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Foreword

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FOREWORD

REV. EDWARD A. MALLOY, C.S.C.*

For more than a year now I have been actively involved in the search for workable solutions to our nation's drug problem — on the national level as a member of the President's Advisory Council on Drugs, at the state level as a member of Governor Bayh's Commission for a Drug-Free Indiana and on the streets sharing the routines and the experiences of police involved in drug law enforcement. On the basis of these intensive fact-finding activities, I have offered the assessment that real breakthroughs are being achieved on a number of fronts—in education, in removing drugs from the workplace, and perhaps most important, in the building of community anti-drug coalitions which have demonstrated impressive power to discourage drug use and to impede drug dealing.

While insisting that progress can and is being made, however, I have been equally emphatic in attesting to the persistence of the drug problem. High on my list of stumbling blocks has been the struggle of the criminal justice system to cope. In fact, the system is overwhelmed. Drug violence in urban neighborhoods makes a mockery of justice. Successful prosecutions of major drug dealers remain rare, while lesser offenders clog the courts and the jails. Mandated sentences for drug-related offenses grow stiffer even as actual sentences must be reduced because of worsening prison overcrowding.

Clearly, a close examination of the role criminal justice should play in confronting the use of drugs is called for, and that undertaking is well served in these pages. The questions raised are many. Steven Wisotsky's painstaking analysis of judicial rulings illustrates how political and public reaction to the drug problem can infiltrate the legal process, raising the spectre of an erosion of civil liberties. John E.B. Myers tackles

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this issue in the concrete, citing the inconsistency of protecting an expectant mother's rights to use alcohol and tobacco, despite acknowledged risks for her unborn child, while maintaining that the similar risks of illegal drug use are cause for her prosecution. Myers also poses the dilemma of the state's authority to prevent child abuse versus the likelihood that the threat of prosecution may deter pregnant drug users from seeking prenatal care and may encourage them to seek abortions.

Virtually everyone who has studied the drug problem will agree, I think, with Ethan Nadelmann's statement that "A drug control policy based predominantly on approaches other than criminal justice . . . offers a number of significant advantages over the current criminal justice focus. . . ." No less a figure than former head of the federal Office of Drug Control Policy William Bennett argues here (in a reprise of an address delivered last fall at Notre Dame) that government, whether as jailer or healer, should not be seen as the ultimate answer to drug use, nor to the breakdown of family values that underlies it.

Beyond this point of agreement, wide divisions emerge. Nadelmann and James Ostrowski may accept Bennett's long view that ". . . individual morality accruing social capital from generation to generation . . ." is the ultimate ethical answer to social ills. However, to the direct question at hand — the role of the criminal justice system in dealing with drug use — Nadelmann and Ostrowski argue for the separation of drug use and criminal justice, that is, for decriminalization of some or all controlled substances.

In support of this proposal they are skilled advocates. Nadelmann is particularly effective in his comparisons of the social consequences of illegal drug use versus those resulting from the use of alcohol and tobacco. No likely effects of legalization, he argues, would approach the harm caused by these two legal substances. Still he concedes that "legalization is a risky policy, one that may indeed lead to an increase in the number of people who abuse drugs." ("But," he adds, "that risk is by no means a certainty.")

Ostrowski goes even further, citing patterns of drug use that suggest the safer the drug, the greater the number of its users — *and the converse*. These patterns, he maintains, argue against any explosion of chronic drug use among a predominantly cautious public, even if legalization does prompt an increase in experimentation. In the views of both men, the benefits of legalization — in terms of cost, ethical consistency, protection of civil liberties, and freedom for the criminal justice

system to concentrate on the criminal acts of drug users rather than on drug use itself — more than compensate for any risks involved in the policy.

Gabriel Nahas categorically rejects all these arguments. Working from many of the same historical precedents — the lessons of Prohibition, patterns of drug use, and comparisons with alcohol and tobacco — he concludes that the more recreational drug users there are in a society, the more true addicts there are, and that the more drugs there are in a society, the more they are used.

This, of course, is the same irreconcilable disagreement that characterizes the legalization debate beyond these pages. Whatever its resolution (my experience suggests that legalization is unlikely to win the support of policymakers), the debate itself serves a valuable purpose in reminding us of the scope of the social havoc wreaked by the lethal — and legal — killers, tobacco and alcohol, and in demanding that we respond to the challenge of drugs with creative rather than reflexive thinking.

An example of such creative thinking is to be found in Karen Klocke's report on the initial success of jail-based drug treatment programs in New York City. The program she describes addresses the need both for increased therapy for addicts, particularly those involved in criminal acts, and for jails to do more than incarcerate drug-addicted offenders. While her recommendations illustrate the enormity of the need still to be addressed for treatment programs, her report nonetheless supplies a measure of hope.

An alternative to current imprisonment policy not addressed in these pages is the use of private facilities to house nonviolent drug offenders with only one to two years of their sentences remaining. The arguments for this approach are that it separates nonviolent offenders from the general prison population and that a facility designed exclusively for a small, specific population of offenders can be built more cheaply than a large institution. Texas, among other states, has experimented with this approach, and while the results have been mixed, it at least represents an alternative to the present penal gridlock.

In the end, it must be admitted, there is no consensus evident in these pages on the future role of criminal justice in the resolution of the drug problem. But why should we expect such an outcome? If consensus concerning this dauntingly complex problem were so easily achieved, there would be no need for this exchange in the first place. What is important is

that this examination of legal and ethical issues take place — and that it continue.

I am gratified that the Journal has seen fit to address this issue. Certainly, it is a textbook example of the interplay of law, ethics and public policy. Even moreso, it is an example of the type of issue we at Notre Dame, in this case through the White Center, ought to address. I commend the commitment of all those whose opinions are heard here, as well as the work of the editors in bringing these views to the Journal. This volume deserves a careful reading by anyone devoted, as am I and as all the contributors to this symposium are, to a just and effective resolution of the drug problem.