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BEYOND “PERFECTION”: CAN THE INSIGHTS OF *PERFECTING CRIMINAL MARKETS* BE PUT TO PRACTICAL USE?

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Response to: David Michael Jaros, Perfecting Criminal Markets, 112 Colum. L. Rev. 1947 (2012).

INTRODUCTION

David Jaros’s thought-provoking new Article, *Perfecting Criminal Markets*,¹ sheds light on a heretofore unappreciated effect of our obsession with criminalization: that merely by creating new crimes, lawmakers may inadvertently strengthen existing criminal markets. Professor Jaros demonstrates this by making apparent the links between what he calls first-order criminal conduct, such as drug dealing, prostitution, or smuggling undocumented immigrants into the country, and the second-order activities that can spring up around it.² Since criminalizing particular goods or services leaves those markets unregulated, it creates opportunities for separate harmful conduct.³ Criminalizing the sale of drugs (the primary or first-order activity) creates an incentive for dealers to maximize profits and escape harsher punishments by selling fake drugs (the second-order activity); criminalizing prostitution (first-order) eliminates the possibility of health standards or testing for sex work, thereby increasing the risk that sex workers might knowingly transmit HIV (second-order); criminalizing the smuggling of undocumented immigrants into the country (first-order) creates the opportunity for smugglers to transport their human cargo in hazardous conditions (second-order). These second-order activities create inefficiencies in the primary criminal markets by diminishing competition, generating asymmetries of information, and

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1. David Michael Jaros, *Perfecting Criminal Markets*, 112 *Colum. L. Rev.* 1947 (2012).

2. See *id.* at 1949 & n.4.

3. See *id.* at 1950 (noting that “criminalization can create new criminal opportunities by pushing markets underground where the government is unable to use regulatory tools that might prevent the new antisocial activity”).

increasing risk.⁴ When legislatures respond by criminalizing these second-order activities, they inadvertently improve—or perfect, as Jaros puts it—the original first-order market.

To make his point, Jaros adopts the rational choice model of neoclassical deterrence theory, which assumes that criminalizing an activity will deter its occurrence.⁵ But while criminalization may deter these second-order crimes, Jaros argues, it will also correct the market inefficiencies they entail. By isolating and identifying the dynamic between second-order crimes and first-order criminal markets, Jaros uncovers an unexplored aspect of the costs of criminalization. His descriptive point also carries policy implications—if criminalization is counterproductive, even on its own terms, then we need to reconsider whether it is the best approach to deal with the harm posed by criminal markets.

But the model Jaros employs has its limits. The weakness of a rational choice account of criminal markets is that it relies so heavily on the assumption that prospective criminals will be aware of, and swayed by, criminal laws that might in fact be quite obscure. In the first Part of this Response, I consider some of the factors, including lack of effective information and risk miscalculation, that might blunt the deterrent value of these laws, and hence their market-enhancing effects.

The second Part of the Response explores the normative implications of his argument. Jaros contends that, because the market-boosting effects of criminalization muddy the moral message of the criminal law, this creates an opportunity to reconsider alternative means of harm reduction, particularly for “vice” crimes such as those involving drugs and prostitution. He rightly questions what he terms the “facilitation norm,” the idea that, since one of the criminal law’s functions is to condemn, any approach that does not punish must condone. This norm is undermined if criminalization, while appearing to send a message of condemnation, in fact simultaneously encourages criminal behavior. And Jaros is right: Alternative strategies of harm reduction do need to be destigmatized. When viewed in the aggregate, the kind of second-order criminalization Jaros describes seems to be less of an attempt at deterrence than a (fairly ineffective) effort to protect public health and safety. Incorporating a public health approach to some of these issues, particularly in the area of vice crimes, might prove far more beneficial than unreflective criminalization. In these ways, Jaros’s Article makes a valuable contribution to the project of reevaluating “the practical and normative implications of using the criminal law to fight antisocial behavior.”⁶

4. See *id.* at 1965–70.

5. See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 *J. Pol. Econ.* 169, 207 (1968) (suggesting that “entry into illegal activities can be explained by the same model of choice that economists use to explain entry into legal activities”).

6. Jaros, *supra* note 1, at 1950.

I. THE THEORY OF SECOND-ORDER ACTIVITY

For the purposes of his argument, Jaros approaches the market for crime in the same way as any market for legitimate goods or services—a rather elegant move, as it is precisely the calculus that lawmakers (say they) employ. He posits that criminalization increases the price of an illegal good or service by adding the expected cost of apprehension and punishment to the price of the good or service, as well as by eliminating legal avenues to obtain it.⁷ This leads to market opportunities for criminal entrepreneurs, some of whom will engage in second-order activities, which themselves can lead to market failure. A second wave of criminalization will deter these second-order activities, but will then have the perverse effect of strengthening the markets for the primary crime—the very markets the criminal law was trying to eradicate in the first place.

To illustrate his points, Jaros primarily discusses the sale of fake drugs, HIV-aware prostitution, and human smuggling resulting in death.⁸ Because all of these activities make the market less attractive to consumers of the first-order goods or services, their occurrence weakens the market. The drug buyers don't know whether they are going to get cocaine or a heady mixture of crushed sheetrock and baking soda,⁹ the sex consumer might be afraid of contracting HIV, and the person contemplating illicit entry into the country might fear being left to die in transit. Criminalization of these second-order activities can correct these problems: Deterrence will decrease the incidence of these risks, and consumer confidence will rebound.

In the hermetic world of *homo economicus*,¹⁰ Jaros's argument is logical and compelling. But as soon as one considers any externalities that might

7. See *id.* at 1956. Jaros does not deal with the kinds of crimes that have identifiable victims, such as murder or rape, but with those that arise out of a demand for goods and services that have been prohibited. It is these latter crimes that have turned criminalization into a growth industry. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 *Mich. L. Rev.* 505, 512–15 (2001) (explaining expansion of legislative criminal law).

8. Some of these second-order activities are a more serious variant on the primary crime (deadly human smuggling, HIV-aware prostitution), while others are new forms of activity (selling fake drugs) growing out of the market opportunities created by an illicit market. Arguably, a closer corollary to the first two examples in the drug market context would be selling drugs adulterated with hazardous substances, rather than the sale of fake drugs. Federal law imposes much tougher penalties on the sale of narcotics if injury or death occurs from their use. See, e.g., 21 U.S.C. § 841(b)(1)(B) (2006) (setting penalty for distributing 500 grams or more of cocaine at five to forty years unless “death or serious injury results from the use of such substance,” in which case sentence “shall be not less than 20 years or more than life”). Such death or injury might be due to overdose or to the addition of harmful substances like rat poison or arsenic to the drugs.

9. The information asymmetry works both ways, however. The buyer might not know whether he is getting baking soda, but the seller doesn't know whether the buyer is a narc.

10. For the purposes of his Article, Jaros adopts the assumption “that potential criminals are rational, econometrically grounded actors who weigh the qualities and probabilities of punishment before acting.” Jaros, *supra* note 1, at 1950 (internal quotation marks omitted).

obscure or delay the criminal law's deterrent force, this line of reasoning falters. People cannot be deterred by what they don't know, and there is reason to suspect that most potential offenders have no idea what laws apply to them.¹¹ Furthermore, as Paul Robinson has argued, "[e]ven if they know the legal rules, potential offenders commonly cannot or will not bring such knowledge to bear to guide their conduct in their own best interests, such failure stemming from a variety of social, situational, or chemical influences."¹² So the market effects may not be as clear as Jaros contends.

There is another wrinkle here too—the people primarily deterred by the new round of criminalization are the service providers, the drug sellers, or the sex workers, not the consumers. But the primary market improves with consumer confidence. It requires several more steps for the consumers to be more willing to enter the market or to pay higher prices: They have to be aware of these laws, and sufficiently satisfied that the service providers will conform their behavior in response.¹³ Of course, there might be situations where consumers may overestimate the deterrent value of a new law. As Jaros points out in his example of HIV-aware prostitution, even if the law does not deter, sex consumers might believe it does and therefore feel safer than they should.¹⁴ But most consumers of these goods and services are driven by the kinds of forces that tend not to respond all that much to market changes. The drug addict, the individual craving paid sexual services, or the person desperate to leave her country and enter the United States may be impervious to changes in criminal sanctions against those who provide them what they need.

11. See Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioral Science Investigation*, 24 O.J.L.S. 173, 176 (2004) (noting that "people rarely know the criminal law rules, even when those rules are formulated under the express assumption that they will influence conduct"). The sale of fake drugs appears to be a case in point. While Jaros notes that the sale of fake drugs has been criminalized by nearly three-quarters of the states, Jaros, *supra* note 1, at 1949, this fact does not appear to be common knowledge. In a highly unscientific survey of criminal law colleagues, I found that most were surprised to hear that selling fake drugs was a crime. This certainly calls into doubt whether these laws can have any deterrent effect at all if no one knows about them.

Indeed, the crime of selling fake drugs made it into the online Museum of Hoaxes under the status "Unusual Crime." See Fake Cocaine, The Museum of Hoaxes (Nov. 25, 2008), http://www.museumofhoaxes.com/hoax/weblog/comments/fake_cocaine (on file with the *Columbia Law Review*) (noting that "being charged for selling fake cocaine is a curious concept"). CriminalDefenseLawyer.com, a resource for people seeking legal advice and representation, observed that, "[s]urprisingly, you can be arrested and charged for selling drugs even though you do not have 'real' drugs. . . . [T]he police can show that not only you were attempting to distribute illegal substances, but also pursue fraud charges against you." Can I Go to Jail for Selling Fake Drugs?, Criminal Defense Lawyer, <http://www.criminaldefenselawyer.com/legal-advice/criminal-defense/drug-charges/jail-selling-fake-drugs.htm> (on file with the *Columbia Law Review*) (last visited Feb. 16, 2013).

12. Robinson & Darley, *supra* note 11, at 204.

13. Jaros's example of an undocumented immigrant contemplating paying a smuggler to get into the United States is subject to just these problems. The chances that a person in another country, desperate enough to pay an exorbitant fee to a "coyote," would be familiar with the provisions of Title 8 of the United States Code, much less be swayed by them, seem slim.

14. On the other hand, some brothels and escort services might independently test their workers to reassure their consumers and increase sales. These service providers would also not be affected by the criminalization of HIV-aware prostitution.

It seems doubtful that the criminalization of fake drugs has much deterrent effect on sellers at all. There is already substantial data showing that dealers of “real” drugs are not deterred by the prospect of an early, violent death.¹⁵ It is hard to imagine that the distant possibility of a relatively light criminal sanction would deter someone from selling fake drugs,¹⁶ when the more immediate prospect of a bullet in the head would not.¹⁷ Indeed, it seems likely that most fake drug dealers engage in that activity not only because it has an unusually high profit margin,¹⁸ but also because they know that the penalties are so much more lenient than for selling the real thing.

There is also some question about whether these criminal laws have anything more than a marginal effect on consumer behavior. First, as Jaros explains, despite the laws, drug purchasers have no legal recourse if sold fraudulent product, unlike the beneficiaries of ordinary consumer protection laws. Second, habitual drug users will typically have regular dealers they patronize. These dealers may already enjoy a good reputation as purveyors of quality product, and the criminalization of fake drugs will have no effect on them or their regular customers. It seems that the only people who would be reassured by the perceived deterrent effect of these laws would be those customers who have no or little previous experience with the local drug market.

So what are these laws really about? Since selling baking soda instead of cocaine is really a crime of fraud rather than of drug dealing, criminalization would seem to put the government in the rather strange position of protecting

15. See Russell Dean Covey, *Deterrence’s Complexity*, in *Criminal Law Conversations* 118 (Paul H. Robinson et al. eds., 2009) (citing Steven Levitt & Sudhir A. Venkatesh, *An Economic Analysis of a Drug-Selling Gang’s Finances*, 115 Q.J. Econ. 755, 784 (2000)) (noting that street-level crack dealers in Chicago faced 25% chance of being killed in first four years of business).

16. For example, in California, Georgia, and New York, the sale of fake drugs is a misdemeanor, punishable by a maximum of one year in prison. Cal. Health & Safety Code § 11355 (West 2007); Ga. Code Ann. § 16-13-30.2(a) (2011); N.Y. Pub. Health Law § 3383(7) (McKinney 2012). Contra Mich. Comp. Laws Ann. § 333.7402 (West 2012) (selling counterfeit drugs is felony punishable by up to ten years in prison).

In contrast, the penalties for the sale of real cocaine are considerably higher. In New York, selling over two ounces of cocaine is a Class A-1 felony, N.Y. Penal Law § 220.43 (McKinney 2008), punishable by “not less than 15 years nor more than 25 years” in prison, *id.* § 70.00(3)(a)(i). In Georgia, the sale of over 400 grams of cocaine is punishable by a mandatory minimum sentence of twenty-five years. Ga. Code Ann. § 16-13-31(a)(1) (2012). In Michigan, sale of over 450 grams of cocaine is punishable by a term of up to thirty years. Mich. Comp. Laws Ann. § 333.7401(2)(a)(ii) (West 2012).

17. Not to mention the fact that, while the lesser sanctions will be further discounted by the uncertainty of apprehension and prosecution by a government that may never identify the fake drug seller, there is close to a 100% chance that the defrauded buyer knows who sold them the fake product.

18. The street price for a gram of cocaine is approximately \$125. Arthur Fries et al., *Inst. for Def. Analyses, The Price and Purity of Illicit Drugs: 1981–2007*, at 9 (2008), available at http://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/bullet_1.pdf (on file with the *Columbia Law Review*). This adds up to a little over \$56,000 a pound. In contrast, a pound of baking soda costs \$2.99 on Drugstore.com. See *Arm & Hammer Baking Soda*, Drugstore.com, http://www.drugstore.com/products/prod.asp?pid=195585&catid=184273&aid=338666&aparam=goobase_filler (on file with the *Columbia Law Review*) (last visited Feb. 16, 2013).

the narcotics market from those who would perpetuate a fraud upon it, much in the way the Better Business Bureau protects the plumbing industry from fly-by-night contractors. Protecting good business practices in the drug market cannot be the legislative motivation. But the alternative justification that Jaros suggests motivates these laws—to lessen opportunities for violent retaliation by defrauded buyers¹⁹—seems no more plausible. Ultimately, it seems that the only realistic justifications for these second-order criminal laws are to protect health and safety. Inhaling sheetrock dust is a recognized health hazard.²⁰ So is ingesting rat poison, arsenic, or strychnine.²¹ So is contracting the HIV virus. If public health is the true goal, then perhaps the criminal law is the wrong way to go about it.

II. THE NORMATIVE CONSEQUENCES OF THIS INSIGHT

Assuming that Jaros is right about how criminal markets will respond to the criminalization of second-order crimes, his Article raises several important implications. First, it presents yet another reason for legislatures and law enforcement to take stock of how their actions have unintended effects—in Jaros's words, how "some criminal statutes carry hidden costs that may offset some of the public safety benefits that the laws were intended to engender."²² If policymakers were to conduct a cost-benefit analysis of vice policies, the effect of secondary criminalization on primary markets would be a reasonable element to factor into their calculations.²³

But criminal law policymakers spend very little time, if any, engaged in such calculations, for a myriad of reasons.²⁴ First, some of the stakeholders in the criminal process might not want to know how their choices may perfect criminal markets.²⁵ Additionally, even if they did know, they might be compelled to pursue a "tough on crime" agenda anyway and simply dismiss the incremental improvements in the primary markets as a cost of doing

19. See Jaros, *supra* note 1, at 1959 (noting "violent self-help response that follows the sale of fake illegal drugs" imposes costs on both dealer and surrounding neighborhood).

20. Nat'l Inst. for Occupational Safety & Health, Ctrs. for Disease Control & Prevention, Pub. No. 99-113, Control of Drywall Sanding Dust Exposures 1 (1999), available at <http://www.cdc.gov/niosh/docs/99-113/pdfs/99-113.pdf> (on file with the *Columbia Law Review*).

21. See *supra* note 8 (discussing sale of drugs adulterated with hazardous substances).

22. Jaros, *supra* note 1, at 1978.

23. Arguably, a pure cost-benefit analysis would reveal that licensing these activities and taxing them would probably be the most beneficial.

24. See Darryl K. Brown, Cost-Benefit Analysis in Criminal Law, 92 Calif. L. Rev. 323, 338–40 (2004) ("[C]riminal law traditionally focuses only on the benefits of punishment . . . regardless of the costs on others . . . of punishing individual or corporate offenders."). This lack of engagement with cost-benefit analysis is not limited to legislators, but extends to prosecutors and police as well.

25. The primary benefit that legislators gain from additional criminalization is that they appear to be tough on crime, an attribute they need to keep their jobs. See Donald A. Dripps, Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don't Legislatures Give a Damn About the Rights of the Accused?, 44 Syracuse L. Rev. 1079, 1080 (1993) (observing that "[t]he first duty of a politician is to get elected, and the second is to get re-elected").

business.²⁶ Finally, even if the political actors understood the stakes and wanted to respond to this new information, they might not be able to convey it in a way that was understandable to the public.²⁷

Jaros's second suggestion is more intriguing, and may have a better chance of gaining some traction.²⁸ He contends that understanding how criminalization itself assists and supports other antisocial activity may equalize the footing between criminalization and alternative approaches to social harm. "If the criminalization of the second-order crime does not signal social approval of the first-order criminal market," despite perfecting that market, he reasons, "then harm reduction policies similarly need not be regarded as sanctioning bad behavior."²⁹ In other words, if the relationship between the two orders of crime were properly understood, it could provoke a normative reassessment of regulatory alternatives to criminalization.

While there are many reasons why criminalization is such an attractive option to lawmakers,³⁰ the lack of acceptable alternatives may well be one of

26. Cf. *id.* at 1095 (arguing that legislatures have every incentive to dilute rights of accused and establish procedures that favor government because it costs nothing and "gratiff[ies] police, prosecutors, and apprehensive citizens without offending taxpayers"). Dripps's arguments about a systematic devaluation of an accused's procedural rights have equal force in the realm of expanding the criminal code.

27. Given the fact that a sizeable proportion of the population believes that raising the marginal tax rate to 39.6% means that their *entire* income will be taxed at that rate, the interdependency between first-order and second-order crimes may be simply too difficult to explain. See Margaret Sullivan, *The Times Should Explain Marginal Tax Rates—Repeatedly, if Necessary*, N.Y. Times Pub. Editor's J. (Nov. 26, 2012, 11:42 AM), <http://publiceditor.blogs.nytimes.com/2012/11/26/the-times-should-explain-marginal-tax-rates-repeatedly-if-necessary/> (on file with the Columbia Law Review) (responding to criticism for failing to correct common public misconception that marginal tax rates apply to all gross income, not just amount of income over "cut off line"). Nuance does not flourish in a sound-bite era, and anything that seems counterintuitive (more laws may actually *encourage* crime?) may simply get drowned out by more traditional law-and-order voices.

28. Jaros also proposes that legislators take account of the consequences of second-order criminalization in order to "begin to fashion a more integrated structure of criminal sanctions." Jaros, *supra* note 1, at 1978. I am perplexed by what that would mean. For example, he writes, "[i]f criminalizing the sale of fake illegal drugs inadvertently improves the market for genuine drugs, a legislature might consider offsetting the impact of the new law by strengthening the penalty for the first-order crime." *Id.* It seems hard to believe that Jaros, a former public defender, would really be suggesting that the drug laws are too lenient, and that the penalties ought to be ratcheted up. In a world where distribution of more than 400 grams of cocaine entails a mandatory minimum sentence of 25 years in prison, see, e.g., Ga. Code Ann. § 16-13-31(a)(1)(C) (2012), there is nowhere else to go, except for maybe universal life imprisonment for drug dealers. It would be surprising if Jaros were truly agnostic about the consequences of even harsher policies, and actually preferred a model of "integrated criminal sanctions," regardless of their devastating effect.

29. Jaros, *supra* note 1, at 1989.

30. From a legislator's perspective, criminalization is relatively quick, easy, and cost-free, both in terms of political capital and taxpayer money. For a persuasive explanation of the perennial appeal of punishment over other forms of regulation, see Miriam H. Baer, *Choosing Punishment*, 92 B.U. L. Rev. 577, 582 (2012) (arguing that "public actors who adopt retributive, condemnatory stances experience greater ease in securing and maintaining resources than those regulators who limit themselves to the unromantic goals of internalizing externalities and curing market failures").

them. And the perceived lack of viability of these alternatives—initiatives such as clean-needle exchanges or licensing prostitution—is bound up in assumptions about the criminal law’s expressive function. In theory, the law’s expressive function is an effective means of enforcing social norms and deterring antisocial behavior. But the criminal law does not express itself clearly. Because criminal codes are so broad that universal enforcement is impossible,³¹ there is substantial ambiguity as to what message the law is sending. As William Stuntz memorably asked, “What, after all, does expressive criminal law express? Is the message the law that the legislature passes? Or is it the sum of the arrest and prosecution decisions of individual police officers and prosecutors?”³²

Despite its ambiguity, most policymakers still hold to the idea that criminal law “sends a message.” This belief, Jaros argues, entails costs because of the law’s perceived monopoly on expressions of condemnation. If the criminal law condemns by forbidding an activity, then it is popularly believed that alternative approaches, which merely try to reduce harm, must condone the bad behavior. Jaros terms the popular conflation of facilitation and condonation—which is what prevents alternative approaches from even being considered—the “facilitation norm.”³³ But if criminalization does in fact boost illegal markets, then the law’s initial message is mixed at best. There is then even less reason to put much faith in the binary view that criminalization condemns, therefore alternatives condone. It may be time, Jaros implies, for policymakers to jettison the facilitation norm and reevaluate the merits of alternative crime prevention measures.

There are a number of reasons why this shift will be difficult to accomplish, but even more compelling reasons why it should be attempted. The rate of incarceration in the United States has long passed the point where it can be called epidemic.³⁴ This has come at significant financial and social cost.³⁵ And these costs are not evenly distributed: The communities that suffer

31. See Nirej J. Sekhon, *Redistributive Policing*, 101 *J. Crim. L. & Criminology* 1171, 1195 (2011) (noting that “federal and state criminal codes achieved binding-busting girth in the twentieth century”).

32. Stuntz, *supra* note 7, at 521. Beyond the fact that “the law’s messages are likely to be very different from the messages one would infer from a look at the statute books,” those messages “are likely to be buried, swamped by local variation and hard-to-discern arrest patterns, by low-visibility guilty pleas and even lower-visibility decisions to decline prosecution.” *Id.* at 523.

33. Jaros, *supra* note 1, at 1989 (“[T]o the extent that such policies are unacceptable simply because they suggest that society condones the criminalized activity, the facilitation norm may be foreclosing valuable opportunities to improve social welfare.”).

34. Since the late 1980s, the number of inmates in American prisons and jails increased from 585,000 to a peak of approximately 2.3 million in 2008, although this number has declined slightly since then. See Pew Ctr. on the States, *One in 100: Behind Bars in America 2008*, at 5 (2008), available at http://www.pewstates.org/uploadedFiles/PCS_Assets/2008/one%20in%20100.pdf (on file with the *Columbia Law Review*).

35. State prison expenditures have increased from \$2.8 billion to \$50 billion over the past thirty years. Marshall Clement et al., *The National Summit on Justice Reinvestment and Public Safety: Addressing Recidivism, Crime, and Corrections Spending 16* (2011), available at <http://justicereinvestment.org/summit/report> (on file with the *Columbia Law Review*). In terms of

from the highest crime rates end up having high proportions of their population incarcerated, further destabilizing the community and leading to more crime and thus more incarceration.³⁶ By any account, this is not an intelligent, or fair, use of the criminal law. In contrast, alternative approaches might provide better outcomes at lower cost.

One promising suggestion would be to incorporate public health methodologies into our approach to controlling antisocial behavior, particularly vice and exploitation.³⁷ While criminal regulation of HIV-aware prostitution is unlikely to have much deterrent effect, but may unwittingly increase buyers' confidence in the sex market, a more direct way of undermining the market might be through public health outreach. Rather than taking the roundabout route of imposing heavier criminal penalties on HIV-positive sex workers, posting prominent notices in highly trafficked areas—maybe something along the lines of “Ask me about my HIV status” or “Do you know your sex worker's HIV status?”—might do a lot more for deterrence of consumer behavior.

This is not to say that none of the second-order behaviors cited by Jaros should be criminalized. There is obviously a greater social and moral harm inflicted by the drug dealer who cuts his product with rat poison, or the smuggler who allows his clients to die in his charge rather than seeing them safely across the border, and the criminal law rightly accounts for that. But if the criminal law could somehow be pried away from its perceived stranglehold on moral value expression, then alternative strategies of harm reduction might be destigmatized and considered more openly. While the realization that criminalization can encourage other criminal activity might not alone be enough for policymakers to make the leap to considering alternative means of harm reduction, it is another nudge in the right direction.

In the final analysis, the facilitation norm is not only reductive, but wrong. Criminal law may say it is sending a message of moral condemnation, but it is talking out of both sides of its mouth if it is in fact simultaneously supporting criminal markets. Alternative approaches may not be encouraging

social cost, see Ernest Drucker, *A Plague of Prisons: The Epidemiology of Mass Incarceration in America* 106 (2011) (“Very high rates of imprisonment concentrated in specific communities cause social disorganization, undermining the normal social controls of family and community that are the best (and most natural) guarantors of good behavior.”).

36. See Sharon Dolovich, *Foreword: Incarceration American-Style*, 3 *Harv. L. & Pol’y Rev.* 237, 241 (2009) (contending that mass incarceration “operates to create a class of permanently marginalized and degraded noncitizens, marked out by the fact of their incarceration for perpetual social exclusion and ongoing social control”); see also Sekhon, *supra* note 31, at 1218 (noting that disproportionate arrest rate of urban minorities has “all played out in a broader context marked by increased hostility to welfarism”). Instead of providing public services to poor neighborhoods, American cities have chosen to leave most of the management of the poor to the police and the criminal justice system. See *id.* (citing Loïc Wacquant, *Urban Outcasts: A Comparative Sociology of Advanced Marginality* 12, 30–34 (2008)).

37. See, e.g., Robert E. Freeman-Longo, *Reducing Sexual Abuse in America: Legislating Tougher Laws or Public Education and Prevention*, 23 *New Eng. J. on Crim. & Civ. Confinement* 303, 316 (1997) (advocating treatment-based approach to preventing sexual abuse); Jonathan Todres, *Moving Upstream: The Merits of a Public Health Law Approach to Human Trafficking*, 89 *N.C. L. Rev.* 447, 452–53 (2011) (noting advantages of “a public health approach” to address “underlying problems” that cause human trafficking).

harmful conduct so much as they are trying to ensure the health and safety of those already participating in illegal markets. To bastardize Shakespeare, if it were done, then 'twere well it were done safely.³⁸

The alternative approaches may simply be expressing a preference that people not die from adulterated drugs, HIV, or suffocation in a shipping container. Arguably, the moral message, if any, is one of the value of human life.

CONCLUSION

Regardless of whether one is convinced by every one of his examples, Jaros has found a fresh and novel way to show that criminalization can enhance crime. By following the tenets of neoclassical deterrence theory through to their logical conclusion, Jaros demonstrates that, even on its own terms, criminalization as a means of reducing social harm is highly problematic. There is an urgent need to rethink our approach to social problems, particularly vice crimes. Our current appetite for criminalization and increasingly harsh penalties has only resulted in record-breaking rates of incarceration, disproportionate impact on people of color, and an unsustainable drain on state and federal budgets. If people begin seriously thinking about the consequences of perfecting criminal markets in the way Jaros describes, then his insights could do some real good.

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38. The actual quote, from Macbeth's soliloquy when he is contemplating murdering his king, Duncan, is, "If it were done when 'tis done, then 'twere well it were done quickly." William Shakespeare, *Macbeth* act 1, sc. 7, ll. 5–6 (Horace Howard Furness, Jr. ed., J.B. Lippincott Co. 4th rev. ed. 1903).