Reimagining Drug Crimes as Result-Oriented Offenses, or How to Speak to a Legislator about Decriminalization

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ABSTRACT
Drug offenses aim to prohibit certain kinds of conduct, typically possessing or selling dangerous drugs. Over the past five decades, the increased prosecution and sentencing of these conduct offenses has not only failed to achieve its desired effect—curbing drug abuse—but also contributed to myriad social ills, including swelling prison populations and disproportionate minority confinement. The proposed solution offered by political theorists and social scientists has been direct: to stem the tide of social ills brought about by criminalizing drug use, we should decriminalize drug use. The problem with the proposed solution is that it does not adequately address the foundational tenets of the criminal justice system, including the retributive basis for punishing offenders in the first place. In short, the direct solution of decriminalization offers a consequentialist fix to a system grounded on non-consequentialist moral theory. This Essay offers a counterproposal, one that obliquely addresses the social ills created by the War on Drugs by changing the target of drug prosecutions from conduct-oriented offenses (such as possession and distribution) to result-oriented offenses (such as corrupting another with drugs). The hope is that this change in focus will convince lawmakers to adjust downward their drug sentencing schemes while ameliorating the social ills of the War on Drugs as a side benefit.

The War on Drugs is, at bottom, a war on a certain kind of conduct. From its initial salvo, the War on Drugs has targeted the distribution of dangerous drugs. President Richard Nixon famously claimed that “drug abuse” was “public enemy

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number one” \(^2\) when speaking in support of the recently enacted Controlled Substances Act. \(^3\) Although drug abuse was to be contained by prosecuting those who merely possessed these dangerous drugs, \(^4\) those who trafficked in such drugs were punished much more severely. \(^5\)

The punishment of drug traffickers resulted in a drastic increase in the federal prison population. Between 1998 and 2012, the number of federally sentenced prisoners increased by 84%, and the number of drug offenders in federal prison grew by 63%. \(^6\) Of the 102,012 drug offenders incarcerated in fiscal year (“FY”) 2012, almost all (99.5%) were incarcerated on “drug trafficking” offenses, and the most serious charge for the great majority of those offenders (92.4%) was their drug offense. \(^7\)

Under federal law, the conduct of “possession with the intent to distribute” dangerous drugs is punished under the same statute as the conduct of actually distributing drugs. \(^8\) In this manner, possession (although not “mere” possession) is equated to trafficking. Federal courts have opined on how little evidence must be required to demonstrate that defendants had an “intent to distribute” the drugs they possessed. Circumstantial evidence alone is sufficient to demonstrate the intent to distribute dangerous drugs. Such evidence may include the relationship one might have to an accomplice who clearly trafficked in drugs. \(^9\) Moreover, having a large quantity of drugs, by itself, may justify a conviction for “intent to distribute.” \(^10\) Even holding an amount of drugs greater than could be plausibly claimed “for personal use” while being in an apartment containing items connected with the drug trade has

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\(^5\) See id. § 841(a)(1) (2020) (punishing distribution and manufacturing, as well as “possession with intent to distribute,” with up to twenty years in prison).


\(^7\) Id. These data are being used because they represent peak incarceration, before decriminalization efforts took hold in the U.S. “After decades of growth, the federal prison population declined in 2013 and 2014.” Ryan King et al., How to Reduce the Federal Prison Population, URB. INST. 2 (Oct. 2015), https://apps.urban.org/features/reducing-federal-mass-incarceration/[https://perma.cc/8C9H-UZSR].


\(^9\) See United States v. Cormier, 468 F.3d 63, 71 (1st Cir. 2006) (holding that a defendant could be convicted of intent to distribute drugs based solely on evidence of joint constructive possession of the drugs with “a co-venturer—i.e., possession shared with an accomplice or lookout,” and distinguishing United States v. Swiderski, 548 F.2d 445 (2d Cir. 1977)).

\(^10\) United States v. Serrano-Lopez, 366 F.3d 628, 635 (8th Cir. 2004) (holding that “[t]he large quantity of drugs involved is evidence of the defendant’s knowledge”).
been held sufficient to find someone guilty of possession with intent to distribute cocaine.\(^{11}\)

The problem here is that, in criminalizing the trafficking of drugs, the federal statute criminalizes the *possession* of drugs under certain circumstances and punishes these possessors at the same rate as traffickers. The proposed solution to the problem of prisons packed with drug offenders, therefore, has been direct: Decriminalize the possession of certain drugs.\(^{12}\) Decriminalization has received broad-based support, not only among the general populace, but also across the political spectrum. Indeed, decriminalizing drug use seems to be one of the few policies that the political left and right can agree on. Liberals, libertarians, and Critical Race Theorists (“CRT”) have all argued against criminalizing nonviolent drug offenses.

The liberal position is primarily an argument against legal moralism.\(^{13}\) Legal moralism is the view that popular morality should influence lawmaking.\(^{14}\) The troublesome cases focus on purely private conduct, conduct that is deemed immoral by a community and, on that basis, is deemed illegal. In this country’s recent history, interracial marriages\(^ {15}\) and homosexual sodomy\(^ {16}\) were criminalized because they

\(^{11}\) United States v. Zapata-Tamallo, 833 F.2d 25, 26–29 (2d Cir. 1987) (holding that defendant could be convicted of intent to distribute when he was found in an apartment with, among other things, a baggie of 25.13 grams of cocaine, a blue bag containing 7.5 kg of 90% pure cocaine, and a scale capable of weighing up to two grams).

\(^{12}\) The worldwide movement may have begun in earnest in 2001 when Portugal became the first country to decriminalize all drug consumption. See Naina Bajekal, Want to Win the War on Drugs? Portugal Might Have the Answer, TIME (Aug. 1, 2018, 6:09 AM), https://time.com/longform/portugal-drug-use-decriminalization/ [https://perma.cc/KAH7-8ZQN].

\(^{13}\) The classic statement of this liberal position was offered by H.L.A. Hart in his debate against Patrick Devlin. Hart argued that Devlin’s conclusion that the majority’s moral attitudes were sufficient justification to prohibit any intolerable private conduct was based on a confusion over the role of the majority in a democracy: “The central mistake is a failure to distinguish the acceptable principle that political power is best entrusted to the majority from the unacceptable claim that what the majority do with that power is beyond criticism and must never be resisted.” H. L. A. HART, LAW, LIBERTY, AND MORALITY 79 (1963).

\(^{14}\) This is the most conservative statement of the thesis. Others have argued that morality *must* influence lawmaking because public law is, at bottom, the enactment and enforcement of moral laws. The natural law moral theory holds that principles of morality are, in some sense, derived from the nature of the world, including the nature of human beings, and that valid public laws are those that are justified by the principles of natural law. See, e.g., Gustav Radbruch, *Five Minutes of Legal Philosophy* (1945), 26 OXFORD J. LEGAL STUD. 13, 14 (Bonnie Litschewski Paulson & Stanley L. Paulson trans.) (2006) (“There are principles of law, therefore, that are weightier than any legal enactment, so that a law in conflict with them is devoid of validity.

\(^{15}\) Overturned by the Supreme Court of the United States in Loving v. Virginia, 388 U.S. 1, 3 (1967) (unanimously holding that criminal statutes proscribing miscegenation violated the Fourteenth Amendment to the United States Constitution even though, as the trial court found, such statutes derived their authority from religious custom and tradition).

\(^{16}\) The Supreme Court of the United States upheld this criminal proscription in Bowers v. Hardwick, 478 U.S. 284 (1986), and then overturned it in Lawrence v. Texas. 539 U.S. 558 (2003). In *Lawrence*, the Court held that criminally proscribing sexual intimacy by same-sex couples in the
were deemed immoral. The primary defender of legal moralism, Patrick Lord Devlin, famously claimed that such private acts should be subject to legal sanction if they are held to be morally unacceptable by the “reasonable man.”

At bottom, legal moralism is an attempt to use the institution of law to support the very society that passes laws for its protection in the first place: “Societies disintegrate from within more frequently than they are broken up by external pressures. There is disintegration when no common morality is observed.” So, the argument goes, to combat “social disintegration,” a society is justified in criminalizing immoral behavior.

The liberal counter to this legal moralist argument is that the law is a public, not private, institution and that, although churches (for example) may be interested in coercing private conduct, the law should not. John Stuart Mill pronounced the contrary liberal position: The law should criminalize only conduct that causes harm to others. As applied to criminalizing drug possession, the liberal view would be that society’s dim view of drug users and addicts is an insufficient basis to criminalize that activity.

The libertarian position is primarily an argument against legal paternalism. Legal paternalism is the view that some criminal laws are justified if they prevent harm to oneself. Mandatory automobile seat belt and motorcycle helmet laws are examples. To save their own lives, drivers of cars and operators of motorcycles must protect themselves, or face penalties. The individual’s freedom of not being home violated the Fourteenth Amendment to the United States Constitution, even though proscriptions against sodomy “have ancient roots.”

If a certain practice evokes in the “reasonable man” (or “the man in the Clapham omnibus”) a “real feeling of reprobation,” “intolerance,” or “disgust,” then “the limits of tolerance” are likely to have been breached, and society may be justified in regulating even private morality. Patrick Devlin, The Enforcement of Morals 141–144 (1959).

Lord Devlin, as a judge passing sentences in criminal court, was motivated by the belief that crime must somehow be connected to sin—a “transgression against the divine law or the principles of morality.” Devlin, supra note 17 at 131.

In such cases, punishment is “need[less]” because another institution’s instructions and “terror” adequately enforce the individual’s obligations to behave in a certain way. Jeremy Bentham, An Introduction to the Principles of Morals and Legislation 177 (1823).

"[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others." John Stuart Mill, On Liberty 13 (Batoche Books 2001) (1959).

One formulation of this argument is that the coercion underpinning paternalism defeats the coerced person’s autonomy and treats a morally autonomous individual as being incompetent. See, e.g., Jeffrie G. Murphy, Incompetence and Paternalism, 60 ARCHIVES FOR PHIL. L. & SOC. PHIL. 465, 478 (1974), https://www.jstor.org/stable/23678832.

“The principle of legal paternalism justifies state coercion to protect individuals from self-inflicted harm, or in its extreme version, to guide them, whether they like it or not, toward their own good.” Joel Feinberg, Legal Paternalism, 1 CAN. J. PHIL. 105, 105 (1971), https://www.jstor.org/stable/40230341.
restrained by a seat belt or a protective head covering is not sufficient to overturn society’s interest in saving human life. The libertarian rejoinder to this argument is that it undervalues the autonomy that all morally responsible adults have within a society. To the extent that individual autonomy should be maximized, such laws restricting that autonomy are unjust. As applied to criminalizing drug possession, the libertarian view would be that society’s desire to protect its citizens from their own bad or harmful behavior is an insufficient reason for criminalizing that behavior.

The CRT position is a broader stance against the systemic racism inherent in the American legal system. The liberal and libertarian views espoused above are inadequate, according to CRT, because they assume—and therefore cannot address—the institutional racism entrenched in the “criminal justice” system. Under CRT, law is inherently racist in that it functions to create and maintain social, economic, and political inequalities between whites and nonwhites. Moreover, because the institution of law is used to entrench race as a social construct, law uses race as an instrument to oppress and exploit persons of color. The criminal law must therefore explicitly consider race in sentencing to achieve equity for those who have been oppressed and disadvantaged by the criminal justice system.

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24 “Unlike traditional civil rights discourse, which stresses incrementalism and step-by-step progress, critical race theory questions the very foundations of the liberal order, including equality theory, legal reasoning, Enlightenment rationalism and neutral principles of constitutional law.” Richard Delgado et al., Critical Race Theory: An Introduction 3 (3d ed. 2017). The charge of system racism seems particularly salient in the case of the War on Drugs given recent confessions by a Nixon aide, John Erlichman: “We knew we couldn’t make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.” Dan Baum, Legalize it All: How to win the war on drugs, Harper’s Mag. (Apr. 2016), https://harpers.org/archive/2016/04/legalize-it-all/ [https://perma.cc/LT78-V9ZP].

25 “Institutionalized racism is defined as the structures, policies, practices, and norms resulting in differential access to goods, services, and opportunities of society by ‘race’...It is structural, having been codified in our institutions of custom, practice, and law, so there need not be an identifiable perpetrator.” Camara P. Jones, Confronting Institutional Racism, 50 PHyLON 7, 10 (2002), https://www.jstor.org/stable/4149999.

26 A prevalent CRT theme is a critique of liberalism as a foundation of law, in which authors “target a mainstay of liberal jurisprudence such as affirmative action, neutrality, color blindness, role modeling, or the merit principle.” Richard Delgado & Jean Stefancic, Critical Race Theory: An Annotated Bibliography, 79 Va. L. Rev. 461, 462 (1993).

27 This process of racial entrenchment has been described as the formation of a status property right: “Following the period of slavery and conquest, white identity became the basis of racialized privilege that was ratified and legitimated in law as a type of status property. After legalized segregation was overturned, whiteness as property evolved into a more modern form through the law’s ratification of the settled expectations of relative white privilege as a legitimate and natural baseline.” Cheryl I. Harris, Whiteness as Property, 106 Harvard L. Rev. 1707, 1715 (1993).

28 This is meant to address the harm caused by so-called “race neutral” enforcement and sentencing practices. For a list of these “race neutral” provisions, see Elizabeth Hinton et al., Vera
to criminal drug possession, CRT offers a direct explanation for disproportionate minority confinement and discriminatory sentencing practices.\textsuperscript{29}

This widespread political support from liberals, libertarians, and critical race theorists seems to be built on a solid academic foundation. Social scientists have offered data demonstrating that the practice of incarcerating drug possessors has bad social consequences. The primary arguments against the prohibition of drug possession and drug use come from criminologists, economists, and sociologists.

Criminologists argue that drug prohibition is not effective. Criminal laws against drug use have had only a minimal effect on curbing Americans’ appetite for drugs.\textsuperscript{30} Indeed, decades of research demonstrate that any minimal deterrent effect that may have initially been realized has dwindled to almost no effect at all.\textsuperscript{31} Moreover, research indicates that the actual effects of problematic drug use—including reduced quality of life—have a greater deterrent effect on drug use than criminal sanctions.\textsuperscript{32}

Economists argue that drug prohibition is a waste of scarce resources. Jeffrey Miron, Director of Economic Studies at the Cato Institute, estimates that, in 2016, it cost American governments (state, local, and federal) $47 billion to try to prohibit drug use.\textsuperscript{33} Legalizing drugs, on the other hand, could generate $106.7 billion in

\textsuperscript{29} Such as the so called “crack/powder distinction” which, under the Anti-Drug Abuse Act of 1986, initially punished (for purposes of assigning mandatory sentences) possession of 100 grams of crack the same as 1 gram of cocaine, even though crack was a form of cocaine. Given the cultural disparities at the time between the use of these two drugs, opponents claimed the provision was racially biased. “In 1986, before the enactment of federal mandatory minimum sentencing for crack cocaine offenses, the average federal drug sentence for African Americans was 11% higher than for whites. Four years later, the average federal drug sentence for African Americans was 49% higher.” DEBORAH J. VAGINS & JESSELYN MCCURDY, ACLU, CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW i–ii (Oct. 2006), https://www.aclu.org/other/cracks-system-20-years-unjust-federal-crack-cocaine-law/. Although the Fair Sentencing Act of 2010 reduced the sentencing disparity of crack to cocaine from 100:1 to 18:1, the continuing racial disparity would seem obvious.


\textsuperscript{31} See OLIVER ROEDER ET AL., BRENNAN CTR. FOR JUST., WHAT CAUSED THE CRIME DECLINE? 79 (Feb. 12, 2015), https://www.brennancenter.org/our-work/research-reports/what-caused-crime-decline. This may be because knowledge of the severity of punishment has been shown to have no deterrent effect on any crime, much less drug crime. See DANIEL S. NAGIN, DETERRENCE IN THE TWENTY-FIRST CENTURY, 42 CRIME & JUST. 199, 201–02 (2013) (“[T]he deterrent effect of...the certainty of punishment is far more convincing and consistent than the severity of punishment.”).


annual budgetary gains from decreases in drug enforcement spending and increases in tax revenue. Treatment for drug addiction, so the argument goes, would be a much more effective response to drug-related problems.

Sociologists argue that the criminal enforcement of drug use and possession has swelled prison populations. For decades, drug offenses have been a primary driver of increases in federal prison stays. Moreover, this increase in prison populations has had a disparate impact on minority populations. Decriminalizing drug possession, it is argued, would reverse these trends.

The philosophical arguments in favor of decriminalization—libertarianism, liberalism, and critical race theory—assume that citizens will be better off if the practice of punishing drug possession and use is abolished. Increased personal choice, broader personal freedoms, and a greater sense of equity will result if drug possessors are no longer punished. Similarly, the scientific arguments in favor of decriminalization assume good social consequences. More effective deterrence, better use of resources, and reductions in prison populations will result if drug possessors are no longer punished. These arguments—both philosophical and empirical—predict good social consequences as decisive reasons for ending laws that prohibit drug possession and use.

I. PROBLEM

The problem is that most American sentencing schemes are based not on consequentialist moral theories, but rather on non-consequentialist ones. Since the era of “truth in sentencing” (a trend in punishment practices that dovetailed with the escalating War on Drugs), the predominant punishment theory has been retribution.

The retributive trend of punishing offenders based on the primary rationale of desert began with the Minnesota Sentencing Commission and the guidelines it propounded in 1981. Many states, including Ohio, and the federal government were influenced by Minnesota’s “numerical guideline system.” See Andrew Ashworth, Techniques for Reducing Sentence Disparity, in PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY, 249–52 (3d rev. ed. 2009).
have held sway in most American jurisdictions. Predictably then, the consequentialist arguments of the reformers may not sway those who are steeped in this criminal justice tradition. The retributive response to data-driven arguments is that good social consequences do not matter if the offender deserves punishment. And the retributive response to philosophical arguments grounded in principles of equality, liberty, or equity is that, if justice requires punishment, then the state is morally required to give it.

For these reasons, sweeping reforms to decriminalize drug activity will not persuade those in charge of promulgating and prosecuting criminal laws. In short, the direct solution of decriminalization may work for drugs that have been deemed less harmful (like marijuana), but may be repelled by legislators who want to defend retributive justice against any further incursion into current sentencing practices. Thus, lasting reform must take a more oblique approach to decriminalization by changing the way criminal justice practitioners and policy makers think about how and why drug offenders should be punished.

39 “The shift from utilitarian to retributive ideas was fast and decisive…Retributive theories fit the mid-1970s like a glove. By shifting the focus of punishment away from the offender’s circumstances and needs to his culpability, retributive theories addressed all the major criticisms of indeterminate sentencing.” Michael Tonry, Looking Back to See the Future of Punishment in America, 74 Soc. Rsch. 353, 358 (2007), https://www.jstor.org/stable/40971936?read-now=1&refreqid=excelsior%3Afac42d5b01aaef227cc20c1951ec111e&seq=6&page_scan_tab_contents.

40 “Retributivism is a very straightforward theory of punishment: We are justified in punishing because and only because offenders deserve it. Moral culpability (‘desert’) is in such a view both a sufficient as well as a necessary condition of liability to punitive sanctions.” Michael S. Moore, The moral worth of retribution, in Punishment and Rehabilitation 94, 96 (3d ed., 1995).

41 This is because the offender has the moral right, as a fully autonomous human being, to be punished. Herbert Morris, Persons and Punishment, 52 Monist 475, 475–76 (1968), https://www.jstor.org/stable/27902099?read-now=1&refreqid=excelsior%3A15b1e3eb2aa8178562d5a02da3de5640&seq=2&page_scan_tab_contents. One can almost hear Kevin Costner’s famous speech in the movie JFK: “Let justice be done though the heavens fall.” JFK (Warner Bros. 1991). Before we jeer too much at this Kantian notion, however, we should consider the alternative perspective of the Warren Court and its famous decisions in Gideon and Miranda. In those cases, the State was making arguments—based on bad consequences—that providing counsel and reading constitutional rights to all defendants would cost too much, would grind the system to a halt, would hamper legitimate investigation, and would free obviously guilty persons. The Court held against these consequentialist arguments, to the benefit of criminal defendants. See Gideon v. Wainwright, 372 U.S. 335, 345 (1963); Miranda v. Arizona, 384 U.S. 436, 498–99 (1966).

42 Our Country’s recent history also counsels caution. We witnessed the unintended consequences of another sweeping reform—psychiatric deinstitutionalization—in the 1960s through the 1980s: “[A] significant number of chronically mentally ill are now homeless, housed in geriatric nursing homes, or populating overcrowded city and county jails. These negative outcomes of deinstitutionalization are vital concerns of public policy.” Deborah Deas-Nesmith & Stephen McLeod-Bryant, Psychiatric Deinstitutionalization and its Cultural Insensitivity: Consequences and Recommendations for the Future, 84 J. Nat’l Med. Assoc. 1036, 1036 (1992), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2571658/pdf/jnma00278-0054.pdf.
II. PROPOSAL

The American criminal justice system has focused primarily on prohibition: Prohibiting citizens from using drugs classified as “dangerous.” It is not surprising that, if a sentencing scheme starts at the felony level to punish drug use, then that scheme will punish even more severely the person who preys on a user by selling them drugs or who creates an illegal enterprise to manufacture and distribute those drugs. If dangerous drug use should be prosecuted as a felony, then the supplier of that dangerous drug should be prosecuted at a higher felony level.43

The reform of drug offenses requires a different mindset for dealing with drug offenders. The recommendation here is a simple one: Consider the primary target of drug offenses to be the offender who would harm another with dangerous substances.44 Once the felony level has been set for that harmful offender, the felony levels for those in the supply chain—traffickers and users, in particular—can be set at a lower, and possibly a misdemeanor, level. In this way, nonviolent drug offenses could be punished at a much lower level then they are currently. The hope is that, even without outright decriminalization, the desired social consequences would be realized as a side benefit of implementing the reimagined sentencing guidelines.

III. PRINCIPLES

The conceptual move from prohibiting use to proscribing harm must be based on sound principles of penology. What follows is a set of principles that should be acceptable to most criminal justice professionals and advocates, including those who continue to rely on a retributive sentencing model.

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43 This is based on the retributive principle of proportionality—sentencing an offender based on “the gravity of the offense.” In this case, the higher felony level tracks the more egregious conduct: Trafficking. This is not meant to be a controversial principle: “People have a sense that punishments scaled to the gravity of offenses are fairer than punishments that are not.” Andrew von Hirsch, Proportionality in the Philosophy of Punishment, 16 CRIME & JUST. 55, 56 (1992), https://www.jstor.org/stable/1147561.

44 John Stuart Mill argued that causing harm to others was the only acceptable reason for limiting citizens’ liberty, either by threatening or by actually imposing punishment upon them. Mill, supra note 21, at 13. Non-anarchists generally accept this principle of liberalism; any disagreement among political philosophers is typically based on what more than “harm caused to others” is the appropriate target of the criminal law. For a survey of these widely “liberal” positions, see Joel Feinberg, Harm to Others: The Moral Limits of the Criminal Law 14–16 (Oxford University Press 1987). The proposal here is meant to limit the scope of proscriptions against felonious drug activity to those who harm others, either by assaulting them, exploiting them, or obstructing their access to recognized interests.
A. Result-oriented offenses are an appropriate target of criminal law.

This principle should be uncontroversial. Many of the most serious offenses in any sentencing scheme, including murders and felonious assault, are result-oriented offenses. These crimes are punished most severely because they directly cause social harm.\(^{45}\) A murderer “purposely cause[s] the death of another.”\(^ {46}\) An assaulter “knowingly … cause[s] serious physical harm to another.”\(^ {47}\)

The distinction between result-oriented offenses and conduct-oriented offenses is illustrative here. Result-oriented offenses proscribe the intentional causing of a result. Conduct-oriented offenses prohibit the intentional doing of an act. An example might help to differentiate the two types. Consider a person who drives a car while intoxicated. The criminal offense of driving while intoxicated is a conduct-oriented offense: The conduct of driving a car in an inebriated state is deemed so risky that the driver should be punished. The result-oriented offense of vehicular manslaughter, causing the death of another when driving while intoxicated (for example), is punished more severely.\(^ {48}\) The social harm caused by involuntary manslaughter—death to the victim, loss to the victim’s family and friends—is much greater than the social harm caused by driving while intoxicated—increased risk to other drivers.

Because result-oriented offenses directly cause social harm, they are appropriate targets of the criminal law. Moreover, because sentencing schemes tend to reserve the most severe punishments for result-oriented offenses that directly cause harm to others, drug offenses that similarly cause direct harm to others also should be punished severely.


\(^{46}\) See, e.g., Ohio Rev. Code Ann. § 2903.02(A) (West 1998).


\(^{48}\) See, e.g., Ohio Rev. Code Ann. § 2903.04(B) (West 2004), which makes “caus[ing] the death of another…as a proximate result of the offender’s committing or attempting to commit a misdemeanor,” such as Operating a Vehicle while Intoxicated, a felony in the third degree. Conviction carries a prison sentence of up to thirty-six months. See Ohio Rev. Code Ann. § 2929.14(A)(3)(b) (West 2021).
B. Attempts to commit offenses should be punished at a lesser, but predictable, rate.

This principle also should be uncontroversial.\textsuperscript{49} Indeed, nearly every jurisdiction provides a discount for attempted offenses.\textsuperscript{50} Typically, an attempt to commit a particular offense is scaled to the sentencing level below the completed offense.\textsuperscript{51} For example, if a completed felonious assault were to be punished as a second-degree felony, then an attempt to commit felonious assault would be punished one step lower, as a third-degree felony.

C. A system of graduated attempts—as series of lesser-included offenses—is an appropriate plea-bargaining tool.

Plea-bargaining is another routine practice in the criminal justice system.\textsuperscript{52} It has been estimated that, in the federal system, more than 97% of all criminal cases are disposed of by a negotiated guilty plea.\textsuperscript{53}

The results of plea negotiations often times approach legal fictions. For example, a prosecutor might “plead down” a DUI charge to a charge of “reckless operation.” Certainly one must operate one’s car recklessly to be driving under the influence; so the fiction is not unbelievable. It is just that there is a sense in which the defendant is not convicted of “what he did.” In such cases, the process of plea negotiation has been called (often times pejoratively) “sentence negotiation.” In

\textsuperscript{49} This is a practical, not a philosophical, statement. Kantian retributivists might argue that, because the same evil motive is expressed by one who attempts, as by one who completes, an offense, the punishment should be the same. One should not get the benefit of “moral luck,” as it is said. And retributivists have famously tried to provide theoretical justifications for the ubiquitous practice of discounts for attempts. For a survey of these views, see generally Kenneth Einar Himma, Luck, Culpability, and the Retributive Justification of Punishment, 22 LEWIS & CLARK L. REV. 709 (2018), https://law.lclark.edu/live/files/26901-lcb223article2himmmapdf.

\textsuperscript{50} “Almost every jurisdiction world-wide punishes an attempt that succeeds more severely than the attempt that fails.” Russell Christopher, Does Attempted Murder Deserve Greater Punishment than Murder - Moral Luck and the Duty to Prevent Harm, 18 NOTRE DAME J. L. ETHICS & PUB. POL'Y 419, 419 (2014), https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1253&context=ndjlep [https://perma.cc/7NX5-NWS8].

\textsuperscript{51} Ohio follows suit. Ohio’s sentencing provisions for attempts can be found in OHIO REV. CODE ANN. § 2923.02(E)(1) (West 2019).

\textsuperscript{52} This is not to say that plea-bargaining is a just system or that it is not ripe for abuse. The practice has been upheld as constitutional. See, e.g., Brady v. United States, 397 U.S. 742, 758 (1970). And, again, the system is used—primarily for purposes of prosecutorial and judicial economy—in all American jurisdictions.

\textsuperscript{53} According to a recent study from the Pew Research Center, of the roughly 80,000 federal prosecutions initiated in 2018, just two percent went to trial. More than ninety-seven percent of federal criminal convictions are obtained through plea bargains, and the states are not far behind at ninety-four percent. John Gramlich, Only 2% of federal criminal defendants go to trial, and most who do are found guilty, PEW RSCH. CTR. (June 11, 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/ [https://perma.cc/JP7S-U4QQ].
short, the question is not whether the person is guilty; the question is what the person is guilty of.

The practice of plea-bargaining is both constitutional and ubiquitous. We can assume that it will continue in some form no matter what criminal justice reforms might be instituted. So, in any sentencing reform regarding drug offenses, this practice of plea-bargaining, even if it creates legal fictions, should be permissible.

D. Attendant circumstances may be used to distinguish between similar types of offenses, rather than to establish a sentencing enhancement.

An attendant circumstance is an element of a criminal offense that demonstrates the context within which a person criminally acted. An attendant circumstance must be proved beyond a reasonable doubt, just like the other material elements of a criminal offense. An example might help to demonstrate how attendant circumstances are analyzed in criminal offenses. Consider common-law larceny. Larceny is defined as (1) the taking and (2) removing (3) of the personal property (4) of another (5) by trespass (6) with the intent to permanently deprive. The mens rea—the mental element—of the offense is “with the intent to permanently deprive.” The criminal conduct is “taking” and “removing” the property. The other elements are attendant circumstances. They tell us what kind of property was involved (personal property), whose property it was (another’s), and how the property was taken (by trespass).

In recent years, attendant circumstances have been added on to criminal offenses as sentencing enhancements. In other words, these attendant circumstances illustrate the dangerous circumstances in which an offense was committed so that a greater sentence can be given to that offender. Many so-called “mandatory minimums” fit under this scheme. For example, if a person commits an offense “while brandishing a firearm,” then that person may receive a mandatory term of years “consecutively to and prior to” the sentence for the underlying

54 Or, at least, not unconstitutional. See Brady, 397 U.S. at 753 (“[W]e cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime.”).

55 “A ‘result’ or ‘conduct’ is not an offense unless certain ‘attendant circumstances’ exist. An ‘attendant circumstance’ is a fact that exists at the time of the actor’s conduct, or at the time of a particular result, and which is required to be proven in the definition of the offense.” JOSHUA DRESSLER, BLACK LETTER OUTLINES: CRIMINAL LAW 11 (2d ed. 2005), https://lscontent.westlaw.com/images/content/DresslerCrimLaw.pdf.

56 Here, the enhancement would be termed a “conduct enhancement”—such as committing a robbery with a firearm—rather than a “status enhancement”—such as having sufficient prior convictions to net a life sentence under a so-called “Three Strikes” law. See ELAN DAGENAI ET AL., STAN. COMPUTATIONAL POL’Y LAB, SENTENCING ENHANCEMENTS AND INCARCERATION: SAN FRANCISCO, 2005–2017, at 1 (Oct. 17, 2019), https://policylab.stanford.edu/media/enhancements_2019-10-17.pdf.
How the person committed the offense—with a firearm—enhances the sentence for the offense itself.

Drug offenses have “mandatory minimums” as well. For example, the specific location of a drug sale—say within 1000 feet of a school—may add a sentence to a typical trafficking charge. Moreover, the type of drug sold may increase a typical trafficking charge. Finally, the amount of drugs sold may increase a typical trafficking charge. In all these examples, attendant circumstances—where, what kind, and how much of the drug was sold—provides an add-on sentence.

This is not to say that attendant circumstances must be used to enhance penalties for a given offense. Again, this is a recent practice designed to punish offenders who are viewed as more dangerous given the circumstances of their offense. Attendant circumstances also have been used to distinguish between different kinds of offenders within a given offense type. For example, there are several different kinds of burglaries that may be distinguished by their attendant circumstances. Aggravated burglary might be a (1) trespass (2) into an occupied structure, like a home (3) while someone is present or likely to be present. Burglary—punished at a lesser rate—might be a simple (1) trespass (2) into an occupied structure. Breaking and entering—punished at an even lesser rate—might be a (1) trespass (2) into an unoccupied structure, like a detached garage. Here, attendant circumstances—such as potential victimhood and type of building—support a gradation of offenses, rather than an enhancement of a punishment for a given offense.

Another way of describing this usage of attendant circumstances is that attendant circumstances distinguish between types of offenders based on their intentions. The gradation of offenses—from breaking and entering to burglary to aggravated burglary—is shorthand for the intentions of the offenders and the potential harm that might be caused. Breaking into a detached garage—a building that no one is predicted to live in—demonstrates an intention only to steal, not to harm others. On the other hand, breaking into a residence while someone is home demonstrates an intention not only to steal, but also to accost the residents.

A sentencing reform of drug offenses could also take into account the attendant circumstances of those offenses as a shorthand categorization of the relative dangerousness of the drugs involved or the intentions of the offenders considered. The attendant circumstances would not have to be used as sentencing enhancements for any particular drug offense.

E. *The vulnerability of intended or impacted victims may be considered in determining the severity of an offense.*

Sentencing schemes permit consideration of particularly vulnerable victims in sentencing decisions. These vulnerable victims are often placed into the actual criminal offense as an attendant circumstance. In short, the fact that the crime caused

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57 Ohio Rev. Code Ann. § 2929.14(C)(1)(c) (West 2021) lists the kinds of “consecutively to and prior to” sentence enhancements under Ohio law.
harm to a particular kind of person is used to categorize offenses. For example, if one commits a sex offense against a person for whom they are responsible, then that “trusted” defendant could be sentenced more severely than a defendant who did not have that relationship.\textsuperscript{58} Moreover, if a person has a status that makes that person more susceptible to being taken advantage of by an offender, then the offender who trades on that vulnerability may be sentenced more severely than an offender who does not.\textsuperscript{59}

A sentencing reform of drug offenses could also consider the vulnerability of certain kinds of victims in grading offenses for purposes of sentencing.

F. Distinctions between offenses appropriately distinguish between kinds of harms that could be caused by those offenses.

A focus on result-oriented offenses permits grading offenses based on the predicted results that might be caused. This is the basis for many current sentencing schemes. Typically, the result-oriented offenses are graded with reference to the resulting harms for given categories of offenses. The greater the harm that could be caused, the greater the potential punishment would be.

Harms are not merely physical, however. Indeed, a wide variety of harms are anticipated under the criminal law. One contemporary moral philosopher, Joel Feinberg, has famously grouped this set of possible harms under the label of “welfare interests.” Harm to one’s welfare interests might include everything from “interests in one’s own physical health and vigor” to the “absence of groundless anxieties and resentments” and from “the integrity and normal functioning of one’s body” to “a tolerable social and physical environment.”\textsuperscript{60} All of these welfare interests are the basic requisites of a person’s wellbeing; without them, a person’s higher interests and goals cannot be achieved.

Criminal statutes tend to group harm to welfare interests by virtue of how close to the victim—in proximity and in time—the harm is realized. For example, harm to one’s bodily integrity or personal autonomy are punished most severely. On the other end of the spectrum, harms to one’s potential well-being are punished least severely.

I will follow this general gradation of criminal offenses by providing three groups of offenses. Assaultive offenses—those causing direct physical harm to a victim—are punished the most severely. The harm in assaultive offenses is the harm

\textsuperscript{58} An example in Ohio would be the categorical denial of intervention in lieu of conviction to a person holding a “position of trust” to the victim of the offense. See State v. Massien, 926 N.E.2d 1282, 1283 (Ohio 2010) (discussing this theory as it applies to a nurse who, due to her addiction, stole pain medications from her employer-hospital that were meant for her patients).

\textsuperscript{59} For example, menacing by stalking is a first-degree misdemeanor, but is enhanced to a fourth-degree felony if “[t]he victim of the offense is a minor.” OHIO REV. CODE ANN. § 2903.211(B)(2)(d) (West 2016).

to one’s right to bodily integrity. Typical offenses include murder, manslaughter, assault, and rape.

*Exploitative offenses* take advantage of a victim and are punished next most severely. These offenses harm the victim economically and emotionally and infringe upon the victim’s right to autonomy. Typical offenses include fraud, theft, and burglary.

*Obstructive offenses* tend to thwart the welfare interests of another. Here, the victim is one for whom the offender is in some way responsible. These offenses thwart a person’s interest in a tolerable social environment in which to thrive. Such offenses against one’s potential, although criminal, are punished least severely. A typical offense might be contributing to the delinquency or unruliness of a minor.

A sentencing reform of drug offenses could also take into account this grading of offenses based on a recognized scaling of harms caused.

### IV. Program

The problem with current sentencing schemes is that they start with prohibiting the use of drugs and graduate sentences for trafficking and distributing drugs upward from there. So, if drug use is punished as a low-level felony, then trafficking drugs will be punished as a higher-level felony. The principles provided above should permit a different orientation to drug sentencing. The proposal here is that a drug sentencing scheme should start at a noncontroversial set point for any kind of criminal offense: Direct harm caused to others. For drug offenses, the crime that best suits that description is corrupting another with drugs.\(^{61}\)

Corrupting another with drugs is a result-oriented offense. The prohibited result is to “cause serious physical harm to [an]other person.”\(^{62}\) The mens rea required is “knowingly.”\(^{63}\) This makes corrupting another with drugs an assaultive offense.\(^{64}\) The attendant circumstance—how the assault occurs—is “[b]y any means, administer…or induce or cause another to use a controlled substance.” So, if a person knowingly gives someone drugs and thereby causes them serious physical harm, that person is guilty of corrupting another with drugs.\(^{65}\)

Assuming that corrupting another with drugs is a serious felony, akin to felonious assault, corrupting another with drugs could be classified similarly: As a

\(^{61}\) In what follows, I will use the sentencing scheme and current nomenclature for the current Ohio criminal sentencing guidelines.


\(^{63}\) “A person acts ‘knowingly’ … when the person is aware that the person's conduct will probably cause a certain result.” *Ohio Rev. Code Ann.* § 2901.22(B) (West 2015).

\(^{64}\) Compare this portion of the statute with Felonious Assault, a second-degree felony: “No person shall knowingly…cause serious physical harm to another…” *Ohio Rev. Code Ann.* § 2903.11(A)(1) (West 2019).

\(^{65}\) This is Ohio’s name for the offense. There is nothing special about it, and it sounds weaker than the elements of the offense. The way I will describe it in what follows would justify a stronger label—perhaps Assaulting Another with Drugs.
second-degree felony. If the result of corrupting another with drugs were the user’s death, however, the charge would deserve to be punished as a first-degree felony, one step higher. This would put it in line with involuntary manslaughter: causing the death of another “as a proximate result of the offender’s committing or attempting to commit a felony.”

The current trafficking, use, and possession offenses could be classified under the target offense of corrupting another with drugs as lesser-included offenses. Trafficking offenses are not assaultive offenses, in that they do not directly, physically harm another person. Therefore, they should not be punished as harshly as corrupting another with drugs. However, trafficking offenses are exploitative offenses, in that they take advantage of a user’s need for a controlled substance to make a profit. For that reason, then, trafficking offenses should remain felony offenses, even if lesser felony offenses.

The exploitative offense of trafficking in drugs can be considered an attempt to corrupt another with drugs. For the current second-degree felony, the attendant circumstance is “administering or causing to use a controlled substance.” And there are two steps that must precede “causing another to use a controlled substance”: The victim must get the drug, and the victim must use the drug. The idea here is that, for any trafficking offense, there are two attempted offenses: (1) The attempt to cause another to use a controlled substance; and (2) the attempt to furnish another with a controlled substance. And offense (2) is a precursor to offense (1), because a person must have the drug before she can use it.

This structure permits a series of lesser-included trafficking offenses. If knowingly causing serious physical harm to another by causing them to use a drug is corrupting another with drugs, a second-degree felony, then knowingly attempting to cause another to use a drug, should be a third-degree felony. It is, in effect, attempted corrupting another with drugs. And, if attempted corrupting another with drugs is a third-degree felony, then the “precursor” offense of attempting to furnish another with that drug should be a fourth-degree felony.

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66 Ohio Rev. Code Ann. § 2903.04(A). In this case, the underlying felony of the new charge of “aggravated corrupting another with drugs” would be corrupting another with drugs under R.C. 2925.02(A)(3) (West 2004).
A chart illustrating the reimaged offenses by mens rea, attendant circumstance, result, and penalty follows:

<table>
<thead>
<tr>
<th>Offense</th>
<th>Mens Rea</th>
<th>Attendant Circumstance</th>
<th>Result</th>
<th>Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aggravated Corrupting Another With Drugs (&quot;ACAWD&quot;)</td>
<td>Knowingly</td>
<td>By any means cause another to use a drug</td>
<td>Thereby causing the other’s death</td>
<td>F1</td>
</tr>
<tr>
<td>Corrupting Another With Drugs (&quot;CAWD&quot;)</td>
<td>Knowingly</td>
<td>By any means cause another to use a drug</td>
<td>Thereby causing the other serious physical harm</td>
<td>F2</td>
</tr>
<tr>
<td>Aggravated Trafficking (&quot;Attempted CAWD&quot;)</td>
<td>Knowingly</td>
<td>By any means furnish a drug to another</td>
<td>Thereby causing the other to use the drug</td>
<td>F3</td>
</tr>
<tr>
<td>Trafficking (&quot;Attempted Aggravated Trafficking&quot;)</td>
<td>Knowingly</td>
<td>By any means</td>
<td>Furnish a drug to another</td>
<td>F4</td>
</tr>
</tbody>
</table>

The first two offenses would be classified as assaultive offenses. For ACAWD and CAWD, the result is direct physical harm to another. The second two offenses—the trafficking offenses—would be classified as exploitative offenses. The basis for trafficking offenses is that the dealer is exploiting the vulnerabilities of buyers to make money. The social harm created by the trafficking offenses is, therefore, economic and emotional.

The next two offenses anticipate social harm to vulnerable victims who are not the drug user. These are obstructive offenses, offenses that tend to hinder the emotional and social development of persons who may be adversely affected by witnessing a trusted adult routinely using drugs. The typical vulnerable victim in such cases would be one’s child or some other closely related children who witness the deleterious effects of routine drug use. The typical offender in these cases would be the addict whose need for the drug outweighs, in the instant, the addict’s duties to rear children in a healthy environment and to set an appropriate example for those subject to her influence.

Similar offenses currently exist in criminal codes. For example, in Ohio, one is guilty of a first-degree misdemeanor if one “[a]ct[s] in a way tending to cause a child or a ward of the juvenile court to become an unruly child or a delinquent child.”

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Moreover, each day the statute is violated registers as a separate offense.\(^{68}\) Similarly, if a caretaker knowingly fails to provide for a “functionally impaired person under the caretaker’s care,” and the lack of care causes physical harm to the functionally impaired person, the caretaker is guilty of a first-degree misdemeanor.\(^{69}\)

The new offenses would proscribe use and possession, but only in the presence of a vulnerable victim, a person whose welfare the community could predict would be harmed by a continual course of conduct involving drug usage. The predicted result would be the negative effect on the welfare of the vulnerable victim. But the offenses here would proscribe the related conduct that would lead to the predictable social harm. When added to the chart, the two new offenses would look like this:

<table>
<thead>
<tr>
<th>Offense</th>
<th>Mens Rea</th>
<th>Attendant Circumstance</th>
<th>Conduct</th>
<th>Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Using Drugs in the Presence of a Vulnerable Victim (“UDPVV”)</td>
<td>Knowingly</td>
<td>By a continual course of conduct, in the presence of a vulnerable victim</td>
<td>Use a drug</td>
<td>F5</td>
</tr>
<tr>
<td>Attempted UDPVV</td>
<td>Knowingly</td>
<td>In the presence of a vulnerable victim</td>
<td>Use a drug</td>
<td>M1</td>
</tr>
</tbody>
</table>

Again, these two offenses would be classified as obstructive offenses, and the defendants would be assumed to be those addicted to drugs, those for whom care of vulnerable victims has taken a backseat to drug usage. And because these offenses are “conduct” offenses, the penalties are lower than the offenses that cause direct harm to others. Moreover, these offenses might better target offenders who require treatment outside of the criminal justice system via “intervention in lieu of conviction” programs.\(^{70}\)

Finally, simple drug possession offenses would be classified in a lower penalty range than attempted UDPVV, given that there would be no need for the prosecution to prove that a vulnerable victim was present. In a sense, every simple drug possession would assume the social harm that someone else might be negatively affected by the offender’s usage of the drug. There would be no argument that simple drug possession, or even drug use, was to be prohibited due to the harm one might cause to oneself.\(^{71}\)

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\(^{68}\) *Ohio Rev. Code Ann.* § 2919.24(C) (West 2017).


\(^{70}\) See, e.g., Ohio’s intervention in lieu of conviction statute, *Ohio Rev. Code Ann.* § 2951.041 (West 2021), and its recent expansion under HB 1, which became effective April 12, 2021.

\(^{71}\) Again, this is the primary philosophical concern with laws against drug use: legal moralism and legal paternalism are not acceptable moral bases for punishment. For this general argument see
Adding simple drug use and possession to the ongoing chart of graduated drug offenses would look like this:

<table>
<thead>
<tr>
<th>Offense</th>
<th>Mens Rea</th>
<th>Attendant Circumstance</th>
<th>Conduct</th>
<th>Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Using Drugs</td>
<td>Knowingly</td>
<td>Use a drug</td>
<td>M2</td>
<td></td>
</tr>
<tr>
<td>Possession of Drugs</td>
<td>Knowingly</td>
<td>Possess a drug</td>
<td>M3^72</td>
<td></td>
</tr>
<tr>
<td>(“Attempted Using Drugs”)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

V. POSSIBILITIES

The proposed structure solves several problems with the recent skirmishes in the War on Drugs. The proposed structure: (1) Provides a principled means for reducing mere use and possession offenses to low-level felonies and misdemeanors based on the notion that use and possession offenses are precursors to result-oriented offenses that directly cause harm to others; (2) provides three distinct categories of defendants, a categorization that will permit a more reasoned usage of criminal justice resources to deal with each; and (3) provides a reasonable way of eliminating certain egregious practices, including prescribing greater punishments for offenses in certain geographical zones and based on a predetermined “schedule” of perceived drug dangerousness.

A. Use and Possession as Precursor Offenses

The primary benefit of the proposed structure is that it removes from felony sanctions the drug offenses of simple use and possession. Current philosophical, economical, and social arguments against criminalizing drug use and possession are compelling. Unfortunately, the methods by which these prohibitions are eradicated, especially when based upon strident “decriminalization” or “defunding” rhetoric, are not as persuasive. The proposed structure gives a logical, guideline-based reason for dropping use and possession offenses below the felony level of punishments: Use and possession are precursor (or lesser-included) offenses to the felony-level drug offenses that harm other persons. Because the new focus for drug offenses is


^72 This would be the maximum penalty one could receive for mere drug possession. Different jurisdictions, based on social policies regarding the relative dangerousness of drugs, could reduce this penalty as they see fit. For example, some jurisdictions have already “decriminalized” possession of “personal use” amount of marijuana. Nothing in this proposed scheme would require increasing those penalties.
on the result of drug activity, possession and personal use of drugs are seen as lesser offenses.

B. *Three Categories of Defendants*

The proposed structure divides felony defendants into three categories: (1) assaultive; (2) exploitative; and (3) obstructive. And the sentencing scheme purports to punish these types of defendants in descending amounts: First- and second-degree felonies for assaultive defendants; third- and fourth-degree felonies for exploitative defendants; and fifth-degree felonies and first-degree misdemeanors for obstructive defendants.

Resources can be allocated based on these categorical distinctions. Prison could be an appropriate option for the violent, assaultive defendants who have knowingly caused the death of, or serious physical harm to, others by causing them to use drugs. Asset forfeiture, irrespective of prison, could be used against exploitative defendants on the theory that economically driven offenses should be addressed by undercutting the profit motives of those offenders. And treatment in lieu of conviction could be reserved for the obstructive defendants whose addiction drove them to commit a drug offense that could harm others in their charge.

C. *Proof of Elements, rather than Sentence Enhancements*

The proposed structure features the harmful results of drug offenses. Because personal use and possession are envisioned as precursors to offenses with harmful results, typical measures of worsening conduct can be used to prove elements of charges, rather than to enhance sentences. Currently, three factors ratchet up the typical third-degree trafficking charge: Type of drug, amount of drug, and proximity to a school.

The proposed structure would permit jurisdictions to avoid labyrinthine add-ons to sentences in favor of using these attendant circumstances—what kind of drug, how much of the drug, where the offense occurred—as evidence of the offender’s awareness that he would cause the proscribed result. Take for instance, the charge of corrupting another with drugs. To be found guilty, the offender must be proved to have (1) knowingly (2) caused another to use a drug (3) thereby causing (4) serious physical harm to that other person. The perceived dangerousness of the drug would, in the proposed scheme, help the prosecutor prove that the defendant knew that giving the drug to the person would cause her serious physical harm. This would be easier to prove if the drug involved were fentanyl, as opposed to marijuana. And it would be easier to prove if the drug amount were one gram of heroin, as opposed to one-tenth of a gram of heroin.

On the other hand, if the drug were deemed less dangerous and were evidenced in smaller amounts, the prosecution might be swayed to accept a lesser charge for a plea deal. If the prosecution could not prove that the offender knew that the drug (say, marijuana) would cause serious physical harm to the other person (given the
relatively small amount, say two grams), then the prosecution would be tempted to take a plea to a lesser charge of aggravated trafficking in drugs—knowingly causing another to use the drug—a third-degree, rather than a second-degree, felony.

In these cases, then, the amount and type of drug involved would not raise the felony level of the offense beyond a second-degree felony. It would secure a plea deal to the appropriate level of offense. And it could reserve prison sentences as a sanction for those who pled to a second-degree felony or higher.

Proximity to a school could also be used as evidence of guilt, rather than as a sentencing enhancement. In cases where vulnerable victims were involved, the proximity to a school might become a relevant concern. If a person is charged with using a drug in the presence of a vulnerable victim, then evidence of school kids who might be present during the offense goes to proving the attendant circumstance of “in the presence of a vulnerable victim.” However, this attendant circumstance, when used as proof of the particular charge, would not increase the sentence of that charge beyond a fifth-degree felony.

In this manner, attendant circumstances would be used as elements of an offense, not as an enhancement of a sentence. The prosecution would be required to prove beyond a reasonable doubt the presence of a vulnerable victim (for example), to prove the offender guilty of a felony drug offense. The prosecution would not be permitted merely to prove possession of a dangerous drug to convict an offender of a felony drug offense and then argue to the judge that the sentence on that felony should be even higher because it was committed in the presence of a vulnerable victim. The hope is that, by keeping attendant circumstances as elements of offenses, the prosecution’s job in convicting drug offenders would be a bit more difficult and would, in turn, encourage plea bargains to lesser-included offenses, as guided by the principles proposed and the charts provided above.