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## THE CRIMINAL LAW AND THE NARCOTICS PROBLEM

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In the first portion of this article, Mr. Cantor comprehensively analyzes the legal efforts which have been made, both in this country and on the international level, to combat the trade in illicit narcotics. These efforts, he believes, have been largely ineffective and are, for a number of reasons which he details, doomed to continuing failure. In concluding, Mr. Cantor calls for a comprehensive interdisciplinary attack on the problem and, in that connection, he sets forth definitive suggestions concerning the important role which the criminal law may be able to play in the socio-medical plan which is eventually developed.—EDITOR.

### INTRODUCTION

The problem posed by the illicit traffic in narcotics,<sup>1</sup> surely as much as any other contemporary social evil, has generated great controversy. This controversy has arisen largely from differing views of the role the criminal law should play in ridding the United States of the evils this traffic causes. Both sides to this controversy usually agree that when the criminal law can serve a rehabilitative function it should be so utilized. But for several reasons—primarily cost and the lack of a cure for opiate addiction—the law is not, save in a few largely unsuccessful instances, used as a rehabilitative agent. Mainly it exists to deter, and it is around its capacity to deter and eventually eradicate the illicit trade in narcotics that the argument swirls.

One side argues that the solution lies, at least in the first instance, in imposing severe penalties for violation of both federal and state criminal narcotics statutes. This is the pronounced, often-repeated view of the Commissioner of the Federal Bureau of Narcotics.<sup>2</sup> The same view was reflected

<sup>1</sup> The term "narcotics" as used herein includes all derivatives, preparations and mixtures of opium; cocaine and any derivative, preparation and mixture of coca leaves, except derivatives which do not contain cocaine, ecgonine, or substance from which either may be made; marihuana and any other parts of the cannabis sativa plant, by whatever name known, and every compound, derivative or preparation thereof, excluding the mature stalks or any fibers produced therefrom, or any product of the seeds of the plant; and any synthetics with properties similar to opium, coca leaves and/or marihuana or their derivatives. The term "narcotics" does *not* include barbituates, amphetamines, derivatives or extracts of peyote or any other drug not expressly described above.

<sup>2</sup> ANSLINGER & TOMPKINS, *THE TRAFFIC IN NARCOTICS* 295-97 (1953); FEDERAL BUREAU OF NARCOTICS, *RELEASE ON THE FEDERAL NARCOTICS LAWS* (October, 1956).

in both the 1956 report of the Subcommittee on Narcotics to the House Ways and Means Committee,<sup>3</sup> and the resulting Narcotics Control Act of 1956,<sup>4</sup> which increased the penalties for violations of federal narcotics laws.

The opposition, while at odds on its proposed solutions, nevertheless unites in condemning this punitive approach and in stressing that the narcotics problem is essentially and primarily a medical one, necessarily requiring some form of legal dispensation of narcotics for its solution.<sup>5</sup> It has been claimed that the punitive approach has proved itself "totally ineffective"<sup>6</sup> and that it lacks the capacity to deter either the non-addicted dealer in narcotics or the addicted user.<sup>7</sup> Moreover, it has been asserted that the very existence of such punitive laws creates an illegal business in narcotics which, in its own interest, inveigles new customers into addiction, and that, therefore, the so-called deterrence laws in fact encourage the very menace they were designed to obliterate.<sup>8</sup>

The purpose of this paper is to determine the extent to which punitive legislation can act as an effective deterrent in eradicating the trade in

<sup>3</sup> House Subcommittee on Narcotics, *Report on the Illicit Traffic in Narcotics* (84th Cong., 2d Sess., Comm. Print., 1956).

<sup>4</sup> INT. REV. CODE OF 1954, §7237. This is described in more detail in the text, *infra*, under the heading "American Narcotics Laws (Federal)."

<sup>5</sup> NARCOTICS, U.S.A. 231-44 (Weston ed. 1952); LINDESMITH, *OPIATE ADDICTION* 204-10 (1947); BARNES & TEETERS, *NEW HORIZONS IN CRIMINOLOGY* 88-89 (2d ed. 1951); NEW YORK ACADEMY OF MEDICINE, *REPORT ON DRUG ADDICTION* 12 (1955).

<sup>6</sup> NARCOTICS, U.S.A. 234 (Weston ed. 1952).

<sup>7</sup> NEW YORK ACADEMY OF MEDICINE, *REPORT ON DRUG ADDICTION* 10 (1955).

<sup>8</sup> VOLLMER, *THE POLICE AND MODERN SOCIETY* 117-18 (1936).

illicit narcotics. The first step is to examine the efforts—international and American—which have been made to combat this trade.

#### INTERNATIONAL CONTROLS

If any one adjective aptly describes the nature of the narcotics problem, it is "international," and this is especially so in relation to the United States, for in the narcotics trade the United States is almost completely a consumer nation.

The poppy, from which opium<sup>9</sup> comes, requires a particular type of soil and a special climate. To flourish, it must have both a very wet and hot climate and a subsequent hot and dry climate. Thus areas of India, Iran, Turkey, Greece, Yugoslavia, and China are the prime producers of raw opium; however, Mexico, Bulgaria, Southeast Asia, North Africa, Pakistan, and the U.S.S.R. are also large producing areas.<sup>10</sup>

Cocaine, obtained from the coca leaf, is an extract which comes from Peru, Bolivia, and Indonesia (Java in particular) where the coca leaf is indigenous.<sup>11</sup>

Marihuana is more widespread and can be grown in the United States.<sup>12</sup> Today it is found either growing wild or under cultivation in India, Burma, Turkey, Syria, Lebanon, Greece, Brazil, Mexico, Africa, the United States, and to small degree in Western Europe.<sup>13</sup>

Moreover, the nations in which the narcotics are processed are often neither the producing nor the consuming nations. Also, nations which are neither producer, processor nor purchaser may serve as smuggling conduits.

The history and description of international attempts to combat the narcotics trade are omitted here because of their detailed exposition in a previous article.<sup>14</sup> For our purposes it is enough to point out that no convention or protocol ever adopted has numbered among its signers all those nations whose support is essential to making such agreements effective. Naturally, Communist China

<sup>9</sup> "Opium" when used herein, refers not only to opium itself, but to all its addictive derivatives, especially morphine and diacetylmorphine (heroin).

<sup>10</sup> WILLOUGHBY, *OPIMUM AS AN INTERNATIONAL PROBLEM* 1 (1925); ANSLINGER & TOMPKINS, *THE TRAFFIC IN NARCOTICS* 210-11 (map) (1953).

<sup>11</sup> WILLOUGHBY, *OPIMUM AS AN INTERNATIONAL PROBLEM* 2 (1925).

<sup>12</sup> This is, of course, illegal. *INT. REV. CODE OF 1954*, §§4741-4786.

<sup>13</sup> ANSLINGER & TOMPKINS, *THE TRAFFIC IN NARCOTICS* 18 (1953).

<sup>14</sup> ANSLEY, *International Efforts to Control Narcotics*, 50 *J. CRIM. L., C.&P.S.* 105 (1959).

is a signatory to none of them. In addition, India, Iran, Malaya, Pakistan, the U.S.S.R., Mexico, Bolivia, Peru, Yugoslavia, Italy, and Bulgaria—of the important nations in this area—have all, on at least one occasion, refused to sign.<sup>15</sup> And when, in 1950, representatives of the drug-manufacturing nations and the principal opium-producing nations met to consider setting the price at which opium should sell and to discuss the need for international inspection to ensure compliance with price and quota restrictions, again effective agreement was not forthcoming. The agreement which resulted—The Opium Protocol of 23 June 1953—did not restrict prices, nor did it create any inspection system to oversee compliance with any of the idealistic terms agreed to.

#### AMERICAN NARCOTICS LAWS

##### *Federal Laws*

The principal narcotics laws which are designed to halt the illicit trade in narcotics are:

1. The Harrison Narcotic Law, now incorporated in the Internal Revenue Code;<sup>16</sup>
2. The Narcotic Drugs Import and Export Act, as amended;<sup>17</sup>
3. The Marihuana Tax Act, also part of the Internal Revenue Code;<sup>18</sup> and
4. The Narcotic Control Act of 1956.<sup>19</sup>

The Harrison Act, passed in 1914, was America's attempt to implement obligations incurred by signing The Hague Convention of 1912. As is evident by its inclusion in the Internal Revenue Act, this law was enacted pursuant to Congress's power to tax. However transparent this pretext may be, and however valid may seem the contention that Congress was in reality masking an unconstitutional police measure in taxation clothes, nonetheless the act has been upheld as a revenue measure, and the question of its constitutionality may be deemed closed.<sup>20</sup>

The Harrison Act imposes a tax upon "narcotic drugs, produced in or imported into the United States, and sold, or removed for consumption or sale."<sup>21</sup> Some preparations are exempted if their

<sup>15</sup> U.N. Doc. No. E/CN 7/335/add. 3 (1958).

<sup>16</sup> *INT. REV. CODE OF 1954*, §§4701-4736.

<sup>17</sup> Jones-Miller Act, 42 Stat. 596 (1922), 21 U.S.C. §§171-185 (1952).

<sup>18</sup> *INT. REV. CODE OF 1954*, §§4741-4786.

<sup>19</sup> *Ibid.*, §§7237-7238.

<sup>20</sup> *United States v. Jin Fuey Moy*, 241 U.S. 394 (1916); *United States v. Doremus*, 249 U.S. 86 (1919); *Nigro v. U.S.*, 276 U.S. 332 (1928).

<sup>21</sup> *INT. REV. CODE OF 1954*, §4701.

narcotic content is below a prescribed minimum.<sup>22</sup> It is made unlawful under section 4704 for any person to "purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package," and doing so without such stamps is made *prima facie* evidence of the violation of section 4704 by the person in whose possession the unstamped narcotic drugs are found. This presumption has been held to be constitutional.<sup>23</sup>

The act requires annual registration of every importer, manufacturer, producer, wholesale dealer, retail dealer, physician, dentist, veterinary surgeon, other practitioner, researcher, analyst, instructor, or, if not one of the above, one who nevertheless dispenses remedies or preparatives of limited narcotic content. Moreover all fitting this description must pay an "occupational tax" ranging from \$1.00 to \$24.00 per year.<sup>24</sup> Once again a presumption is raised; this time it pertains to possession of any original stamped package by one who has not registered and paid the appropriate tax, and this presumption decrees that such possession "shall be *prima facie* evidence of liability to such special tax."<sup>25</sup> This has also been upheld.<sup>26</sup>

Section 4705 makes mandatory the use of special order forms whenever narcotic drugs are sold, bartered, exchanged or given away, and it requires further that any physician, dentist, veterinary surgeon or other practitioner keep records of any drugs handled.

Of especial significance for the narcotic addict<sup>27</sup> is the wording of sections 4704a, 4705, and 4724.

Section 4704a provides in part:

"It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package. . . . The provisions of subsection a. shall not apply . . . to any person having in his or her possession any narcotic drugs . . . which have been . . . issued for *legitimate medical uses* by a physician. . . ."

<sup>22</sup> *Ibid.*, §4702.

<sup>23</sup> *Casey v. United States*, 276 U.S. 413 (1928); *Mulaney v. U.S.*, 82 F.2d 638 (9th Cir. 1936).

<sup>24</sup> *INT. REV. CODE OF 1954*, §§4721, 4722.

<sup>25</sup> *Ibid.*, §4723.

<sup>26</sup> *James v. United States*, 279 Fed. 111 (5th Cir. 1922).

<sup>27</sup> "Addict" as used herein—until specifically changed—denotes only a repeated user of any narcotic; it does not distinguish between those psychologically and physiologically dependent upon regular dosages of opium or any opiate extract or synthetic, on the one hand, and those who merely use some narcotic or have to some extent become psychologically dependent on one, on the other hand.

Section 4705 reads similarly:

"It shall be unlawful for any person to sell, barter, exchange or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given. . . . Nothing contained in this section shall apply . . . to the dispensing of or distribution of narcotic drugs to a patient by a physician . . . *in the course of his professional practice only.* . . ."

And in section 4724c we find:

"It shall be unlawful for any person who has not registered and paid the special tax provided for by this subpart . . . to have in his possession or under his control narcotic drugs. . . . Provided, that this subsection shall not apply . . . to the possession of narcotic drugs which . . . have been *prescribed in good faith* by a physician. . . ."

Section 4724a, moreover, utilizes the phrase "for *legitimate medical uses*" employed also in section 4704a.

When the Harrison Act was first passed, phrases such as "legitimate medical purposes," "professional practice" and "prescribed in good faith" were interpreted, not unreasonably, by some physicians to mean that addiction could be regarded as a disease, and that the addict, as a patient, could be prescribed narcotics to alleviate the horrors of withdrawal, *i.e.*, that period of intense illness and pain which results from the discontinuance of the regular opiate dosages upon which the user has become both psychologically and physically dependent. However, this is not the legal interpretation which has attached to these phrases. The Treasury Department interpreted the Harrison Act to label unlawful any medical prescription for an addict for the purpose of satisfying the demands of the addiction itself.<sup>28</sup> This construction has been approved by the courts.<sup>29</sup> Thus, as a result of the Harrison Act as interpreted, the addict must go to illegal sources to obtain his narcotics.

In 1922, Congress passed the Jones-Miller Act, officially known as the Narcotic Drugs Import and Export Act. Its constitutionality has been upheld.<sup>30</sup>

<sup>28</sup> *Treas. Reg. No. 5, Art. 167* (1957); *Treas. Dec. No. 2809* (20 March 1919).

<sup>29</sup> *Jin Fuey Moy v. United States*, 254 U.S. 189 (1920); *Nigro v. United States*, 117 F.2d 624 (8th Cir. 1941); *United States v. Keidanz*, 270 Fed. 585 (S.D. N.Y. 1921).

<sup>30</sup> *Yee Hen v. United States*, 268 U.S. 178 (1925); *Gee Woe v. United States*, 250 Fed. 428 (5th Cir. 1918).

This act prohibited the importation of any narcotic not specifically found necessary for medical and scientific needs,<sup>31</sup> banned the importation of crude opium for the purpose of making heroin,<sup>32</sup> restricted the importation of coca leaves<sup>33</sup> and marihuana<sup>34</sup> and prohibited the exportation of narcotic drugs.<sup>35</sup> Like the Harrison Act, the Jones-Miller Act created presumptions. Section 174 provides:

"Whenever on trial for a violation of this subsection the defendant is shown to have or have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

This presumption frees the government from having to show the possessed narcotics were in fact unlawfully imported and that the defendant knew this.<sup>36</sup> Such presumptions run throughout the act.<sup>37</sup>

The penalties for violating the importation restrictions on narcotic drugs are, for a first offense, imprisonment for not less than five nor more than twenty years, and in addition, a fine not exceeding \$20,000. For a second or subsequent offense the minimum is ten years, the maximum forty years, and the additional fine may be, as before, \$20,000.<sup>38</sup> Like penalties attach for the unlawful importation of marihuana.<sup>39</sup> Stricter penalties are provided, though, in the case of one, himself over eighteen years of age, who

"knowingly sells, gives away, furnishes, or dispenses, facilitates the sale, giving, furnishing, or dispensing, or conspires to sell, give away, furnish, or dispense any heroin unlawfully imported or otherwise brought into the U.S., to any person who has not attained the age to eighteen years."

Such a person may be fined not more than \$20,000 and may be imprisoned not less than ten years as a minimum, with life the maximum, except that should the jury direct the defendant may receive the death penalty.<sup>40</sup> It is here worthy of note that

the section above described has, besides the alternative death penalty, a presumption of unlawful importation which arises when heroin is found in the defendant's possession.

The third important federal anti-narcotics law is the Marihuana Tax Act, passed in 1937, and now part of the Internal Revenue Code.<sup>41</sup> This act is, in basic structure, patterned after the Harrison Act. The Marihuana Tax Act places a transfer tax on all transfers of marihuana,<sup>42</sup> prescribes order forms,<sup>43</sup> makes unauthorized possession unlawful and makes possession presumptive evidence of guilt,<sup>44</sup> imposes an occupational tax,<sup>45</sup> and requires registration<sup>46</sup> and returns.<sup>47</sup> Just as happened with the Harrison Act, the Marihuana Tax Act was attacked as an unconstitutional attempt by Congress to regulate a trade beyond its scope by means of a tax facade; this attack was also unsuccessful.<sup>48</sup>

The fourth basic federal anti-narcotic legislation, effective as of July 19, 1956, is known as the Narcotic Control Act of 1956.<sup>49</sup> This act prescribes penalties for all violations of the Harrison Act and the Marihuana Tax Act for which those acts do not themselves provide specific penalties. The act treats violations of the laws relating to opium, coca leaves and marihuana and does not differentiate between them. The penalties provided by the act are:

1. Generally

a. Not less than two years or more than ten years imprisonment. Fine of not over \$20,000 is optional.

b. For a second offense, not less than five years or more than twenty years imprisonment. Fine of not more than \$20,000 is optional.

c. For a third or subsequent offense, the offender may get not less than ten or more than forty years in prison and, in addition, may also be fined \$20,000.<sup>50</sup>

2. For selling, bartering, exchanging, giving away or transferring any narcotic drug or marihuana to a person under eighteen (if the offender is

<sup>31</sup> Jones-Miller Act, *op. cit. supra* note 17, §173.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*, §173a.

<sup>34</sup> *Ibid.*, §176a.

<sup>35</sup> *Ibid.*, §182.

<sup>36</sup> Frank v. United States, 37 F.2d 77 (8th Cir. 1929); United States v. Moe Liss, 105 F.2d 144 (2d Cir. 1939).

<sup>37</sup> Jones-Miller Act, *op. cit. supra* note 17, §§176a, 176b, 178, 179, & 181.

<sup>38</sup> *Ibid.*, §174.

<sup>39</sup> *Ibid.*, §176a.

<sup>40</sup> *Ibid.*, 176b.

<sup>41</sup> INT. REV. CODE OF 1954, §§4741-4786.

<sup>42</sup> *Ibid.*, §4741.

<sup>43</sup> *Ibid.*, §4742.

<sup>44</sup> *Ibid.*, §4744.

<sup>45</sup> *Ibid.*, §4751.

<sup>46</sup> *Ibid.*, §4753.

<sup>47</sup> *Ibid.*, §4755.

<sup>48</sup> United States v. Sanchez, 340 U.S. 42 (1950).

<sup>49</sup> INT. REV. CODE OF 1954, §7237.

<sup>50</sup> *Ibid.*, §7237a.

himself over eighteen), the mandatory sentence is not less than ten or more than forty years imprisonment plus the optional \$20,000 fine.<sup>51</sup>

The act also provides, inter alia, that upon conviction for a second or subsequent offense, the penalty for which falls under section 7237a, or upon conviction of *any* offense the penalty for which falls under section 7237b, or under several sections of the Jones-Miller Act and/or the Act of July 11, 1941<sup>52</sup> neither suspended sentences nor probation may be granted.<sup>53</sup>

To enforce these laws the federal government created the Bureau of Narcotics, a subdivision of the Treasury Department, in 1930. Its average budget is somewhat less than \$2 million per annum, and it maintains a force of 250 agents, 25 less than Congress has authorized. The sole responsibility for preventing smuggling rests with the Bureau of Customs. In the view of the Congressional Subcommittee on Narcotics, both of these bureaus suffer from a shortage of manpower.<sup>54</sup>

#### State Laws

The Uniform Narcotic Drug Act, with slight modifications, is law in forty-six states, Puerto Rico, and the District of Columbia.<sup>55</sup> Thus only four states have adopted their own basic anti-narcotic legislation. These are California, Massachusetts, Pennsylvania, and New Hampshire. The state narcotics laws of California and Pennsylvania have been approved by Commissioner Anslinger

<sup>51</sup> *Ibid.*, §7237b.

<sup>52</sup> The act of July 11, 1941, as amended, is incorporated into the Federal Code as section 184a of title 21. It prescribes penalties for persons found in illegal possession of narcotics on a vessel of the United States. Other federal laws relevant to this topic not described in this paper are:

1. The Opium Poppy Control Act of 1942 (21 U.S.C. 188-188n), barring the cultivation of the opium poppy in the United States;
2. The Act of August 9, 1939, as amended August 9, 1950 (49 U.S.C. 781-788), allowing the United States to seize vessels, vehicles, etc. used to transport contraband narcotics;
3. The Act of July 3, 1930 (21 U.S.C. 199), empowering the Commissioner of the Federal Bureau of Narcotics to pay informers, and
4. The Act of January 18, 1929 (42 U.S.C. 257), establishing Public Health Service Hospitals for addicts in Lexington, Ky. and Fort Worth, Texas.

The famous Boggs Act, passed in 1951 (Public Law 255, 82nd Congress), has been superseded by the Narcotic Control Act of 1956, *op. cit. supra* note 19.

<sup>53</sup> INT. REV. CODE OF 1954, §7237d.

<sup>54</sup> House Subcommittee on Narcotics, *Report on the Illicit Traffic in Narcotics*, 11, 12 (84th Cong., 2d Sess., Comm. Print. 1956).

<sup>55</sup> 9(B) U.L.A. 274.

of the Bureau of Narcotics as being of "comparable efficacy" to the Uniform Narcotic Drug Act,<sup>56</sup> the negative implication being that, from the point of view of enforcement, only the laws of Massachusetts and New Hampshire fall short of the standards set up by the advocates of the punitive approach. This was echoed by the 1956 report of the House Subcommittee on Narcotics when it stated in part:

"The last annual report of the Government of the United States on Traffic in Opium and Other Dangerous Drugs to the International Drug Convention indicates that the States of Kansas, New Hampshire, and Massachusetts do not have adequate narcotic legislation."<sup>57</sup> The Uniform Narcotic Drug Act provides, in its most important sections, as follows:

1. Section 2 makes it unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug, except as authorized in this act.
2. Section 4 makes possession of narcotic drugs, obtained as authorized, lawful only if "in the regular course of business, occupation, profession, employment or duty of the possessor."
3. Section 5 allows, inter alia, a physician to administer drugs only "within the scope of his employment or official duty, and then only for scientific or medicinal purposes."
4. Section 7 allows a physician to administer drugs "in good faith and in the course of his professional practice only."
5. Sections 9 & 10 require records to be kept and labels to be affixed to packages.

6. Section 11 defines authorized possession of narcotic drugs by an individual as capable of existing only if the individual has received same pursuant to an authorized prescription or sale for dispensation as defined under section 5. Thus, as in the federal narcotics laws, possession per se is unlawful unless obtained in certain exempted ways and from certain authorized personnel. The usual prescriber, of course, is a physician, and the legality of his prescriptions rests, as in the Harrison and Marihuana Tax

<sup>56</sup> ANSLINGER & TOMPKINS, *THE TRAFFIC IN NARCOTICS* 154 (1953).

<sup>57</sup> House Subcommittee Report, *op. cit. supra* note 54, at 10, 11. This report was written before Kansas adopted the Uniform Narcotic Drug Act in 1957.

Acts, upon the definitions awarded to such phrases as "within the scope of his . . . official duty," "for scientific and medical purposes," and "in good faith and in the course of his professional practice only." Though very few cases have arisen which interpret these phrases, it seems clear that the Uniform State Narcotic Acts will be so interpreted as to make unlawful prescriptions to an addict for the purpose of treating his addiction.<sup>58</sup> The similarity between the Uniform Act and the Harrison and Marihuana Tax Acts, and the general intention of the states to complement federal enforcement activities in this field dictate this conclusion. Such an intent is in fact expressed in codified form in the Uniform Act.<sup>59</sup>

Section 20 is the penalty section. In the Model Act this is left blank, each state providing its own. The disparity among the penalties imposed is rather striking, especially when one considers the fact that this is, after all, a "uniform" act. The form of section 20 which appears most often, though not always the same in all details, is the one presently used in Maryland.<sup>60</sup> It prescribes increasing sentences for second, third and subsequent offenses. The first offense is punishable by not less than two or more than five years, the second by not less than five years or more than ten years, and the third or any subsequent offense by not less than ten or more than twenty years. A schedule of graduated fines is also included.

Some of the Uniform Acts include life imprisonment,<sup>61</sup> and a lesser number make death a possible penalty should the jury so recommend.<sup>62</sup> The

<sup>58</sup> *Tonis v. Board of Regents*, 295 N.Y. 286, 67 N.E. 2d 245 (1946); *McKay v. State Board of Medical Examiners*, 103 Colo. 305, 86 P.2d 232 (1938); *Smith v. State*, 214 Ind. 169, 13 N.E.2d 562 (1938); *People v. Guagliata*, 362 Ill. 427, 200 N.E. 169 (1936).

<sup>59</sup> UNIFORM NARCOTIC DRUG ACT, §19.

<sup>60</sup> MD. ANN. CODE, §300 (1957). For comparable penalty provisions, see also the applicable code sections of Alabama, Alaska, Arkansas, Connecticut, Delaware, Florida, Georgia, Iowa, Maine, Nebraska, Nevada, New Jersey, New Mexico, Oklahoma, South Carolina, Tennessee, Virginia, Washington, West Virginia, and Wyoming.

<sup>61</sup> Indiana, for instance, prescribes life imprisonment as the maximum sentence for a third offender, the minimum being 20 years. IND. STAT. ANN. §10-3538a (1957 Cum. Supp.). This is the usual way in which life imprisonment is used. Connecticut, however, prescribes life imprisonment as the mandatory sentence for a third offense. CONN. REV. STAT. §19-265 (1955 Supp.). This mandatory sentence attaches to a third offense violative of any provision of the Uniform Act.

<sup>62</sup> MO. STAT. ANN. §195-200 (1958 Cum. Pocket Part); OKLA. STAT. ANN., titles 63-67 §420 (1958 Cum. Pocket Part); TEXAS PENAL CODE §23(2) (1958 Cum. Pocket Part).

death penalty is provided only for violations involving minors, though the age definition for minors differs among the states.<sup>63</sup>

By way of contrast, some jurisdictions not only do not provide for either life imprisonment or the discretionary death penalty, but make one year the maximum penalty for a first offender.<sup>64</sup> In Montana, the maximum sentence for a first offense for violation of any provision of the Uniform Act is imprisonment in the county jail for a term not exceeding six months and a fine not exceeding \$1000. But life imprisonment is possible if the offender sells, etc., drugs to one under eighteen years of age.<sup>65</sup>

Other sections of the Uniform Act relate to the act's deterrent machinery. Section 21 provides that

"No person shall be prosecuted for a violation of any provision of this act if such person has been acquitted or convicted under the Federal Narcotic Laws of the same act or omission which it is alleged, constitutes a violation of this act."<sup>66</sup>

Though this will not bar a subsequent state prosecution on constitutional grounds of double jeopardy,<sup>67</sup> it nonetheless, by its existence, forestalls such prosecutions.<sup>68</sup> Section 18 puts the burden of proof of any exception, excuse, proviso, or exemption contained in the Uniform Act upon the defendant. This has been held not to violate the Federal Constitution.<sup>69</sup>

Many states have added other weapons to their enforcement arsenal by adding to the penalty section of the Uniform Act sections which provide that prior narcotics convictions of federal or state laws will qualify as prior offenses for the purposes of interpreting their statutes,<sup>70</sup> and that the normal state laws permitting suspended sen-

<sup>63</sup> Missouri—under 21; Oklahoma—under 18; Texas—under 19.

<sup>64</sup> D.C. CODE §33-423; KAN. GEN. STAT. §65-2519 (1957 Supp.); In Arizona the judge may in his discretion, for a first offense, impose a sentence of one year in the county jail with or without a fine. But it is discretionary and a higher penalty for a first offense is permissible. ARIZ. REV. STAT. §36-1020; *State v. Benton*, 78 Ariz. 85, 276 P.2d 516 (1955).

<sup>65</sup> MONT. REV. CODE §54-125.

<sup>66</sup> UNIFORM NARCOTIC DRUG ACT, §21.

<sup>67</sup> *People ex rel. Liss v. Superintendent of Women's Prison*, 282 N.Y. 115 25 N.E. 2d 869 (1940).

<sup>68</sup> *State v. Worthham*, 63 Ariz. 148, 160 P.2d 352 (1945).

<sup>69</sup> *State v. Jourdain*, 225 La. 1030, 74 So.2d 203 (1954).

<sup>70</sup> An example of this map can be found in Virginia. VA. CODE ANN., §1385(23).

tences, probation and parole will not be allowed to pertain to narcotics offenses.<sup>71</sup>

New York, though one of the states that has adopted the Uniform Act, merits specific examination due to its status as the state with the gravest narcotics problem. Its penalty sections provide for imprisonment for from seven to fifteen years for selling, etc., narcotic drugs to one under twenty-one, and from five to fifteen years if no minor is involved. "Possession" offenses also range from five to fifteen years imprisonment. These penalties are all for first offenses.<sup>72</sup> New York provides, as a special addition to its section 1941 on second or third felony offenses, that the third narcotic offense shall incur imprisonment of from fifteen years to life. A second offense is punishable, as are all second felony convictions in New York, by a minimum sentence equal to one-half the longest term provided for the first conviction and a maximum sentence not longer than twice the longest term provided for the first conviction. Translated, this means that conviction of a second narcotics offense in New York carries a minimum sentence of seven and one-half years and a maximum sentence of thirty years.<sup>73</sup>

A novel type of presumption is contained in the New York version of the Uniform Act. It is a presumption of intent to sell, etc., a narcotic drug which arises if the defendant was found to possess certain specific quantities of unlawful narcotics.<sup>74</sup>

This leaves the few states which have not adopted the Uniform Act. California and Pennsylvania, the two states without the Uniform Narcotic Drug Act whose narcotics laws were deemed adequate by Commissioner Anslinger,<sup>75</sup> have statutes largely similar in their basic attributes to the Uniform Narcotic Drug Act. The penalties provided for violations of the California and Pennsylvania acts are also similar, with both states, especially Pennsylvania, included within

<sup>71</sup> Usually, such provisions bar suspended sentences, probation and parole until the minimum sentence has been served. Often this is true of all offenders save first offenders. Ind. Stat. Ann., §10-3538c (1957 Cum. Supp.).

<sup>72</sup> N.Y. CONSOL. LAWS ANN., bk. 39, §§1751 (1) & (2).

<sup>73</sup> *Ibid.*, §§1941(1) & (2).

<sup>74</sup> *Ibid.*, §1751(3). This same presumption exists in section 1751(4) as to all persons found in an automobile wherein such quantities of narcotics are found. Virginia provides not for presumptions based on quantity, but rather for a stiffer sentence when narcotics in excess of specific quantities are found in defendant's possession. VA. CODE, §54-516.

<sup>75</sup> See notes 56 and 57, *supra*.

that group of states which imposes the severest penalties.<sup>76</sup>

The two states which did not, in Mr. Anslinger's view, have adequate anti-narcotics laws were Massachusetts and New Hampshire. Since the time when these states were criticized, both have altered their statutes, though to differing degrees. It would be proper to say of Massachusetts that it has had, since January 1, 1958, an utterly new law. Because of the strong resemblance of the new law to the Uniform Act in all major aspects of narcotic regulation, and particularly because its penalties, though not including death or life imprisonment, are stiffer than the bulk of the states, it is believed that Commissioner Anslinger would approve of and deem adequate the present Massachusetts statute.<sup>77</sup> As to New Hampshire, though its narcotics law covers fewer aspects of the narcotics problem than the laws of the other forty-eight states, and though it has a much narrower regulatory scope, nonetheless it prohibits unauthorized possession, sale, prescription, etc., of all the narcotic drugs under federal control and provides that violation of the law shall be punished by imprisonment for not less than one year and a day nor more than ten years.<sup>78</sup> As of July 5, 1955, any violation of section 318.49 involving an intent by defendant to provide narcotic drugs to a minor, or actually doing so, is punished by from three to ten years for a first conviction, from five to fifteen years for a second conviction, and from fifteen to thirty years for a third conviction.<sup>79</sup>

This survey of state penal legislation would be incomplete without briefly mentioning three other mechanisms by which state control over narcotics violations is exercised. First, some states specifically label addiction a crime.<sup>80</sup> Second, some states provide for the commitment of an addict to an

<sup>76</sup> CAL. HEALTH & SAFETY CODE §§11712, 11713, 11714, 11715, 11715.6, 11715.7 and 11716. Note that life imprisonment is possible under section 11713. As to Pennsylvania, life imprisonment is the sole and mandatory penalty for third offenses and no suspended sentences, probation or parole may be granted. PA. STAT. ANN., tit. 35, §865.

<sup>77</sup> MASS. GEN. LAWS ANN. §§197-217D. Though Massachusetts does not prescribe life imprisonment as such, it does prescribe maximum sentences of 25 years (§212A), 30 years (§217C), 40 (§217B), and 50 years (§217A) for different violations.

<sup>78</sup> N. HAMP. REV. STAT. ANN., §318:49-2 (1957 Supp.).

<sup>79</sup> *Ibid.*, §318:49-2 (1957 Supp.).

<sup>80</sup> An example of this is Colorado where an addict is deemed a "disorderly person" and as such may be confined in the county jail or state penitentiary for six months to one year. COLO. REV. STAT., §48-6-20 (4) (1957 Supp.).



institution or hospital equipped to treat addiction medically.<sup>81</sup> And third, in some states, municipalities have adopted ordinances to combat local problems.<sup>82</sup>

In resumé, the laws of our federal and state governments are strong ones, not only imposing stringent penalties upon those found guilty of infringement, but also utilizing means which are unusual in the criminal law—such as presumptions against the accused and restrictions on suspended sentences, probation and parole—in order to provide as much deterrent force as the ingenuity of legal minds and the relevant constitutions will permit. Moreover, those who champion the punitive, deterrent approach to the problem of illicit narcotics consider these laws, with the exception of those in force now in New Hampshire, as adequate to serve their deterrent function.

Before the ability of these federal and state laws, operating along with international controls, to deter the illicit narcotic traffic can be examined, the boundaries of the present problem must be delineated. Only in this way can the past effectiveness of such penal legislation be estimated and the future problems facing such legislation be appraised.

#### THE PRESENT PROBLEM

The extent of the illicit traffic, whether measured in terms of monetary value, number of addicts, or amount of narcotics, is, unfortunately, impossible to establish with precision. This imprecision typifies the narcotics problem, filled as it is with a plethora of statistical, medico-chemical, and psychiatric unknowns. This lack of certainty makes contradiction of assertions difficult, and the partisan can therefore underestimate or overestimate, as his interest desires, with an impunity unavailable in other fields.

The starting point in such an evaluation as

<sup>81</sup> N.Y. CONSOL. LAWS ANN., bk. 44, §3341. This is done in the discretion of the presiding magistrate.

<sup>82</sup> ANSLINGER, *Narcotic Addiction as Seen by the Law-Enforcement Officer*, 21 Fed. Prob. 22 (No. 2, 1957). These three factors have been touched upon summarily because, due to the much harsher penalties imposed by federal and other state laws, their importance as deterrents is negligible. It must be recalled that all persons—whether or not dependent upon regular dosages of an opiate—are equally vulnerable to the penalties inflicted for unlawful possession or sale of narcotics. Thus these penalties, having greater punitive force than the “disorderly persons” or commitment laws, are the ones by which the deterrent potency of “the law” as an entity must be measured.

this should logically be the Federal Bureau of Narcotics. This Bureau has estimated, as of 1956, that some 60,000 addicts exist in the United States. This number purportedly represents a decrease of about 190,000 from the number of addicts existent prior to passage of the Harrison Narcotic Act in 1914, and a decrease from 1952, when the peak was reached in the postwar upsurge in addiction.<sup>83</sup> Presumably this figure of 60,000 addicts includes not only those whose use of opiates and opiate-synthetics has resulted in both physical and psychological dependence upon continued dosages, but also users of other narcotics, most particularly cocaine and marihuana (and their derivatives and synthetics), as this is how “addiction” is defined in Commissioner Anslinger’s book.<sup>84</sup> So viewed, the estimate of 60,000 is quite low as compared with other estimates.

The Mayor’s Committee on Narcotics estimated that, in 1951, New York City alone contained between 45,000 and 90,000 drug users.<sup>85</sup> Oursler and Smith refer to the Narcotics Bureau estimate of 60,000 as “conservative” and go on to say, “Other estimates vary between one hundred and two hundred thousand. But the figure could be even higher.”<sup>86</sup>

Another view is that “various present-day estimates of illicit users range from 100,000 to 4 million. . . . Less than one million might be a closer guess.”<sup>87</sup>

It has been stated, this time by a police official—Lieutenant Walter of the Narcotics Division of the Los Angeles Police Department—that over 53,000 heroin addicts alone existed in the United States in 1951.<sup>88</sup> This figure does not include addiction to any other derivative of opium, opium itself or any synthetic opiate; nor does it include users of marihuana or cocaine. This figure may not include all those who used heroin either, depending upon how Lt. Walter defined “addicts.” If only 20 percent of all addicts use heroin, as was true in the group tested by D. P. Wilson,<sup>89</sup> then the 60,000 figure is only about 25 percent of

<sup>83</sup> House Subcommittee on Narcotics, *Report on the Illicit Traffic in Narcotics* 8, 9 (84th Cong., 2d Sess. Comm. Print., 1956).

<sup>84</sup> ANSLINGER & TOMPKINS, *THE TRAFFIC IN NARCOTICS* 242, 243 (1953).

<sup>85</sup> STEVENS, *Make Dope Legal*, *Harpers Magazine* 42, 43 (Nov. 1952).

<sup>86</sup> OURSLER & SMITH, *NARCOTICS: AMERICA’S PERIL* 42 (1952).

<sup>87</sup> WILSON, *MY SIX CONVICTS* 330 (1951).

<sup>88</sup> LEONG, *NARCOTICS—THE MENACE TO CHILDREN* 23, 24 (1952).

<sup>89</sup> WILSON, *op. cit. supra* note 87, at 336.

the true total. And even if heroin is "the most popular drug with addicts in this country" as Commissioner Anslinger maintains, probably correctly,<sup>90</sup> still the 60,000 estimate is probably highly incompatible with Lt. Walter's 53,000 figure, even though the latter number is as of 1951.

Some assert that drug addiction has in fact actually increased since the advent of modern punitive anti-narcotics laws.<sup>91</sup>

The only conclusion one can reach is that the "conservative" estimate of 60,000 addicts is probably unrealistic. Those who have dealt with this problem, however variant their estimates may be, have had to admit that the number of addicts and/or narcotics users in the United States cannot be correctly discerned. No statistics exist. Most that are put forth are merely inferences drawn from the number of offenders apprehended. But who can know what percentage of all offenders are apprehended? And how many narcotics users are listed, when arrested, under some other crime which they may have been caught committing? The New York Academy of Medicine opines that "a careful medical evaluation of those arrested as 'thieves' would probably show that in a number of cases they should more properly have been classified as 'addicts.'"<sup>92</sup>

But despite uncertainty as to extent, certainty does exist as to the fact of the present narcotics problem. It cannot be controverted that the combination of punitive laws and international controls has not reduced the illicit narcotics trade in the United States to negligible proportions. Therefore, the question inexorably arises—why have these apparently potent restraints failed to eliminate the American narcotics problem? And, inseparably, a second question arises—will they continue to fail? It is the thesis of this paper that they will.

#### THE DETERRENT-RESISTANT CHARACTERISTICS OF THE NARCOTICS TRAFFIC

##### *Profits*

Profits attract, and fabulous profits exert a huge attraction. History proves this graphically. The

<sup>90</sup> ANSLINGER & TOMPKINS, *op. cit. supra* note 84, at 281. This conclusion was reached by Albert Deutsch as well. Mr. Deutsch said, "Heroin is the most frequently used opiate among American addicts." DEUTSCH, *WHAT WE CAN DO ABOUT THE DRUG MENACE 7* (Public Affairs Pamphlet No. 186, 1952). But no basis for this was given and no indication is given as to what "most frequently" would mean translated into percentages. Most likely this conclusion is drawn from some statistics compiled from studies of apprehended persons.

<sup>91</sup> THE NEW YORK ACADEMY OF MEDICINE, *REPORT ON DRUG ADDICTION 5* (1955).

<sup>92</sup> *Ibid.*

world has always had men who would seek gold, explore new routes, become mercenaries, embrace piracy, or enlist in the most hazardous adventures where, if successful, great riches were to be had. To be sure, not all or even many will be so attracted. But some always are. And the glitter of high prospective profits has always been able to lure such entrepreneurs despite the dangers involved. Illegality has been an ineffective bar, even when it meant death to the apprehended. This is true of the illegal narcotics trade.

Varying estimates of the profitability of the narcotics trade exist. One of these, made on February 16, 1959, is that twenty-eight and one-half pounds of unadulterated heroin, with a wholesale value of \$12,000, would bring in more than \$3,600,000 in the illegal market.<sup>93</sup> This means that the final retail price represents a price 300 times the wholesale price, or 30,000 percent of the wholesale price. Now it is true that intermediaries exist between the wholesaler and the ultimate retailer—the distributors, the peddlers and then the pushers—but such a profit margin allows of division without losing its fantastically remunerative character. One reason for this high price is that the narcotic is constantly diluted as it passes from wholesaler, to distributor, to peddler, and to pusher. Lactose is used for this adulteration process.

Four days after this estimate was made, on February 20, 1959, another police raid uncovered more heroin. This raid unearthed seventy-five and one-half ounces of heroin which the Queens (New York City) police valued at \$500,000, or \$6,622 per ounce, retail.<sup>94</sup> This differs from the prior estimate by approximately \$1,272 per ounce, as the retail value per ounce, if the figures of the February 16 estimate were correct, would be about \$7,894.

A New York Police magazine reported in 1952 that a kilo (2.2 pounds) of heroin had a wholesale price of about \$3,000 outside the United States and a final retail price, to the addict, of about \$313,500.<sup>95</sup> This would place the retail value of heroin, per ounce, in 1952 at about \$8,906. While this figure exceeds those more recent estimates given above, it nonetheless represents a lesser

<sup>93</sup> N.Y. Times, Feb. 16, 1959, p. 19, col. 1 (city ed.). The estimate in this article was reported to have been made by Inspector Edward Carey of the Narcotics Bureau of the New York Police Department.

<sup>94</sup> N.Y. Times, Feb. 20, 1959, p. 19, col. 1 (city ed.). This estimate was not specifically ascribed to any particular source in the article.

<sup>95</sup> NARCOTICS, U.S.A. 129 (Weston ed. 1952).

profit margin. Here the final retail value is only slightly over 100 times the wholesale price or 10,000 percent of it.

The figures quoted refer only to heroin, the most profitable of the narcotics. Raw opium, at one estimate, would bring a 6,200 percent return on one's investment,<sup>96</sup> whereas marihuana, in one reported transaction, was to return only a little over 400 percent.<sup>97</sup>

The total annual profits realized in this country by the illicit narcotics traffic cannot be ascertained. But they are not needed in order to appreciate the fact that, whatever they may actually be, they are immense. One West Coast gang was said by the Federal Bureau of Narcotics to have made, per year, a net figure of about \$50,000,000.<sup>98</sup> The New York Academy of Medicine speaks of "profits of such enormity as to strain the imagination,"<sup>99</sup> and another source estimates the annual amount of narcotics sold illicitly in New York City alone to be valued at \$100,000,000.<sup>100</sup> Mr. Anslinger's estimate, based on his "conservative" figure of 60,000 addicts, is that the annual amount spent by addicts in this country for illicit narcotics is \$219,000,000.<sup>101</sup>

When profits of this magnitude are to be had, the world will never lack for takers.

#### *Communist China*

In this day of atom and hydrogen devices, of napalm and poison gas, and of nuclear missiles, it should not be surprising that Communist China has utilized the narcotics trade as an instrument of national policy.<sup>102</sup> The volume of this trade directed towards the free nations of Southeast Asia, Japan, the Philippines and the United States has not been inconsiderable. The revenue obtained from the sale of narcotics for 1952 has been put at approximately \$70,000,000.<sup>103</sup> The reasons for this nefarious undertaking are thought to be twofold: the weakening of the countries to which the narcotics (morphine, heroin and raw opium) are exported, and the acquisition of foreign exchange, especially dollars. There is a grim irony in the fact that China, so long victimized by

foreign-imposed opium sales, should now be utilizing the same ploy to serve communist purposes.<sup>104</sup>

In terms of deterrence this is an ominous development. Not only is a continuous supply of opiates made available, but those who control it will not be deterred from selling in the American market, as others might, by any save the most startling degree of increased effectiveness in our law enforcement apparatus or by any more stringent punitive measures. Losing manpower to our prisons cannot be expected to deter China. They simply have too many men and have shown themselves not to be reluctant to lose men to gain an objective. Perhaps even a huge drop in the price of narcotics in the illicit American market would also fail to discourage the Chinese from continuing to insinuate narcotics into the United States if the objective of weakening us internally is considered, apart from the profits, a sufficient motivation in itself. Moreover it can be assumed that China will have no difficulty enlisting enough agents to undertake this work, whatever our penalties and whatever the level of our enforcement effectiveness may be. The death penalty has never deterred the patriot from sabotage or espionage; neither will it or, a fortiori, any lesser penalty deter Chinese agents from doing their nation's bidding with regard to smuggling, selling, and/or spreading narcotics into the United States. And if agents cannot be enlisted they can always be compelled.

#### *Organization*

Deterrence may be defeated by profits and patriotism. It may also be thwarted by organization. This fact arises because severity of punishment is but one requisite for deterrence; the other is the certainty of apprehension and subsequent conviction. In the narcotics trade the latter factor is weak; thus deterrence itself is weak. This is partly due to the fact that for several reasons narcotics are easily smuggled. First, we have lengthy land borders with Mexico and Canada. Second, narcotics themselves are small in size and can be disguised and hidden in a multiplicity of devious, ingenious ways. Third, narcotics may come in by sea or air over many different routes, carried by seamen or supposed tourists, despite customs officials however diligent. Perhaps the futility of stopping the smuggling of narcotics was

<sup>104</sup> MERRILL, *JAPAN AND THE OPIUM MENACE* (1942). This provides a full account of how opiates were used against the Chinese.

<sup>96</sup> *Id.* at 136.

<sup>97</sup> OURSLER & SMITH, *NARCOTICS: AMERICA'S PERIL* 31 (1952).

<sup>98</sup> *Id.* at 33.

<sup>99</sup> NEW YORK ACADEMY, *op. cit. supra* note 91, at 6.

<sup>100</sup> LEONG, *op. cit. supra* note 88, at 24.

<sup>101</sup> Quoted in House Subcommittee Report, *op. cit. supra* note 83, at 9.

<sup>102</sup> ANSLINGER & TOMPKINS, *op. cit. supra* note 84, at 76-99.

<sup>103</sup> *Id.* at 93.

most aptly described by Commissioner Anslinger when he said,

"If you had the Army, the Navy, the Coast Guard, the F.B.I., the Customs Service and our (narcotics) service, you would not stop heroin coming through the Port of New York."<sup>105</sup>

However difficult the problem would be were these factors all that had to be contended with, the fact is that the size and efficiency and financial power of the chief smuggling organizations magnify the difficulties a thousandfold. This is not only true where a *nation* directs such endeavors, as is the case with Communist China, but it is true, too, with regard to the gangs involved. For these are, more properly, syndicates, not gangs, with large memberships, legitimate fronts, legal staffs, and a hierarchy of leadership which does not itself take part in the day-to-day operations of the business, be it narcotics or anything else.<sup>106</sup> Thus deterrence as embodied in punitive laws is largely a threat only to underlings, usually of the lowest levels at that, and not to the leadership itself. Not only will fear of death keep those apprehended from giving names to the police, but as an organizational tactic few men on any level know the names of those on the next highest level; so ignorance even more than fear makes tracing the leadership difficult. That very few of the top leaders ever get caught is indicated by the vocabulary of the addict himself which defines a "big man" as: "the big distributor of drugs. He is usually not an addict and he seldom goes to jail."<sup>107</sup>

Thus, since the expectation of apprehension is so small in those who organize and mastermind the syndicates, the deterrent laws, however stern, must correspondingly lack effectiveness. And as to those leaders not resident in the United States, deterrent laws can amount only to an annoyance, requiring just enough energy to supplant the arrested hack with a replacement.

#### *Inadequacy of International Controls*

The fact that the great bulk of illicit narcotics in the United States comes from other nations—either in crude or refined form—means that the effectiveness of international controls has a great

<sup>105</sup> Quoted in NEW YORK ACADEMY, *op. cit. supra* note 91, at 7.

<sup>106</sup> N.Y. Times, Feb. 16, 1959, p. 19, col. 3 (city ed.); OURSLER AND SMITH, *NARCOTICS: AMERICA'S PERIL* (1952). The former deals with organized crime in general while the latter concentrates on criminal groups involved in narcotics, particularly the Mafia.

<sup>107</sup> LINDESMITH, *OPIATE ADDICTION* 212 (1947).

influence on the effectiveness of our laws. In a purely deterrent sense, if the dangers of apprehension were great throughout all steps prior to importation into the United States, perhaps the added risk of severe penalties in the United States would convince at least some proportion of narcotics smugglers that it just wasn't worth it. But, as it is now, dangers prior to the United States seem insufficient to add appreciably to the totality of deterrents facing the illicit traffic. Thus our laws alone must challenge the lure of profits; in this uneven battle they invariably lose.

Why they should be ineffective is easy to see. First, Communist China does not belong to the United Nations and is a party to none of the international conventions and protocols. On the contrary it actively promotes the trade. Second, the major opium producing nations have not agreed to permit international inspection to check on their obeisance to agreed-upon national quotas. Third, in many countries where policing is either purposely ineffective or necessarily inadequate, narcotics are grown and traded in comparative safety.<sup>108</sup> A fourth difficulty is that the important international agreements have failed to enlist all of the nations which produce opiates, marihuana, and/or cocaine.<sup>109</sup> A fifth reason is, assuming arguendo that all governments sincerely wished to stop illicit cultivation, production, and smuggling of narcotics within their borders, the natural, inherent difficulties involved—given the high degree of organization and wealth possessed by these syndicates—would pose tremendous obstacles. These obstacles grow larger as the number of synthetic narcotics increases, and as the probability increases that syndicates may eventually make their own. Of the sixty narcotics now under supposed United Nations control, *thirty-five* or 58.3 percent are synthetics.<sup>110</sup>

#### *The Nature of Addiction*<sup>111</sup>

##### *1. Dependence and Withdrawal*

Deterrence presupposes rationality. It proceeds

<sup>108</sup> N.Y. Times, March 6, 1959, p. 34, col. 7. This describes the situation today in interior Thailand where natives make opium contrary to Thai law but with considerable impunity.

<sup>109</sup> For the nations alluded to, see text, *supra* under heading, "International Controls."

<sup>110</sup> U.N. Doc. No. E/CN. 7/335/ add. 4 (1958).

<sup>111</sup> Addiction and addict are used in the remainder of this paper to refer only to those users of an opiate who have reached the point of psychological dependence upon regular dosages and have also become physically dependent upon such dosages so that, if dosages are not received, they suffer from withdrawal. "Withdrawal" is defined in this section of the text.

on the assumption that the detriments which would inure to the prospective criminal upon apprehension can be made severe enough to dissuade him from undertaking the criminal act on the ground that the rewards of the crime will not outweigh the probability of having to suffer those detriments. But such a weighing process requires thought by those against whom the deterrent penalty is aimed. The clearest case is insanity. No legal deterrent can regulate the conduct of one who is bereft of reason, because he will be oblivious to such deterrent. The opiate addict, in the same way, cannot be deterred from seeking his drug, and it is this one fact, more than anything else, which must necessarily frustrate the capacity of the criminal law to erase the illicit narcotics market. For it is the nature of the addict that his accustomed dosages, and perhaps steadily increasing amounts of them, are absolutely essential for his physical well-being. His body actually depends upon these dosages for normal functioning. He thus is a regular, guaranteed, thoroughly entrapped customer who will pay any price to get what he must have. He provides a captive market which gives the illicit narcotics trade a security unknown in most any other type of business—legal or illegal.

Since the nature of addiction must be comprehended to understand why laws, no matter how stringent, cannot deter the addict, it is profitable to examine the nature of what all addicts fear possibly above death—the abstinence syndrome, known popularly as withdrawal.

Withdrawal refers not to the act of withdrawing from the addict the dosages he has become used to, or the fact that such dosages have become unavailable when needed, for whatever reason; rather, withdrawal refers to the physical and mental reactions that the addict suffers when such dosages are due, but not available.

Erich Hesse, speaking of physical dependence and the phenomenon of withdrawal, describes them thusly:

“When the organism is deprived of the alkaloid, it immediately reacts by producing abstinence symptoms. States of exaltation, manic fits, cramps and serious circulatory disturbances endanger the life of the addict . . . Voluntary escape from the clutches of the poison (morphine) is no longer possible once a real addiction has developed.”<sup>112</sup>

<sup>112</sup> HESSE, NARCOTICS AND DRUG ADDICTION 43 (1946).

A more lengthy and graphic portrayal of withdrawal is presented by Dr. de Ropp:

“Withdrawal sickness . . . is a shattering experience and even a physician . . . finds it an ordeal to watch the agonies of patients in this condition. The addict begins to grow uneasy about twelve hours after the last dose of morphine or heroin . . . he yawns, shivers, and sweats . . . discharge pours from the eyes . . . watery mucus pours from the nose . . . the hair on the skin stands up and the skin itself is cold . . . his bowels begin to act with fantastic violence . . . causing explosive vomiting . . . The abdominal pain is severe and rapidly increases . . . thirty-six hours after his last dose of the drug the addict presents a truly dreadful spectacle . . . his weakness may become so great that he literally cannot raise his head.”<sup>113</sup>

It is this fact—the dreadful nature of withdrawal—that “drives the user irresistably to any lengths to obtain a supply. In desperation even suicide may be resorted to as a way out.”<sup>114</sup> Added to this is the fact that withdrawal, however advanced, may be relieved by simply taking the opiate dosage the absence of which was the cause of withdrawal. Dr. Harris Isbell, Director of the Addiction Research Center, Public Health Service Hospital, Lexington, Kentucky, has written:

“It is a dramatic experience to observe a miserably ill person receive an intravenous injection of morphine, and to see him thirty minutes later shaved, clean, laughing and joking.”<sup>115</sup>

Thus the addict craves his opiate both to prevent withdrawal and to stop it. And the craving is so great that the addict invariably “becomes determined to get the drug without counting the risk.”<sup>116</sup> Being in such a non-rational state, the law cannot deter him.<sup>117</sup>

## 2. *The absence of a cure*<sup>118</sup>

It is not correct to say that drug addiction is

<sup>113</sup> DE ROPP, DRUGS AND THE MIND 152-54 (1957).

<sup>114</sup> LINDESMITH, OPIATE ADDICTION 55 (1947).

<sup>115</sup> Quoted in DE ROPP, *op. cit. supra* note 113, at 153.

<sup>116</sup> NEW YORK ACADEMY, *op. cit. supra* note 91, at 7.

<sup>117</sup> This conclusion is shared also by Dr. Herbert Barger, Consultant to the U.S. Public Health Service. His views are presented in: Hotchner, *This Bold New Plan Can Smash the Dope Menace*, *This Week Magazine* 12 (Sept. 14, 1958).

<sup>118</sup> Two basic types of treatment are employed to relieve the addict of *physical* dependence upon an opiate—abrupt withdrawal and gradual withdrawal. These two methods are described in detail in Note, *The Treatment of Drug Addiction at the Correctional Hospitals in New York City*, 13 J. CRIM. L. & C. 122-26 (1922).

"incurable." Commentators vary as to the percentage of curables among the addict population, and most seem to agree that, out of every hundred treated, at least a few may remain permanently away from opiates. In this area of the narcotics field, as in most others, controversy abounds.

On the one hand, it is claimed that roughly 25 percent of all those treated are in fact cured; Commissioner Anslinger, in a rather ambiguous passage, cites statistics which show that of 18,000 addicts treated at the Lexington Hospital, 64 percent never returned for treatment whereas the other 36 percent did. He does not expressly claim that failure to return to Lexington either conclusively or presumptively implies permanent cure, yet he fails to examine further this 64 percent and refers to these figures as proof that the addict can be rehabilitated. Clearly this figure of 64 percent is of very minimal value; many reasons could exist for ex-patients of Lexington to relapse and still not go back to Lexington. Also, many addicts could in fact have gone back after the period examined by Commissioner Anslinger was over, *i.e.*, after 1952.<sup>119</sup> The worthlessness of Commissioner Anslinger's figures can be appreciated even more clearly by viewing them in the light of the admission of Dr. Kenneth W. Chapman, Assistant Chief of the Public Health Service, that only fifteen percent of the patients treated at the federal narcotics hospitals have been permanently cured.<sup>120</sup>

The contrary, or "cynical" view as Commissioner Anslinger would term it, is that only about two percent of all treated addicts can be permanently cured.<sup>121</sup> Dr. Herbert Barger would say that "perhaps" this figure is as high as three percent with this percentage the implied ceiling.<sup>122</sup> Professor Lindesmith is probably the most pessimistic as to the incidence of genuine, permanent cures. He refers to a study of about 800 German addicts made by Dansauer and Rieth in which 81.6% of the "cures" relapsed within a year; after the third year had elapsed, 93.9% had relapsed, and, after five years 96.7% had relapsed. As to the

3.3% left, no assurance existed that they also did not eventually relapse.<sup>123</sup>

The argot of the addict once again is helpful. The phrase "once a junker, always a junker" shows the addicts' views on the inevitability of relapse after treatment.<sup>124</sup> Moreover, the argot also contains the word "kick-back" which means "the addict's relapse into his habit after a period of abstinence."<sup>125</sup>

The reasons for this propensity to relapse, though essentially unknown, are loosely referred to as psychological; were the physiological dependence the crucial factor no problem would exist as, properly treated, withdrawal can be relatively easy and, once the recovery from withdrawal is completed, the physical dependence is at an end. But unfortunately it is not that simple. For the mind has not altered, and those dark influences which caused the initial addiction—whether psychological or environmental or an amalgam of both—still exist. Because withdrawal cannot extricate from the addict these scarcely-comprehended forces, the cure is little more than an abnormal interim, a respite between periods of active, all-engrossing addiction. Professor Lindesmith suggests that knowledge is the *sine qua non* of addiction, that addiction cannot exist until the opiate user has undergone withdrawal, felt its distresses, used opiates in alleviation and has understood precisely what has happened to him. Without this knowledge no addiction could take root in the mind, for the remedial properties of the opiate would not have been impressed upon the addict. But once he knows the nature of withdrawal and knows that the opiate, and only the opiate, can either relieve or prevent it, then the dependence upon the opiate becomes so embedded that it will exert an irresistible longing for opiates which will persist even after treatment has cured physical dependence. And science knows of no practicable way of purging the mind of these destructive remembrances.<sup>126</sup>

But whatever theory of addiction is adopted, and whatever percentage of addicts are deemed curable between zero and 25, the conclusion seems inescapable that neither forced nor voluntary cures are a solution. Laws which seek to accomplish such cures will fail as deterrents, for they will, at

<sup>119</sup> ANSLINGER & TOMPKINS, *THE TRAFFIC IN NARCOTICS* 241 (1953). The authors do not identify the source of the estimate of 25% cures or the studies behind it.

<sup>120</sup> NARCOTICS, U.S.A. 112 (Weston ed. 1952).

<sup>121</sup> ANSLINGER & TOMPKINS, *op. cit. supra* note 118, at 241. Again the proponents of and basis for this view are not presented.

<sup>122</sup> Hotchner, *This Bold New Plan Can Smash the Dope Menace*, *This Week Magazine* 12 (Sept. 14, 1958).

<sup>123</sup> LINDESMITH, *op. cit. supra* note 114, at 49.

<sup>124</sup> *Id.* at 47. "Junker", of course, means addict.

<sup>125</sup> Lindesmith, *The Argot of the Underworld Drug Addict*, 29 J. CRIM. L., & C. 271 (1938).

<sup>126</sup> LINDESMITH, *op. cit. supra* note 114.

best, encounter three recidivists out of every four addicts they treat.

It is therefore believed that, due to the fantastic profits, the role of Communist China, the high degree of organization possessed by the narcotics syndicates, the inadequacy of international controls, and the very nature of addiction itself, the present federal and state laws, or any others sired by the punitive approach, lack the ability to abolish the illegal narcotics traffic or reduce it to negligible proportions.

Assuming this, it becomes unnecessary to examine charges that the punitive federal and state legislation has in fact *increased* the illegal narcotics traffic.<sup>127</sup> That it cannot eradicate it or lessen it sufficiently is reason enough to seek another approach, one not placing primary reliance upon the deterrent capabilities of penal laws. The details of this approach raise questions beyond the ken of the legal discipline. Indeed, it is so complex that no one discipline can deal with it in all its aspects. A comprehensive attack on the problem must include the knowledge of the doctor, bio-chemist, psychologist, pharmacologist, sociologist, lawyer, legislator, United Nations specialist, and educator. For this reason this paper will not presume to choose among the various socio-medical plans suggested or actually in use,<sup>128</sup> but will instead

<sup>127</sup> These arguments usually claim that such laws, by making narcotics illegal, have forced a rise in the price of narcotics and have thus caused addicts to beget other addicts as customers in order to earn the needed money. Another argument is that making narcotics unlawful makes them more alluring to the curious and the adventurous. Such arguments cannot be weighed; for each proponent an opponent exists and neither has any definite statistics or completely persuasive logic to sustain his position. No one can show that, even if addicts do generally try to convert others into addicts—an assumption which is itself controverted—the present number of addicts exceeds the number that would have existed had anti-narcotics legislation never been passed. And no one can show that illegality has clothed narcotics with more allure than stigma.

<sup>128</sup> Some of the plans suggested are:

1. Utilize narcotic clinics at which addicts could obtain controlled, medically determined, low cost dosages. Stevens, *Make Dope Legal*, Harper's Magazine 40-47 (Nov. 1952); Hotchner, *This Bold New Plan Can Smash the Dope Menace*, This Week Magazine 11-13 (Sept. 14, 1958); NARCOTICS, U.S.A. 242 (Weston ed. 1952); NEW YORK ACADEMY OF MEDICINE, REPORT ON DRUG ADDICTION 14 (1955).

2. Allow physicians to prescribe for addicts as in any other case of disease. LINDESMITH, OPIATE ADDICTION 205 (1947). This is the practice in England under certain circumstances. The Dangerous Drugs Act, 1951, 14 & 15 GEO. VI, c. 48; BR. INFO. SVC. RELEASE, THE CONTROL OF DANGEROUS DRUGS IN GREAT BRITAIN (1957). Favorable evaluations of this practice may be

merely assume that one of them, or some combination of them, is the logical alternative to the punitive approach. No third alternative seems to exist.

It is the second thesis of this paper that the criminal law may well have an important role to play in whatever type of plan is used, even though presumably this plan would follow a socio-medical approach.

#### POSITIVE USE OF THE CRIMINAL LAW AS A DETERRENT

##### *Marihuana and Cocaine*

The present federal and state laws do not, in the main, differentiate between the use of opiates, on the one hand, and cocaine and marihuana on the other.<sup>129</sup> Yet definite, maybe crucial, differences exist.

1. Marihuana and cocaine are stimulants whereas opiates are depressants. Cocaine causes restlessness and excitement, tends to convey

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found in The Times (London), July 15, 1957, p. 11, last col. and *ibid.*, April 16, 1958, p. 11, last col.

The "clinic" plans vary as to the role of federal agencies and other details. Most plans stress the need for increased research and psychotherapeutic follow-up treatment after the "cure" to fight recidivism. All seem to agree that *addicts* must be able to get the drugs they require legally. There is division as to the role of education.

Though such plans are assumed herein to be the logical alternatives to the punitive approach, it is not true that all medical authorities favor these plans. Among those who have voiced opposition to these types of plans are Dr. James V. Lowery, former Medical Director of the Public Health Hospital, at Lexington; Dr. Harris Isbell, Director of the Addiction Research Center at Lexington; and Dr. Robert H. Felix, Director, National Institute of Mental Health. Anslinger, *Narcotic Addiction as Seen by the Law-Enforcement Officer*, 21 Fed. Prob., 34 (No. 2 1957); Hotchner, *This Bold New Plan Can Smash the Dope Menace*, This Week Magazine (Sept. 14, 1958). Arguments exist also as to why the clinics opened shortly after the end of World War I failed—because of inherent, uneradicable faults or because of operational difficulties which could be corrected. Only a full study could resolve these arguments.

<sup>129</sup> The Narcotic Control Act of 1956 is entitled "Violation of law relating to opium and coca leaves and marihuana." No differentiation is shown between offenses concerning opiates and marihuana—cocaine. INT. REV. CODE OF 1954, §7237a. The Uniform Narcotic Act is similar. "Narcotic Drugs" are defined therein as "coca leaves, opium, and cannabis, and every other substance neither chemically nor physically distinguishable from them." This is contained in §1 (14). Moreover the prohibitory sections of the act speak in terms of "narcotic drugs" as though they were utterly fungible, treating all identically. 9(B) U.L.A. 279-332.

feelings of great physical and mental power, induces delusions and persecution complexes, and "may make a man dangerous" as the cocaineist "under the influence of his delusions is quite capable of using it (a weapon)."<sup>130</sup> Marihuana, which has aroused violent debate as to its dangerousness,<sup>131</sup> nonetheless does tend to cause nervous excitement, hallucinations, distortions of time and space relationships and, of greater danger, marihuana tends to release inhibitions and thus let loose a psychotic personality upon society if the psychotic potential existed in the particular person prior to taking marihuana. Persons already unbalanced may be rendered temporarily insane by using marihuana.<sup>132</sup>

The opiates, however, are not stimulants. They are depressants, and they induce euphoria. The popular image of the violent "dope fiend" is an utterly inaccurate picture of the person addicted to opiates, especially while under the influence of his dosage. Instead of creating an abnormal state, the opiate dosage preserves the addict in normalcy. The dosage's function is to prevent withdrawal distress; the exhilaration is one of relief and relaxation and contentment, not one of superhuman moods, delusions, or psychotic impulses.<sup>133</sup>

2. Marihuana and cocaine are *not* addictive, whereas opiates are.<sup>134</sup> Under no circumstances can true addiction result from using marihuana and cocaine as it does from using opiates. The terrible ordeal of withdrawal is peculiar to the opiates and does not result when dosages of cocaine and marihuana are ceased. Thus the user of cocaine and marihuana may indeed become fond of and used to such dosages; but in never becoming as addict he never reaches the point at which he becomes thoroughly irrational and immune to deterrent legislation. He does not *have* to have his dosage.

Thus, not only do the effects of cocaine and marihuana make deterring the use of these imperative, but there seems reason to believe deterrent legislation may be able to reduce the problem of illicit cocaine and marihuana use to

negligible proportions and that such plans as those listed in footnote 128, above, should not attempt to deal with it. For here the market security available to the illicit trade in opiates does not exist, as no addicts exist. This means the user cannot be counted on to persevere in his dosages unmindful of rising prices or severer penalties. Of course, the other obstacles to stopping the illicit trade will still exist, but it may just be that, without profit security, those obstacles will fall away. The international trade in illicit cocaine is steadily diminishing,<sup>135</sup> and it is known that the coca leaf, as opposed to the opium poppy and the cannabis plant, grows primarily in but two countries—Peru and Bolivia—thus making the control problem much easier. Moreover Communist China does not figure in the cocaine traffic.

As to marihuana, it presents great supply problems inasmuch the cannabis plant grows in much of the world, including the United States. However, its profit margin is well below that of the opiates, at approximately 400 percent, and once again Communist China is not a factor. It seems quite possible that if time and attention now directed towards the much greater illicit opium problems were able to be diverted to the illicit marihuana trade, upon implementation of some form of opiate dispensation plan for addicts, that trade could be greatly reduced. Unlike the opiate addicts the marihuana users could not be expected to remain uncomplaining customers when increasing law enforcement raised the price of marihuana, the probability of apprehension and perhaps even the severity of the penalties. This is true of cocaineists as well.

#### *Opiate Traders<sup>136</sup> and Non-Addicted Users*

1. *Opiate Traders.* Non-addicted persons who traffic in illegal opiates should be subject to the full vigor of punitive legislation. Not themselves addicted, they have the free will required for the success of deterrent laws. Such laws by themselves will probably not dissuade the opiate trader from continuing his trade so long as the profit remains high, or he is serving his country, or other factors reduce the probability of apprehension. Nonetheless if the profits lessen with the advent of some plan seeking to administer opiate dosages to the

<sup>130</sup> DE ROFF, *DRUGS AND THE MIND* 64 (1957).

<sup>131</sup> *Id.* at 100-114.

<sup>132</sup> *Id.* at 61-114. Illustrations of homicidal and suicidal effects of marihuana, as well as of hallucinations, delusions and brutality caused thereby, are found in ANSLINGER & TOMPKINS, *THE TRAFFIC IN NARCOTICS* 22-25 (1953).

<sup>133</sup> Sandoz, *Report on Morphine to the Municipal Court of Boston*, 13 J. CRIM. L. & C. 13 (1922).

<sup>134</sup> Sandoz, *op. cit. supra* note 133, at 12; DE ROFF, *op. cit. supra* note 130, at 78, 79; LINDESMITH, *op. cit. supra* note 114, at 6.

<sup>135</sup> U.N. Doc. No. ST/DPT/SER. A/80, p. 17 (1958).

<sup>136</sup> "Opiate traders" are used herein to include all non-addicted persons who smuggle, distribute, process, sell, or manufacture illegal opiates.



addict medically, the presence of severe punitive legislation will be a powerful added reason for leaving the business. At some point the profits become too low to be worth it. The criminal law can help make this point appear sooner.

2. *Non-Addicted Users.* Like the opiate traders, one who uses opiates but has not yet reached addiction retains his freedom of will. Until addiction he is amenable to deterrence. Until addiction he ranks with the cocaine and marihuana users and should be so regarded by the law. Though not dangerous in the truly criminal sense because he is free of the terrors of withdrawal before his dosage and euphoria after it, the non-addict user nonetheless threatens society because he may at any time become an addict and because, even though not yet an addict, he supports the illegal trade. The fact of addiction may be ascertained medically, thus the addict and the user are distinguishable for purposes of punishment. This is done by medical, psychiatric and chemical examinations.<sup>137</sup> It can also be done simply by seeing if withdrawal distress occurs. No non-addict user could simulate withdrawal.

Of course any rejoinder that this would encourage users to become addicts must be rejected as ridiculous. A user may seek opiates but he never seeks *addiction* to opiates. It is precisely the unfounded feeling that *he* will not become an addict that keeps the opiate user dabbling in opiates. No one dreads and hates addiction so much as the addict himself, and the more one knows about addiction the less one desires it. It must be borne in mind that opiate addiction is a constant battle to feel *normal*, not a period of self-regulated ecstasy. The opiate dosages serve only to protect the addict's normality against the ravages of withdrawal; they do not induce a pleasurable state except as normality is deemed pleasurable. The desire for an exotic experience, which might inspire the user of cocaine and marihuana, would not exist as an inducement to further use of or eventual addiction to opiates, though it is true that initial dosages often do afford a pleasurable relief from anxieties. This, however, ceases with use.

<sup>137</sup> NARCOTICS, U.S.A. 235 (Weston ed. 1952).

None of this is meant to imply that the user of marihuana and cocaine, or the non-addict user of opiates, may not have a strong desire for his narcotic that cannot be easily deterred. Cigarettes, for instance, are not addicting, yet many have fruitlessly sought to give them up. But desire is not craving and, while the one *may* be controlled by fear of punishment, at least in most cases and to some extent, the other is oblivious to threats. Thus the criminal law may attack the first but it is powerless against the second.<sup>138</sup>

#### CONCLUSION

Because of the huge profits, the political motivations of Communist China, the inadequacy of international controls, the high degree of organization and wealth characteristic of the international narcotics syndicates, and the nature of opiate addiction, it is believed that federal and state punitive legislation is incapable of abolishing the illicit narcotics trade or of reducing it to negligible proportions. Since the present legislation is, except in the state of New Hampshire, deemed adequate by champions of the punitive approach, if it is doomed to failure for the above reasons, clearly a new approach is needed. Though choosing and describing this new approach is properly a task for a battery of experts representing several disciplines, nonetheless it will presumably involve some form of legal dispensation of opiates to addicts. It seems probable, nevertheless, that this new approach could be profitably complemented by punitive legislation which seeks to deter the illicit use, possession, sales, distribution, manufacture, and processing of cocaine and marihuana, as well as all non-addicts who traffic in or use illicit opiates.

<sup>138</sup> This paper takes no position on the feasibility of punishing addicts who, though legal opiate dispensaries have been set up or private physicians have been empowered to prescribe for addiction, still continue to get their opiates through illegal channels or deal in opiates to raise the money therefor. Also not covered is the problem of what to do about addicts who accept clinical or physicians' care but who, in doing so, somehow violate the law. These questions can be decided only as part of a comprehensive, detailed plan aimed at destroying addiction.