According to Lorraine Mazerolle and Janet Ransley (2003), “third-party policing” describes police efforts to persuade or to coerce third parties, such as landlords, parents, local government regulators, and business owners to take on some responsibility for preventing crime or reducing crime problems. Obviously this definition seeks to distinguish policing directed at those who are and who might be criminal offenders from policing efforts directed at non-offending “others.” Thus, the definition emphasizes the affinities that third-party policing has with other forms of civil regulation. Examples of such regulation abound. In an effort to ensure that corporations do not defraud stockholders, regulators place constraints, both civil and criminal, on accountants and lawyers. In an effort to make sure that employers do not violate civil rights laws, legislators have structured statutes so that violators pay plaintiffs’ attorneys fees should the plaintiffs win. In this way, plaintiffs are persuaded to become “private attorneys general” helping public officials to enforce the law. In an effort to ensure that athletes do not take illegal drugs, the National Football League requires teams to complete random urine tests of players. The federal government is now pressuring the Major League Baseball to do the same. In this way, the sports leagues become third-party enforcers of laws prohibiting the use of certain drugs.

Given the pervasive forms of such regulation today, that such “third-party” efforts are becoming common in the enterprise of street crime control should hardly be surprising. In fact, we can redescribe even those efforts typically conceptualized as directed primarily at offenders in terms of third-party controls. One common consequence of criminal offending is a sanction in the form of a prison sentence or fine. However, it is silly to think that only the offender suffers the opprobrium that accompanies such sanctions. Families of the offender, as well as friends, can also suffer (e.g., Braman 2004). In a world in which the costs associated with formal punishment extend beyond the actual offender to non-offenders, we should expect such third parties to engage in efforts to persuade, or even informally coerce, potential offenders to refrain from crime. And,
social theorists have long explained how informal norms combine with formal sanctions to effect deterrence.\textsuperscript{1} When informal social controls are supported by legal sanctions, social costs are made more salient so that behavior is better regulated.

Importantly, informal controls are not relevant simply when they support formal legal sanctions. Informal controls also involve the normative processes and ethics of social interaction that regulate everyday social life, as well as the mobilization of community that occurs in response to problem behaviors (Doyle and Luckenbill 1991). Thus, informal social controls are effective in several ways: inhibition of problem behaviors, facilitation of conformity, and restraint of social deviance once it appears. The key is to see that that evaluation of the deterrent effect of a policy cannot depend simply on the likely impact of formal punishment, but, rather, must also include some kind of assessment of the reciprocity between legal and social controls. It is not enough to ask whether a potential offender will be persuaded not to offend by assessing how he will compare the costs of potential punishment against the benefit of engaging in the crime. We also need to know about the potential offender’s community context and social role to be able to begin to make assessments regarding the potential effectiveness of a planned formal legal sanction.

My task here is not to bring all policing efforts under the potentially commodious umbrella of third-party policing, however. While it should be clear that much of traditional criminal law enforcement and policing can be described as “third-party policing,” in this volume the meaning of the term is more limited. Contributors to this volume have pinpointed third-party policing as those relatively recent efforts by many policing agencies that recognize that much social control is exercised by institutions other than the police and that crime can be managed through agencies besides those concerned primarily with dispensing criminal justice, such as the police. Specific examples include nuisance abatement, anti-gang loitering laws, and public housing eviction policies among others (Mazerolle and Ransley in this volume).

The primary purpose of this chapter is to review the arguments made by the critics of third-party policing efforts. Although the concerns of most of these critics are based in constitutional law, some critics make a special effort to explicate the potentially destructive racial dynamics of some third-party policing strategies. These arguments target the distributional effects of exactly which groups bear the burden of third-party law enforcement. After reviewing these arguments, this chapter will conclude by attempting to address the costs and benefits of third-party policing strategies with special emphasis on the race-based critiques of these approaches.
Civil libertarian critique

One basic criticism of government targeting of third-party non-offenders to persuade or informally coerce the so-called “real offenders” to refrain from lawbreaking is that by targeting third parties the government uses its power to restrict the liberty of those who “really aren’t doing anything wrong.” The essence of civil libertarianism is that coercive government power should be deployed only in those instances in which it is necessary to protect individuals from the use of force or fraud by others. Under this view, a threat to levy a civil fine against a landlord in order to persuade her to better scrutinize and identify potential drug-dealing renters is patently impermissible. According to libertarian beliefs, state power ought to be trained upon the drug dealer, not the landlord, as the dealers are the true wrongdoers.

Private groups, legislators, and other governmental officials have an answer to this foundational criticism. Criminal offenders are sometimes difficult to locate and bring to justice through the conventional criminal justice apparatus. In fact, criminal liability itself has, over time, expanded to address this problem. We punish offenders not only for the crime of robbery, but also for the offense of attempted robbery. Further, prosecutors often utilize offenses such as conspiracy and solicitation in order to ferret out and punish crime before it takes place. Neither the doctrine of conspiracy nor of solicitation actually requires that the prohibited act occur. The doctrines require simply that a person agrees with another to commit a criminal offense (conspiracy), or request that another engage in conduct that constitutes a crime (solicitation). Additionally, we punish those who assist others in criminal offending under the doctrine of accomplice liability even when the accomplice has not himself or herself committed any act that most would deem criminal. According to the doctrine of accomplice liability, individuals can be punished when they make a decision to further the criminal act of another and engage in an act that furthers the principal’s criminal act. In addition to all of this, civil remedies have long been used to hold offenders to account outside of the traditional criminal justice context.

Prophylactic measures, combined with civil remedies, provide law enforcers with a wider range of alternatives to crime control that are less costly than traditional criminal justice approaches. Third-party policing, then, is simply a small extension of this trend. There is, however, one basic difference between third-party policing efforts and prophylactic criminal and civil remedies directed at wrongdoers: those co-opted into enforcement efforts are not themselves wrongdoers in the usual sense.
This basic difference is a key difference for critics of third-party policing concerned with civil liberties. Such critics might point to *Bennis v. Michigan* as a paradigmatic case of third-party policing gone awry. In *Bennis*, a car was seized from Mr. Bennis after he had been convicted of committing an indecent act with a prostitute while the two were in the car. Mrs. Bennis claimed that her interest in the car could not be forfeit to the State of Michigan because she was completely unaware of her husband’s activities. The United States Supreme Court, in a plurality opinion, nonetheless ruled against her. As a result of the Court’s decision, the State of Michigan was allowed to keep the Bennis family 1977 Pontiac, which was paid for primarily with money Mrs. Bennis earned from babysitting.

The *Bennis* plurality stated that there was a long history of permitting forfeiture against innocent owners in order to prevent further use of illicit property. The reasoning is obvious: if an innocent owner knows that there is a risk that her property might be forfeit if someone else uses the property for illegal purposes, she likely will take greater care than she otherwise would to ensure that her property is not so used. That is, she will become a third-party police officer.4

The problem with this reasoning, according to civil libertarians, is not whether the procedure works or not; rather, the problem is that the forfeiture process is fundamentally unfair under basic principles of due process of law. For one thing, the deterrence rationale that applies to Mrs. Bennis potentially implies that Michigan can punish Mrs. Bennis for her husband’s crime. Such punishment is clearly inconsistent with due process. The Supreme Court has recognized the due process right of an innocent person to be free of punishment.5 Mrs. Bennis was not tried and convicted before her punishment – the forfeiture of her interest in the family car – was meted out by the state. Indeed, she could not possibly have been convicted for the crime her husband committed. Mrs. Bennis had no awareness of her husband’s activities, so she possessed no criminal intent to engage in the offense or to further it in any way. Moreover, Mrs. Bennis had engaged in no act that could be considered criminal. While her husband was involved with a prostitute, Mrs. Bennis was simply waiting for her husband to come home for dinner.

Even if one were convinced that Michigan’s actions in this case were not punitive, but instead were merely regulatory,6 one might still conclude that the state’s action offended due process. Deterring an activity such as prostitution is, of course, a legitimate aim of a state’s police powers; however, due process principles require that government respect the rights of property owners and afford them procedural protections under civil law as well as criminal law. The Constitution’s text is clear: government
may not deprive individuals of life, liberty, or property without providing due process of law. Unfortunately for Mrs. Bennis and for others similarly situated, the procedural protections required to satisfy constitutional minimums are minimal. Still, the fact that a particular procedure meets the minimum requirements of procedural due process does not mean that critics are without recourse. Critics often contend that an enforcement operation like that in Bennis is inconsistent with substantive due process even when the operation meets the constitutional requirements of procedural due process. As Mary Cheh (1994: 25) has neatly summarized:

Substantive due process analysis ordinarily proceeds along two tracks. Almost all laws touching social and economic matters are judged under a lenient rational-basis test, while laws that interfere with certain intimate and personal rights, such as child rearing, marriage and divorce, and use of contraceptives, are judged under a vigorous strict-scrutiny test. The rational basis test is easily satisfied. Ordinary social and economic regulation is presumed constitutional, and so long as the law serves any permissible police power objective, it will be upheld. Legislatures are free to decide, without court interference, how they will tax, regulate, and control behavior.

Under these analyses a litigant must prove either that the forfeiture is so unreasonable as to fail rational basis, or that there is a protected interest at issue such that the more rigorous strict scrutiny test applies. Both of these types of arguments fail more often than they succeed.

This review of Bennis and related constitutional doctrines might suggest that it is futile for civil libertarians to adopt these constitutional arguments to block third-party policing efforts. Such a conclusion would be mistaken. Consider litigation against anti-gang loitering ordinances and curfews, which some consider third-party policing tools, and which have become increasingly popular in municipalities. Loitering and curfew ordinances are designed to keep teens from congregating at night to attract the ire of rival gang members and pick fights, or standing on corners to help friends hidden in alleys to sell drugs. By enforcing these laws, it is thought that police can help adults simply by acting as additional eyes and ears in the neighborhood. Some of these laws also are designed to make parents more accountable by penalizing parents whose children violate the ordinance. These laws have been met with resistance and constitutional challenge, and in many cases, the civil libertarian critics have been successful. Chicago’s first anti-gang loitering law was deemed unconstitutionally vague, a fate shared by numerous “loitering with intent” statutes around the country. Curfews in Washington, DC (Hutchins v. District of Columbia), San Diego (Nunez v. City of San Diego), and other cities (e.g., City of Maquoketo v. Russell) have likewise been deemed to abridge the due process rights of teens and their parents.
Ultimately the civil libertarian critique of government agencies involved in third-party policing boils down to one basic point: a concern with the scope of accountable government power. Civil libertarian critics believe, with some justification, that the greater the government’s power, the more difficult it is to control; therefore, we all are better off if government power is limited as much as possible. One suspects that these critics would not be so concerned if they could be persuaded government power in these areas was utilized in a rational and transparent manner. Unfortunately, to the extent that preferred strategies utilize civil justice and political mechanisms as controls, as opposed to criminal justice mechanisms, it becomes that much more difficult to keep track of government activity and to limit it. Police discretion, always a powerful tool even when confined to criminal justice processing, potentially grows to almost unrecognizable proportions once let out of the criminal justice cage.

Racial equity critique

Some critics of third-party policing strategies have complained about a specific problem that could be considered a subset of the critique detailed above. Namely, these critics are worried that as third-party policing strategies loosen the reins on governmental discretion regarding whom to engage as the law is enforced, such discretion inevitably will be exercised more often against poor and minority-race citizens than against those who are not poor and/or of minority race.

Consider as an example Professor Dorothy Roberts’s (1999) race-based critique of an anti-gang loitering law adopted by the City of Chicago in 1992. The ordinance exhibited unique third-party policing features. The Chicago City Council passed the ordinance to restrict gang-related congregations in public ways (Chicago, Il., Code § 8-4-015 1992). The ordinance was designed to respond to the grievances of citizens concerned about commonly occurring criminal street gang activity in their neighborhoods, such as drive-by shootings, fighting, and open-air drug dealing. By loitering in alleyway entrances and on street corners, drug dealers both solicited business and warned hidden compatriots of police patrols. The ordinance empowered designated police officers in specified areas to approach groups of three or more people loitering “with no apparent purpose” provided that those officers had reasonable cause to believe that at least one member of the group was a street gang member and ask the group to move along. If the group refused, then the officer was entitled to arrest the group. The third-party policing aspect is clear. Even those individuals whom the police had no reason to suspect were gang members, were potentially subject to arrest merely because of the company those
individuals chose to keep (and where they chose to keep the company). By subjecting non-gang members to liability, municipal regulators incentivized them to help police constrain the behavior of their gang-involved compatriots.

Professor Roberts’s (1999: 775) assessment of the law is blunt: “expansive and ambiguous allocations of police discretion are likely to unjustly burden members of unpopular or minority groups.” In support of this claim, Roberts (1999: 785) points to the fact that in 1995 46.4 percent of people arrested for vagrancy across US cities were black even though blacks made up only 13 percent of the nation’s population. No doubt a critic such as Roberts would also take data compiled by Justin Ready, Lorraine Green Mazerolle, and Elyse Revere (1998), demonstrating that 91 percent of the tenants evicted from public housing developments in Jersey City as part of a civil remedy program to achieve greater level of order in those developments were black, as evidence of the unjust burden suffered by minorities as third-party policing strategies are implemented (Ready, Mazerolle, and Revere 1998).

An assumption that minorities are unfairly burdened by third-party policing strategies that are designed to give law enforcers more flexibility to address crime and disorder is based upon a fundamental premise – the weak political power of minority groups. Consider a famous Yale Law Journal article written in 1960 by William O. Douglas. In the piece Douglas railed against the argument that anti-loitering laws were beyond constitutional reproach. It was naïve to trust contemporary communities to apply such laws evenhandedly, Douglas asserted, because those arrested under such laws typically came “from minority groups” with insufficient political clout “to protect themselves” and without “the prestige to prevent an easy laying-on of hands by the police” (Douglas 1960: 13). When the court did ultimately deem traditionally worded loitering laws unconstitutionally vague in Papachristou v. City of Jacksonville, Douglas wrote the court’s opinion.

Unlike the more general strategy of civil libertarians, advocates of constitutional arguments designed to protect minority groups from overweening police power have achieved more success in the Supreme Court and lower courts. In the 1960s the prevailing sense of the court was that the coercive incidence of law enforcement, in both the North and South, was concentrated most heavily on minority citizens, who by virtue of their exclusion from the political process had no say about whether those policies were just. The result was the systematic devaluation of both the liberty of individual minority citizens and the well-being of minorities as a group. By insinuating courts deeply into the process of criminal-law enforcement, the federal constitutionalization of state police procedures
was intended to correct this imbalance (Klarman 1991). Similarly, in the political context of the 1960s, law enforcement officials were accountable only to representatives of the white majority. Indeed, for precisely this reason, the police predictably used their discretion to harass and repress minorities. Insisting that law-enforcement authority be exercised according to hyper-precise rules was a device for impeding the responsiveness of law enforcers to the demands of racist white political establishments. Such rules also made it much easier for courts to detect and punish racially motivated abuses of authority.

Thus, by pointing to racial imbalances in the enforcement of loitering laws, curfews, public housing evictions, and nuisance abatement laws, modern critics intentionally draw upon the particularized racial history of such strategies – and the courts’ pointed disfavor of them. But, one question is whether the costs of such strategies, even considering the specific race-based arguments offered by critics such as Dorothy Roberts, outweigh their benefits.

Costs and benefits

As noted above, police departments across the country have turned to third-party policing strategies as seemingly low-cost alternatives to traditional criminal justice apparatus to prevent crime. If such strategies are successful, the benefits are clear: reduced crime for (presumably) less money, as civil justice mechanisms typically are less costly than criminal justice ones. There is a dearth of available evaluations, but the initial studies are promising. For example, Jeffrey Grogger (2002) has found through an empirical analysis of civil injunctions designed to reduce gang violence that in the first year after the injunctions are imposed violent crime falls by 5 to 10 percent. Moreover, in a recent edited volume, Lorraine Mazerolle and her colleagues (Mazerolle and Roehl 1998) collect studies of various civil remedy programs designed to control drug problems. Most of the studies contained in the volume point to the effectiveness of such programs at reducing levels of targeted drug offenses.

The case for third-party policing, then, might be made on this evidence. Note, however, that many third-party policing strategies are place-based programs. And, if such place-based programs caused crime reduction in the targeted areas while simply diverting crime elsewhere, that would be an obvious cost. Geographic displacement of crime is a serious concern when place-oriented interventions are employed (Committee to Review Research 2004: 240). Interestingly, the small body of research pertaining directly to this issue with respect to third-party policing indicates the opposite – a diffusion of crime control benefits (e.g., Mazerolle and Roehl...
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Still, the fact that a few studies indicate some benefit through reduction in crime does not resolve the accounting for costs and benefits in favor of the benefit side of the ledger. While promising, the available studies do not point to sizable results. Moreover, to be confident about a cost-benefit analysis, one must ask in this context whether such crime reduction benefits would be achieved through more traditional policing methods – methods that are less likely to raise the hackles of civil liberties proponents (Caulkins 1998). The results of such an analysis are difficult to attain to say the least, but without such results, police departments and other governmental entities ought to tread lightly before embarking on strategies that present the kinds of grave risks to civil liberties discussed earlier. Critics of third-party policing have a point when they assert that third-party policing interventions cannot be justified on crime reduction, even if substantial, alone.

Presumably the critics whose arguments are sound in racial equity concerns would agree with this assessment. Urban minority residents face more crime than other non-minority groups, so such residents would likely benefit in the form of reduced crime, nuisance, and the like in their communities. However, such residents may not believe that reductions in say, observable open-air drug selling are worth the costs in terms of civil liberties incursions. The case for benefits needs more.

An additional argument that can be made on the benefits side is that third-party strategies potentially can help to change the social dynamics of neighborhoods in ways that promote crime-reducing norms. One way to do this is to point out that traditional criminal law enforcement methods potentially can impede a community’s ability to resist and reduce crime. Traditional law enforcement methods rely on criminal justice processing and punishment – especially incarceration – to achieve crime reduction.

Scholars have articulated theories describing how mass incarceration concentrated at the community or neighborhood level could hamper institutions of informal social control (Nagin 1998; Rose and Clear 1998). Drawing on Shaw and McKay’s (1969) foundational work on the relationship between the social disorganization of neighborhoods and the persistence of high crime rates at the community level, these scholars have focused on various social processes, including (1) the prevalence, strength, and interdependence of social networks; (2) the extent of collective supervision by neighborhood residents and the level of personal responsibility they assume for addressing neighborhood problems; and (3) the rate of resident participation in voluntary and formal organizations (Sampson and Wilson 1995; Wilson 1996; Rose and Clear 1998).
The hypothesis is straightforward: When the processes of community social organization are prevalent and strong, crime and delinquency should be less prevalent, and vice versa. Burgeoning research suggests that mass incarceration following from traditional law enforcement methods inhibits social processes that support crime reduction and prevention (Lynch and Sabol 2004); thus, law enforcement that does not rely heavily on incarcerative approaches, like third-party policing strategies, may be less harmful than traditional law enforcement approaches to fragile urban poor community structures and may indeed support those structures in ways that lead to less crime.

Specifically, civil remedies can be democratizing in a sense. Such remedies typically are not reactive; rather, they are proactive. Neighborhood residents who have been (or feel they have been) underserved by policing organizations historically often can turn to civil remedies as an alternative to traditional strategies. Indeed, an argument can be made that third-party strategies are especially empowering to residents of disadvantaged neighborhoods in a way that traditional policing often is not. That is, state-sponsored strategies that encourage individuals to work with one another can help to sustain a healthy social organization dynamic that can be harnessed in favor of crime reduction and resistance (Meares 2002). Such forces can in themselves be supportive of neighborhood collective efficacy, which itself is associated with lower crime at the neighborhood level (Sampson, Raudenbush, and Earls 1997).

Finally, there may be normative concerns that can be arrayed against the civil libertarians’ own arguments, whether those arguments are grounded in individual libertarian concerns or take on a more group-based, race-specific character. It is important to pay attention to where the groundswell of support for many third-party policing strategies lies. In no small number of cases, the support for these strategies comes from the residents of high-crime neighborhoods who are themselves often members of minority groups – the very people who face a heightened risk of criminal victimization and who live with the destructive impact of crime on the economic and social life of their communities and who feel the pinch of these laws in a meaningful way.

There is often little room in either the general civil libertarian critique or the more specifically racialized critique for the voice of this group of people, but it should be clear that as a normative matter their voices and votes ought to count for something. Of course, deciding that one ought to listen to the people who are most affected by third-party policing strategies does not guarantee a “right answer” to balancing issues inherent in these debates. There is no perspective-free way to determine whether the general structure of third-party approaches violates the Constitution.
Some individual or set of individuals, judging the question in the light of her own experiences and values, must decide whether particular policies embody a reasonable balance between liberty and order. The question is who should decide.

To illustrate, consider an exchange from the City Council hearings on the Chicago gang-loitering ordinance. At the hearings, dozens of inner-city residents – from church leaders, to representatives of local neighborhood associations, to ordinary citizens – testified in favor of the proposed law. Harvey Grossman, Illinois director of the ACLU, testified against it:

I am a lawyer, and I spend a great deal of time doing nothing more than reviewing ordinances and statutes, and it turns into a little bit of a long exam game. . . . We pick apart the statute. We focus on [a] word or [a] phrase, and we try to say why that phrase might or might not be constitutional. (Transcript of Meeting before Chicago City Council Committee on Police and Fire 107. May, 18, 1992)

He then proceeded to “pick apart” the gang-loitering ordinance, demonstrating the tension between it and various judicial precedents.

Alderman William Beavers, a council member who represented a poor and high-crime minority district on Chicago’s south side, objected to this bookish conception of how to appraise the constitutionality of the law. “I don’t know if you are attuned to what’s going on in these neighborhoods,” he told Grossman. “Maybe I need to take you out there and show you what’s really going on” (ibid.: 119). Grossman replied that that wouldn’t be necessary: “I think our ability to come together and to try to resolve issues [like this] really doesn’t . . . depend on if I see what’s happening in your neighborhood or you see what’s happening in my neighborhood.” Rather, what it does depend on is “empathy or ability to understand what’s happening to other people and, two, some commitment, some intellectual integrity and some commitment to principle. And the principle that I am suggesting to you is inviolate. It doesn’t change” (ibid.: 120).

The tough issues surrounding the new community policing obviously aren’t an “exam game” for the median inner-city voter. The people who experience both law enforcement and crime are people who think empathy is motivated by “inviolate” “intellectual” “principles” and just “doesn’t depend,” “really,” on “see[ing] what’s happening in [inner-city] neighborhood[s].” The values at stake and the difficult tradeoffs that must be made are not abstractions. They are real. This perhaps is a place where critics and advocates can come together. Procedural justice scholars have suggested that a reliance on procedures is useful when correct outcomes are not obvious to disparate members of a group. Groups may not always decide on an outcome, but they can almost always decide on procedures.
that everyone finds satisfying (Lind and Tyler 1988). Thus, to the extent that we achieve very little agreement on constitutional substance, perhaps the best strategy to adopt as third-party policing goes forward is to insure that those most affected are insinuated into the political process and that their voices are heard.

Conclusion

As we progress into the twenty-first century, it is likely that non-traditional approaches to policing will continue to include strategies that appear to stray from criminal justice norms. This is to be expected in a world in which community policing, with its reliance on police and citizen interaction, increasingly focuses upon problems that are not obviously connected to crime control such as garbage clean-up, neighborhood marches, and even community prayer vigils. The third-party policing strategies reviewed in this volume clearly are congenial to this brave new world of policing. But the question remains whether this new world adequately recognizes the values that American citizens have always held dear. Civil liberties proponents fear not, but perhaps such critics have not taken adequate account of the instrumental benefits to be obtained through the new policing. Instrumental benefits aside, both critics and proponents of third-party policing seem to have overlooked the potential for political engagement that the new policing strategies can offer to citizens – especially to crime-beleaguered citizens of poor urban communities. Whatever else may be said about these approaches in terms of crime reduction, the normative benefits of expanded political participation for those who have traditionally been shut out of governmental processes may be worth the cost of these controversial programs.

Notes

1. Zimring and Hawkins (1997) explain this point by distinguishing the educative and deterrent effects of punishment. Likewise, Williams and Hawkins (1992) explain the conceptual differences between the deterrent effect of legal sanctions and social control through informal mechanisms.

2. A person is guilty of conspiracy with another person to commit a crime if with the purpose of promoting or facilitating its commission he: (a) agrees with such other person or persons that they or one of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or (b) agrees to aid such other person or persons in the planning or commission of such crime (Model Penal Code, § 5.03).

3. A person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages, or requests another person to engage in specific conduct which would constitute such
crime or an attempt to commit such crime or which would establish his complicity in its commission or attempted commission (Model Penal Code, § 5.02).

4. Note that one dissenter in Bennis, Justice Stevens, clearly disagrees with this point (see Bennis at 1009, Stevens, J., dissenting). Justice Stevens declares that the goal of deterrence is not served by punishing “a person who has taken all reasonable steps to prevent an illegal act.”

5. In fact, the court, relying on substantive due process principles, held that once a criminal is found “not guilty” of a crime, the State may not impose punishment” (Foucah v. Louisiana).

6. Salerno vs. United States describes preventive detention as regulatory rather than punitive and thus requiring more lenient procedural protection under the Due Process Clause.

7. For example, see 18 USC. 981 (1988 & Supp. V 1993) for a discussion of the government’s civil money laundering forfeiture provision or 21 U.S.C. 881 (1988 & Supp. V 1993) which authorizes the civil forfeiture of property connected to narcotics activity. Forfeiture is authorized in more than 140 federal statutes and most states have one or more laws permitting forfeiture (Steven L. Kessler [1994]. Civil and Criminal Forfeiture: Federal and State Practice 2.01, at 2–1). Typically the government can effect its seizure without notice to the owner and without giving the owner a prior opportunity to object. See, for example, 19 USC. 1609–1615 (1988 & Supp. V 1993), the US Customs Service’s procedures for seizure, forfeiture, and recovery of seized property.

8. I should acknowledge here that the two noted aims do not necessary proceed in step. That is, it is certainly possible to imagine a world in which there is much less open-air drug selling and a simultaneous increase in consumption.

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