imperatives such as "use only on weekends." Rituals, which he defines as "patterns of behavior,"⁶⁶ encompass such practices as smoking marijuana from a cigarette that is passed among a circle of people. Both sanctions and rituals serve to limit use,⁶⁷ sanctions by facilitating the deliberate observation of defined limits and rituals by structuring the circumstances of use independently of users' intentions.⁶⁸ By driving drug use underground, however, stigma interferes with communication of the knowledge and practices out of which such controls can develop.⁶⁹

A second means by which stigma promotes drug abuse is in effect the converse of the first. Drug users practice discretion only to the extent that an interest in pursuing other goals renders them sensitive to the threat that stigma will frustrate those pursuits.⁷⁰ As a result,

⁶³ See *id.* at 16 (observing that users' tendency to conceal drug use generally forestalls opportunity to choose among different groups of users, making "association with controlled users . . . largely a matter of chance"); *id.* at 153 (noting that "general attitude of condemnation" made it more difficult to locate opiate-using research subjects than subjects who used marijuana or psychedelic drugs).

⁶⁴ See *id.* at 17 (concluding that "opportunities for learning how to control illicit drug consumption are extremely limited").

⁶⁵ *Id.* at 5.

⁶⁶ *Id.*

⁶⁷ *Id.* at 17-18 (cataloguing ways in which sanctions and rituals moderate drug use).

⁶⁸ Zinberg illustrates the operation of ritual through several observations regarding the practice of sharing a single marijuana cigarette. Since sharing requires users to wait their turn to smoke, each user, upon receiving the cigarette, generally will wish to keep it from others for a shorter rather than longer period of time. This form of courtesy is one way in which the ritual limits the extent of consumption. Furthermore, as the cigarette passes among others, users have the opportunity to gauge the effect of the marijuana they have consumed already and to decline more if satisfied with their level of intoxication. The delay between drags thereby helps users avoid consuming too much of the drug. See Zinberg, *supra* note 51, at 137-38.

⁶⁹ Cf. *id.* at 18 (reporting that "[v]irtually all of our [controlled] subjects had been assisted by other noncompulsive users in constructing appropriate rituals and sanctions out of the folklore and practices circulating in their drug-using subculture"); *id.* at 154-55 (providing examples of controlled users' enforcement of common sanctions against one another).

⁷⁰ See *id.* at 155 ("In effect, our controlled subjects were able to construct a hierarchy of values—a list of activities that were important to them—and then to assign to opiate use

stigma leaves those persons who are most exclusively committed to drug use—by definition, persons struggling with drug abuse—as the most visible representatives of the drug-using population.⁷¹ It is to such persons that recreational drug users often turn for their supply of drugs.⁷² In doing so, they encounter the possibility of a life centered on drug consumption.⁷³ Whereas some users respond to this prospect by developing self-protective rules and rituals,⁷⁴ others find the perverse courage to abandon commitments that interfere with a drug-centered life.⁷⁵

2. *The Impact of Poverty*

Zinberg's concepts of "set" and "setting,"⁷⁶ and in particular his emphasis upon the role of stigma, help illuminate how poverty encourages behaviorally disruptive forms of drug use. The role of poverty can be broken down into two complementary dynamics. First, poverty renders the set, or personality and attitudes, of particular users more abuse-prone. Second, it aggravates drug-related stigma in a way that contributes to more dangerous settings, or social contexts, of use.

The set that poor people bring to drug use often will be shaped by the material deprivations that constitute poverty. This is not to suggest that poverty necessarily leads all poor persons who experiment with drugs to become drug abusers; clearly, some poor drug users are able to draw on sufficient personal resources to maintain a controlled using style. What is offered here is an assessment of probabilities: Poor people are on the whole more prone than the affluent to face

a ranking somewhere within that hierarchy. Unlike compulsive users, they did not put opiates at the top of the list.").

⁷¹ See *id.* at 153 ("[I]n the absence of a highly visible, communicative population of controlled users[,] . . . the addict subculture is the only readily available source of expertise about [opiates].").

⁷² *Id.* at 130-31.

⁷³ See *id.* at 153 (noting that moderate opiate users, in course of encounters with addict-suppliers, are "repeatedly and seductively invited to become full-fledged members of the junkie subculture").

⁷⁴ *Id.* at 131-34 (quoting controlled users' reports of their fear of succumbing to "junkie" lifestyle and asserting that such fear sometimes "acted like a sanction or rule" to support moderate use); *id.* at 155 ("[A] user's constant fear of associating with junkies or of becoming addicted implies a sanction against uncontrolled use.").

⁷⁵ See *id.* at 153 ("[A]lthough the life-style of the addict is repugnant to most controlled users, they sometimes find the addict's bold, outlaw stance attractive."); see also Craig Reinerman & Harry G. Levine, *Real Opposition, Real Alternatives: Reducing the Harms of Drug Use and Drug Policy*, in *Crack in America*, *supra* note 3, at 345, 359 (remarking that "marginalizing drug use into deviant subcultures increases the likelihood of abuse").

⁷⁶ See *supra* notes 59-60 and accompanying text.

circumstances that frustrate the development of attitudes that dispose them to moderate use.⁷⁷

For example, poor people’s educational opportunities—and, often as a result, their occupational opportunities as well—may hold

⁷⁷ See Craig Reinerman et al., *The Contingent Call of the Pipe: Bingeing and Addiction Among Heavy Cocaine Smokers*, in *Crack in America*, *supra* note 3, at 77, 92 (finding that “permanent unemployment, horrible living conditions, and no reasonable hope for a better future make the poor more vulnerable” to all forms of “long-term, hard-drug abuse and addiction”).

A curiously recurrent pattern in statistics on drug abuse lends credence to the notion that relatively benign drug experimentation among the affluent may become highly dangerous use among the poor. People who share socioeconomic characteristics corresponding with poverty, see *supra* note 42, are, paradoxically, most likely to become abusers of illicit drugs even though they are least likely to try such drugs in the first place.

A comparison of college graduates and high school drop-outs provides one example. College graduates are significantly more likely than persons who never complete high school to sample at least one illicit drug in their lifetime: nearly half (45.6%) report such experimentation, while fewer than a third (30%) of high school drop-outs make the same admission. 1999 NHSDA, *supra* note 6, § 2.1. Yet the opposite pattern holds true of the rates at which members of these two groups report use of an illicit substance in the past month. While 4.8% of college graduates meet this criterion, 7.1% of high-school drop-outs do. *Id.* Since recent drug use, such as use within the past month, is a prerequisite of substance abuse, this pattern suggests the existence of a higher rate of substance abuse among high school drop-outs than among college graduates. Cf. Morgan & Zimmer, *supra* note 57, at 143-44 (gauging relative addictiveness of crack and powder cocaine by comparing rates of past-month use, but cautioning that “[t]he fraction of these ‘past-month’ users who go on to daily use and therefore, arguably, to ‘addiction’ is far smaller”).

Data on drug use and employment status present a similar pattern. Whereas unemployed persons are only slightly more likely ever to have sampled drugs than are the full-time employed, they are between 47% and 155% more likely to be current drug users. This pattern emerges from a comparison of a number of pieces of data collected by the NHSDA:

Persons Between Ages 18 and 25		
Employment Status	Percentage Reporting Drug Use at Any Point in Life	Percentage Reporting Drug Use Within Past Month
Employed Full-Time	55.2	16.1
Unemployed	55.0	23.6

Persons Age 26 or Older		
Employment Status	Percentage Reporting Drug Use at Any Point in Life	Percentage Reporting Drug Use Within Past Month
Employed Full-Time	48.8	5.1
Unemployed	54.6	13.0

1999 NHSDA, *supra* note 6, app. g tbls.G.15 & G.16; see also *supra* note 6 (describing same pattern of inverse variation between rates of drug abuse and drug use among white persons and people of color).

In sum, these statistics indicate that higher rates of drug abuse among members of certain groups owe not to their wider use of drugs but to the greater danger that inheres in the experimentation in which they do engage. Since education and employment status correlate to some degree with poverty, see *supra* note 42, this pattern suggests that drug use is often more dangerous for the poor than for others.

little or no promise of particularly remunerative, secure, or meaningful work.⁷⁸ This grim prospect provides little incentive to take care that a drug habit not become so serious as to interfere with the ability to carry out job responsibilities. In this connection, Zinberg's observation that controlled users generally value the status gained from work more than compulsive users suggests one explanation for why poverty correlates with drug abuse.⁷⁹ Likewise, the myriad everyday difficulties created by limited economic means understandably may promote escapism, a drive with which drug use is of course highly compatible.

Still more significant than the relationship between poverty and set is that between poverty and setting. The impact of stigma, a phenomenon with which all drug users must contend, is unusually pronounced among the poor. Throughout the last century, particular drugs have taken on negative connotations upon becoming associated with groups defined by race and social class.⁸⁰ Opium use became newly stigmatized when it was identified with Chinese immigrants,⁸¹ marijuana when identified with Mexican laborers,⁸² and cocaine when identified with poor Southern and urban blacks.⁸³ Even the very term "drug abuse" may have entered the lexicon as a means of describing drug use among particular ethnic minority groups.⁸⁴ Inasmuch as drugs have come to be stigmatized in the absence of any association

⁷⁸ For example, statistical evidence shows that job security is lower in less remunerative occupations. See *supra* note 42. Similarly, an ethnographer of the New York City drug trade reports that part of drugs' appeal for his subjects, poor residents of Spanish Harlem, owed to the "silent, subtle humiliations" of "the entry-level labor market." Bourgois, *supra* note 45, at 73.

⁷⁹ See Zinberg, *supra* note 51, at 161-62 (explaining that many moderate users "had a primary commitment to work that went beyond earning a living").

⁸⁰ See Craig Reinerman & Harry G. Levine, *Crack in Context: America's Latest Demon Drug*, in *Crack in America*, *supra* note 3, at 1, 1 ("Drug scares typically link a scapegoated substance to a troubling subordinate group—working-class immigrants, racial or ethnic minorities, rebellious youth.").

⁸¹ See David F. Musto, *The American Disease: Origins of Narcotic Control* 6 (expanded ed. 1987) (noting nineteenth-century development, during years of economic depression following construction of railroads, of "fear of opium smoking as one of the ways in which the Chinese were supposed to undermine American society").

⁸² See *id.* at 219-20 (reporting emergence during 1930s of official reports characterizing marijuana as dangerously noxious substance and attributing its proliferation to Mexican immigration).

⁸³ See Joseph F. Spillane, *Cocaine: From Medical Marvel to Modern Menace in the United States, 1884-1920*, at 90-104 (2000) (describing transformation in popular and professional perceptions of cocaine use in early part of twentieth century as drug came to be associated with hard laborers and residents of urban vice districts).

⁸⁴ See Zinberg, *supra* note 51, at 25 (noting early use of term "drug abuse" to describe cocaine use among blacks and opium use among Chinese immigrants).

with a specific ethnic group, stigmatization has emerged out of a perceived link between the drug and spurned classes of poor people.⁸⁵

Just as preoccupation with poor people's drug use can be found at the historical origin of drug-related stigmas, contemporary drug use by the poor remains a locus of popular condemnation.⁸⁶ Poor people therefore must keep their drug use especially well concealed in order to preserve opportunities that drug-related stigma could otherwise destroy.⁸⁷ In struggling to maintain controlled forms of use, they face more than the usual difficulty in locating counterparts with whom to develop constraining sanctions and rituals.⁸⁸ In addition, residential and social segregation along class lines typically cause poor people to use drugs in each other's company.⁸⁹ The elevated rate of drug abuse among the poor⁹⁰ makes these encounters unusually likely to expose participants to norms that presume and facilitate a life centered on drug use.

In sum, the limited financial, educational, and medical resources available to the poor, along with the special importance of such resources in overcoming the uniquely potent stigma that attaches to their drug use, leave poor people in especially great danger of developing abusive drug habits.

B. Street Enforcement and Its Discontents

The foregoing analysis of the relationship between poverty and drug abuse facilitates an assessment of how bottom-up enforcement affects poor people's efforts to develop moderate forms of drug use. The following Section begins by closely examining the impact of bottom-up enforcement's augmentation of nonmonetary costs. After

⁸⁵ See, e.g., Musto, *supra* note 81, at 6 ("Morphine did not become so closely associated with an ethnic minority When opiates began to be feared for their addictive properties, morphine was most closely attached to the 'lower classes' or the 'underworld,' but without greater specificity.").

⁸⁶ The example of crack cocaine, discussed *infra* Part III.B.2, best demonstrates this continuing reality. See Craig Reinerman & Harry G. Levine, *The Crack Attack: Politics and Media in the Crack Scare*, in *Crack in America*, *supra* note 3, at 18, 19 ("In 1986, politicians and the media focused on crack . . . when cocaine smoking became visible among a 'dangerous' group. Crack attracted the attention of politicians and the media because of its downward mobility to and increased visibility in ghettos and barrios.").

⁸⁷ See *supra* notes 62-63 and accompanying text.

⁸⁸ See *supra* notes 62-69 and accompanying text.

⁸⁹ Sheigla Murphy and Marsha Rosenbaum emphasize the importance of geographic segregation in sorting users "into one scene or another." Murphy & Rosenbaum, *supra* note 56, at 106. Since new users typically are introduced to drugs by friends, social segregation based on race and class plays an important role in shaping drug-using careers. See *id.* at 103-07 (comparing divergent cocaine careers of one poor and one middle-class woman in San Francisco).

⁹⁰ See *supra* notes 42, 77.

showing that poor people are less likely than others to be discouraged by these costs, this Section considers the impact of such differential deterrence on the setting, or social context, of drug use. The Section then applies psychosocial theory insights to conclude that bottom-up enforcement's impact on the demographic composition of the drug-using community tends to encourage stigma in a way that is especially generative of drug abuse among the poor. Finally, to provide an example of how analogous demographic changes have produced this effect in the past, the analysis turns to the example of crack cocaine's proliferation in the 1980s.

1. Differential Deterrence and the Aggravation of Drug-Related Stigma

The disincentives created by bottom-up enforcement—namely, greater hassles in locating dealers and a heightened risk of apprehension⁹¹—have an uneven impact across class lines. This disparity arises because the poor, despite their comparatively high sensitivity to changes in price,⁹² are for two reasons less sensitive than others to the nonmonetary costs augmented by bottom-up enforcement.

First, the concentration of drug distribution in poor neighborhoods means that drug users of limited income are, on the whole, less likely than others to be daunted by the task of locating increasingly covert dealers. This is so because poor users are more likely to live in the neighborhoods where dealers continue to operate and thus are more likely to be better informed about remaining opportunities for obtaining drugs.⁹³ As a result, the hassle to which bottom-up enforcement gives rise is a much more effective deterrent of the generally more affluent persons who reside outside poor neighborhoods.

Second, assuming that the risk of apprehension faced by the poor matches that faced by the nonpoor,⁹⁴ the significance ascribed to the consequent penalties will vary with income. Whether a bottom-up ap-

⁹¹ See *supra* notes 32-35 and accompanying text.

⁹² See *supra* notes 40-41 and accompanying text.

⁹³ The reality of poor users' readier access to dealers is clear in the divergent cocaine careers of two women recounted in Murphy & Rosenbaum, *supra* note 56, at 106. Whereas one impoverished woman of color described by the authors lived in a neighborhood where "crack had become plentiful . . . while less risky drugs such as powder cocaine and marijuana were difficult to find," a white, middle-class adolescent also interviewed by the authors encountered powder cocaine in a social scene where no one "smoked crack, and few even knew where to buy it." *Id.*

⁹⁴ This premise is a conservative one for purposes of the argument presented in the text. The same local knowledge that enables residents of poor neighborhoods to locate drug dealers more readily should also better equip them to avoid police stings—for example, by escaping through alleys or into buildings with which nonresidents are unfamiliar. The more successful poor sellers and buyers are in making these escapes, the greater the

proach relies on short-term jail stays or the full force of imprisonment, any sanction it threatens generally will inspire more dread in users the more affluent they are.

The assertion here is simply that a pattern obtains when poor people's attitudes are compared with the attitudes of the more affluent, not that every poor person shares these attitudes.⁹⁵ The nonpoor tend to avoid risking the loss of their more secure jobs and future employment opportunities more than the poor tend to value what is often tenuous, temporary, or seasonal employment.⁹⁶ Middle-class users are also more likely to suffer social opprobrium as a result of arrest and conviction on drug charges.⁹⁷ Finally, when punishment takes the form of a lengthy prison term, the loss of income suffered by the nonpoor will be greater than the corresponding loss among the poor. Of course, terms of incarceration bring other significant consequences, such as financial hardship among persons dependent on im-

difference between bottom-up enforcement's deterrent effect on poorer and more affluent participants in the drug trade.

⁹⁵ See *supra* notes 77-79 and accompanying text.

⁹⁶ See *supra* note 42 (discussing higher rates of unemployment among service and trade workers than among professional and managerial ones).

⁹⁷ Much has been written on the issue of whether there exists an "oppositional culture" or "culture of poverty" among members of an underclass excluded from many avenues of social achievement. A careful argument in this vein comes from William Julius Wilson, who identifies structural economic changes in the 1970s and 1980s as the cause of a cycle in which protracted joblessness among residents of inner-city communities led to their increasing isolation from mainstream patterns of behavior. See William Julius Wilson, *The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy* 55-62 (1987). For members of this group, imprisonment may in some instances confer a form of status. See Skolnick, *supra* note 2, at 150 (summarizing interviews that suggest "imprisonment may bring a certain elevated 'home boy' status, especially for gang youths for whom prison, and prison gangs can become an alternative site of loyalty"). In a similar vein, an ethnographer of the drug trade has described the social authority achieved by several young men through drug dealing in Spanish Harlem. See Bourgois, *supra* note 45, at 71 ("Crack dealers attain 'status' on the street that they would be hard-pressed to find in any 'legit' job open to them."). Bourgois also reports that some youths who were not "particularly active" in the drug trade wore beepers to give the impression of greater involvement. *Id.* In this context, drug-related arrests and convictions might promise at least some benefit to inner-city dealers and users, since the publicity they occasion could function to identify those apprehended with the drug trade.

At the same time, it is important to note that the different meanings possibly associated by some poor people with arrest and conviction do not imply that drug use itself is any less stigmatized among this group. Though a reputation as a dealer may be valuable, a reputation as a drug user need not confer any corresponding measure of status. See *id.* at 70 (pointing out Spanish Harlem crack dealers' openly displayed disdain for their clients). Poor users therefore may be relatively unconcerned about arrest precisely because it offers an opportunity, regardless of what crimes are actually charged, to appear involved in the distribution, rather than simply the use, of drugs. They nonetheless will continue to face the consequences of stigma in efforts to join with other drug users toward the end of developing rituals and sanctions for the control of drug use. See *supra* notes 62-69 and accompanying text.

prisoned breadwinners for their support. If such costs are suffered disproportionately by the poor, it is conceivable that the threat of imprisonment may in fact be a uniformly effective deterrent of drug use that mitigates the otherwise disparate impact of bottom-up enforcement. Yet even if this is true, it is unlikely that the caution inspired by the risk of lengthy prison terms outweighs the overall effect of those features of bottom-up enforcement that discourage drug use primarily among those with higher incomes.

The tendency of bottom-up enforcement to deter more affluent than poor users is, from the perspective of the poor, neither a harm nor a benefit; rather, it only can be considered an impact of lesser magnitude than the corresponding one upon the more affluent. The maintenance of systematically skewed disincentives over time, however, gives rise to circumstances that do have a harmful effect on the poor. By deterring more affluent than poor users, the bottom-up approach ultimately intensifies the association of drugs with the poor and thereby aggravates the same stigmas that have emerged historically from this association.⁹⁸ As insights from the psychosocial theory of drug abuse make clear, drug use is more likely to deteriorate into drug abuse the more stigmatized it is. Stronger stigma demands more discretion on the part of controlled users, exacerbating their difficulties in identifying other users with whom to develop and reinforce sanctions and rituals for containing use.⁹⁹ At the same time, heightened stigma does not end users' necessary reliance upon drug abusers for their drug supply.¹⁰⁰ Encounters with a "junkie" life-style continue to suggest the possibility of an alternative to discreet use: abandonment of concern about those pursuits with which drug-related stigma may interfere.¹⁰¹

Whether bottom-up enforcement ameliorates or exacerbates the incidence of drug abuse on the whole is therefore a question of the relative magnitude of two contending forces. On the one hand, higher nonmonetary costs should dampen the rate of drug abuse by prompting both abstention and reduced use among some potential and actual users. On the other hand, the aggravation of drug-related stigma makes it more difficult for persons who do try drugs to maintain controlled forms of use. Among affluent users for whom nonmonetary costs are in fact a significant deterrent, bottom-up enforcement may well depress the overall drug-abuse rate. But among poor people, for

⁹⁸ See *supra* notes 80-85 and accompanying text.

⁹⁹ See *supra* notes 62-69 and accompanying text.

¹⁰⁰ See *supra* notes 71-72 and accompanying text.

¹⁰¹ See *supra* notes 73-75 and accompanying text.

whom nonmonetary costs are relatively unimportant,¹⁰² the aggravation of stigma is unmet by any comparable countervailing force. As a result, for poor people, if not for the entire population, bottom-up enforcement appears likely to promote rather than reduce drug abuse.

Furthermore, this tendency of bottom-up enforcement suggests a self-reinforcing process. As more affluent users respond to higher nonmonetary costs by abstaining from use, some additional number of affluent users, though not deterred earlier by higher nonmonetary costs, are likely to end a habit that has become increasingly associated with the poor. Stigmatization therefore may grow still stronger. In the end, the process initiated by bottom-up enforcement becomes a vicious cycle in which the poor are—and, in fact, have long been—most grievously caught.

2. *Lessons from Crack Cocaine*

If the foregoing diagnosis of bottom-up enforcement's creation of a vicious cycle appears to reflect wanton pessimism, one need look no further than the crack scare of the 1980s and 1990s for an illustration. While the spread of crack cocaine itself did not result from bottom-up enforcement, its uniquely harmful import for poor inner-city populations did result in large part from demographic changes highly akin to those prompted by the increases in nonmonetary costs that are the signature of bottom-up enforcement.

At the time crack appeared in the mid-1980s, cocaine aficionados were already familiar with the practice of smoking homemade derivatives of the drug. Since at least the late 1970s,¹⁰³ "freebasing" had involved the refinement of cocaine powder into a substance that delivered cocaine vapors when burned.¹⁰⁴ Reliance upon a homemade derivative had required freebasers to purchase powder cocaine rather than a cheaper product manufactured by dealers.¹⁰⁵ As a result, cocaine freebasing was not more common among poor cocaine users than others.¹⁰⁶ Few popular institutions paid any significant attention

¹⁰² See *supra* notes 92-97 and accompanying text.

¹⁰³ Compare Reinerman & Levine, *supra* note 86, at 18 (reporting that freebasing became increasingly popular in late 1970s), with Hamid, *supra* note 46, at 57 (relating long-time drug user's initiation into freebasing "around 1973").

¹⁰⁴ When smoked, whether as freebase or crack, cocaine enters the bloodstream more quickly than when it is snorted. Morgan & Zimmer, *supra* note 57, at 133. Faster uptake produces a different high from the stimulation known to users of powder cocaine: It is shorter in duration, more intense in pleasure, and more likely to culminate in a "crash" as its effects dissipate. *Id.* at 145-46.

¹⁰⁵ See *id.* at 134 (explaining difference between dealers' and users' roles with respect to manufacture of freebase and crack).

¹⁰⁶ See Reinerman & Levine, *supra* note 86, at 18 ("All phases of freebasing, from selling to smoking, took place most often in the privacy of homes and offices of middle-class or

to the practice.¹⁰⁷ This relative tolerance persisted even as the advent of freebasing prompted a sharp upswing in cocaine consumption among higher-income users.¹⁰⁸

Smokers of cocaine, whether in the form of freebase or crack, report experiencing a rapid succession of ups and downs that spurs a powerful impulse to administer new doses as earlier ones wear off.¹⁰⁹ This tendency to “binge” is likely more common among cocaine smokers than users of powder cocaine.¹¹⁰ As freebasing grew in popularity, dealers harnessed the potential to profit from this phenomenon by cooking cocaine into crack and selling the product themselves.¹¹¹ Smaller amounts of the drug now could deliver an effective dose, making it possible to market cheaper units for sale.¹¹² This development made crack particularly alluring for people already acquainted with drug use and unable to afford more expensive highs.¹¹³ As a result, crack use came to be concentrated among poor people living in inner-city communities.¹¹⁴

With this development, the social distance between poor, inner-city communities and mainstream medical, legal, and media institutions produced a new professional and popular consensus that smoked

well-to-do users.”); cf. Hamid, *supra* note 46, at 52-53 (offering case study of freebasing among group of Greenwich Village bohemians and Rastafarian marijuana dealers).

¹⁰⁷ See Reinerman & Levine, *supra* note 86, at 18 (noting that emergence of freebasing was not accompanied by “orgy of media and political attention”).

¹⁰⁸ See *id.* (asserting increase in cocaine consumption among middle- and upper-class users in late 1970s, attributable in part to spread of freebasing).

¹⁰⁹ See Reinerman et al., *supra* note 77, at 84-88 (detailing patterns of compulsive use described by more than fifty heavy cocaine smokers with whom authors conducted in-depth interviews).

¹¹⁰ See Morgan & Zimmer, *supra* note 57, at 145-46 (observing that bingeing “appears to be more common among cocaine smokers than sniffers”).

¹¹¹ The advent of crack represented an entrepreneurial innovation rather than any purification of the refining process. In fact, the base that cocaine smokers had created before the appearance of crack delivered a purer form of cocaine. See *id.* at 134 (noting that despite this difference in purity, “the experience of smoking crack [is] quite similar to that of smoking freebase”).

¹¹² *Id.*

¹¹³ See Reinerman et al., *supra* note 77, at 77 (finding that crack users, to greater extent than other heavy users of cocaine, “had taken large amounts of licit and illicit drugs over the years”). See generally Eloise Dunlap, *Impact of Drugs on Family Life and Kin Networks in the Inner-City African-American Single-Parent Household*, in *Drugs, Crime, and Social Isolation: Barriers to Urban Opportunity* 181 (Adele V. Harrell & George E. Peterson eds., 1992) (describing drug-taking careers of six women who complemented use of crack with other drugs and had first encountered drug use at early age through family members).

¹¹⁴ See Jeffrey Fagan & Ko-lin Chin, *Initiation into Crack and Cocaine: A Tale of Two Epidemics*, 16 *Contemp. Drug Probs.* 579, 580-81 (1989) (collecting early field reports of use and marketing of crack among inner-city residents).

cocaine is a uniquely harmful substance.¹¹⁵ This novel stigmatization transformed what previously had been a comparatively controlled form of cocaine use into a widely abused one. Before the advent of crack, relatively affluent freebasers had retained the incentives and resources required to control their use or, if their use became problematic, to seek private treatment.¹¹⁶ Roughly ten years after the height of the crack scare, however, cocaine use of all kinds had declined among the middle and upper classes, while crack abuse remained a serious problem in poor communities.¹¹⁷ It is not implausible to suppose that wealthier freebasers turned away from a practice they had pioneered in response to the new popular association of cocaine smoking with the poor.

By discouraging drug use far more effectively among the nonpoor than the poor, bottom-up enforcement operates to intensify the same stigma that developed independently of law enforcement in the case of crack cocaine. So long as the concentration of drug dealing in poor neighborhoods continues to structure the impact of enforcement aimed at retail drug markets, bottom-up enforcement will produce a deterrent force that is only weakly felt by the poor.¹¹⁸ Like the exacerbation of drug-related crime caused by top-down enforcement, the tendency of bottom-up enforcement to heighten stigma and thereby produce more drug abuse is a harm that affects the poor most acutely.

CONCLUSION

This Note has argued that criminal drug enforcement gives rise to several effects of special import for the poor. Although the foregoing analysis has treated top-down and bottom-up enforcement separately, this bifurcated approach should not be read to imply that contemporary law enforcement is limited to one or the other strategy. In practice, the large number of independent agencies operating at the federal, state, and local levels has meant the simultaneous use of each kind of enforcement: Some agencies adopt top-down initiatives at the

¹¹⁵ See Morgan & Zimmer, *supra* note 57, at 134-35 (commenting on proliferation, "once crack had been introduced to the inner-city poor," of articles in specialized drug abuse and medical journals characterizing crack as unprecedented danger); Reinerman & Levine, *supra* note 86, at 18-19 (arguing that social class, race, and status of crack users attracted attention of politicians and journalists who had earlier ignored cocaine freebasing among more affluent users).

¹¹⁶ See Reinerman & Levine, *supra* note 86, at 18.

¹¹⁷ Nadelmann, *supra* note 3, at 303 (concluding, in 1997, that "[a]lthough all forms of cocaine use have declined among the middle and upper classes, crack addiction remains a very serious problem among the most impoverished and vulnerable segments of the population").

¹¹⁸ See *supra* notes 93-97 and accompanying text.

same time that others pursue bottom-up approaches. This does not mean that the good and ill effects of top-down and bottom-up enforcement simply cancel each other out. Rather, the effects of kinds of enforcement come about in tandem. The impact of contemporary drug enforcement on the poor is therefore the sum total of the full range of effects that have been discussed here.

To summarize these, the increase in drug prices prompted by top-down enforcement is certain to discourage drug use among the poor and thereby to prevent some amount of drug abuse as well. Yet top-down enforcement's aggravation of drug-related violence and property crime takes an unusually heavy toll among residents of the predominantly poor communities where drug distribution is centered. At the same time, bottom-up enforcement's tendency to discourage drug use more effectively among the nonpoor than the poor helps reinforce the social stigma that contributes with special force to poor people's vulnerability to drug abuse.

From the perspective of the poor, the impact of bottom-up enforcement should be reckoned a harmful one. No similarly straightforward conclusion can be drawn about top-down enforcement. If it were possible to maintain or raise current prices through noncriminal means—an uncertain proposition¹¹⁹—the lifting of criminal sanctions might well eliminate the underworld context that underwrites drug-related crimes. Reform of this kind would deliver the benefits of high prices without leaving the poor to suffer the harm of drug-related violence and theft. Yet in the absence of any assurance that a regulatory regime could achieve the same price effects as a criminal one, the evaluation of top-down enforcement remains contingent upon an assessment of the legitimacy and urgency of the various aims and consequences of contemporary drug policy. All this Note can contribute to this discussion is the observation that assigning a value to top-down enforcement's impact on the poor requires somehow weighing lives lost to gunfire against lives damaged by drug abuse.

¹¹⁹ Jonathan Caulkins argues that removal of criminal sanctions against the distribution of illicit drugs would cause a dramatic decrease in prices. In Caulkins' view, the ability of fly-by-night distributors to elude regulators means that a price of three dollars per gram should be considered "an upper bound on the retail price of cocaine after legalization." Caulkins, *supra* note 20, at 7. Caulkins acknowledges, however, that the retail price of some similarly unrefined, legally marketed consumer products also vastly exceeds the cost of the raw materials used in their production. See Caulkins & Reuter, *supra* note 19, at 595 (remarking that "farm gate price" of wheat accounts for about 2.5% of retail price of box of shredded wheat cereal). He nonetheless maintains that this markup owes to factors different from those which contribute to the price of illicit drugs. See *id.* (discussing costs associated with processing, taxation, packaging, shipping, promotion, overhead, and inventory). Caulkins and Reuter fail to explain, though, why such costs would not likewise be incurred in the marketing of legalized drugs subject to regulatory controls.

The interests of the poor are admittedly not the only relevant concern in the design of drug policy. But they are surely one of the most important factors to be considered. Quite independently of any commitment to a more equitable distribution of resources throughout American society, the campaign against drug-related harms must pay special attention to the segment of society in which drug abuse and drug-driven violence have been disproportionately concentrated. The abolition or limitation of bottom-up enforcement stands to ameliorate the problem of drug abuse in poor communities. Alternatives to top-down enforcement might preserve the positive results of contemporary policy in these communities without exacting as substantial a toll in exchange. Closer consideration of these reforms is imperative.