

Controlled Substances

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Controlled Substances

Crime, Regulation, and Policy

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In memory of

Lester J. Mazor, Professor Emeritus, Hampshire College
1936—2011

The Honorable M. Blane Michael, United States Court of Appeals for the Fourth Circuit
1943—2011

“It is not possible to know how far the influence of any amiable honest-hearted duty-doing man flies out into the world; but it is very possible to know how it has touched one’s self in going by . . .”

—Charles Dickens, *Great Expectations*

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Preface

Forty years ago, President Richard Nixon declared drug abuse “public enemy number one in America”^{*} — “the modern curse of youth, just like the plagues and epidemics of former years.”^{**} In the decades since, our drug laws and policies have for the most part closely matched this rhetoric. As a result, the number of Americans incarcerated for drug offenses today is larger than the entire United States prison and jail population was in 1980. Despite the vigorous enforcement of drug prohibition, however, its wisdom and morality continues to be hotly debated. Indeed, a poll by Gallup in late 2011 found that 50% of Americans now favor taxing and regulating marijuana like alcohol.

Yet, while modern drug laws have dramatically changed our criminal justice system, they are strangely absent from the curriculum at most law schools. Every criminal law casebook devotes significant coverage to homicide, property crimes, and rape. But only a handful include a chapter or section on drug offenses. Criminal procedure courses are filled with drug cases. But this is only because so many of the leading Fourth, Fifth, and Sixth Amendment cases happened to involve drug prosecutions. Courses like federal criminal law and international criminal law sometimes include coverage of drug offenses. And there are some schools that offer a seminar or course on drug policy. At most law schools today, however, a student could take every single criminal law-related offering without studying drug law and policy.

It is hard to say why there is such a large gap between the coverage of drug crimes in law schools and the importance of drug crimes to criminal law practice and criminal justice policy. A lack of prepared course materials may be partly to blame. There has not been a casebook dedicated to controlled substances law since the second and final edition of Gerald F. Uelmen and Victor G. Haddox’s excellent work *Drug Abuse and the Law: Cases, Text, Materials* in 1983. Another explanation may be that some criminal law teachers mistakenly believe drug offenses are too straightforward to merit much attention. In 2011, for example, prominent criminal law professor Orin Kerr wrote on the *Volokh Conspiracy* blog that because “[t]he elements of drug crimes are trivially simple . . . there’s no purpose to be served in covering those crimes in a substantive law class.” It is not hard to imagine how someone might jump to this conclusion. Drug decriminalization may make for an interesting policy debate, this line of thinking may go, but when a person is found with drugs in their pocket, what legal defense could she possibly have?

Whatever the reason for the inattention to drug laws, teachers and students alike have been the poorer for their absence from law schools. A course on controlled substances provides a uniquely rich mix of complex legal and policy problems. A close look at the law of drug crimes reveals unusually tough challenges in how to define

^{*} ANDREW B. WHITFORD AND JEFF YATES, *PRESIDENTIAL RHETORIC AND THE PUBLIC AGENDA: CONSTRUCTING THE WAR ON DRUGS* 86 (2009).

^{**} DAN BAUM, *SMOKE AND MIRRORS: THE WAR ON DRUGS AND THE POLITICS OF FAILURE* 12 (1997).

them, how to prove them, and how to grade them. Is drug possession meant to punish drug ownership or physical contact with drugs? What sort of evidence is sufficient to ascribe an intent to distribute to someone in possession of drugs? Should we sentence drug offenders based on the type and quantity of drugs involved in their offense or some other metric? The enforcement of drug laws, meanwhile, provides an ideal vehicle for studying a number of important and often overlooked issues like prosecutorial discretion, the use of informants in modern policing, and racial profiling. And, of course, drug prohibition presents one of the most difficult tests for the theories of punishment. Though we may disagree about how much punishment a thief, a killer, or a drunk driver should receive, few question that theft, murder, and driving under the influence should be crimes. Many theorists and policy analysts, however, believe that drug criminalization is unjust or unworkable.

From beginning to end, this course provides an intellectually engaging experience for a wide range of law students. Students who plan on becoming prosecutors or defense attorneys will learn about an area of the law that will inevitably occupy a large percentage of their practice. Others will enjoy debating marijuana legalization or studying the relationship between race and our drug laws.

This book is designed to accommodate a number of different types of courses on drug abuse and the law. I teach the subject as a three-credit lecture course that covers drug policy, drug crimes, and drug regulation, using materials from the first seven chapters of this book. However, this book could also be used in a seminar on drug policy or the “war on drugs,” an advanced criminal law course, or a study abroad course on international and comparative drug control. Portions of the book could also be used to supplement a first-year criminal law course. If you are a teacher who is considering this book, please refer to the Teacher’s Manual for suggested syllabi or email me if you would like to discuss ideas.

Before I close, a few formatting notes. My chief objective has been to make this book as readable and user-friendly as possible. I have minimized the use of ellipses. Ellipses appear for omitted material within a sentence or paragraph. But I have opted not to use them where whole paragraphs or the beginning or end of a paragraph have been cut. I have deleted most in-text citations and the vast majority of footnotes from the cases and materials. Footnotes that have been retained are marked using the original numbering from the source material. A * indicates a footnote that I have written. Finally, in place of the traditional “notes and questions” sections, I use short narrative essays (usually one or two paragraphs) to link and supplement the materials.

I have found learning about and teaching this subject to be incredibly enjoyable and rewarding. I hope that you will as well.

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