the costs of the various products—if in order to turn out more of A we must also, or need not, take more of B—and if the impact of the differentials can be ascertained, then incremental costs exist and can be measured approximately, even if total costs cannot; and the possibility of changing the production facilities and product mix, at a profit, will determine business conduct and possibly call for Robinson-Patman defense later on.

The disagreement on policy may be more briefly stated. Mr. Rowe sees little hope of legislative change and hence looks to judicial re-interpretation which will bring the Robinson-Patman Act closer to the policy of the Sherman Act. The reviewer was himself of this opinion at one time, but has to confess error. It is true that the bare language of the act could be re-interpreted, but the degree of Mr. Rowe's success is to be measured by the way he has reduced to intellectual order a vast body of judicial doctrine that has grown up around those words, and his very work now, I think, pleads against him. Judges, however intelligent and independent, cannot disregard precedent in all directions, and they cannot do much to change what is truly "a caricature of antitrust." What is important is that they realize that the act must be strictly limited within its own bounds and kept from infecting the Sherman Act enforcement. But the only way to reform the Patman Act itself is to repeal it.

M. A. ADELMAN\*

Narcotics and the Law: A Critique of the American Experiment in Narcotic Drug Control. By WILLIAM BUTLER ELDRIDGE. New York: New York University Press, 1962. Pp. xiv, 204. \$5.00.\*

Narcotic Addiction in Britain and America: The Impact of Public Policy. By EDWIN M. SCHUR. Bloomington: Indiana University Press, 1962. Pp. 281. \$7.50.†

Opium is like the finger of God; it smites and it heals. When it heals it is the Gift of Heaven. When it smites it is the Curse of Hell. When it quiets the hacking cough of the tubercular, and stills the agonies of death caused by cancer, it is the kindly Dr. Jekyll; but when it merely satisfies the cravings of addiction, it becomes the hideously cruel monster, Mr. Hyde. It is a Simon Legree, a Slave Master which holds in its clutches a grim army of miserable unfortunates; and this army lends itself as docile prey for the ruthless miscreants who enrich themselves on the weakness and depravity of their brother. . . .

The Treasury Department eagerly awaits the time when an irate public

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 $<sup>\</sup>dagger$  Professor Schur is Assistant Professor of Sociology at Tufts University. (Hereinafter cited as Schur.)

opinion shall penetrate the darkness of evil doing, and blazon forth the dawn of a new day in unified enforcement; but with no such millennium in sight, it intends to pursue its relentless warfare against the despicable dope peddling vulture who preys on the weakness of his fellow man.\*

American policies toward opiate addiction—the heart of the narcotics "problem"—are unique.¹ Our law has uncompromisingly stigmatized and punished the addict, his condition and his behavior by highly coercive means which run counter to current attitudes toward punishment and treatment in other areas and which trench on the values embodied in constitutional limits on official power. Yet despite such severity the results are hardly satisfying.² Addiction is still with us to a degree which causes high anxiety.³ Our present national program in many ways strikingly resembles our prior "noble experiment" in the profligate invocation of the criminal sanction.⁴ While this program may afford occasions for creative judicial definition of the appropriate limits of police strategy in the use of informers,⁵ entrapment,⁶ search and seizure,⁶ it also threatens to demonstrate anew our national predisposition

- \* Anslinger, *The Narcotic Problem*, Proceedings of the Attorney General's Conference on Crime 351, 357 (1934).
  - <sup>1</sup> ELDRIDGE 118.
- <sup>2</sup> The White House Conference on Narcotic Drug Use, Washington, D.C., Sept. 26-28, 1962; a Conference on Narcotic Drug Use, U.C.L.A., April 27-28, 1963; and a Conference on the Control of Narcotic Addiction, University of Chicago Law School, May 6, 1963, reflected this dissatisfaction.
- <sup>3</sup> The Mayor of the City of New York "asserted [to the President's Advisory Commission on Narcotic and Drug Abuse] that the social cost of the Narcotics problem 'is climbing by the hour (and) the blight is spreading.'" N.Y. Times, June 4, 1963, p. 32, col. 1.
- See also Interim Report of the President's Advisory Commission on Narcotic and Drug Abuse, April 3, 1963; Editorial, Wall Street Journal, April 17, 1963, p. 16, col. 1; Report on Drug Addiction II, New York Academy of Medicine, April 1, 1963.
- <sup>4</sup> Perhaps one of Prohibition's historic contributions may prove to be judicial decisions arising from the enforcement fiasco. See, e.g., Marron v. United States, 275 U.S. 192 (1927); Bayars v. United States, 273 U.S. 28 (1927); Carroll v. United States, 267 U.S. 132 (1925); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Rep. of the Nat'l Comm'n on Law Observance and Enforcement, Enforcement of the Prohibition Laws of the United States (1931).
  - <sup>5</sup> Schur 54, 55; Eldridge 62.
- <sup>6</sup> Sorrells v. United States, 287 U.S. 435 (1932), and Sherman v. United States, 356 U.S. 369 (1958), the leading cases, arose out of narcotic transactions. So did the crime instigating behavior of a Government addict-agent, Pabon, in United States v. Silva, 180 F. Supp. 557 (S.D.N.Y. 1959), where Judge Weinfeld directed a verdict of acquittal in scorching terms. On entrapment doctrine and practices, see Bancroft, Doctrine and Administration of the Law of Entrapment: Device and Defense (1963) (unpublished student essay, on file in University of Chicago Law Library).
- On entrapment generally, see Model Penal Code § 2.13 (Proposed Official Draft, 1962); SCHUR 56.
- <sup>7</sup> A few of the recent cases which come to mind include Rios v. United States, 364 U.S. 253 (1960); Elkins v. United States, 364 U.S. 209 (1960); Jones v. United States, 362 U.S. 257 (1960) (re standing to object); Henry v. United States, 361 U.S. 98 (1959); Rochin v. California, 342 U.S. 165 (1952).

toward penal policies which court disaster. Bluestockings with brickbats do not solve delicate and complex social problems.

The consolidated indictment which Professor Schur and Mr. Eldridge have independently filed makes two major charges. The first accuses legislatures and law enforcement agencies of pursuing uneconomical, inappropriate and inhuman policies, and charges organized medicine with a lack of professional independence and courage. The second charge, made by Professor Schur, is that the known and (in his view) successful British alternative has been ignored.

A program of controls lacks economy and efficiency when it not only fails to reduce significantly the size or character of the problem to which it is addressed, but also produces serious side effects. Although in 1914 we were said to be "an opium consuming nation," with an addict population variously estimated at between a quarter of a million and over two million persons, we have today an official federal "census" of about 45,000 known addicts with estimates that range up to over one million. The profile of this population—which we do not accurately know—is a mosaic of myths. The dominant image is that of the "drug fiend," usually thought to be a youthful member of a deprived ethnic minority, encouraged and supplied by unscrupulous organized criminal predators. 11

But punitive policies have driven away neither addiction nor our anxieties about it. Logic and observation, if not systematic statistical studies, suggest that these policies have fostered criminal behavior by addicts left with no other means to satisfy compulsive needs.<sup>12</sup> They have shored up the sense of isolation of subgroups in which counter-mores are prominent and for which the addict serves as a notorious exemplar.<sup>13</sup> The development of political and social responsibility among such subgroups has been frustrated, and separa-

<sup>8</sup> ELDRIDGE 9, quoting Representative Harrison, author of the first federal narcotic control act. Between 1870 and 1909, Representative Harrison reported, the use of opium nearly tripled. ELDRIDGE 9. Importation of opium was big business for the Government which "had collected thereon an aggregate revenue of over \$27,000,000." There was even some anxiety that the importation ban created a threat that our "Pacific slopes might . . . become opium producers." ELDRIDGE 8.

<sup>9</sup> ELDRIDGE 7 n.27.

<sup>&</sup>lt;sup>10</sup> Schur 43-44. For a critique of the "impeccable raiment of 'actual' counting of addicts," see Eldridge 74-78, where he concludes that "the addict Statistics are inconsistent within themselves and inconsistent also with other narcotics Experience" and "there is no way known to check the completeness of the Bureau's figures." Eldridge 77. The Mayor of the City of New York, pleading for "generous Federal grants to supplement local expenditures on the narcotic problem . . . said that 25,000 to 50,000 addicts lived there." N.Y. Times, June 4, 1963, p. 32, col. 1.

<sup>&</sup>lt;sup>11</sup> Eldridge 10.

<sup>&</sup>lt;sup>12</sup> SCHUR 51, 188-91; ELDRIDGE 25-28 presents a careful discussion of this major issue.

<sup>13</sup> SCHUR 144-46.

tism encouraged. Our highly punitive program has also committed police, prosecutorial and prison resources to processes which not only offer little promise of "cure" but enhance the probability of relapse<sup>14</sup> and recidivism.<sup>15</sup> "Assembly-line" crime, to use Professor Packer's phrase,<sup>16</sup> threatens to divert criminal law enforcement resources from more pressing and deserving problems. Professional medicine has been effectively discouraged by the official policies.<sup>17</sup> Potentially cheaper and more efficient treatment procedures have been neglected. Available medical resources have not been adequately allocated, and private initiative has been checked. Scientific research in the etiology, epidemiology and treatment of addiction has been frustrated.<sup>18</sup>

These undesirable results are apparently in good part due to the efforts of law enforcement agencies operating in an area beyond their competence. 19 Not only has their influence on policy making and implementation been inappropriately large but they have forced the merger of separable social and therapeutic judgments about addiction and its control. The result has been the kind of inappropriate criminal treatment of "sick" persons that was condemned by the Supreme Court as unconstitutionally cruel and unusually punitive in Robinson v. California. 20 Astonishingly enough, the specialized enforcement bureaucracy even fails to maintain adequate statistics by which the scope of the problem can be accurately determined and the effect of recent

<sup>14</sup> "Relapse should be recognized as a predictable symptom of addiction." ELDRIDGE 33; SCHUR 28-32, 61-63.

<sup>16</sup> This phrase was used by Professor Packer at a conference on the Control of Narcotic Addiction, The University of Chicago Law School, May 6, 1963.

<sup>17</sup> ELDRIDGE 68-80. Recently, however, the President's Advisory Commission on Narcotic and Drug Abuse "has requested both the American Medical Association and the Nat'l Research Council to submit to it definitive statements on what constitutes the legitimate medical treatment of an addict." Letter to the Editor, N.Y. Times, May 30, 1963, p. 16, col. 7, from Dean F. Markham, Executive Director of the Commission. With "the approval of the Federal Bureau of Narcotics," on June 19, 1963, "For the first time the [American Medical Association] declared it was not unethical for doctors to treat an addict with a narcotic. Most physicians have feared criminal prosecution and professional sanctions if they provided such treatment." N.Y. Times, June 20, 1963, p. 35, col. 8.

<sup>15</sup> SCHUR 61.

<sup>18</sup> ELDRIDGE 32.

<sup>19</sup> Ibid.

<sup>&</sup>lt;sup>20</sup> 370 U.S. 660 (1962); Note, 57 Nw. U.L. Rev. 618 (1963); Note, 41 Texas L. Rev. 444 (1963); Note, 111 U. Pa. L. Rev. 122 (1963). For a scholarly discussion of the implications of Robinson, see Packer, *Mens Rea and the Supreme Court*, 1962 Sup. Ct. Rev. 107, 147 n.144, 152 n.154. *Robinson* was recently followed by the Supreme Court of Illinois, in People v. Davis, 27 Ill. 2d 57, 188 N.E.2d 225 (1963), and presumably the validity of remaining addiction statutes is in grave doubt. *Robinson* may even have established a doctrinal basis for an attack on possession and use of narcotics statutes, and cast a shadow on the bases of convictions of addicts for crimes other than narcotics violations which they commit while in an addicted condition.

policies quantitatively measured.<sup>21</sup> Mr. Eldridge's scrupulous analysis of available official figures leaves no doubt about that.<sup>22</sup>

Such short-form indictments, however, require bills of particulars, and these authors have provided them with mixed persuasiveness. Mr. Eldridge's consists of three groups of data based upon a limited research project of the American Bar Foundation started in 1960.23 The design sought simply to evaluate the "effectiveness of the legislation by correlating statutory enactments with changes in the complexion of the narcotics problem."24 Mr. Eldridge concisely develops the statutory scheme, a statistical analysis of its effectiveness and a summary of the historical development and local attitudes which have shaped American policy. His book is useful in its succinct summary of state legislation relating to various forms of sale and possession (e.g., possession, possession for sale, sale, sale to minor by adult), professional practice, addiction (whether proscribed as such or in terms of occasional users, or vagrancy or other "acts of status" 25), registration, sentences (factors affecting mitigation and aggravation, mandatory minima and maxima, suspension, probation, and parole), and miscellaneous provisions covering places where narcotics are kept, and the use of narcotic paraphernalia.26 The Appendices, setting out tables analyzing the state schemes, including the widely adopted Uniform Narcotic Drug Act, provide detailed authoritative support for his conclusion.<sup>27</sup> Almost every conceivable "act" by any party to a narcotics transaction has been covered by legislation. Addict, peddler, accomplice and doctor are regulated to the point where possession ("actual as well as constructive" but "not passing, fleeting or shadowy"28) and sale29 are stretched

- <sup>21</sup> On "the lack of accurate, complete, and fully-revealing statistics and data on the administration and effect of drug control policies in the United States," see Eldridge 66-103. On Federal Bureau of Narcotics data—"the best potential source of information on the activities of addicts, peddlers, and enforcement officials"—Mr. Eldridge concludes "unfortunately, the accuracy, completeness, and validity of the sources are so questionable that heavy reliance upon Bureau publications is dangerous" owing to "lack of uniform standards to guide reporting agencies," misleading labels to categories, changes in subject matter, and multiplication of discrepancies. Eldridge 68-70.
- <sup>22</sup> Harry J. Anslinger, retired Commissioner, Federal Bureau of Narcotics, dissents to Mr. Eldridge's opinion in his Book Review, 31 FORDHAM L. REV. 222 (1962).
- <sup>23</sup> The work consisted of "library searches; correspondence with officials, agencies, and other authorities throughout the country; limited interviews; and examination of reports, treatises, statistics, and any other data revealing the actual experiences of the states. Field studies of the administration of the narcotic drug laws were not planned for this initial effort." Eldride 49. This is empiricism on a modest scale, indeed. The clues yielded thus far should stimulate systematic and intensive "field studies." Professor Schur, in his two years of research in Britain, made some "case studies," Schur ch. 4, and "relied" on "comparable British sources of information." Schur 117.

<sup>&</sup>lt;sup>24</sup> Eldridge 49.

<sup>&</sup>lt;sup>25</sup> Donnelly, Goldstein & Schwartz, Criminal Law 543 (1962).

<sup>&</sup>lt;sup>26</sup> Eldridge 50-66.

<sup>28</sup> ELDRIDGE 52.

<sup>27</sup> ELDRIDGE 133~93,

<sup>&</sup>lt;sup>29</sup> Eldridge 56,

to do service, with only rare and questionable distinctions between addict and peddler, larger seller and addict-pusher.<sup>30</sup> Professional medical practice has been regulated far beyond the ministerial control of prescription forms;<sup>31</sup> at the extreme, California prescribes by statute the course of treatment involving use of drugs.<sup>32</sup> This intervention reflects both an hysterical distrust by law makers of the medical profession and a striking lack of legislative influence on the part of doctors.

The inhumanity of American policy expresses itself in several features of the prevailing statutory scheme. Contrary to the general trend in sentencing policy,33 severe mandatory sentence formulae are the rule in all legislation regarding narcotics transactions.34 Minima and maxima have been pushed higher and higher (including greater authorization of life sentences), and the ameliorating effect of suspension, probation or parole has been denied violators in narcotics cases. Assuming, however, that criminal treatment does not fit addict behavior, presumably any punishment would be severe and inhuman. At least, this appears to be suggested by the Supreme Court's holding in Robinson. But just exactly what role the criminal sanction ought to play is left unclear. Mr. Eldridge believes it "obviously has a place in any effort to combat illicit traffic and . . . drug use,"35 but he does not clarify why or in what circumstances. Professor Schur, although he goes far beyond Mr. Eldridge in roundly condemning our "punitive approach," is, curiously, quite prepared to use it against addicts who would not participate in his proposed program and who "obtained drugs from unauthorized sources."36 Nor does the Supreme Court deny that coercive measures may be taken against addicts to compel their treatment under "civil" commitment procedures.<sup>37</sup> But no one has developed an adequate and acceptable rationale for the invocation of

- 30 ELDRIDGE 54.
- 31 ELDRIDGE 58-61.

- 32 ELDRIDGE 60.
- <sup>33</sup> See Wechsler, Sentencing, Correction and the Model Penal Code, 109 U. PA. L. Rev. 465 (1960); Model Penal Code, arts. 6, 7 (Proposed Official Draft, 1962).
  - 34 ELDRIDGE 65.
  - 35 ELDRIDGE 107.
  - 36 SCHUR 222.

<sup>&</sup>lt;sup>37</sup> Robinson v. California, 370 U.S. 660, 664-65 (1962): "In the interest of discouraging the violation of such laws, or in the interest of the general health or welfare of its inhabitants, a State might establish a program of compulsory treatment for those addicted to narcotics. Such a program of treatment might require periods of involuntary confinement. And penal sanctions might be imposed for failure to comply with established compulsory treatment procedures. Cf. Jacobson v. Massachusetts, 197 U.S. 11 . . . ." The interaction between "criminal" conviction processes and "civil" commitment procedures is unclear and cause for serious inquiry. It is quite clear that the prosecutor's arsenal has several weapons to use against disturbing persons, such as addicts. Cf. Arnold, Symbols of Government ch. 7 (1937) (passim). Compare Model Penal Code § 6.13 with Model Penal Code § 7.04 (Proposed Official Draft (1962)).

criminal sanctions and their limitations in the narcotics addiction area.<sup>38</sup> Such a task would, I believe, be a true test of legal scholarship.

The lack of a widely shared meaning of "severity" or "inhumanity" is less serious, however, than the adoption of severe measures without a reasonable basis for believing that they will be effective. Nor does the original adoption of these measures excuse the failure to test their effectiveness and to revise them accordingly. Our present system of controls is accordingly both irrational and undemocratic; it does not embody a policy selected from among available responses in terms of direct effectiveness and the informed assessment of and minimal sacrifice of competing social values. A democratic jurisprudence surely requires that the state's coercive interventions and official deprivations ought to be imposed only when the probabilities of their rationality and fairness are demonstrably high. The tacit assumption may be that police, prosecutors and courts, despite the mandatory character of the sentencing provisions, will still employ their customary "discretion." If so, this ambiguity in policy cannot appeal to anyone concerned with the supremacy of the rule of law. The risk of unequal treatment is maximized where the ultimate sanction is greater than that commonly imposed for comparable criminal behavior, and where individuation of treatment is not guided by carefully formulated criteria. It is inhuman to lump together addict and non-addict, and to leave the selection of sanctions to the unprincipled and unchecked "discretion" of law enforcement agencies.

One would suppose that punishment is inhuman when it does not produce results. But not even the advocates and sponsors of our prevailing treatment scheme have had the intellectual honesty to maintain records which would make it possible to measure the efficacy of present policies. The Federal Bureau of Narcotics has "no information... on sentences actually imposed upon narcotics violators." The plain fact, as Mr. Eldridge effectively shows, is that our national enforcement agencies have neglected their obligations and opportunities, and have utterly failed to establish or maintain a reporting and recording system which will permit policy appraisal. His conclusion bears repetition: "[T]he material [for assessing the effectiveness of heavy penalty legislation] is not presently available; it was not available to this study, and it was not available to those persons and organizations who have made unqualified pronouncements about the success or failure of preventive methods employed so far in this country."

Why this astonishing state of ignorance continues to exist is a most irritating feature of the puzzle. Professor Schur asserts without demonstration that the enforcement bureaucracy has a stake in the continuation of present policies,<sup>41</sup> and wonders whether the "drug traffic has the support of legitimate

<sup>38</sup> See Donnelly, Goldstein & Schwartz, Criminal Law 252-97, 929-96 (1962).

<sup>39</sup> ELDRIDGE 70.

<sup>40</sup> ELDRIDGE 103.

<sup>41</sup> SCHUR 196-97.

business and political interests."<sup>42</sup> These tantalizing speculations border on careless gossip, and contrast with the succinct exposition which Mr. Eldridge gives to dominant "social attitudes as a factor in control policies."<sup>43</sup>

Key elements of the mythology consist of artful or innocent half truths or misconceptions based on lack of information.44 "The medical profession . . . has found little cause for alarm in the physiological symptoms of narcotic addiction," contrary to the popular belief that "narcotics ravage the body."45 But law enforcement agencies have peddled a portrait of addiction which is technically descriptive of withdrawal and not indulgence symptomology. Nor are addicts, contrary to police-induced hysteria, predictably a sexual menace; opiates have depressant effects on sexual appetites "thus actually diminishing the probability of sexual crimes being committed by addicts."46 Although addicts behave antisocially, it is difficult to attribute such behavior to drug use alone. Indeed, Mr. Eldridge finds that "nothing has been shown to demonstrate that the use of opiates generally produces in and of itself, serious dangers to the physical well being of the addict or the social well being of the community."47 Prevailing views that "addiction is contagious"48 and "destroys morality,"49 that "once an addict, always an addict,"50 that "addicts are criminals,"51 or at least "weak, ineffective members of society,"52 depend on oversimplification, misinformation and social judgments strongly affected by the moral predispositions of the observer.<sup>53</sup> The effects of drugs on the user, both authors appear to say, is more a function of the observer's value standards than of any characteristic of addiction itself. The immorality, ineffectiveness, unproductivity and criminality of addicts, and the spread of addiction, come largely from the conflict between the rejection by the dominant social and political forces of alternative values in "inferiors," and the partial adjustment to such deprivation by the subgroup through the use of and addiction to opiates. In short, Mr. Eldridge's submission, more clearly stated than Professor Schur's, supports the charge that in a substantial sense American society has contributed through both its legal and social processes to making its addicts pariahs. The call is for a revaluation of our efforts to find acceptable solutions to pressing personal alienation and social frustrations now released by deprived persons through addiction.

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42 SCHUR 189.
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<sup>43</sup> Eldridge ch. 2.

<sup>45</sup> ELDRIDGE 16.

<sup>44</sup> ELDRIDGE 12, 125; SCHUR 201.

<sup>46</sup> ELDRIDGE 20.

<sup>&</sup>lt;sup>47</sup> ELDRIDGE 21; cf. ELDRIDGE 119: "This study has found no evidence which compels the conclusion that all narcotics offenses are so insidious or all narcotics offenders so incorrigible that those who work with them should be denied the means found effective in dealing with other types of anti-social behavior." (Emphasis in original.)

<sup>48</sup> ELDRIDGE 28-29.

<sup>51</sup> ELDRIDGE 24-28.

<sup>49</sup> ELDRIDGE 18-20.

<sup>52</sup> ELDRIDGE 21-24; but cf. SCHUR 211-12.

<sup>50</sup> ELDRIDGE 29-33.

<sup>53</sup> ELDRIDGE 13, 19-20, 22, 25.

Professor Schur's response to the call, and his novel contribution to the debate, 54 lie in the report of his two years of field research in Great Britain. 55 It also constitutes the second count of his charge, that we have neglected or misrepresented an obvious example of the fact that addiction need not be exacerbating, that policy makers need not respond to it hysterically, and that a comparable society has managed addiction by a self-respecting medically controlled and oriented program—a program which can easily be applied to our situation. This is an appetizing prospect for starved scholars. But the menu is not followed by a meal.

Professor Schur's material is based on a sample of the British experience which does not establish its typicality, representativeness or comparability. There is a general failure of officials in Britain to provide information necessary for full scholarly evaluation. "Complete information about addiction . . . is not available," says Professor Schur; "Certainly it is not possible to obtain data about a representative sample of British addicts."56 The official explanation which he accepts—that data are incomplete because of general satisfaction with the drug situation—may appeal to British bureaucracy (as the opposite result apparently satisfies its American counterparts), but this does not allow one confidently to share his conclusion that the evidence shows "a fairly clear picture of the addiction situation in Great Britain."57 How can the community, apart from its officials, determine from data which are incomplete, unavailable and impossible to obtain even from official sources whether the situation is indeed satisfactory or whether official reports are fair and accurate? Since it is quite unlikely that Britain has an addiction control problem similar to ours, there is little occasion for pressing it as a manifestly suitable alternative to our present policies. One can evaluate a legislative proposal or a written regulatory scheme for what it says or does not say, and one can reason that if people behaved logically they need not, for example, commit crime. But to predict how

<sup>54</sup> Both authors draw almost entirely on the major documents of opiate addiction in America, such as ABA-AMA JOINT COMM. ON NARCOTIC DRUGS, DRUG ADDICTION, CRIME OR DISEASE? (1961); the Symposium on Narcotics, 22 LAW & CONTEMP. PROB. 1 (1957), Kolb, Lindesmith, Terry & Pellens, Nyswander, Pescor, Maurer & Vogel, and Wikler, and undertook no original field work over the same ground. See Bibliographies in SCHUR 252–56; ELDRIDGE 197-204.

55 Professor Schur has previously published some of his observations in various journals.

For his sources of information, Professor Schur drew upon interviews with doctors and officials, questionnaires submitted to medical specialists, interviews, case studies, a sample survey, and relied heavily upon the Rolleston Committee (1926), and the Brain Inter-Departmental Committee Reports (1961), and other available official documents. See Schur 117, 118, 156-64.

56 SCHUR 116.

<sup>57</sup> SCHUR 117. The British bureaucracy is no more scrupulous about statistical records of their program. "There are no statistics regarding British treatment efforts." SCHUR 154. But Professor Schur nonetheless views "such efforts optimistically."

On American official ignorance of their treatment efforts, see ELDRIDGE 32, where he finds this condition "almost incredible."

a program is likely to operate, or how people will in fact behave, requires an empirical projection and estimate of probabilities which Professor Schur's evidence does not enable one to make. His chapter on "Five British Addicts," supplemented by a "very sketchy catalog of twenty-three customers of an all-night London chemist" (which Professor Schur could "not check for reliability") is of dubious value.<sup>58</sup> How they were selected, what relation they bear to the profile of the population, what conclusion one can fairly draw or indeed, what purpose of Professor Schur's aside from impressionistic reportage is served by this material, are not at all made clear. Three of the five addicts, for example, indicate not only knowledge but participation in some form of illicit transactions.<sup>59</sup> Extrapolation from this would yield an obviously ridiculous result.

Professor Schur, wisely I think, backs off from the conclusion one is led to expect from the thrust of his study. But the qualifications deprive his recommendations of persuasiveness if not relevance. "This medically-oriented approach seems to work very well."60 "There is practically no addict-crime. Nor is there strong development of a special addict subculture."61 Some of the limitations of his observations are also seen in his own partially disarming description of "the most reasonable argument against" his conclusions.62 Comparative study of more general cultural factors, he says, "might well be interesting"63 even though he did not make it. Interesting indeed! Professor Schur earlier reproached the proponents of the so-called "pre-disposition approach" to addiction "because it ignores important cross-cultural variations."64 How policies developed in response to possibly quite different cultural conditions can be recommended without preliminary comparison and estimate of necessary alterations remains mysterious. His further admission significantly affects his conclusion. "The question of exactly why addiction has not become a social danger in Great Britain is a very difficult one to answer in any scientifically conclusive way. Too many variables are involved to allow us to render any definitive explanation."65 Difficulty may explain a failure of research, but it does not, by the same token, permit an inference of applicability. Considering the ambitious scope of his study<sup>66</sup> and the putative radicalism of his ultimate "policy" recommendations (that we make "a complete break with the punitive approach"67), scholarship required a confrontation with the

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      58 SCHUR 124-26.
      62 SCHUR 209.

      59 SCHUR 89-90, 95-96, 108.
      63 Ibid.

      60 SCHUR 205. (Emphasis added.)
      64 SCHUR 38.

      61 SCHUR 206. (Emphasis added.)
      65 SCHUR 209.
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<sup>&</sup>lt;sup>66</sup> The interaction between addict behavior and social and official policy is a fascinating "major theme," stated categorically several times, but inadequately developed. SCHUR 7-8, 207. It suffers, too, from the vice of an image of the addict, as an homogeneous entity, responding mechanically in simple behavior patterns, e.g., SCHUR 208.

<sup>67</sup> SCHUR 219-20.

claim that a benign situation in Britain resulting from cultural differences led to a nonpunitive policy. If Professor Schur means what he says, that "undoubtedly . . . it would be a mistake to attribute the British situation solely to their non-punitive policy," then to what other factors may one attribute it?68 On this he is unfortunately silent. The British attitude we are told is not radical. It is merely "neutral," that is, all they have done is "agree not to oppose addiction with harsh negative sanctions."69 Yet even this is obviously not quite so, as they do deal "negatively" though not as harshly as we do, when the addict goes outside of permissible treatment channels.70 Essentially, Professor Schur's position on the applicability of British policy and practice to the American situation is that, assuming the difficulties and differences, "it does not follow . . . that policies patterned along British lines could not work in the United States."71 The question, one had supposed, was whether they could work here. The general judgment he finally reaches, is "quite simply, the British approach makes sense."72 Perhaps it does; the British picture is surely a great deal more attractive than the pattern of legislation and enforcement which Mr. Eldridge presents. But policy formulation and its transnational adoption is a complex and difficult business, not appropriately conducted at the curbstone.

The prayers for relief in the indictment which Messrs, Schur and Eldridge have filed are different to a degree which illuminates the dilemmas of the control problem. Professor Schur, a bit too certain about our present knowledge and the inevitable failure of our punitive approach, recommends in preference to all other alternatives, a five-point program: 1) A Federal public health service experiment to determine the effects of legal distribution of drugs on a small, carefully screened group of addict-applicants "who seem likely to participate conscientiously" and who "would agree to almost constant observation and guidance by a trained caseworker."73 The optimism of the procedure, as well as the unrepresentativeness of the sample, is astonishing. 2) "Assuming the results of this experiment to be reasonably favorable" (by criteria not articulated by Mr. Schur), an "Addiction Treatment Agency responsible for the supervision of a federally financed national program for the medical care of addicts" would be established.74 The Federal Bureau of Narcotics would be confined to "strictly law enforcement activities-primarily the control of smuggling-for as long as necessary."75 Professor Schur's assumption, presumably, is that the use of narcotics outside of official treatment services would completely atrophy, although he also submits we may have to live with an ineradicable minimum level of addiction in our population. 3) All fa-

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68 SCHUR 209. (Emphasis added.)
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<sup>69</sup> SCHUR 212-13.

<sup>70</sup> SCHUR 71.

<sup>71</sup> SCHUR 210.

<sup>72</sup> SCHUR 211. (Emphasis added.)

<sup>73</sup> SCHUR 220. (Emphasis added.)

<sup>74</sup> Ibid. (Emphasis added.)

<sup>75</sup> Ibid.

cilities for treatment would be utilized "for addicts prepared to undergo voluntary withdrawal treatment."76 Those unprepared would be officially encouraged to do so, as "every effort would be made to enlist the cooperation of such addicts in treatment and rehabilitation attempts."<sup>77</sup> Even outside physicians, officially approved, would be used in preference to dispensary clinics. This step would "avoid the dangers involved in bringing a large number of 'underworld type' addicts together in one place."78 Why? Professor Schur's answer is "It would make treatment seem a more private and fully voluntary matter."79 The benevolence of Professor Schur's officials may only be transparent. Finally, after 4) establishing an addiction after-care service, and 5) repealing all laws regulating "possession" and "use" of narcotics, we learn the degree of choice retained by the uncooperative addict: "Any addict who might refuse completely to participate in the program outlined above would, however, be subject to legal sanctions if he obtained drugs from unauthorized sources. Laws against any persisting illicit traffic would be stringently enforced."80 Although Professor Schur reproaches as "compromise measures" numerous recent proposals "because of their continued reliance on compulsory process,"81 his program suffers from the same vice.

An effective criticism of Professor Schur's program may be found in Mr. Eldridge's earlier published volume. Mr. Eldridge, dubious about the desirability or efficacy of programs based on our present state of ignorance, proposes that relevant information must be gathered in order to formulate rational policy alternatives. Two major premises are operative: First, "absent compelling considerations, thus far undemonstrated, those having the responsibilities for dealing with narcotics problems should not be denied means found effective in other areas of crime and antisocial behavior;" and second, "adoption of new untried approaches . . . should be postponed until additional information has been systematically gathered . . . . "82 These premises rest on his conclusion that there is both insufficient evidence to prove the claims made on behalf of the American system, and a lack of adequate evidence "on which to make a valid prognosis of the effect of suggested reforms"83 (including the British system).84 "[T]here has never been a clear picture of narcotics traffic and use in this country, ... there have been changes in habits and practices but the extent thereof is not known, and that even if these things were known, there is no clear understanding of the

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76 SCHUR 220. (Emphasis added.) 80 SCHUR 222. (Emphasis added.)
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 <sup>77</sup> SCHUR 221. (Emphasis added.)
 81 SCHUR 219.

 78 Ibid. (Emphasis added.)
 82 ELDRIDGE 118.

 79 Ibid. (Emphasis added.)
 83 ELDRIDGE 116.

<sup>&</sup>lt;sup>84</sup> ELDRIDGE 111-12, based on earlier "comprehensive" articles. Lindesmith, *The British System of Narcotics Control*, 22 LAW & CONTEMP. PROB. 138 (1957); Schur, *British Narcotics Policies*, 51 J. CRIM. L., C. & P.S. 619 (1961).

reasons for them."85 Our deplorable state of knowledge has persisted for fifty years or more, based on "misconceptions . . . which . . . [have] in time created a whole body of dope mythology effectively blocking public support of a dispassionate inquiry."86 Until ignorance is replaced by intelligence, proposals which purport totally to eliminate access to drugs seek, in Mr. Eldridge's prudent view, "an unrealistic, impossible and visionary goal," inasmuch as we do not know "the extent to which rigid control methods can diminish the narcotics problem."87 By the same token, our ignorance of "the extent to which free distribution of drugs can reduce the problem is purely conjecture."88 He anticipates Professor Schur's criticism of the American system and the logical virtue of the British. The economic argument that "those persons who are receiving free drugs will not have to commit crime to support their habits . . . is a truism, but to project that narcotics associated crime will thereby disappear necessarily relies on a faulty syllogism."89

Mr. Eldridge's standpoint is sensible. Basic recognition must be given to the proposition "that the whole narcotics problem cannot be lumped together,"90 that addiction is quite complex, that responsibility must be realigned and functions performed only by those competent to do so. By separating the different roles and functions which the legislator, policeman, prosecutor, judge and doctor perform, the problem may begin to be soluble. Recognition must first be given, then, to the fact "that the treatment of addiction and research into possible preventive medicine are medical problems and should be dealt with as such. . . . that the enforcement of narcotics laws and treatment of narcotic addiction are dichotomous functions."91 Freeing the medical profession from the notorious intrusions of the Federal Bureau of Narcotics would likely lead to a search for new means of treatment through methods designed to permit adequate appraisal of the patient, his condition, environment and other factors which bear on improving the prospects of recovery, which presently are frighteningly low. By emphasizing that therapeutic and social efficacy and desirability are different and distinguishable concerns, Mr. Eldridge makes a valuable point. Organized medicine is obligated and should be encouraged to assume its responsibility in defining "professional practice" (the key term in the Harrison Act, 92 effectively modified by Federal Bureau of Narcotics pressure). The judiciary, hogtied, frustrated and thus often inclined to nullify state provisions relating to sentencing should have restored to it its discretion to individuate sentence and to weigh criteria

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85 ELDRIDGE 103.
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<sup>86</sup> Eldridge 12. 89 Ibid.

<sup>87</sup> Eldridge 116–17. 90 Eldridge 119.

<sup>88</sup> Eldridge 117. 91 Eldridge 120.

<sup>92 42</sup> Stat. 596 (1922), as amended, 21 U.S.C. § 173 (1958).

by which the addict and society might be better served. Parole and probation should be utilized here as in other offenses.

Finally, Mr. Eldridge proposes that we begin to set uniform and meaningful reporting standards and gather "definitive information" through the establishment of a national agency.<sup>93</sup> But what information is essential is surely "the most difficult part of the data gathering program."<sup>94</sup> The bare minimum he proposes includes the addict's personal statistics, present offense, narcotics history, criminal record, judicial disposition, prison history and probation record. But these data would be a function primarily of police or official activity, as at present, and still would not give us the more detailed and comprehensive material we need.

Efforts to control addiction and addict behavior not only bear on specific problems but also illuminate the outer limits of penal sanctions in controlling analogous conduct. Addict behavior is not dissimilar to cannibalism under threat of starvation,95 mental illness, sexual psychopathy, or forms of consensual or sumptuary behavior condemned by laws relating to gambling. consumption of alcohol, use of contraceptives, obscene publications, homosexual conduct, prostitution, adultery and abortion. What is sufficiently disturbing to individuals or the community to warrant official interventions and deprivations is often either unclear or grossly misplaced in its value orientation. Professor Packer is quite right when he emphasizes the singular but unfulfilled responsibility of legal scholarship in this troublesome area. In commenting on the Model Penal Code, which unfortunately did not, for various reasons, deal with narcotic control, he observed that more "explicit recognition" should be given to "what must have been a controlling consideration: that the resources of legal scholarship have yet to be mobilized to deal in the large and in detail with questions about the criteria for invocation of the criminal sanction."96 Disproportionate attention has perhaps been given to some problems in the administration of criminal justice, such as homicide. which are at least not quantitatively of the magnitude of those presented by compulsive or victimless interactions which produce "crimes" such as those proscribed by narcotics control laws. Criteria to guide the exercise of legislative choice as well as discretion in the invisible world of the station house,97

<sup>93</sup> ELDRIDGE 126.

<sup>94</sup> ELDRIDGE 127.

<sup>&</sup>lt;sup>95</sup> Cf. Queen v. Dudley & Stevens, [1884] 14 Q.B. 273. For an interesting journalistic report of this case see McCormick, Blood on the Sea (1962).

<sup>&</sup>lt;sup>96</sup> Packer, The Model Penal Code and Beyond, 63 COLUM. L. REV. 594, 606 (1963); cf. Remington, Criminal Justice Research, 51 J. CRIM. L., C. & P.S. 7 (1961); Wechsler, Challenge of a Model Penal Code, 65 HARV. L. REV. 1097 (1952).

<sup>&</sup>lt;sup>97</sup> See Goldstein, Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice, 69 YALE L.J. 543 (1960).

the prosecutor's office98 and the correctional99 or therapeutic institution (whether denominated a hospital or prison) have not been articulated with necessary clarity.

Neither of these books under review, as earnest as they are, preempt the role which legal scholarship ought to play in narcotics policy making. Mr. Eldridge's contribution, perceptive as it is in its analysis and its call for data, does not sufficiently identify the questions which must be qualitatively answered by the criminal law. And Professor Schur, despite his fervent and hortatory report of British practices and policy, merely echoes without elaboration Professor Mannheim's generality about the criteria<sup>100</sup> of labeling behavior criminal. The indispensible search for why, how and what ought to be treated by the criminal process requires scientific multifactoral analysis, not the fruitless pursuit of a single all purpose explanation, greater specification and clarification of competing objectives to be served by intensive state intervention, and a principled weighing of alternatives. One contribution of the Model Penal Code has been its sophisticated structure of culpability. The issues posed by addiction and addict behavior are a serious practical and theoretical challenge to this predicate of criminal justice. Until the right questions are put, reformative answers may not be unlike "throwing feathers endlessly hour after hour."101

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<sup>98</sup> See Harry W. Jones, *Law and Morality in the Perspective of Legal Realism*, 61 COLUM. L. REV. 799, 807 (1961); MODEL PENAL CODE § 2.12 (Proposed Official Draft, 1962) (De Minimis Infractions).

<sup>99</sup> Comment, Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts, 72 YALE L.J. 506 (1963).

 $^{100}$  Schur 211, referring to Mannheim, Criminal Justice and Social Reconstruction (1948).

<sup>101</sup> William James, quoted by Thurman Arnold and cited in Kalven, *The Metaphysics of the Law of Obscenity*, 1960 Sup. Cr. Rev. 1, 44.

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