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Killing The Proverbial Two Birds With One Stone: Using Environmental Statutes And Nuisance To Combat The Crime Of Illegal Drug Trafficking

Omar Saleem*

I. Introduction

Illegal drugs and the destruction of the natural environment both are major concerns of many Americans.¹ These twin social problems raise serious social concerns.² Tremendous efforts have

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2. The fear of illegal drug fosters and perpetuates the corollary fear of crime. JAMES A. INCIARDI, THE WAR ON DRUGS HEROINE, COCAINE, CRIME, AND PUBLIC POLICY 17 (1986). Both fears rose sharply in late 1988, and subsequently diminished in 1990 when economic and foreign policy concerns became the thrust of political agenda. DAVID W. RASMUSSEN & BRUCE L. BENSON, THE ECONOMIC ANATOMY OF A DRUG WAR, 122-27 (1994). Fear and discontent have been the precursor of such punishment schemes as “three strikes and you’re out”, People v. Romero, 56 Crim. L. Rep. (BNA) 17 (Cal. App. Supp. Feb. 1, 1995), which has been strenuously debated. See Marc Peyser and Donna Foote,
been channeled into confronting both environmental degradation and stopping the flow of illegal drugs. A tendency exists to separate the problems from each other and view them as unrelated issues. This article posits that environmental degradation and illegal drugs are connected, and that combating one problem will address the other.³

Section II of this article outlines the magnitude of the illegal drug problem and its impact on society, law, communities and individuals. It concludes that the United States is losing the war on drugs. Any effort to address the problem must foster community empowerment, including the use of environmental statutes and nuisance laws.

Section III is divided into two parts. The first part discusses the harmful environmental and health effects of clandestine drug labs resulting from the release of harmful chemicals. The second part demonstrates how communities can use hazardous waste statutes to combat the dangerous wastes produced by clandestine drug labs.

Section IV examines how nuisance laws effectively combat illegal drug trafficking and promote community responsibility and empowerment. Various criticisms for using nuisance laws to combat illegal drug trafficking are reviewed. This section also discusses how a nuisance cause of action can supplement criminal law by filling in gaps left by criminal laws in the fight against drugs.

Section V discusses the relationship between illegal international drug trafficking, herbicide use, and the National Environmental Policy Act (NEPA). This section also addresses how communities may have an impact on United States foreign policies that affect the human environment.

³ In a different context environmental and criminal laws have intersected over the past two decades. The proliferation of environmental laws and regulations have impacted American businesses. Violations of environmental laws and regulations have resulted in criminal prosecutions against corporate officials. United States v. Dee, 912 F.2d 741 (4th Cir. 1990); v. Film Recovery N.E.2d 1090 (Ill. App. 1990); United States v. White Fuel, 498 F.2d 619 (1st Cir. 1974); see generally Symposium, Criminal Enforcement of Environmental Laws, 22 ENVTL L. 1315 (1992); California v. Hale, 228 Cal. Rptr. 277 (Cal. Ct. App. 1986).
II. Magnitude of the Illegal Drug Problem

... Why do the people think so little of death? Because the rulers demand too much lightly. Having little to live on, one knows better than to value life too much.4

Both valuing life too little and glamorizing drugs too much have contributed to the use and sale of illegal drugs, an alarming social problem5 that is commonly characterized as a war.6 The magnitude of the illegal drug problem has fostered robust debate about drug legalization,7 discriminatory enforcement of drug laws,8 sentencing disparity,9 federal funding,10 drug-related evictions,11

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4. LAO TSU, TAO TE CHING 75 (Gia-Fu Feng & Jane English trans., 1972).
5. The problem of health-related substance abuse is not limited to illegal drugs. Various classes of drugs include alcohol, cigarettes, marijuana, stimulants, inhalants, cocaine, crack, hallucinogens, analgesics, tranquilizers and sedatives. RONALD BAYER & GERALD M. OPPENHEIMER, CONFRONTING DRUG POLICY ILLICIT DRUGS IN A FREE SOCIETY 32 (1993). The motivations for consumption of illegal drugs include: curiosity, boredom, pleasure, spirituality, peer influence, social alienation, psychological alienation, lack of self identity, and apathy. ALAN CORNWELL AND VICKY CORNWELL, DRUGS, ALCOHOL AND MENTAL HEALTH 9 (1993).
religious freedom,\textsuperscript{12} homelessness,\textsuperscript{13} the siting of drug recovery homes,\textsuperscript{14} the correlation between drugs and crime,\textsuperscript{15} the relationship between gender and illegal drugs,\textsuperscript{16} and the erosion of constitutional rights in the prosecution of drug crimes.\textsuperscript{17}


10. The Senate Appropriations Committee voted to eliminate funding to the Office of National Drug Control Policy (ONDCP). The ONDCP was developed to coordinate a national anti-drug strategy. See JET, Aug. 14, 1995, at 4-5.


The use of illegal drugs is also perceived as the primary cause of other social harms, including violence to women and children, property crimes, family breakdown, homelessness, inadequate education, budgetary problems, dissolution of communities and AIDS. The despoliation and despair caused by illegal drug usage is amply demonstrated in the statement, “Junk is the ideal product... the ultimate merchandise. No sales talk necessary. The client will crawl through a sewer and beg to buy.” Another indication of the desperation of drug users is the story of a Florida

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Attorney Gerry Spence articulated the impact of marginalizing constitutional rights to halt crime when he wrote a letter to a friend explaining why he decided to represent a controversial client:

In this country we embrace the myth that we are still a democracy when we know that we are not a democracy that we are not free, that the government does not serve us but subjugates us.

... We cheered the new king on as it diluted our right to be secure in our homes against unlawful searches and secure in the courts against unlawful evidence. We cheered the new king on because we were told that our sacred rights were “loopholes” by which our enemies, the murderers and rapist and thieves and drug dealers, escaped.

... At last the new king was crowned when we forgot the lessons of history, that when the rights of our enemies have been wrested from them, our own rights have been lost a well, for the same rights serve both citizen and criminal.

Gerry Spence, FROM FREEDOM TO SLAVERY 7-10 (1995). Contra Diane-Michele Kransnow, To Stop the Scourge: The Supreme Court’s Approach to the War on Drugs, 19 AM. J. CRIM. L. 219 (1992)(author examines the impact of the Supreme Court’s decisions related to illegal drugs and how those decisions affect the Bill of Rights. She concludes that the decisions, though seemingly against individual rights, are necessary to eradicate illegal drugs from society).


They [drugs] were the center of my life. I had gotten to the stage where everyday I used enough drugs-reefers, cocaine, or both-so that I felt above worries, any strains. If any worries did manage to push their way through to the surface of my consciousness, I could float them back where they came from until tomorrow, and then until the next day.

mother who traded her 12 year old daughter for crack cocaine. The daughter was raped, impregnated, and contracted a venereal disease.¹⁰

The pervasiveness of illegal drug usage is demonstrated in the California case, United States v. U.S. Currency, $30,060.¹¹ In this case, Los Angeles police officers stopped a motorist for a traffic violation.¹² While approaching the motorist’s car, the officers noticed a plastic bag full of money on the front passenger seat containing bills in denominations of $5, $10, $20, $50, and $100 for a total of $30,060.²³ A narcotics detection dog indicated that the bag of money carried the scent of a controlled substance.²⁴ After advising the motorist of his Miranda warnings, the officers searched his car and questioned him about the money.²⁵ The officers failed to find drugs in the car, and the motorist explained that he earned the money while working in a local café.²⁶ Dissatisfied with the motorist’s account of how he obtained the money, the state sought to seize the money as a product of illegal drug sales.²⁷ The state argued that the dog’s awareness of the scent of a controlled substance on the money, the packaging of the money, and the motorist’s suspicious rendition of how he earned the money established probable cause that the money was used or acquired in violation of drug laws.²⁸

The court disagreed with the state citing a study presented by the defense in which a forensic toxicologist had test samples of $1, $2, $5, $10, $20, $50, and $100 bills from noncriminal sources such as banks, casinos, department stores, and restaurants throughout

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²⁰. Girl, 12, Traded for Drugs, Ends Up Being Raped, SUN-SENTINEL, (Los Angeles) Apr. 9, 1995, at 15A. The hopelessness reached by the addicted results in prostitution and other crimes. See INCIARDI, supra note 2, at 155-73. Over 99% of the juvenile delinquents in Miami who used illegal drugs did so at a median age of 11.6, and most juvenile drug abusers are physically and sexually abused. JAMES A. INCIARDI ET AL., STREET KIDS, STREET DRUGS, STREET CRIME AN EXAMINATION OF DRUG USE AND SERIOUS DELINQUENCY IN MIAMI 74-75, 104-05 (1993).


²². U.S. Currency, $30,060, 39 F.3d at 1040.

²³. Id.

²⁴. Id.

²⁵. Id.

²⁶. Id.

²⁷. U.S. Currency, $30,060, 39 F.3d at 1040.

²⁸. Id. at 1041.
the western United States. The study indicated that 75 percent of all currency in the Los Angeles area was tainted with residue of cocaine or some other controlled substance. The percentage of money tainted with residue from a controlled substance ranged for 10 to 15 percent in Bozeman, Montana, to 75 percent in Los Angeles and Las Vegas. Consequently, the court found probable cause was lacking and denied forfeiture of the money.

The magnitude of the drug problem in the United States prompted former president Richard Nixon to proclaim, “public enemy number one in the United States is drug abuse.” Approximately 20 years later former president George Bush echoed this sentiment when he stated, “All of us agree that the gravest domestic threat facing our nation today is drugs.”

These statements are based upon alarming statistics. Approximately 22 million Americans have tried cocaine and four million are chronic or regular cocaine users. Cocaine related deaths in the United States rose from 334 in 1981 to 617 in 1984. The addicted population poses a social threat because of a willingness to commit crimes for retribution or for money to purchase drugs. For example, in 1981 over 25 percent of all homicides in Dade County Florida resulted from drug trafficking activities.

In 1983 the National Institute of Justice stated that one-third of all inmates in state prison were under the influence of a mind-altering substance just before they committed the crime for which they were imprisoned. Drug arrests nationwide constituted a

29. Id. at 1041-43.
30. Id. at 1043.
31. Id.
32. U.S. Currency, $30,060, 39 F.3d at 1045.
34. Id. During the Bush administration federal funds for anti-drug efforts increased exponentially. John P. Walter, Race and the War on Drugs, 1994 U. CHI. LEGAL F. 107. Efforts to combat the use and sale of illegal drugs has given rise to substantial federal legislation such as the Anti-Drugs Abuse Act, Pub. L. 100-690 [H.R. 5210], and the Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. §§ 801-904.
36. Id.
37. Id.
38. Id.
39. Id.
major percentage of all arrests in 1991.\textsuperscript{40} Between 1980 and 1987 federal drug prosecutions increased by 153 percent, and in 1991 arrests involving drugs or alcohol accounted for almost one-third of all arrests.\textsuperscript{41} Half of all persons in the criminal justice system have substance abuse problems.\textsuperscript{42}

These statistics demonstrate the pervasiveness of illegal drug sales and use. The pervasiveness of the problem has resulted in presidential recognition of the drug problem, countless debates, and endless arrests. Yet, America is losing the war on drugs because of a lack of desire to confront the problem. Presidents Reagan, Bush, and Clinton have focused on harsher drug laws, longer prison sentences for drug offenses, and the death penalty for certain drug-

\textsuperscript{40} The highest arrest rates in the United States for 1993 were for driving under the influence, larceny, simple assault and drug abuse violations (each exceeding one million). \textit{Federal Bureau of Investigation, U.S. Dept. of Justice, Uniform Crime Reports} (1993); \textit{see also, Bureau of Justice Statistics, U.S. Dept. of Justice, Sourcebook of Criminal Justice Statistics} (1993). As of 1989, possessors and traffickers represented roughly 21 percent to 24 percent of the 395,553 inmates of the nation's county and municipal jails and an estimated 25 percent to 35 percent of the 710,054 convicts serving sentences in the state and federal prisons. Thus, in 1989, drug prohibition forced our penal institutions to warehouse somewhere between 260,000 and 343,000 people, who otherwise would not have burdened that system. If we add those who were imprisoned not for drug crimes but for drug-related crimes (such as crimes to get drug money, or murders and assaults arising out of the drug business) we could include another 150,000 to the total. Thus about half of our penal populations there because of drug prohibition. Randy E. Barnett, \textit{Bad Trip: Drug Prohibition and the Weakness of Public Policy}, \textit{Yale L.J.} 2593, 2611 (1994).


related crimes, but they have neglected treatment, education, prevention and community involvement.

As Walter Cronkite has suggested, to combat illegal drugs, we must refocus our thinking, escape the clichés and begin to analyze the problem more rationally. Community empowerment is vital to the new focus and can be facilitated through the use of nuisance and environmental laws. Nuisance and environmental laws have been used successfully in the war on drugs. Despite the success of such laws, they are seldom used. Why are such effective means to combat the war on drugs used so infrequently?

First, attorneys have failed to assume responsibility for the illegal drug problem. Nuisance and environmental laws are enforceable by communities without the assistance of counsel. The idea that law empowers the client or the community is uncharacteristic of the legal profession. Attorneys are typically perceived as detached and learned experts who represent a client's interests from a position of authority. Professor Patricia Williams stated, "In my experience, most non-corporate clients looked to lawyers as gods." This type of relationship is counter productive. Attorneys can facilitate the empowerment of their clients through advocacy, education, and collaboration.

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43. The majority of funds to fight the drug war have been channeled into supply-reduction (interdiction) rather than demand reduction and treatment. Mathea Falco, Toward a More Effective Drug Policy, 1994 U. CHI. LEGAL F. 9. See also, ABBIE HOFFMAN & JONATHAN SILVERS, STEAL THIS URINE TEST: FIGHTING DRUG HYSTERIA IN AMERICA 9-20 (1987).

44. The inadequacy of governmental treatment policies is reflected in the social security law which allows for disability benefits based on a person's addiction to alcohol or drugs, but limits disability benefits to 36 months because that time frame is considered sufficient for rehabilitation and treatment. See PUB. L. No. 103-296 [H.R. 4277], Aug. 15, 1994. In Broward County, a Florida drug court experiment was designed to place persons without a prior conviction for cocaine possession or distribution into rehabilitation with less emphasis on punishment. Amy Driscoll, New Ruling Could End Drug Court Experiment, THE HERALD (Broward ed.) Sept. 27, 1995, at 1BR. The life and statement of famed jazz singer Billie Holiday depicted the lack of treatment: "I had white gowns and white shoes. And every night they'd bring me white gardenias and the white junk. When I was on, I was on and nobody gave me trouble. No cops, no treasury agents, nobody. I got into trouble when I tried to get off." DOROTHY WINBUSH RILEY, MY SOUL LOOK BACK LESS I FORGET A COLLECTION OF QUOTATIONS BY PEOPLE OF COLOR 105 (1991).


46. Patricia J. Williams, Alchemical Notes: Reconstructing Ideals from Deconstructed Rights, in CRITICAL RACE THEORY THE CUTTING EDGE 84 (Richard Delgado ed., 1995).

Nuisance and environmental laws empower communities to fight illegal drug trafficking. A program, initiated by the Young Lawyers Section of the Bar Association of the District of Columbia, called “Operation Crackdown” demonstrates the impact attorneys and the community can have on illegal drug trafficking by using environmental laws.\(^48\) The program stresses community involvement. Community members provide the information to establish a nuisance from the activities generated from a neighborhood crack house, and attorneys, on a pro bono basis, represent community members in their efforts to use nuisance laws to close crack houses and force landlord responsibility and liability.\(^49\) The scarcity of such programs, however, reflects the lack of commitment or resources by attorneys.\(^50\)

Second, the drug problem is perceived as primarily confined to low-income minority communities.\(^51\) This perspective is reflected in President Clinton’s statement, “[t]rafficking in crack, and the violence it fosters, has a devastating impact on communities across America, especially inner-city communities.”\(^52\) Consequently, President Clinton signed a bill which created substantial disparity between prison sentences for crack cocaine and powder cocaine offenses.\(^53\) The bill punishes low-income minorities more harshly


\(^{49}\) Id. Prosecutors throughout the country, even in small rural areas, are beginning to learn environmental laws in an effort to enforce environmental criminal laws. See Mike Frankel, Lawyers to Take on Violators, THE TAMPA TRIBUNE, Sept. 15, 1995, at 1.

\(^{50}\) The federally-funded legal services programs handle approximately 1.5 million cases per year. Marc Feldman, Political Lessons: Legal Services for the Poor, 83 GEO. L. J. 1529, 1536 (1995).

\(^{51}\) The drug problem is increasingly identified with poor, inner-city people of color who supposedly lack the moral fiber and family structure necessary to become productive members of society. Mathea Falco, The Making of a Drug-Free America: Programs That Work 15 (1992). However, the general drug user, according to former drug czar William Bennett, “is white, male, a high school graduate, employed full time, and living in a small metropolitan area or suburb.” John A. Powell & Eileen B. Hershenov, Hostage to The Drug War: The National Purse, the Constitution and the Black Community, 24 U.C. DAVIS L. REV. 557, 610 (1991); see also, A New Drug Gallops Through the West-Mexicans Muscle in on Methamphetamine, U.S. NEWS & WORLD REP., Nov. 13, 1995, at 50 (the article points out that methamphetamine abusers are predominately 18 to 34 year old working-class whites). Historically, race has been linked to the American drug-related problems of crime and illegal drug usage. Sheri Lynn Johnson, Black Innocence and the White Jury 180 (1995). See also Sheri Lynn Johnson, Comment, Unconscious Racism and the Criminal Law, 73 CORNELL L. REV. 1016 (1988); Sherri Lynn Johnson, Race and the Decision to Detain the Suspect, 93 YALE L. J. 214 (1983).

\(^{52}\) 58 Crim. L. Rep. (BNA) 1109 (Nov. 1, 1995).

\(^{53}\) Id.
than affluent whites for consuming cocaine and reduces the war on
drugs to a racial problem and ineffectively focuses on street corner
drug peddlers instead of multi-billion dollar cartels.\textsuperscript{54}

Are we really fighting the war on drugs by punishing crack
dealers and abusers who are generally low-income minorities? Or
are we really fostering and perpetuating racial stereotypes and
benefiting from those stereotypes, while serving the interest of
whites rather than fighting the war on drugs?\textsuperscript{55} The profits
generated from illegal drugs transcend the street corner drug
dealer. Sales from opium, heroin, and cocaine generate more than
$130 billion a year.\textsuperscript{56} Numerous countries depend, in part, upon
the sale of cocaine and opium based substances for their economic
survival.\textsuperscript{57} If the war on drugs actually targeted countries how
would this impact the international social, economic, and political
order when world economics and politics have become global and
interdependent?\textsuperscript{58}

\textsuperscript{54} Id.

\textsuperscript{55} Political rhetoric exploits the public fear of drugs and crime. The 1988 presidential
campaign of George Bush portrayed images of Willie Horton-a person of African descent
convicted of a crime who was released on furlough and victimized a white couple. Horton's
release occurred during the democratic presidential candidacy of Michael Dukakis, who was
then governor of Massachusetts. The Horton scenario was used by the Bush campaign to
illustrate Dukakis' "softness" towards crime and criminals and precipitated what David
Anderson called, "expressive justice," namely, capital punishment and mandatory sentencing
to reduce crime. DAVID C. ANDERSON, CRIME AND THE POLITICS OF HYSTERIA: HOW THE

\textsuperscript{56} WILLIAM J. CHAMBLISS, THE CONSEQUENCES OF PROHIBITION: CRIME,
CORRUPTION AND INTERNATIONAL NARCOTICS CONTROL (1992). See also BRUCE M.

\textsuperscript{57} Such countries include Turkey, Colombia, Peru, Bolivia, Afghanistan, Mexico, Iran,
Jamaica, India, Nigeria, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, Uzbekistan,
Nigeria Major Trafficker of Drugs to U.S., N.Y. TIMES, Apr. 5, 1994 at A1; Tim Golden, A
Recent law enforcement efforts revealed a multi-billion dollar conspiracy to traffic the drug
"ice" into the Philippines and Hong Kong. Emma Batha, Drug Baron Stripped of $12m in
Assets, SOUTH CHINA MORNING POST INTERNATIONAL WEEKLY, May 20, 1995, at 4. There
is currently an international concern that South Africa will become a major channel for the
international illegal drug route. JAMES S.E. OPOLOT, THE CRIME PROBLEM IN AFRICA: A
WAKE UP CALL OF THE 1960s-1990s (1995). Global interdependence has given rise to the
creation of several international documents aimed at the international flow of illegal drugs.
Timothy L.H. McCormack and Gerry J. Simpson, The International Law Commission's Draft
Code of Crimes Against the Peace and Security of Mankind: An Appraisal of the Substantive

\textsuperscript{58} HENRY KISSINGER, DIPLOMACY 17-28 (1994) (the author demonstrates that the
balance of world power has shifted and the United States can neither dominate nor withdraw
from international concerns). The interconnectedness of the world's economies has
The efforts by attorneys and the state towards the war on drugs are derailed by profits, maintenance of the status quo, and racism. The war on drugs demands a community effort because, as Professor John O. Calmore has stated, "When there is nowhere to run and nowhere to hide, people must take a stand in place, at one's home base." Both environmental statutes and nuisance laws are useful but seldom used means for communities to fight the war on drugs. The remainder of this paper illustrates how communities that are left to defend themselves can use nuisance and environmental laws to clean the environment and combat illegal drug trafficking.

III. Clandestine Drug Laboratories and Hazardous Waste

A. Clandestine Drug Laboratories

Environmental degradation is a major problem in low-income communities where racial minorities reside. It was estimated that "[t]hree out of every five Black and Hispanic Americans lived in communities with uncontrolled toxic waste sites." The Environmental Protection Agency stated, "Racial minority and low-income populations experience higher than average exposures to selected air pollutants, hazardous waste facilities, contaminated fish, and agricultural pesticides in the workplace." Despite the disproportionately high number of hazardous waste facilities in low-income racial minority communities, the federal government has

established a global village which makes national concerns of international importance. Olugbenga Adesida, World Prospects from an African Perspective, 3 The Futurists 68 (Jan.-Feb. 1966). (The author is an economist and information systems analyst for the United Nations Development Project).

59. The level of environmental degradation reflects the adage: Almost as color defines vision itself, race shapes the cultural eye, what we do and do not notice, the reach of empathy and the alignment of response. Taylor Branch, Parting the Waters: America in the King Years, 1954-63, xii (1988).


imposed penalties for violation of hazardous waste laws at a rate 500% higher in white communities than in minority communities. Sources of toxic substances include both legitimate businesses and clandestine laboratories that produce illegal drugs. The federal government is unwilling or unable to protect low-income minorities from the dangers of hazardous waste. Communities can utilize hazardous waste laws to reduce the hazardous substances generated in their area by illegal drugs.

Illegal drug trafficking has generated, in addition to violence and death, the environmental problem of hazardous waste. Hazardous waste is the by-product of numerous clandestine drug laboratories (CDL) used to manufacture illegal drugs. The CDLs manufacture stimulants, depressants, hallucinogens and narcotics, in facilities that vary from crude to highly technical. A CDL can exist in a private residence, motel, hotel, apartment, trailer, houseboat, campground, or business.

The number of CDLs in the United States increased exponentially within the past ten years: 1981 (184 labs), 1985 (425 labs), 1986 (509 labs), 1987 (682 labs), 1988 (810 labs), 1989 (1,000 estimated labs). In 1988 four states accounted for 78 percent of the CDLs seized by the Drug Enforcement Agency: California (44%), Texas (19%), and Oregon and Washington (15% combined).

CDLs are located throughout the United States. In 1978 it was projected that CDLs would produce 25 tons of “crank” with an estimated value of $3 billion. Methamphetamine CDLs operate in rural areas because they emit strong unpleasant odors; their operators seek the countryside to avoid detection. In a ranch-style farmhouse in Missouri, a person was arrested for using flammable

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65. Id.
66. JOINT FEDERAL TASK FORCE OF THE DRUG ENFORCEMENT ADMINISTRATION, ENVIRONMENTAL PROTECTION AGENCY AND UNITED STATES COAST GUARD, GUIDELINES FOR THE CLEANUP OF CLANDESTINE DRUG LABORATORIES 1990 [hereinafter GUIDELINES].
67. Id.
68. Id.
69. Id.
70. Id. at 1.
chemicals to process "crank" with a street value estimated at $1 million.\footnote{72} CDLs primarily produce three drugs: methamphetamine (82\%), amphetamine (10\%), and PCP (2.5\%).\footnote{73}

The synthesis of methamphetamine, the primary product of CDLs, involves a series of chemical reactions. There are reportedly nine methods for synthesis of methamphetamine.\footnote{74} Processors frequently use the precursor chemicals of phenyl-2-propanone (P-2-P) and methylamine.\footnote{75} When P-2-P is unavailable, processors use various precursors and reagents to produce P-2-P.\footnote{76} Some of the ingredients can be obtained over-the-counter from chemical supply companies, and there are an estimated thirty-four different precursors, reagents, solvents and catalyzing materials.\footnote{77} The chemicals used in CDLs include methamphetamine acetic anhydride, benzene, chloroform, ethanol, hydrogen cyanide, hydrochloric acid, lead acetate, lithium aluminum hydride, mercury chloride, methylamine, petroleum ether, phenylacetic acid, phosphine, red phosphorus, sodium (metal), and thionyl chloride.\footnote{78} In different intensities each chemical poses some degree of toxicity, ignitability, corrosivity, explosivity, and carcinogenic characteristics.\footnote{79} For example, "red phosphorous, if contaminated with white phosphorous, may explode on contact with air. Mercuric chloride produces hematologic and neurologic complications, and kidney damage may occur with chronic exposure. Lithium aluminum hydride is spontaneously flammable on contact with air or moisture."\footnote{80}

The contamination from the CDLs impacts the general public. In 1986 toxic fumes from a CDL forced 50 residents to evacuate San Mateo County, California.\footnote{81} In San Diego, 450 teachers and students were forced to evacuate a school after chemicals from a

\footnote{72}{\textit{The Newest Drug War}, supra note 71.}
\footnote{73}{\textit{Id.} at 2.}
\footnote{74}{Kenneth Fisher, \textit{Illegal Drug Labs Pose Cleanup Problems}, \textit{POLLUTION ENGINEERING}, Nov. 1990, at 70, 73.}
\footnote{75}{Tamara B. Mahu, \textit{Legal Liabilities Faced by Owners of Property Contaminated by Clandestine Methamphetamine Laboratories: The Oregon Approach}, 27 \textit{WILLIAMETTE L. REV.} 325, 326-27 (1991).}
\footnote{76}{\textit{Id.}}
\footnote{77}{\textit{Id.} at 326. The DEA administrator has developed a list of precursor chemicals. See 21 C.F.R. § 1310.02(a) (1993).}
\footnote{78}{\textit{GUIDELINES}, supra note 66, at 3.}
\footnote{79}{\textit{Id.}}
\footnote{80}{Fischer, \textit{supra} note 74, at 73.}
CDL leaked from drums into the school playground area. In Kelso, Washington, a motel manager discovered a room, that had been rented and used as a CDL for a week to prepare methamphetamine, was contaminated with highly dangerous chemicals. In another case, a rented U-Haul truck that had been used as a CDL was so severely contaminated that it was no longer usable.

The search and seizure of CDLs exposes police and fire fighters to chemicals that are highly irritating, corrosive, depressant, asphyxiating, carcinogenic, flammable, and explosive. One methamphetamine CDL burned to the ground in 15 minutes, and another stored enough chemicals to destroy an entire city block. The laborers in the CDLs who process the illegal drugs often develop a fatal bone disease and have a life expectancy of 7 years. The contamination associated with an illegal lab includes floors, walls, ceilings, glassware, countertops, furniture, sinks, commodes, bathtubs, floor drains, fans, chimneys, soil, surface water, groundwater, sewer and stormwater systems, septic systems, cesspools, caves and mines.

The profits from CDLs are tremendous. Chemical supply companies are often aware that the chemicals they sell are used illegally, but the companies can generate 1/3 to 1/2 of their revenues in cash sales of precursor drugs. In less than a day, CDL processors can transform approximately $200 worth of precursor chemicals into methamphetamine with a street value of $98,000. Environmental hazardous waste laws can effectively serve as a means to combat illegal drug trafficking and require the CDL processors, who are profiting from the production of illegal drugs, to pay for the environmental cleanup.

82. Id.
83. Rising Number of Meth Labs Expose Cities, Countries to High Cleanup Costs, Liabilities, 8 Toxic L. Rep. (BNA) at 168 (July 4, 1990) [hereinafter Rising Number of Meth Labs].
84. Id.
85. Id.
86. Id.
87. Id.
88. Fischer, supra note 74, at 73.
89. HOUSE COMM. ON REGULATION AND BUSINESS OPPORTUNITIES, IMPACT OF CLANDESTINE DRUG LABORATORIES ON SMALL BUSINESS, H.R. Doc. No. 5, 100th Cong., 2d Sess. 22 (1988).
90. Id. at 15.
B. Hazardous Waste Laws

Hazardous waste contamination of the natural environment by the CDLs implicates specific hazardous waste statutes. There are two principal federal statutes which regulate hazardous waste. The Resource Conservation and Recovery Act (RCRA) was enacted in 1980 and regulates a hazardous substance from its creation through disposal.91 The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), or Superfund, provides for cleanup of hazardous waste sites.92 RCRA and CERCLA are complimented by other statutes which also regulate hazardous waste: the Clean Air Act,93 the Water Pollution Control Act,94 the Ocean Dumping Act,95 the Safe Drinking Water Act,96 the Federal Insecticide, Fungicide and Rodenticide Act,97 the Toxic Substances and Control Act,98 and the National Environmental Policy Act.99

1. RCRA. —RCRA establishes a "cradle to the grave" scheme for regulating hazardous waste. RCRA encourages state administration of hazardous waste programs, research, and the approach that land disposal is the least favored method of managing hazardous waste.100 The Act also requires the EPA to develop criteria to identify and list hazardous wastes,101 and to establish record keeping requirements and manifest systems to track shipments of hazardous waste from point of generation.102 Hazardous waste transporters are required to maintain manifest systems103 and standards are set to ensure that owners and

96. 40 U.S.C. § 300(f)-300(j).
100. 42 U.S.C. § 6901.
operators of hazardous waste facilities safely treat, store, and dispose of hazardous waste.104

RCRA defines hazardous waste as a solid waste, or combination of solid waste, which causes or contributes to mortality, illness, or poses a hazard to health or the environment from improper treatment, storage, disposal or transportation.105 Hazardous wastes have characteristics such as reactivity, corrosivity, ignitability, and toxicity; are listed in the EPA's list of hazardous waste; or are deemed a hazardous waste under the "mixture" or "derived-from" rules.106 The characteristics were established to prevent fires, releases of waste, and explosions during waste management.107 The mixture rule mandates that a waste be treated as hazardous if it is a mixture of a solid waste and one or more hazardous wastes.108 The "derived-from" rule provides, "any solid waste generated from the treatment, storage or disposal of a hazardous waste, including any sludge, spill residue, ash, emission control dust or leachate...is a hazardous waste."109

Essentially, the application of RCRA requires consideration of certain threshold questions. First, is the substance a solid waste?110 Second, is the solid waste a hazardous waste?111 If the substance is both a solid waste and a hazardous waste, then RCRA regulates the generator, transporter, owner, or operator of any facility responsible for the substance.112 All hazardous waste treatment, storage, and disposal facilities (TSD) must have a permit from the EPA or establish an interim status to operate.113 The EPA can act to restrain anyone who has contributed, or is contributing, to the past or present handling of any hazardous wastes which may present an imminent and substantial endangerment to health or the natural environment. RCRA also provides

106. 42 U.S.C. §§ 6901-86. Although the terms hazardous waste and toxic waste are used interchangeably, toxic waste is merely one type of hazardous waste.
109. 95 40 C.F.R. § 261.3(c)(2) (1994).
110. A solid waste is any discarded material, which is abandoned, recycled or inherently waste-like. See 40 C.F.R. § 261.2(a)(1), (a)(2). Certain materials are expected from the category of solid waste. See 40 C.F.R. § 261.2(e), (e)(1)-(3).
111. See 40 C.F.R. § 261.2.
112. Id.
for citizen suits, which allow any person to commence a civil action alleging either a violation of RCRA permit requirements or an imminent and substantial endangerment to health or the natural environment through the treatment, storage, or disposal of a solid or hazardous waste.\textsuperscript{114}

RCRA § 6928 provides federal enforcement authority including criminal, civil and administrative penalties.\textsuperscript{115} Among environmental statutes, RCRA is the most frequently used to impose criminal sanctions.\textsuperscript{116} Several RCRA provisions provide for criminal sanctions, all of which are felonies.\textsuperscript{117} Sections 6928(d)(1)-(2) provides that "knowingly transporting or causing to be transported hazardous waste to an unpermitted facility and knowingly disposing of hazardous waste without a permit is punishable by a maximum of $50,000 for each day of violation or imprisonment to 5 years or both."\textsuperscript{118} Additionally, section 6928(d)(3)-(d)(5) provides that "those who knowingly omit, falsify, destroy, conceal, fail to file, or transport without a manifest in violation of RCRA documentation requirements are subject to criminal sanctions."\textsuperscript{119} Section 6988(e) of RCRA provides that "anyone who knowingly places another in imminent danger of death or serious bodily injury is subject to a fine of not more than $250,000 or imprisonment to 15 years or both."\textsuperscript{120} An organization would be subjected to a greater fine of up to $1,000,000.\textsuperscript{121}

The "knowing" conduct prohibited under RCRA is subject to a lesser burden of proof than traditional crimes because environmental crimes are health and welfare statutes designed to protect the public. Therefore, a prosecutor need only prove the intent to commit the act, and not the specific intent to violate RCRA. A violator's knowledge of whether a particular substance is hazardous

\begin{footnotesize}
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\item \textsuperscript{114} 42 U.S.C. § 6972(a)(1)(A) to (B).
\item \textsuperscript{115} 42 U.S.C. § 6928.
\item \textsuperscript{117} 42 U.S.C. §§ 6901-6986.
\item \textsuperscript{118} 42 U.S.C. § 6928(d)(1)-(2).
\item \textsuperscript{119} 42 U.S.C. § 6928(d)(3).
\item \textsuperscript{120} 42 U.S.C. § 6988(e).
\item \textsuperscript{121} Id.
\end{itemize}
\end{footnotesize}
or lacking a permit is irrelevant. Consequently, the CDL operators can be prosecuted under RCRA because it is not necessary to prove they are aware of RCRA provisions.

CDL operators can also be prosecuted under section 6928(e) because "night dumping" of dangerous chemicals from a CDL is conduct which places others in imminent danger of death or serious bodily injury. RCRA requires merely that a person "knowingly" engage in certain conduct without a permit. It is not necessary to show that the person knew what the law required or had the specific intent to violate the law. For example, in United States v. Tumin and United States v. Gomez, the defendants abandoned ether, a hazardous waste and a by-product of CDLs. In Tumin, the court stated that it was no defense that the defendant was unaware of RCRA requirements, while in Gomez the court found that the defendant was unaware his conduct placed others in imminent danger. Tumin was sentenced to five years imprisonment. Gomez received imprisonment for narcotic offenses, although the prosecution vehemently argued that he should have also received prison time for knowingly endangering others.

The requirement under environmental statutes that a person knowingly do an act, rather than knowingly violate a statutory provision, was underscored in United States v. Weitzenhoff. In Weitzenhoff, managers of a Honolulu sewage treatment plant were convicted of violating the Clean Water Act (CWA). A person is subject to criminal prosecution under the CWA for knowingly violating any permit conditions of the CWA. Although the

127. No. 87-488, slip op. at 203-06.
128. Id. at 204 n.97.
130. 35 F.3d 1275 (9th Cir. 1993), cert. denied, 115 S. Ct. 939 (1995).
131. Id. at 1281.
managers were permitted to discharge a specific amount of sludge into the ocean, buildup occurred and they released additional sludge, exceeding their permit limitations. They were sentenced to prison, and the Ninth Circuit upheld the convictions because the CWA does not require the prosecution to show that the managers knew their acts violated any specific provision of the CWA.\(^{133}\) The court’s decision demonstrates that “knowledge” under environmental statutes is defined in a manner which allows for both public safety concerns and greater criminal enforcement powers by the state.\(^{134}\) In sum, under RCRA, both the government and private citizens may proceed against a CDL processor for lack of a hazardous waste permit, posing an imminent and substantial danger to the public, improper recordkeeping, and “knowingly” violating RCRA.

2. CERCLA. —In addition to RCRA, CERCLA provides ammunition to communities in the war on drugs. After years of debate Congress enacted CERCLA to supplement RCRA. Although both statutes address hazardous waste concerns, RCRA focuses on the on-going management of hazardous waste, while CERCLA was enacted to address the general public’s and Congress’ concerns about inactive hazardous waste sites and spills.\(^{135}\) The basic scheme of CERCLA grants the federal government broad powers to respond to an actual or threatened release of a hazardous substance.\(^{136}\) The federal government can, itself, arrange for cleanup of the contaminated site or order another party to clean the site.\(^{137}\) CERCLA requires that the release of a hazardous substance be immediately reported to the National Response Center (NRC).\(^{138}\) Failure to notify NRC subjects the violator to imprisonment of not more than 3 years or up to 5 years

\(^{133}\) *Weitzenhoff*, 35 F.3d at 1286.

\(^{134}\) The public safety aspect of environmental regulations creates a burgeoning concern about the applicability of traditional warrant and probable cause requirements in the context of criminal environmental laws. Kenneth A. Grady and Craig H. Zimmerman, *Preparing for the Onslaught: Search Warrants and Inspections in Environmental Criminal Cases*, NAT. RESOURCES & ENV'T'L L. 7 (Spring 1994). See also, 1994 NATURAL RESOURCES LAW INSTITUTE (NRLI) NEWS, 5, 14.


\(^{136}\) 42 U.S.C. § 9604.


\(^{138}\) 42 U.S.C. § 9604.
for a subsequent conviction.\textsuperscript{139} Additionally, CERCLA provides for public availability to documents and a public right of comment.\textsuperscript{140}

Section 107 of CERCLA imposes liability for cleanup of a hazardous waste site on potentially responsible parties (PRPs). When a PRP is unavailable, then CERCLA allows the use of "Superfund" money to pay for the clean up of hazardous wastes on land.\textsuperscript{141} CERCLA also directs the President to list the national priorities among the properties across the United States where a release or threatened release of a hazardous waste has occurred.\textsuperscript{142}

CERCLA mandates that the EPA, or any other plaintiff, establish that: The defendant is a PRP; the site is a facility; there is a release or threatened release of a hazardous substance; the response cost; and compliance with the National Contingency Plan.\textsuperscript{143} Section 107 of CERCLA identifies certain groups of PRPs including: current owners and operators of a facility, owners and operators of a facility at the time of disposal of the hazardous waste, hazardous waste transporters, and hazardous waste generators.\textsuperscript{144} The liability scheme under section 107 for PRPs is strict, retroactive, joint and several.\textsuperscript{145} The term "facility" under

\begin{itemize}
\item \textsuperscript{139} 42 U.S.C. § 9603 (a)-(b)(3). In an effort to encourage reporting, information obtained through such notification is not used in a criminal prosecution "[e]xcept a prosecution for perjury or giving false statement." \textit{Id.}
\item \textsuperscript{140} Public information and participation are integral parts of CERCLA. See. 42 U.S.C. § 9617.
\item \textsuperscript{141} 42 U.S.C. § 9611(a). Although the terms "CERCLA" and "Superfund" are used interchangeably, the latter is merely one component of the former.
\item \textsuperscript{142} 42 U.S.C. § 9605(a)(8)(A). Sites are ranked according to the Hazard Ranking System which considers such factors as toxicity, risk to drinking water, and endangerment to humans. See § 9605(c). It has been argued that such a listing constitutes a regulatory taking by the state such that the landowner is entitled to just compensation under the Fifth Amendment to the U.S. Constitution which provides "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. For a discussion on the flaws of such a position see Daniel R. Hansen, \textit{Environmental Regulation and Just Compensation: The National Priorities List As a Taking}, 2 N.Y.U. ENVTL. L.J. 1 (1993).
\item \textsuperscript{143} B.F. Goodrich v. Murtha, 958 F.2d 1192 (2d Cir. 1992).
\item \textsuperscript{144} 42 U.S.C. § 9607.
\item \textsuperscript{145} There is an innocent landowner defense under CERCLA which provides "[i]f the defendant obtained actual knowledge of the release or threatened release of a hazardous substance at such facility when the defendant owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge, such defendant shall be treated as liable." 42 U.S.C. § 9601(35)(C). CERCLA also encourages settlements by providing that PRPs who settle, under certain conditions, are not liable for claims for contribution. 42 U.S.C. § 9613(f)(1)-(2). See also 42 U.S.C. § 9622(g)(5).
\end{itemize}
CERCLA is more broadly defined than under RCRA. A facility under RCRA is a regulated facility that treats, stores, or disposes of hazardous waste.\textsuperscript{146} Under CERCLA a facility is any natural or human made structure and "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located."\textsuperscript{147} CERCLA would apply to any site where a hazardous substance is located.

CERCLA is effective in combatting CDLs because property contaminated by hazardous wastes subjects property owners and responsible tenants to liability as PRPs. CERCLA applies whenever "there may be an imminent and substantial endangerment to public health or welfare or the environment because of an actual or threatened release of a hazardous substance."\textsuperscript{148} CDL processors that abandon, dump or discard their hazardous byproducts fall under CERCLA. Those involved in such illegal activities would be liable for the cost of removal or remedial action, any other response costs, damages for injury, destruction, or loss of natural resources; and cost of any health assessments or health effects.\textsuperscript{149} This could reduce the cost to taxpayers who pay $4,000 to $20,000 to clean a contaminated CDL site.\textsuperscript{150}

The interplay between CERCLA and the Drug Enforcement Agency (DEA) was demonstrated in Howell, New Jersey.\textsuperscript{151} There, the DEA raided a hazardous waste facility and found unknown chemicals in deteriorated drums and cylinders which emitted vapors and exposed a nearby stream to contamination.\textsuperscript{152} The site was an alleged locale for manufacturing illegal drugs.\textsuperscript{153} The DEA removed some materials and contacted the EPA to effectuate action at the contaminated site to stabilize, remove, and dispose of the hazardous substances.\textsuperscript{154} The site was maintained by Zschiegner Refining Co., and DEA suspected that illegal drugs

\textsuperscript{146} 42 U.S.C. § 6903(29).
\textsuperscript{147} 42 U.S.C. § 9601(9)(A), (B).
\textsuperscript{148} 42 U.S.C. § 9606(a).
\textsuperscript{149} 42 U.S.C. § 9607(a)(4)(A)-(D).
\textsuperscript{152} Id.
\textsuperscript{153} Id.
\textsuperscript{154} Id.
were manufactured on the property from 1989 to 1992. The estimated $250,000 clean up cost would come from the EPA's Region II Superfund program.

Along with criminal charges, the cost of clean up can be imposed on Zschiegner Refining Co. Any other owners or operators of the property may also be subjected to liability. The rationale behind CERCLA is that those who create the problem should pay for the cleanup. The goal of CERCLA is not to penalize with fines, rather it is a remedial or restitutionary statute. The reach of CERCLA is broad enough to implicate CDL personnel in order to protect public health, safety, and welfare.

Both RCRA and CERCLA encourage state participation in coping with hazardous waste concerns. RCRA specifically provides that any state may administer and enforce its own hazardous waste program. However, a state's program cannot be less stringent than RCRA. The State of Washington developed its own hazardous waste program which has been effective in combating illegal drug trafficking. In Washington, a person dumped sodium cyanide, hydrochloric acid, acrylonitrile, lead acetate and sodium hydroxide on sand dunes. The chemicals had been used to make methamphetamines in a CDL. Upon conviction, the defendant was sentenced to 30 days in jail and ordered to pay $10,000 to cleanup the hazardous waste. This penalty allowed for the punishment of the guilty party and the cleanup of the natural environment. This dual approach is most effective in the continuing struggle by communities to address the problem of illegal drug trafficking.

Hazardous waste and nuisance laws intersect and communities can rely upon both in the war on drugs. In Baldwin v.
the defendant was suspected of engaging in illegal drug trafficking. The police conducted surveillance and followed the defendant to a remote farmhouse that defendant used to manufacture, store, and distribute illegal drugs. The police confiscated chemicals that were dangerous to human health and the environment including PCP, benzene, potassium cyanide and methanol. A bag of parsley flakes, several measuring cups, a chemical thermometer, a triple beam balance and filter papers were other evidence of a CDL. The defendant had created both hazardous substances and a nuisance. The court found that although the farmhouse was closed to the public it constituted a nuisance because of the quantity of drugs that were manufactured there. A premises maintained to manufacture, store, or conceal illegal drugs is a nuisance because it harms public safety and morals.

IV. Nuisance Law and Illegal Drug Trafficking

A. Community Involvement Via a Nuisance Cause of Action

Environmental laws are primarily statutory and resulted from the outgrowth of a burgeoning environmental awareness which arose in the 1960s in response to threats to public health and welfare. The development of environmental statutes was documented by attorney David Sive who traced environmental laws in the United States to the early 1960s controversies of DDT and the Storm King Mountain. Although Congress enacted numerous environmental statutes and the EPA promulgated regulations

163. Id.
164. Id. at 396. Benzene is a carcinogen, that, if ingested or inhaled, causes mucous membrane irritation, neurological symptoms, leukemia and death. Methanol is a flammable liquid, and potassium cyanide is a poisonous compound. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 191, 1024, 1342 (1994).
165. Baldwin, 468 A.2d at 397.
166. Environmental statutes impact agriculture, commerce, trade, conservation, judicial procedures, labor, minerals and mining, navigable waters, public health and welfare, public lands, shipping and transportation.
between 1972 and 1980, common law is still a viable means of enforcing environmental regulations and statutes. A common law cause of action such as nuisance is not abrogated by environmental statutes, and nuisance provides fertile ground for effective litigation strategies which can be employed at a grassroots level. Efforts at combating illegal drug trafficking have found support in a nuisance cause of action. In combating the war on drugs numerous jurisdictions have relied not only on criminal laws and civil forfeitures, but on public nuisance actions as well.

Public nuisance laws are vital because illegal drugs destroy communities. The following dismal scenario demonstrates the community and individual harm suffered from the flow of illegal drugs:

At the Potomac Gardens public housing complex 12 blocks from the U.S. Capitol, a woman stuffs towels beneath her door to keep out the vapors from people smoking crack in the stairwell. . . . A heroin addict shoots dope into a vein in her groin, moments after she tells reporters that she wants to kick the addiction. A crack dealer with cold eyes twists the diamond ring on his pinkie finger and says he would not hesitate to kill to protect what is his. The lives of . . . [residents of public housing complexes] revolve around the city's most notorious, longstanding drug markets, where minor insults easily escalate to death . . . .

A New York City resident indicated that the drug problem in her neighborhood is so dire that her children are always stepping on

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crack vials and syringes. Nuisance laws can assist in addressing these problems.

Historically, nuisance laws have protected the individual's zone of privacy. The individual's privacy interests are depicted as a circle within a circle. The outer circle represents the area of acceptable minor intrusions. As members of society we accept certain intrusions into the outer circle as part of living in an industrialized society. For example, we allow, within certain limitations, hazardous waste facilities, airports, jails, and highways. The inner circle represents the inner core of individual interests. This sphere contains our core expectations of privacy. When this inner circle is threatened or penetrated, the individual seeks to enforce certain rights to eliminate the intrusion.

One such right is the right to quiet enjoyment of property. A house of prostitution and an establishment where obscene materials are kept have both been deemed conduct which, under certain conditions, constitute a nuisance. The sale of illegal drugs was less prevalent when the early nuisance laws were used to abate prostitution and obscenity. Recently, numerous jurisdictions have expanded nuisance to target illegal drug trafficking. Prosecutors and communities have been successfully using nuisance laws where other laws have failed. For example, in an Oregon case, State v. Smith, the defendant was charged under a statute that criminalized the sale and distribution of a controlled substance. Oregon statutory law specified that it was a crime to frequent a place where illegal drugs were used or sold. The defendant was found not guilty of the offense because her visit to the residence was an isolated event precipitated by matters beyond her control. Nonetheless, the court stated that the statute focused on the nature of the place and was rooted in common law nui-


174. For example, Ohio defines nuisance as among other things, a place where prostitution is conducted or where obscene materials are kept. OHIO REV. CODE ANN. § 3767.01(c) (Banks-Baldwin 1995).

175. 571 P.2d 542 (Or. App. 1977).

176. Id.

177. Id.

178. Id.
sance. The court indicted that any place frequented by drug addicts, for illegal drug consumption, or used for illegal drug storage is a nuisance.

A line of California cases beginning with Farmer v. Behmer also demonstrates the use of nuisance theory to combat illegal drug trafficking. In Farmer, the defendant rented his apartment to a known prostitute who used the premises to engage in prostitution. The plaintiff was the defendant's neighbor and sought a permanent injunction prohibiting the defendant from permitting the lease, rental, or occupancy of his premises for a house of prostitution. The court indicated the sale of illegal alcohol, use of profane language, and obnoxious sight and sounds were immoral and disorderly conduct which constituted a public nuisance. The court agreed with the plaintiff that such activity on the defendant's property deprived the plaintiff of the use and enjoyment of his property, and held that the defendant was prohibited from maintaining his property in a manner that fostered or perpetuated a public nuisance. The Farmer case demonstrates the impact of community fortitude, ingenuity, and concern. A member of the community used nuisance law to halt illegal activity.

Following the Farmer decision California enacted a statute to address the impact of illegal drug trafficking on the general public. The statute provides that any place used for the possession or distribution of illegal drugs is a nuisance. The California

179. Id. at 544.
180. 571 P.2d at 544 (relying on Oregon Law).
181. 100 P. 901 (1909). See also People v. Lim, 11 P.2d 431 (1941) (stating that the statutory enumeration of certain offenses as nuisances does not abrogate the common law rule that other obnoxious offenses, such as gambling, are nuisances per se).
182. Farmer, 100 P. at 902.
183. Id.
184. Id. Zoning laws are also useful to address public harms. For example, zoning laws have been used to close adult bookstores in Hollywood, Florida. Such establishments are deemed to offend the public, particularly when they are near residential neighborhoods. Brent Mitchell, City Cites Zoning Law In Effect To Close Down Adult Bookstores, MIAMI HERALD, Mar. 5, 1995, at 12.
185. Farmer, 100 P. at 902-03.
186. CAL. HEALTH & SAFETY CODE § 11570 (West 1972) provides: Every billing or place used for the purpose of unlawfully selling, serving, storing, keeping, manufacturing, or giving away any controlled substance, precursor, or analog . . . and every building or place wherein or upon which those acts take place, is a nuisance which shall be enjoined, abated and prevented, and for which damages may be recovered, whether it is a public or private nuisance.

Id.
Statutorily implemented nuisance law is essentially a codification of common law nuisance.\textsuperscript{187} The California Statute defines nuisance as anything that is injurious to health, or is indecent or offensive, or which interferes with the comfortable enjoyment of life or property.\textsuperscript{188} The core of a nuisance claim is the harmful interference with comfortable enjoyment. Professor William Prosser succinctly stated, "Nuisance is a French word which means nothing more than harm."\textsuperscript{189} Illegal drug activities harm a community and undermine the rights of individuals to quiet enjoyment. Illegal drug activities penetrate and harm the inner core or circle of each member of a community.\textsuperscript{190} Whether pursuant to a statute or based on common law, nuisance actions can effectively target illegal drug activities.

Eighty-one years after \textit{Farmer}, the California courts in \textit{Martinez v. Pacific Bell}\textsuperscript{191} again discussed the intersection of illegal drugs and nuisance law. In \textit{Martinez}, a parking lot which was 20 feet away from a public telephone was used regularly to conduct illegal drug transactions. Individuals around the telephone were not only involved in illegal drug trafficking, but harassed passersby and parking lot customers. The petitioner, a parking lot employee, was assaulted by those persons in 1987 and 1989. He told the appropriate telephone companies about the assaults and asked them to remove the booth. The phone company refused. After the petitioner was assaulted for a third time in 1989, he brought suit against the telephone companies alleging, among other claims, that the telephone booth constituted a public nuisance.\textsuperscript{192}

\textsuperscript{188} CAL. CIV. CODE § 3479 (Deering 1995). In numerous jurisdiction nuisance is a common law cause of action. In California nuisance is statutory. \textit{See} Prosser, \textit{supra} note 187, at 1003; Mangini v. Aerojet-General Corp., 230 Cal. App. 3d 1125, 1134 (1991). Under California Civil Code § 3480 a public nuisance is defined as, "[o]ne which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." \textit{Id}.
\textsuperscript{189} Prosser, \textit{supra} note 187, at 997.
\textsuperscript{190} Under Florida law, "All nuisances which tend to annoy the community or injure the health of the citizens in general, or to corrupt the public morals, are misdemeanors of the second degree." FLA. STAT. ch. 823.01 (1994). Michigan defines nuisance as, "Not only a defect, but threatening or impending danger to the public." \textit{See} Kilts v. Kent TWP, 380 Mich. 446, 470 (1968).
\textsuperscript{191} 225 Cal. App. 3d 1557 (1990).
\textsuperscript{192} \textit{Id}. at 1560.
The court rejected the petitioner's nuisance claim because he failed to demonstrate either a special relationship giving rise to a duty by the telephone companies to protect him, or that the telephone booth was the proximate cause of his injuries.\footnote{193} Significantly, the court did not preclude a nuisance cause of action arising from illegal drug activities. Rather, the court found that, under specific facts of the case, a prima facie showing of nuisance was not established because nuisance, as with any tort, requires proximate cause.\footnote{194} The court did state, however, that "[a] neighboring landowner might potentially receive normal nuisance remedies of injunction or damages for diminution in property value, which damage allegedly resulted from drug-related activities on another's nearby property."\footnote{195}

The obligations of property owners and the power of community activism, in the context of a nuisance claim from illegal drug trafficking, are further demonstrated in disputes arising in Small Claims Court in both Berkeley and San Francisco, California.\footnote{196} Residents of both cities filed separate nuisance actions in Small Claims Court against property owners alleging the owners allowed illegal drug-related activities on their properties.\footnote{197} In California Small Claims Court the plaintiff is not represented by an attorney, and a cause of action can be advanced by concerned community members who represent their individual or community interests.\footnote{198} It costs only $6 to file a claim in California Small Claims Court with an additional $4 to effectuate service of process by the court.\footnote{199} Communities may also find Small Claims Court more inviting because of its speed. A matter could remain unresolved in

\footnote{193}{Id. The petitioner never proved that his injuries were inflicted on premises owned or controlled by the telephone companies, because he was not using the telephone when the injuries occurred and the attack occurred on the petitioner's own parking lot. \textit{Id}.}
\footnote{194}{Id.}
\footnote{195}{Id. at 1568.}
\footnote{196}{See Katherine Bishop, \textit{Neighbors in West Use Small Claims Court To Combat Drugs}, N.Y. Times, Oct. 17, 1989, at A16. In San Francisco, illegal drug activity exposed the residents to fights, automobile traffic and gunshots. The residents formed a community organization and complained. Their complaints ranged from health and building code violations to child abuse. Arrests were made, but proved futile to stop illegal drugs. Consequently, the community filed a nuisance action in small claims court. \textit{Id}.}
\footnote{197}{Id.}
\footnote{198}{Id.}
\footnote{199}{Id.}
California Civil Court for up to five years, while Small Claims Court proceedings are held within 30 days.\textsuperscript{200}

In \textit{Lew v. Superior Court (Byrd)},\textsuperscript{201} the plaintiffs lived near a 36-unit HUD-insured section 8 apartment complex owned and operated by the defendants. The Berkeley, California residents adjacent to the defendants' property filed 66 separate actions in Small Claims Court and the cases were consolidated for trial.\textsuperscript{202} While California Small Claims Court actions have a jurisdictional limit of $2,000,\textsuperscript{203} a consolidated judgment for the residents allowed them a total judgment of $218,325.00 upon a finding that the defendants' property was used for the sale and distribution of illegal drugs and therefore was a nuisance.\textsuperscript{204}

The defendants petitioned the California Court of Appeals to compel the Superior Court to set aside the consolidated judgment in Small Claims Court alleging that the Small Claims Court could not award such an amount because it exceeded the $2,000 jurisdictional limit.\textsuperscript{205} However, consolidated judgments have been upheld in California Small Claims Courts because the jurisdictional amount applies to each plaintiff, rather than the aggregate amount or the incidental harm to the party liable for damages.\textsuperscript{206}

The Court of Appeals denied the petition and relied upon \textit{Farmer} and \textit{Martinez} to conclude that the defendants' property was a nuisance.\textsuperscript{207} The \textit{Lew} plaintiffs were allowed to recover for damages on a nuisance theory based upon the emotional distress they suffered from activities conducted on the defendants' property.\textsuperscript{208} The plaintiffs offered evidence of prostitution on the defendants' premises, confrontations with drug dealers, and their

\textsuperscript{200} Bishop, \textit{supra} note 196, at A16.
\textsuperscript{201} 25 Cal. Rptr. 2d 42 (1993).
\textsuperscript{202} Id.
\textsuperscript{203} At the commencement of these actions the jurisdictional amount for California Small Claims Court was $2,000. That amount has increased to $5,000. Compare \textit{CAL. CIV. PROC. CODE} § 116.2(a) (West 1989) with \textit{CAL. CIV. PROC. CODE} § 116.220(a)(1) (West 1995).
\textsuperscript{204} \textit{Lew}, 25 Cal. Rptr. 2d at 44.
\textsuperscript{205} Id. at 43.
\textsuperscript{206} \textit{See City and County of San Francisco v. Small Claims Div.}, 141 Cal. App. 3d 470 (1983) (174 plaintiffs filed suit against the city and country as owners of an international airport and the claims were consolidated for judgement).
\textsuperscript{207} \textit{Lew}, 25 Cal. Rptr. 2d at 44-45.
\textsuperscript{208} Id.
fear for their lives because of the violence generated by drug related activity.\footnote{209}{Id. at 43-44. Conversely, the war on drugs has created a number of complaints by landowners in Graberville, California who assert that low-flying police helicopters in search of marijuana crops are interfering with the use and enjoyment of their property. \textit{See War on Marijuana Draws Complaints in California}, N.Y. TIMES, Sept. 19, 1994, at A12.}

The \textit{Lew} decision demonstrates that physical injury or diminution in market value of property is not required for recovery under a nuisance claim. A party may recover for damages for discomfort, annoyance, and mental suffering from fear of danger proximately caused by the nuisance. The \textit{Lew} decision has broad implications because the court indicated that a landlord has a duty to act in a reasonable manner to prohibit illegal drug activity on the property. The court did suggest one limitation on the right to bring suit by requiring that the party bringing the action suffer mental harm. In \textit{Lew}, such a showing was evidenced by the defendants’ unreasonable conduct in allowing illegal drug trafficking.\footnote{210}{Id. at 42.} There was sufficient evidence that the premises was used for illegal drug-related activities.\footnote{211}{Id.} The drug dealers had easy access to the premises and used the premises to avoid apprehension by the police.\footnote{212}{Id.} Furthermore, the flow of drugs could have been reduced by fences, key-card gates, a live-in manager, and discussions with residents.\footnote{213}{Id. at 47.} The \textit{Lew} court held that conduct related to illegal drugs is a nuisance whether conducted by the owner, tenant, or guest on the premises.\footnote{214}{Id.}

In \textit{Lew} and \textit{Martinez} the persons in control of the property knew about the illegal drug activity and failed to act. Neither court addressed the issue of whether there is a nuisance cause of action against a landlord who is unaware of the existence of illegal drug trafficking on the premises. This issue was addressed in a Texas case, \textit{United States v. 2011 Calumet}.\footnote{215}{699 F. Supp. 108 (S.D. Tex. 1988).} The landlord leased property to the tenant for use as a senior citizen’s hall.\footnote{216}{Id. at 109.} Pursuant to the leasing agreement the tenant could neither make alterations to the building nor use the property for illegal purpos-
Failure to comply with the lease conditions constituted a default. If the tenant failed to comply within ten days after notice of the violation, then the lease was subject to termination. While the tenant leased the property it was frequently subjected to police raids and altered with the installation of steel doors, barricaded windows, and mirrors above the entrance. The alterations were designed to maintain and perpetuate the tenant's drug sales and typified the structural arrangements of a crack house. The landlord's property manager, in referring to the property, testified:

[T]here was something going on over there that wasn't quite kosher because it [sign on front of building] said Senior Citizen's Hall; and I myself I've been down there, and all I ever see going in there is kids, ... [y]oung, young kids, yeah, early 20's, late teens, early 20's black males ... Yeah, I've been curious, very curious. ... [T]here was probably something that wasn't quite kosher going on in there. We've had our suspicions, but nobody has ever complained to us about anything going on. It's just people comment.

The court found that although the landlord and its employees were aware of suspicious circumstances on the premises, they neither investigated nor attempted to give the tenant notice of the duty to correct pursuant to the lease agreement. This case is distinguishable from the Lew decision because in Lew the neighbors complained, giving the landlord actual notice. In 2011 Calumet, the landlord asserted there was no affirmative duty to act due to a lack of actual awareness of what had occurred on the property.

The 2011 Calumet court disagreed with the landlord for two reasons. First, the lease agreement itself indicted that ground for default existed if the tenant either conducted illegal activities on

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217. Id.
218. Id.
219. The crack house is a house, apartment or private club where a user can both purchase the drug and use it on the premises. In some instances, the buyer only can purchase the drug but is denied entry and is not allowed to see faces of dealers. Many of these "crack houses" are fortified with steel doors and door jams, as well as bars on the windows to defeat entry by police or rip-off artists. LYMAN, supra note 35, at 26.
221. Id. at 124.
222. Id.
COMBATTING ILLEGAL DRUG TRAFFICKING

the property or altered the premises.223 The court's position on this point, however, fails to acknowledge that a nonbreaching party to a contract may choose to ignore a breach and continue with the contract. Any affirmative duty under the contract to restrict alterations was an obligation the parties could choose to modify or disregard.

Second, and more pertinent, the court stated, "Land ownership entails duties to the community in which the land is situated. A land owner may face legal consequences for failure to correct a nuisance about which he was totally unaware."224 A landlord cannot escape liability to the community where the land is situated by refusing to investigate suspicious facts and allegations of illegal drug trafficking. The court reasoned that crack cocaine is a vicious, addictive drug which causes humans to prey on one another, and that any premises used to sell crack is a nuisance for which a landlord is responsible. The landlord's responsibility is tantamount to an affirmative duty to protect persons from criminal activity.225

The State of New York also used nuisance abatement law to combat illegal drug trafficking.226 The Hotel Strand in Times Square, New York, was a hub for illegal drugs. Hotel patrons were regularly arrested for possession of guns or drugs and hotel rooms were regularly used to make crack cocaine.227 Arrests proved futile, so the state sued alleging the hotel was a public nuisance and the New York nuisance abatement law proved instrumental. Earlier actions in New York for nuisance focused on houses of prostitution and gambling.228 Here, however, the State closed the

223. Id. at 109.
224. Id. at 110.
225. 2011 Calumet, 699 F. Supp. at 110. See also Sally G. v. Orange Glen Estates Owners, 227 Cal. Rptr. 559 (Cal. Ct. App. 1986). A recreational club house was not maintained by the landlord and a young child was molested. The court took into account the totality of the circumstances and determined that it was foreseeable that a third person would commit a criminal act upon landowners property; therefore, landowners had an obligation to protect persons from harm. Id.
226. Now Cities Hit Drug Suspects Where They Live, N.Y. TIMES, Jan. 25, 1991, at B16 [hereinafter Cities Hit Drug Suspects]. Although the action was brought by the state, it could have been brought by a member of the community.
227. Crack is made from cocaine by mixing cocaine with an equivalent amount of baking soda or ammonia. The substance is dissolved in water poured into a container, and repeatedly heated and cooled until there is a gummy substance which is poured through a filter such as a scarf or paper towel. A residue of the substance collects on the filter. The residue is scraped off, dried, chopped up into small pieces, and placed in small bottles for sale as crack. LYMAN, supra note 35, at 26.
hotel as a public nuisance because of illegal drug activities.\textsuperscript{229} This civil action proved useful because New York City jails are over-crowded and nuisance actions impact the deep pockets of property owners who maintain drug-related nuisances.\textsuperscript{230} Despite claims that such actions unfairly punish innocent property owners and result in the closing of needed low-income housing, the government prevailed because of public health and safety concerns.\textsuperscript{231}

In another New York case, \textit{1021-27 Ave. St. John Hous. Dev. Fund Corp. v. Hernandez},\textsuperscript{232} a landlord sought possession of the tenant’s apartment on the ground that the tenant allowed guests into his apartment who used drugs and interfered with the peace and quiet of other tenants. The landlord asserted that the tenant’s apartment was used for illegal purposes and that the tenant was unwilling or unable to exercise control over the apartment.\textsuperscript{233} The landlord presented several witnesses who testified that numerous unknown persons visited the tenant throughout the day and engaged in illegal drug-related activities.\textsuperscript{234} Witnesses also saw the tenant drunk outside his apartment and associating with known drug dealers and drug abusers.\textsuperscript{235} Other tenants were threatened by him and heard fighting and shouting inside his apartment.\textsuperscript{236} The court noted that living in a deteriorated neighborhood is insufficient to justify a nuisance, and awarded the landlord possession of the premises while granting the tenant time to abate the nuisance.\textsuperscript{237} The case demonstrates how landlords, along with tenants, can also confront those who use their premises for illegal drug activities.\textsuperscript{238}

\begin{itemize}
\item\textsuperscript{229} \textit{Cities Hit Drug Suspects}, supra note 226, at B16.
\item\textsuperscript{230} \textit{Id.} New York State provides that the government may recoup its costs expended in investigating, advancing, and maintaining an action for permanent injunction to abate a nuisance. \textit{City of New York v. Basil Co.}, 589 N.Y.S.2d 319 (N.Y. App. Div. 1992).
\item\textsuperscript{231} \textit{Cities Hit Drug Suspects}, supra note 226, at B12.
\item\textsuperscript{232} 584 N.Y.S.2d 990 (N.Y. Civ. Ct. 1992).
\item\textsuperscript{233} \textit{Id.}
\item\textsuperscript{234} \textit{Id.} at 991.
\item\textsuperscript{235} \textit{Id.}
\item\textsuperscript{236} \textit{Id.}
\item\textsuperscript{237} \textit{1021-27 Ave. St. John Hous. Dev.}, 584 N.Y.S. 2d at 994.
\item\textsuperscript{238} A person who is aware that their home or business is used on a continuing basis for illegal drugs has a duty to stop the nuisance. \textit{Porter v. State}, 570 So. 2d 823, 827 (Ala. Ct. App. 1990).
\end{itemize}
B. Criticisms of Using Nuisance Laws as a Means to Combat Illegal Drugs

Criticisms of the use of nuisance theory to combat illegal drugs include: (1) Innocent persons are adversely affected because of the likelihood of increased homelessness;\(^{239}\) (2) The focus of nuisance actions on private residences and property owners is misplaced because illegal drugs are often sold from store-front-crack-houses and by street gangs;\(^{240}\) (3) Enforcement of nuisance laws are discriminatory because such laws are only enforced in low-income communities where people of color reside;\(^{241}\) (4) Nuisance actions to combat illegal drugs are based upon vague notions and violate due process of law;\(^{242}\) (5) Nuisance actions should be limited to conduct on adjoining property and not extend to tenants who reside on the same property.\(^{243}\)

1. Homelessness. — A concern about using nuisance actions to combat illegal drugs is that such actions will generate drug evictions and thereby increase homelessness for a sector of society that is already in dire need of adequate housing. This concern ignores the reality that drug dealers prey on communities for the sale of illegal drugs and are far from economically needy and on the brink of homelessness.\(^{244}\) Innocent persons who reside with drug dealers present concerns which a New York court addressed equitably. In *Lloyd Realty Corp. v. Albino*\(^ {245}\) the court held that a parent did not have to vacate the apartment when the daughters,

239. See infra notes 244-54 and accompanying text.
240. See infra notes 255-70 and accompanying text.
241. See infra notes 271-82 and accompanying text.
242. See infra notes 283-91 and accompanying text.
243. See infra notes 292-307 and accompanying text.
244. Drug dealers are known to take food stamps from the needy in exchange for cocaine. *Dozens Accused of Trafficking Food Stamps*, N.Y. TIMES, Sept. 24, 1995, at 16 [hereinafter Food Stamps]. Crack dealers tend to be drug free and show a disdain for their victims, “One seller occasionally taunted his customers: ‘That’s right, mah’ man! Come on. Keep on killing yourself; bring me that money.’” Ellen K. Coughlin, *Understanding East Harlem’s Culture*, THE CHRONICLE OF HIGHER EDUCATION, Dec. 8, 1995, at A8-9. A cocaine habit costs the “average” user $100 a day and may reach $1,000-$3,000 per week. *Id.* The street price for cocaine ranges from: $40,000 to $50,000 per kilo; $22,000 to $26,000 per pound; $18,000 to $22,000 per ounce; $100 to $150 per gram; and $35 per 1/4 gram. *LYMAN*, supra note 35, at 24. In 1970 estimated thefts by drug addicts living or operating merely in Central Harlem, New York, amounted to $2.3 billion. *LEE. P. BROWN, CAUSES OF CRIME* 37, 58 (1977).
also occupants of the apartment, sold illegal drugs from the apartment because the parent was unaware of the daughters' illegal drug activity.\footnote{246}

Like New York, Connecticut imposes limits on a landlord's power to evict tenants who reside with persons who engage in illegal drug-related activity. In Connecticut, a nuisance occurs when a person uses premises for illegal drug activities.\footnote{247} A tenant must not disturb the peaceful enjoyment of a neighbor's premises.\footnote{248} In the Connecticut case of \textit{Housing Authority of Norwalk v. Elmore},\footnote{249} the tenant leased an apartment from the landlord and resided there with two children. One of the sons was arrested on housing authority property for possession of marijuana and eventually pled guilty.\footnote{250} The landlord presented evidence that the premises had been used for illegal drug sales, so the burden shifted to the tenant to show lack of knowledge about the nuisance activities.\footnote{251} The court found that the tenant knew about the son's involvement in the possession and sale of illegal drugs and that the tenant assisted in maintaining the nuisance.\footnote{252} The assistance was demonstrated through knowledge of the son's earlier arrest for drugs and that he associated with persons allegedly involved in illegal drug trafficking. Also relevant was the tenant's earlier consideration about whether to remove the son from the apartment to avoid being evicted because of his illegal drug-related activities.\footnote{253}

\footnote{246} \textit{Id. See also} People v. Reed, 61 N.Y.S. 520 (1899); Barrett v. Fook, 129 N.Y.S. 23 (N.Y. App. Term 1911). Innocent owners, who lack knowledge or consent of the illegal activity are also safe from civil in rem forfeiture actions. United States v. 710 Main St., 744 F. Supp. 510 (S.D.N.Y. 1990). Before closure of a premises, California requires the court to consider several factors: (1) duration of the nuisance (2) prior efforts by defendant to abate the nuisance (3) any effect the nuisance has upon other persons, residents or businesses (4) effect of prior abatement orders (5) effect of granting closure of the premises, including availability of alternative housing. Tenants are provided reasonable notice and an opportunity to be heard prior to a closure order. \textbf{Cal. Health \& Safety Code § 11573.5(d)(1)-(5)(c)} (West 1992). Generally, a state cannot confiscate property formerly a nuisance. The nuisance must continue to exist. State v. Miller, No. 93AP-492, 1993 WL 360260 (Ohio Ct. App. Sept. 5, 1993).


\footnote{248} \textbf{Conn. Gen. Stat. § 47a-11(g)}.


\footnote{250} \textit{Id.}

\footnote{251} \textit{Id.}

\footnote{252} \textit{Id.}

\footnote{253} \textit{Id.}
2. Storefront Crack Houses and Street Gangs. —Another concern about using nuisance theory to combat illegal drugs is that drugs are often not sold from private residences. The proper target, critics say, are the storefront crack houses and roving youth gangs. This position is flawed because combating a residential nuisance is not to the exclusion of abating storefront crack houses. Nuisance laws target both. A state has constitutional power to declare that any place maintained for an illegal purpose creates a social harm, and it can enforce compliance or conformity with the law. New York State provides that a person who maintains a place where illegal drugs are used, who visits such a place or who uses its stairway, staircase, hall, roof, or elevator is guilty of a misdemeanor.

The state of Pennsylvania has utilized the law governing warrantless searches and seizures to enforce compliance with the law. In Commonwealth v. Peterson, the police were informed by an anonymous informant that drugs were being sold from a storefront. An undercover officer purchased cocaine from the storefront, which had metal sheets that covered the windows and a heavily barricaded door with a 3-inch hole through which drugs

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254. Metropolitan police officer David Stroud described how a crack house operates:

A crack house can be a house or an apartment [that's] main purpose is used to ingest crack. In these houses, the people who are crack users will come in just for the purpose of ingesting it.

Now in those houses, you can also have some small, some small sales may be made, too, and they will also be nice enough to rent you a pipe if you haven't got your own. And from my experience from going into these crack houses, most of the activity will take place in a large room, like a living room or a basement. That way, you have a whole bunch of people can congregate...and sit around and smoke the crack.

In the kitchen, somebody in the kitchen might also be making some more crack, and also, if you go to one of the other rooms, there will be acts of prostitution also going on in there.

Also most of these houses are very dirty and unkempt, and if you have a crack house in your neighborhood, they aren't very hard to spot at all, because you would just watch for a while, you'd notice activity going on by and around the house 24 hours a day, people going in and out 24 hours a day, characters you've never seen on your block before are coming in there.


256. N.Y. PENAL LAW, § 1533 (McKinney 1994).

and money were exchanged.\textsuperscript{258} After receiving no response to their announcement, police broke down the door, searched the locale and found cocaine.\textsuperscript{259}

The defendant alleged that the cocaine was inadmissible because the police had no information concerning who owned the building, there was no proof the building was abandoned, and that the defendant's use of the property as an illegal commercial enterprise demonstrated a reasonable expectation of privacy which would not justify a warrantless entry of the storefront under the Fourth Amendment and such cases as \textit{Katz v. United States}\textsuperscript{260} and \textit{Rakas v. Illinois}.\textsuperscript{261} The court disagreed with the defendant and stated that although the defendant demonstrated a subjective expectation of privacy in the storefront, that expectation is not one that society would recognize as reasonable under \textit{Katz}.\textsuperscript{262} Therefore, the police did not violate defendant's Fourth Amendment guarantees against unreasonable searches and seizures when they entered the storefront without a warrant.\textsuperscript{263}

In addition to crack houses, street gangs also pose a threat to the general public. The contribution of street gangs to the illegal

\begin{itemize}
\item \textsuperscript{258} \textit{Id.}
\item \textsuperscript{259} \textit{Id.}
\item \textsuperscript{260} 389 U.S. 347 (1967) (Providing a standard to evaluate an infringement on justified expectation of privacy rooted in a presumptive warrant requirement for all searches and seizures).
\item \textsuperscript{261} 439 U.S. 128 (1978) (holding that a passenger in an automobile could not bring a Fourth Amendment claim based on the search of the automobile because he failed to demonstrate a reasonable expectation of privacy in the interior of the car).
\item \textsuperscript{263} Numerous courts have held "that the dangerous nature of 'narcotic crime' or 'drug offenses' supports an automatic frisk, without reference to any trafficking (be it major or minor) or transaction of any size." David A. Harris, \textit{Frisking Every Suspect: The Withering of Terry}, 28 U.C. DAVIS L. REV. 1, 26 (1994); \textit{Search and Seizure Justices Debate Knock-And-Announce Rule As Part of Fourth Amendment}, U.S. LAW WEEK, Apr. 5, 1995. One court held that the plain view doctrine applies to drugs hidden in a hole in the wall of a crack house. \textit{State v. Ford}, 651 A.2d 103 (N.J. Super. 1995).
\end{itemize}
drug trade is enormous.\textsuperscript{264} A gang centralized in Queens, New York, built an empire which generated a million-dollar-a-week revenue with operations throughout the eastern and southeastern United States.\textsuperscript{265} However, there have been successful efforts to have gangs or their members declared a nuisance and to enforce antigang injunctions in states such as California,\textsuperscript{266} Illinois,\textsuperscript{267} and Texas.\textsuperscript{268} These injunctions have enjoined firearms, excessive noise, blocking of public streets, continuing trespasses, littering, disorderly conduct, graffiti, and underage drinking.\textsuperscript{269}

3. Discriminatory Application of Nuisance Laws. —It has been asserted that the use of nuisance laws to abate illegal conduct is based upon corrupt discriminatory practices because such laws are solely enforced in low-income communities against people of color. In \textit{City of New York v. Simithis},\textsuperscript{270} New York State sought civil penalties and a permanent injunction against drug sales and prostitution occurring in a newsstand located in Times Square, New York.\textsuperscript{271} The newsstand also sold adult books, magazines, and videos.\textsuperscript{272} Within one year, twenty-five drug-related arrests were made on the premises, and women employees had frequently

\textsuperscript{264} The activity of street gangs is difficult to curtail because it may often become difficult to define a "gang" for purposes of monitoring juvenile conduct. It has been suggested that gangs are groups of persons who the community recognizes as an aggregate, as does the group itself, and the individuals perform en mass to accomplish an illegal design. Paul Cromwell, et al., \textit{Youth Gangs: A 1990s Perspective}, 43 JUVENILE & FAMILY COURT J. 25, 26 (1992).


\textsuperscript{267} ILL. REV. STAT. ch. 740 para. 147/35 (Smith-Hurd 1994).

\textsuperscript{268} TEX. REV. CIV. STAT. ANN. § 125.062 (West 1994).


\textsuperscript{271} \textit{Id.}

\textsuperscript{272} \textit{Id.}
engaged in prostitution. The City of New York declared the newsstand a public nuisance.

The defendant claimed that the drug arrests in the area were “racially motivated and were instituted to punish, intimidate, or coerce Simithis, a Caucasian, because he permitted young [b]lack and Hispanic persons to congregate within and patronize his establishment.” The defendant removed the action to federal district court of the southern district of New York alleging that federal civil rights laws were implicated because his clientele were predominantly people of color. The court tersely stated, “One can only express profoundly dismay at the travesty that such a claim makes of this nation’s magnificent civil rights laws,” and held that no person has an absolute right to sell drugs or engage in prostitution. The New York nuisance abatement law did not bar a particular group from defendant’s premises, but instead sought to prohibit unlawful conduct on the part of any or all person regardless of race, creed or color. In effect, any residence or commercial enterprise used for illegal drugs on a continuing basis is a public nuisance. Concerning race and the war against illegal drug trafficking the Rev. Jesse Jackson forcefully stated, “We need to see drug pushers as terrorists, and neither age, race, status or sex should be sanctuary. . . . Drugs are a national security issue.”

4. Due Process Challenge. —Efforts to enjoin illegal drug activity as a nuisance have been challenged as violative of due process. In the Florida case of Orlando Sports Stadium, Inc. v. State ex rel. Powell, the defendants’ property was frequented by persons who used illegal drugs on the property. Florida has several

273. Id.
274. Id.
276. Id.
277. Id.
278. Id.

281. Riley, supra note 44, at 106.
282. 262 So. 2d 881 (Fla. 1972).
interrelated statutory provisions which, in relevant part, provide that it is a public nuisance to maintain any place where a law is violated, or any place visited by drug users to use drugs is a public nuisance. When any nuisance exists the state or citizen may sue to enjoin the nuisance. The defendants argued that the above statutory provisions denied them due process of law because the law was not sufficiently explicit in the description of the conduct forbidden and did not indicate the elements of the offense with reasonable certainty.

The court stated that a nuisance corrupts public morals and inconveniences or damages the affected community. The court further stated that in the exercise of its police powers the state has broad discretion to protect public health, safety and welfare, and it would be difficult to enumerate in a statute all the circumstances under which particular conduct or conditions would constitute a nuisance. The determination of what constitutes nuisance is made on a case-by-case basis. A nuisance cause of action is aimed at conduct, which under any variety of circumstances, harms public health, safety, and welfare. Broad language in a nuisance statute is useful at providing a target for an array of illegal conduct related to illegal drug trafficking.

5. *Nuisances Limited to Adjoining Property.* —Another concern about using nuisance theory as a means to combat illegal drug trafficking is based on the common law theory that conduct committed on one’s land is not a nuisance because nuisances are committed by neighbors. This position was embraced by the state of Massachusetts in *Doe v. New Bedford Hous. Auth.* where plaintiffs were tenants of a public housing projects plagued by illegal drug operations involving tenants and nontenants. The plaintiffs asserted that large-scale drug activities in their respective

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283. *Fla. Stat.* ch. 823.05 (1970) (providing that any structure erected, established, or maintained for illegal purposes is a nuisance).
285. *Fla. Stat.* ch. 60.05(a).
286. *Powell*, 262 So. 2d at 884.
287. *Id.* at 883.
288. *Id.* at 884.
289. *Id.*
290. *Id.*
projects created noise and the litter of drug paraphernalia. In addition, they asserted that crime in the area prevented them from going out at night, and prevented their children from playing freely.

The plaintiffs' suits were based, in part, upon nuisance. The court held that a tenant cannot sue a landlord for nuisance, because a suit must be brought against the owner of a separate parcel of land. A property owner must cause a substantial and unreasonable interference with the use and enjoyment of another's property. This requirement was not met because plaintiffs were mere renters and the condition existed on the defendants' own property.

This view has solid legal antecedents. Prosser and Keeton indicate that trespass is an invasion of interests in the exclusive possession of land, while nuisance is an interference with the use and enjoyment of it. The difference is between walking across a lawn and establishing a bawdy house next door. Wood on Nuisance adds that nuisances are always injuries that result from actions done outside of the injured property. American Jurisprudence indicates that nuisance is the unreasonable use of one's property that substantially impairs another's enjoyment of his property. In *Philadelphia Elec. Co. v. Hercules, Inc.*, the Third Circuit held that a successor owner of property cannot sue a previous owner for nuisance because the cause of action is limited to disputes between neighboring contemporaneous land uses.

The failure to recognize a nuisance course of action where illegal drug activities occur on the complaining party's property is an anachronistic position. Numerous jurisdictions have statutorily

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292. Id.
293. Id.
294. Id. The plaintiffs sought: injunctive relief, breach of warranty of habitability, breach of covenant of quiet enjoyment, and nuisance. Id. at 249.
295. Id. at 257.
296. Doe, 630 N.E.2d at 257.
297. Id.
299. Id.
301. 58 AM. JUR. 2D Nuisance § 2 (1989).
302. 762 F.2d 303 (3d Cir. 1985).
enacted a nuisance cause of action for illegal drug activity. The common law definition of nuisance is broad enough to encompass any unreasonable interference with a right common to the general public which adversely impacts public health, safety, or morals. Furthermore, the current trend is to interpret the nuisance cause of action broadly to prohibit illegal drug activities.

C. Closing the Loopholes

Nuisance law can supplement existing criminal laws. The conventional approach of incarcerating those associated with illegal drugs ignores the reality of the overcrowded and poorly-staffed criminal justice system. Prison space is a finite resource. Thousands of accused are awaiting trial, the system is backlogged and 95 percent of the cases are plea bargained. There is simply insufficient interest, ability, resources, and time to put each case through trial. Especially in light of the overwhelming burden on the criminal justice system, the importance of using nuisance laws in the war on drugs should not be overlooked.


305. RESTATEMENT (SECOND) OF TORTS § 821(B) (1979).


307. New York State Corrections Commissioner Thomas A. Coughlin, III testified that illegal drugs have led to overcrowding in prisons and a greater focus should be placed on incarcerating violent offenders and on community based drug treatment. Testimony of New York State Corrections Commissioner Thomas A. Coughlin, III, *Rockefeller Drug Laws—20 Years Later*, before a hearing convened by the Assembly Committee on Codes, June 8, 1993.

308. David Nyhan, *We Lost the War on Drugs*, BOSTON GLOBE, June 9, 1995, at 2. Plea bargaining has often been criticized because it suggested that the guilty escape punishment. See Shelton v. United States, 246 F.2d 571 (5th Cir. 1957). This position was rejected in Santobello v. New York, 404 U.S. 257 (1971), in which the Court held that the disposition of criminal charges by agreement is essential to the criminal justice system. Id. For a discussion about whether the plea bargain arrangement is fair to the accused see, Katheryn K. Russell, *Criminal Law A Critical View From the Inside: An Application of Critical Legal Studies to Criminal Law*, 85 J. CRIM. L. & CRIMINOLOGY 222, 228 (1994).
For example in the 1970 New York case of *State v. Schriber*, the defendant was charged with possession of illegal drugs and drug paraphernalia and with criminal nuisance. The defendant was a college student who rented an apartment above a restaurant. A police officer was present during a marijuana party held in the defendant’s apartment. The officer obtained a search warrant. When the police entered the defendant’s apartment he was absent, but several of his friends were present and his subtenant was asleep in her bedroom. The police seized drug paraphernalia and marijuana from the living room and a paint room. A pipe which contained marijuana residue was found in the defendant’s bedroom.

The court found insufficient evidence to sustain defendant’s drug possession conviction because defendant ceased to live in the apartment a week before the raid, the house was generally open and several persons who used marijuana were in the apartment. Nonetheless, there was sufficient evidence that defendant maintained a nuisance because the premises was maintained “for purposes of engaging in unlawful conduct.” The court reasoned that the defendant’s knowledge of, and acquiescence to, the drug activity was sufficient to establish that the defendant maintained a nuisance. *Schriber*, demonstrates how nuisance law can supplement and close the loopholes in traditional criminal law drug possession cases. If the defendant had been charged solely with possession he would have avoided responsibility for the offense. Nuisance law was instrumental in punishing the defendant and abating the unlawful activity.

V. Interplay Between International Environmental Law and Illegal Drug Trafficking

Any effort to fight the war on drugs must include consideration of the international scope of the drug problem. In the

310. Id.
311. Id.
312. Id.
313. Id.
315. Id.
316. Id. at 553.
317. Id.
international arena and in local communities, environmental laws may prove useful. Under the National Environmental Policy Act (NEPA), Congress established a national policy which encouraged harmony between humans and the environment, mandated the environmental impact statement (EIS) process and established the Council on Environmental Quality. The environmental policies under NEPA impact administrative law, judicial review and agency practices. NEPA differs from other environmental statutes because it applies to federal agencies, not polluters, and it establishes a process rather than sets standards. NEPA requires an EIS from all federal agencies in every recommendation or report on proposals for legislation and other Federal actions significantly affecting the quality of the human environment. The purpose behind the EIS is to encourage environmental understanding. Therefore, federal agencies must consider the impact of any federally financed project on people, wildlife, soil, water, and air.

Environmental laws dealing with herbicides are intertwined with the war on drugs because herbicides have been used to destroy poppy and marijuana fields in Mexico. In National Organization for the Reform of Marijuana Laws (NORML) v. United States Dept. of State the Court addressed the United State's use of herbicides in Mexico to eradicate illegal drugs. NORML sought to enjoin several federal agencies from providing Mexico with financial and other assistance to destroy marijuana and poppy fields by aerially sprayed herbicides such as paraquat. NORML claimed that the federal agencies supported herbicide use in Mexico in violation of the International Security Assistance

321. Id.
322. 508 F. Supp. 1 (1979) [hereinafter NORML]. Environmental concerns have become more global. For example, the Chernobyl disaster demonstrates the insignificance of national borders with respect to environmental concerns. See Irvin Molotsky, Chernobyl and the "Global Village", N.Y. TIMES, May 8, 1986, at B22. Vice President Al Gore has stressed the international problem of global warming as the major environmental problem confronting the world. GORE, supra note 168.
323. Defendant agencies included the Drug Enforcement Administration (DEA); the Agency for International Development (AID); and the Department of Health, Education, and Welfare (HEW). NORML, 508 F. Supp. at 2.
Act, NEPA, and the Eighth Amendment to the United States Constitution.

The Court acknowledged that consumption of paraquat-contaminated marijuana is likely to cause health hazards. Plaintiff argued that pursuant to the 1978 version of the International Security Act a finding of likely health hazards would preclude the U.S. from providing financial and other assistance to Mexico to spray herbicides. Congress, however, amended the Act in 1979 replacing the phrase "assistance ... may not be made available or used for any program involving the spraying of a herbicide . . ." with "assistance . . . may not be made available for the purpose of the spraying of a herbicide." The intent behind the amendment was to continue assistance for the destruction of poppy plants and narcotics interdiction. Although the court's discussion regarding NORML's NEPA claim was reduced to a footnote, the issue was discussed in another case with similar facts.

In \textit{NORML v. United States Dep't of State (1978)}, the court addressed the issue of whether the failure of federal agencies to prepare an EIS for U.S. involvement in spraying poppy and marijuana plants in Mexico violated NEPA. NORML contended that the U.S. participation in the Mexico spraying program endangered the health of NORML's members who smoked marijuana or ate fruit, vegetables, and beef from Mexico. NORML sought to enjoin the United States government from providing assistance to Mexico's herbicide spraying program absent

\begin{itemize}
  \item 22 U.S.C § 2291(d) (1988).
  \item 42 U.S.C.A. §§ 4321-470(d).
  \item NORML alleged that marijuana consumed with paraquat residue may cause fibrosis of the lungs and certain consumption levels are fatal. Therefore, smoking of paraquat-contaminated marijuana constitutes cruel and unusual punishment under the Eighth Amendment to persons who eventually consumed the herbicide through marijuana usage. \textit{NORML}, 508 F. Supp. at 2.
  \item \textit{Id}.
  \item \textit{Id}.
  \item \textit{Id}.
  \item \textit{Id}.
  \item \textit{NORML}, 508 F. Supp. at 2.
  \item \textit{NORML 1978}, 452 F. Supp. at 1226.
  \item \textit{Id} at 1229.
\end{itemize}
an EIS as required under NEPA. NORML argued that spraying herbicides in Mexico constituted a major federal action significantly affecting the quality of the human environment and that an EIS was required. Because defendants were willing to prepare an EIS on the United States' support of Mexico's narcotics eradication program, the court did not have to reach the issue of whether NEPA applied.

Although the plaintiffs were unsuccessful in the above cases, NEPA allows communities and individuals to confront international drug trafficking. The intent behind NEPA is to provide "full and fair discussion of significant environmental impacts and ... inform decisionmakers and the public of reasonable alternatives" in order to avoid adverse impacts to the human environment. Such considerations may require or suggest a more cost efficient means to combat the war on drugs. Trade embargoes, economic sanctions or other means may prove ecologically and economically feasible. NEPA's mandate requiring the preparation of an EIS "gives the future a stake in present decisions." NEPA's goal of ecological and economic productivity compels governmental programs to focus on objectives of responsibility to the future, environmental equity, beneficial use, biological diversity and individual liberty, widespread prosperity, and conservational management.

VI. Conclusion

Governmental apathy, societal prejudices, and the problems associated with illegal drug use require that communities take an active part in the war on drugs. Environmental statutes and nuisance laws are useful because they eliminate ecological hazards and impact the "deep pockets" of individuals partly responsible for the flow of illegal drugs. The severity of the illegal drug problem

335. Id.
336. The Mexican government, with U.S. assistance, began to spray herbicides in 1975. The U.S. provided $12 million per year along with aircraft, training, technical assistance and aircraft maintenance.
338. It has been decided that an EIS is not required to spray paraquat because there is no evidence that the herbicide adversely affects humans, fish, wildlife, and vegetation. North Georgia C.O.P.S., et al. v. Ronald Reagan, 587 F. Supp. 1506 (Ga. 1984).
339. Id.
341. Id. at 14-15.
demands novel solutions. Environmental statutes and nuisance laws have proved to be effective means for strengthening communities and removing hazardous conditions created by illegal drugs.