Southern California Law Review

VOLUME 41

1967-68

GOULD SCHOOL OF LAW
THE LAW CENTER
UNIVERSITY OF SOUTHERN CALIFORNIA
LOS ANGELES, CALIFORNIA

COERCION TO VIRTUE: THE ENFORCEMENT OF MORALS†

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I. Introduction

When law is conceived as a tool for educating the masses or for achieving social order, there is a tendency to extend boundaries of state control. When so conceived, law may become a ready instrument for the achievement of state morality. As Leon Lipson describes Soviet Law:

> Coercion to virtue is esteemed not only for virtue's sake but also as a means of reducing the incidence of law breaking. The number of violations of public order is swollen by the difficulties of the society and by the broadly inclusive notion of what *amounts* to a violation. The more precarious the equilibrium of the state, the greater the perceived danger of subversion; the narrower the line, the harder it is not to deviate from it. Even short of disorder, subversion, and deviation, the failure to do one's part in raising the wealth of the state is an offense against the presuppositions of the leaders and thus against the laws of the realm. If *homo economicus* is not yet respectable enough to be allowed on the stage, let his lines be given to *homo juridicus*: Soviet morality permits the government to threaten pain in order to push the citizen to many acts to which it cannot yet pull him by hope of reward.[1]

Perhaps the motives are different, but the tendency to coerce to virtue, to extend the ambit of violation, is not confined to totalitarian states. Such tendencies are also evident in democratic polities. There, as the fight over prohibition illustrates, *legal moralism* may represent the political victory of a majority over a minority. The political tools to effect change also vary. Voting provides an established means of political redress in a democracy. Still, that redress may be needed

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† This paper was submitted in somewhat different form to the President's Commission on Law Enforcement and Administration of Justice.

1 Lipson, *Host and Pests: The Fight Against Parasites*, 14 Problems of Communism 72-73 (1965).

suggests the basic *political* character of much legal moralism. Whether or not legislation is truly moral is often a question of who has the power to define morality.

The basic theme of this article is that in a democracy legal moralism often represents tendencies of two related kinds. First, there is a tendency to solve or ameliorate what are perceived to be "social problems" through the instrumentality of law. The theory seems to be that the imposition of a criminal sanction will deter the "undesirable" activity, thereby ridding the society of the perceived social problem. The assumptions and consequences of such a position will be examined. Second, there is a tendency to assume that because a criminal sanction exists, there was something like a "genuine" social problem in the first place, or at least, one so serious as to warrant a criminal sanction for those engaging in the activity. This article, on the contrary, will emphasize the definitional and political character of social problems.

Morals and Positive Law

The most famous statement on regulation of the individual is doubtless John Stuart Mill's "very simple principle . . . that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him or reasoning with him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise."[2] Mill is thus opposed to state paternalism—a man is entitled to live his life in his own way without the state making decisions for him as to what is right and good.

Sir Patrick Devlin, who is Mill's most articulate modern critic, accepts Mill's anti-paternalistic philosophy but argues that society is nevertheless entitled to prevent the harm that would be done to it by the "weakness or vice" of too many of its members. Devlin acknowledges that Mill did not overlook this consideration; Mill overrode it in

2 Mill, *On Liberty (London 1859)*, in UTILITARIANISM, LIBERTY AND REPRESENTATIVE GOVERNMENT 72 (Everyman ed. 1910).

the interests of individual freedom. Thus, one dilemma regularly faced by society when it employs state power to prevent or reduce immorality is: to what extent does individual freedom override societal interests to prevent widespread harm? Devlin exemplifies the problem regarding the use of alcoholic beverages:

> . . . while a few people getting drunk in private cause no problem at all, widespread drunkenness, whether in private or in public, would create a social problem. The line between drunkenness that creates a social problem of sufficient magnitude to justify the intervention of a law and that which does not, cannot be drawn on the distinction between private indulgence and public sobriety. It is a practical one, based on an estimate of what can safely be tolerated whether in public or in private, and shifting from time to time as circumstances change. The licensing laws coupled with high taxation may be all that is needed. But if more is needed there is no doctrinal answer even to complete prohibition. It cannot be said that so much is the law's business but more is not.[3]

Thus, Devlin proposes that the legal response ought not to be doctrinal, but practical. There is no limit on how far "society" may go, on how far it may invade a man's privacy, if such an invasion is "necessary to its own integrity."[4]

Yet since Mill recognizes the right of society to institute laws for self-protection, and since Devlin acknowledges that each citizen is entitled to the greatest measure of personal freedom, there seems no principled difference between the two. Why then all the fuss? For a simple reason which leads to complex questions and responses: given the "balancing" standard it is still difficult to know what we are balancing, to be able to measure it, to analyze the assumptions underlying our measures, and to make pre- and postdictions on the basis of certain measures.

Devlin's example of "widespread drunkenness" is instructive. How do we find the "width" or the "spread" of drunkenness; what is meant by "drunkenness" for these purposes; how do we know that measures taken to suppress "drunkenness," prohibition for example, will not only be effective in achieving the non-use of alcoholic beverages—if that was what was intended—but will also not produce socially undesirable side-effects? As this article will contend, the lack of even a rudimentary social scientific approach to the law-and-morals issue has

3 P. DEVLIN, THE ENFORCEMENT OF MORALS 113 (1965).
4 *Id.* at 118.

resulted in deplorable unclarity. Issues are not joined, complexities are bypassed, and empirical evidence ignored—with a distressingly foggy outcome.

State and Society

To illustrate some of the overlooked complexities, let us begin by examining the concept of society as it pertains to the legal enforcement of morals. When Devlin writes about "society" he seems to assume a unity between the collectivity and the State, between the collective sentiments of the population and the formal structure of governance.[5] In a discussion of law and morals, however, the distinction is fundamental, although by no means dispositive of policy issues. It is a distinction to which most sociologists, following Durkheim, would subscribe:

> The State . . . is the organ of social thought. That does not mean that all social thought springs from the State. But there are two kinds. One comes from the collective mass; it is made up of those sentiments, ideals, beliefs that the society has worked out collectively and with time, and that are strewn in the consciousness of each one. The other is worked out in the special organ called the State or government.[6]

It is also a distinction to which traditional political philosophy of the United States would subscribe. The State is a creature created by men; the society is a more natural phenomenon. For purposes of this article, generalized attitudes toward the State are not especially relevant. In the United States, such attitudes have traditionally evoked political conflict. Some see the State as a wholly negative force interfering with natural social units, a position congenial both to the community anarchist and to the rural conservative. Others see the State as a positive force, as a liberating instrument that heightens the potential of the individual personality through intelligent and rationally considered interventions.

Regardless of the position taken on the positive or negative character of the "artificial" force, the State, as contrasted with the "natural" force, the Society, the distinction reflects a basic tension in the area of law and morals. It suggests two models concerning the nature of legislation. In one model, all legislation is perceived as the "natural" embodiment of the collective conscience or of social mores, *i.e.*, the State mirrors the society. Such a view is popularly attributed both to William

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[5] *Id.* at 109.

[6] R. DURKHEIM, PROFESSIONAL ETHICS AND CIVIC MORALS 79 (1958).

Graham Sumner[7] and to Emile Durkheim. Sumner, for example, held that many acts of legislation arose out of the mores, and that under such circumstances the law represented "a crystallization of the mores combined with collective power to maintain the status quo." Positive law became possible when a society attained "the stage of verification, reflection, and criticism." Under such circumstances, prohibitions begin to replace taboos and punishments are planned to effect deterrence rather than revenge.

However, Sumner was especially concerned with the deficiencies of customary law and insisted that the distinction be maintained between "public morals" and "positive law." He wrote that, "The older abuse was to suppress public morals in the name of positive law; the later abuse is to introduce public morals into positive law directly and immaturely." The prime matter for Sumner was "whether to leave a subject under the mores, or to make a police regulation of it, or to put it into the criminal law." Sumner specified several important considerations regarding this issue. First, he wanted to know whether adequate knowledge was at hand to formulate legal prescriptions that achieve desired ends, but without undesired and unplanned consequences. Second, he was concerned with the flexibility of formal enactments, as compared with the "elasticity and automatic self-regulation of custom." Third, he stressed the need for popular support for the proposal or for the government generally as a means of preserving the legitimacy of enforcement. And finally, he questioned whether enforcers have sufficient power to make the affected parties comply with the enactment.

A "natural embodiment" view of legislation is also sometimes attributed to Durkheim.[8] On the contrary, Durkheim explicitly distinguished between the State and its legislation and collective consciousness or collective morality. His model of the State stressed its capacity to provide a rational, or potentially rational, source of social norms. Although Durkheim of course recognized that the legal enactment of of intolerance and indignation may perform positive functions for social integration, especially in primitive societies, he also most clearly emphasized the emergence of the modern State as a valuable "rational" structure capable of containing "natural" irrationalities by means of

[7] *See* Ball, Simpson, & Ikeda, *Law and Social Change: Sumner Reconsidered*, 67 AM. J. SOCIOLOGY 532 (1962), from which the following exposition of Sumner's views was taken.

[8] *See* Hart, *Social Solidarity and the Enforcement of Morality*, 35 U. CHI. L. REV. 1, 13 (1967).

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[9] DURKHEIM, *supra* note

reasoned debate and consideration. Writing as a student of civic morals he states:

> It is not accurate to say that the State embodies the collective consciousness, for that goes beyond the State at every point. In the main, that consciousness is diffused: there is at all times a vast number of social sentiments and social states of mind (etats) of all kinds, of which the State hears only a faint echo. The State is the center only of a particular kind of consciousness, of one that is limited but higher, clearer and with a more vivid sense of itself. There is nothing so obscure and so indefinite as those collective representations that are spread throughout all societies—myths, religious or moral legends, and so on . . . The representations that derive from the State . . . are distinguished from the other collective representations by their higher degree of consciousness and reflection.[9]

Moreover, this reflective character of the State suggests both the inherently mutable character of legal norms and the questionable wisdom of basing policy judgments regarding what legal norms ought to be on the authority of such notions as the common consciousness or common morality. Durkheim's position is not that the State ought to be swayed by myths and religious or moral legends, but rather that the State is an instrumentality which through deliberative and reflective conduct has, or more accurately, ought to have, the capacity to examine such manifestations of "intolerance, indignation, and disgust" as are proposed for lawful enactment.

This article will examine the basis for, and suggest research about, the several components of the rationale for using criminal law as an instrument for controlling or diminishing "immoral" behavior. This rationale ordinarily makes four claims, around which our discussion will be organized.

The first claim is simply that the prohibited activity or the proposed prohibited activity causes damage; that it has serious and deleterious effects upon individuals and upon the society in general. Its practice causes not merely personal problems, but general social problems of grave danger to the community as a whole. This is an empirical question in its broadest sense, raising issues not only of fact, but of the meaning of fact. The difficulties involved in ascertaining such "facts" will be emphasized below.

The related second claim will be discussed jointly with the first, al-

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9 DURKHEIM, *supra* note 6, at 50.

though it might well be given separate attention. This is the question of "cure" or "rehabilitation," and the idea implicit in the rationale that a "cure" can be effected.

The third claim is that there is a societal consensus that the activity in question ought to be forbidden. When the suggestion is made that such activities as homosexuality, adultery, marihuana or drug use, prostitution, or gambling be forbidden by criminal penalty, those who propose prohibition of the activity typically assert that such practices are in serious violation of social *mores*. The section on societal consensus will discuss the meaning of social consensus, especially the politics of criminal law, as well as suggest empirical research in this area.

The fourth claim is that the principal result of enforcement of the criminal law will be deterrence of the forbidden activity. It is rarely, if ever, suggested that the imposition of a criminal sanction might not only fail to diminish the activity in question but that control through criminal law might increase the incidence of the activity being sanctioned and other unlawful activities. Furthermore, it is usually assumed that repression through criminal law will not bring about unanticipated and harmful side effects. This article, however, will concentrate upon the probabilities and actualities of such side effects and will suggest further study along these lines. Thus, examining several instances in which criminal law has been used to solve or ameliorate social and moral problems—especially drinking of alcoholic beverages, homosexuality, marihuana and drug use—we shall attempt to assess how well the rationale for control through criminal law has held up.

II. "Effects" and "Cure"

The description of "effects" and "cure" is an enduring and complex problem in formulating policy regarding such activities as alcohol use, marihauana use, and homosexuality. Rather than attempting to describe actual effects of such behaviors as marihuana and drug use, this section will point to persistent problems in the methodology of assessment of "effects" upon both the individual and the society.

A. *The Difficulties*

A description of effects entails several difficulties, not the least of which is distinguishing independent from dependent variables. For instance, do repressive laws tend to eliminate social problems or simply aggravate them. "Nothing can be more certain," wrote Oliver Goldsmith,

"than that numerous written laws are a sign of a degenerate community, and are frequently not the consequences of vicious morals in a state, but the causes."[10] Goldsmith's puritan contemporaries in the United States held an opposite opinion. For them, numerous written proscriptive laws were a sign of a godly community and were an appropriate means for curbing vicious morals in a state. Much of the writing on the effects of alcohol, narcotics, marihuana, homosexuality, and other "immoral" activities has been colored by the underlying value position of the writers on the relationship between law and morals.

Second, a description of effects is likely to be responsive to "charges" that are advanced by opponents of the activity. Does the use of alcohol, marihuana, or opiates weaken moral fiber? Does it lead to crime? Does it lead to sexual indulgence? Writers on this subject feel obliged to respond to such questions, even though they may be unanswerable or not especially pertinent. For example, suppose one were to ask whether marriage leads to wife-beating? The answer to that question is obviously, yes, but not necessarily. The question as it is framed is absurd; it assumes there is something "wrong" with marriage, and therefore determines the answer. The same bias appears time and again in literature on marihuana, homosexuality, and drug use.

Third, it is very difficult to describe effects in "objective" terms that do not deprecate the activity in question. Objective descriptions typically describe the actor in the third person. We say that the marihuana user, the user of opiates, the user of beverage alcohol does certain things or experiences certain feelings. To the extent that we have not ourselves shared his experience, words like "high" or "intoxicating" take on a disparaging connotation. Thus, an "objective" description may invoke subjective feelings in an observer or listener that would not be invoked in those who have experienced the phenomenon.

Finally, the very conception of effects is based upon a normative model rarely met in practice. This model is of the perfectly "healthy" person engaged in quiescent activity. Suppose we were to ask, "what are the effects of playing tennis on the individual?" In response, we would have to describe a heightened pulse rate, facial flushing, sweating, and marked adrenal activity. In many cases, we would observe loss of breath followed by feelings of dizziness and nausea. There are in addition, reliable reports of death following the activity, especially

[10] A. SINCLAIR, PROHIBITION: THE ERA OF EXCESS 178 (1962).

among the middle aged who neglect exercise. For some reason, we could hint, this insidious "sport" tempts otherwise responsible men to a deadly game. A fairly frightening sounding clinical picture could be described *for a reader who has never experienced a game of tennis.* The description would not be untrue, but out of context; it would have a far different effect on our reader than it suggests to the tennis player. Thus, the very "objectivity" of a clinical description may result in an unintended distortion for the purpose of assessing social policy.

In addition to these difficulties, our capacity for understanding is impeded by those who utilize and distort facts for political purposes, attempting to frighten people away from the behavior in question. For example, one of the posters issued by the press of the Anti-Saloon League in 1913 advertised *The Effect of Alcohol on Sex Life.* In bold black type it declared that sex-life was dominated by a compelling instinct as natural as eating and drinking and that the laws of custom and modern civilization demanded that sex life be under the control of reason, judgment, and will. Since alcohol made all natural instincts stronger and weakened judgment and will, all drinks of which alcohol formed even a small part were harmful and dangerous.[11]

While such literature contains some truth, it is also misleading. It suggests that the physiological effects of alcohol may be generalized to all people, under all social conditions. That implication is clearly not true. Alcohol may be a "dangerous" substance—sometimes, for some people, under some conditions. But in fact it is difficult to distinguish the effects of physiological, psychological, and sociological variables. The issue for the scientist is to determine when and for whom it is dangerous. The scientist must also determine degrees of dangerousness. For many years now, research has been conducted on the effects of alcohol, research which could only be attempted after the prohibition amendment was repealed. Still proceeding, this research has not yet given us completely definitive answers. It has, however, suggested that the physiological and psychological effects of alcohol are mediated by the personality and the cultural backgrounds of those who use it.

11 I. Alcohol Inflames The Passions, thus making the temptations to sex-sin unusually strong.
II. Alcohol Decreases The Power Of Control, thus making the resisting of temptation especially difficult.
III. Alcohol Decreases The Resistance Of The Body To Disease, thus making the result of disease more serious. The influence of alcohol upon sex-life could hardly be worse, AVOID ALL ALCOHOLIC DRINK ABSOLUTELY.
The control of sex impulses will then be easy and disease, dishonor, disgrace and degradation will be avoided.
Id. at 51.

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The literature on marihuana and narcotics is not yet as sophisticated as the literature on alcohol. At present, this literature reflects more a struggle over the *authoritativeness of perceptions of social reality*, than it does an attempt to describe physical, psychological, and social reality as objectively as possible. As Lawrence Kolb has suggested, we must: "eliminate from the minds of the people and especially from the minds of legislators the idea that the people who arrest or prosecute drug addicts have superior knowledge of drug addiction."[12] The Federal Bureau of Narcotics, headed for many years by Mr. Harry Anslinger, a former Assistant Commissioner of Prohibition, has attempted to shape the conception of narcotics and marihuana use in terms of the perception of social reality held by Mr. Anslinger. He writes:

> By 1937, under my direction, the Bureau launched two important steps; first, a legislative plan to seek from Congress a new law that would place marihuana and its distribution directly under Federal control; second, on radio and in major forums, such as that presented annually by the *New-York Herald Tribune*, I told the story of this evil weed of the fields and riverbeds and roadsides. I wrote articles for magazines; our agents gave hundred of lectures to parents, educators, social and civil leaders. In network broadcasts I reported on the growing list of crimes, including murder and rape. I described the nature of marihuana and its close kinship to hashish. I continued to hammer at the facts.
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> I believe we did a thorough job for the public was alerted and the laws to protect them were passed, both nationally and at the state level.[13]

Mr. Anslinger's conception of marihuana is as distorted as the conception of alcohol held by the Anti-Saloon League.[14] It pictures a life full of delirium, violence, and crime. It is a scene populated with horror stories, screaming girls, murdered families and vicious criminals preying on the unsuspecting. It ties marihuana with racketeers and mobsters, depravity and sin, evil men and evil attitudes. This distorted conception of marihuana use has been given both international recognition and status in the field of law enforcement.

From a sociological point of view, a most interesting issue is how organizations are created and used to promulgate a distorted conception of social reality; that is, how propaganda achieves the status of

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12 L. KOLB, DRUG ADDICTION: A MEDICAL PROBLEM 172 (1962).

13 H. ANSLINGER & W. OURSLER, THE MURDERERS—THE STORY OF THE NARCOTIC GANGS 38 (1961).

14 See H. ANSLINGER, THE PROTECTORS: NARCOTIC AGENTS, CITIZENS AND OFFICIALS AGAINST ORGANIZED CRIME IN AMERICA (1964); H. ANSLINGER & W. OUSLER, THE MURDERERS—THE STORY OF THE NARCOTIC GANGS (1961); H. ANSLINGER & W. TOMPKINS, THE TRAFFIC IN NARCOTICS (1953).

authoritative truth via organizational manipulation. The process will be briefly suggested.

Until 1961 there were four important bodies concerned with dangerous drugs on the international level.[15] In 1925, the Geneva Convention established a Permanent Central (Opium) Board and in 1931 the Limitation Convention established the Drug Supervisory Body. The United Nations Economic and Social Council set up in 1946 the Commission on Narcotic Drugs, which, among its other functions, supervised the operation of the several narcotic conventions. Finally, in 1948, the World Health Organization, another agency of the United Nations, formed an Expert Committee on Drugs Liable to Produce Addiction. These four organizations were closely connected with each other, both in outlook and in personnel. The Economic and Social Council became in 1946 the appointing authority of the eight member Permanent Central Board. The four members of the Supervisory Board were appointed by the Permanent Central Board, the Commission on Narcotic Drugs, and the World Health Organization. Throughout the 1950's the Permanent Central Board and Drug Supervisory Body had the same chairman, L. Atzenwiler. Atzenwiler represented these organizations at the Expert Committee of the W.H.O. Similarly the Narcotics Division of the United Nations is represented in the W.H.O. Committee.

The permanent representative of the United States to the United Nations Commission on Narcotics Drugs is Harry J. Anslinger, who was Vice Chairman from 1954 to 1956 and became Chairman in 1957. At the time, Anslinger was serving as head of the U.S. Federal Bureau of Narcotics. The Secretary of the W.H.O. Committee, Argentinian professor Pablo O. Wolff, was Anslinger's main authority on marihuana. R. J. Bouquet, another founding member of this committee, was Anslinger's secondary authority on marihuana.

By controlling international organization regarding drugs, these persons have succeeded in shaping world opinion and policy concerning drugs. They are able to do this by proliferating bodies and committees which rely upon each other's testimony as evidence for the policy outcomes of the committees on which they sit. For example, at the 16th Session (1961) of the Commission on Narcotics Drugs, the representatives of the Netherlands and of India introduced new studies which indicated that marihuana is not addictive and does not lead to

[15] H. ANSLINGER & W. TOMPKINS, THE TRAFFIC IN NARCOTICS 29 (1953); Renborg, *International Control of Narcotics*, 22 LAW & CONTEMP. PROB. 86 (1957).

crimes of violence.[16] This evidence was rejected on grounds that the opinion of the W.H.O. Expert Committee was "still valid," and that *cannabis* (the plant from which marihuana is derived) abuse definitely comes under the terms of its definition of addiction. Arguing legalistically, the commission recalled that it had *agreed* that *cannabis* abuse was a form of drug addiction and emphasized that any publicity to the contrary was misleading and dangerous. It thus becomes virtually impossible to introduce at an international level *empirical evidence* which will seriously alter the conception of the addictive qualities of marihuana and the effects of marihuana. In turn, the statement by the international bodies is used as authoritative justification for national policy concerning marihuana. Thus, rather than fact determining policy, policy decides fact.[17]

The perception of reality held by Mr. Anslinger and his associates also strongly influences "professional" law enforcement. For example, the Department of Police Science and Administration of Los Angeles State College describes the effects of marihuana as follows:

> Marihuana, unlike opium, is an excitent drug. It disrupts and destroys the brain and distorts the mind, resulting in crime and degeneracy. It attacks the central nervous system, and violently affects the mentality and five physical senses. Time, space, and distance are obliterated, and hallucinations occur. Marihuana, like cocaine, is the immediate and direct cause of the crime committed. This drug used with whisky intensifies its violent properties. It gives a feeling of exultation and physical power but, if continued, the drug develops a delirious rage.[18]

There are no references for this statement. Similarly in the works of Mr. Anslinger, there are either no references, or references to volumes which are based upon much hearsay and little or no experimentation.[19]

Occasionally, Anslinger makes important statements of fact without

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[16] U.N. Comm'n on Narcotic Drugs, Report, Supp. 9, at 129, U.N. Doc. E 3512, E/CN. 7/411 (1961).

[17] A more recent example for the systematic "inbreeding" with respect to scientific authorities can be found in *Twenty Years of Narcotic Control under the United Nations*, 18 BULL. NARCOTICS 1 (1966). The author claims that the question of harmful effects of cannabis was not tackled scientifically until 1953, when Pablo O. Wolff was asked by the W.H.O. Expert Committee to write a paper on this question. This is, however, only true if one disregards, as the article does, the careful studies rejecting Wolff's point of view. *Cf.* Bromberg, *Marihuana Toxication: A Clinical Study of Cannabis Sativa Intoxication*, 19 AM. J. PSYCHIATRY 248 (1942).

[18] This passage is quoted in NARCOTICS 172 (J. Williams ed. 1963).

[19] Anslinger's lack of support has been verified by the personal research of the author and his assistants.

any reference: *e.g.*, "Physicians who have made hundreds of tests with Cannabis report that there is no way to predict what effect it can have on the individual . . ."[20] In general our investigations have revealed a mythology in which later writers cite the authority of earlier writers, who also had little evidence. We have found what can most charitably be described as a pyramid of prejudice, with each level of the structure built upon the shaky foundation of earlier distortions.

Take, for example, Anslinger's latest statement on the relationship between crime and marihuana use in the 1966 Encyclopaedia Britannica: "Many emotionally unstable persons known to be associated with major crimes prove to be marihuana users."[21] His bibliography contains three references as support or this statement:

(1) *Maurer & Vogel, Narcotics and Narcotic Addiction.* This book concludes that there is little published evidence in the United States linking the use of marihuana with violent crime "although enforcement officers both here and in Canada feel that there is a close relationship; however, in Asia and South America the reverse is reported, and the late Dr. Pablo Wolff believed that there was a high incidence of violent crime among marihuana users."[22] Thus, Anslinger relies upon Maurer and Vogel, who in turn rely upon "law enforcement," i.e., Anslinger, as *their* source for describing the U.S. situation.

(2) *Wolff, Marihuana in Latin America: The Threat it Constitutes*[23] and *The Physical and Mental Effects of Cannabis.*[24] The first publication, with an introduction by Anslinger, is the printed version of a lecture. Mainly relying on South American sources, Wolff asserts that there is agreement about the "ominous influence"[25] of marihuana on crime. For the United States he cites, however, only Anslinger and R. P. Walton, a pharmacologist of Anslinger's persuasion, for this opinion and admits that others come to different results. Wolff reaches the melodramatic conclusion that marihuana "is the weed which sunders the bounds of inhibition that make it possible to live together in society; weed of the brutal crime and of the burning hell; this weed which splits the personality, which invades the prison and the asylum, the hovel and the palace, which subjugates the savage and the

20 H. ANSLINGER & W. OUSLER, *supra* note 13, at 37.
21 Anslinger, *Marihuana*, 11 ENCYCLOPEDIA BRITANNICA 876 (1966).
22 D. MAURER & H. VOGEL, NARCOTICS AND NARCOTIC ADDICTION 112 (1954).
23 P. WOLFF, MARIHUANA IN LATIN AMERICA: THE THREAT IT CONSTITUTES (1949).
24 U.N. Doc. E/CN. 7/L 91 1955.
25 P. WOLFF, MARIHUANA IN LATIN AMERICA: THE THREAT IT CONSTITUTES, 23 (1949).

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26 *Id.* at 53.
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cultured . . ."[26] Wolff's second publication is a shorter version of the first, with the footnotes brought up to date.

(3) R. J. Bouquet's article in the *Bulletin on Narcotics*.[27] This is a careful analysis of the botanical and pharmacological aspects of cannabis. Bouquet does not attempt any generalization on crime and marihuana.

Anslinger's statement rests therefore on old South American literature, on Walton's at best impressionistic report,[28] and ultimately upon his own convictions. Tragically, this pyramid of prejudice represents the authoritative scientific basis for public policy concerning marihuana.

B. *Research and Policy*

There is an inherent problem in suggesting research on marihuana and opiate use, arising out of the controversial character of the subject matter. The dilemma is this: By suggesting research the writer may also appear to be suggesting that we do not yet know enough to revise our legal policies regarding marihuana use and narcotics use. This is *not* my opinion. We already have enough research to reform our legal policies, provided we share similar assumptions as to the purpose of those policies.

1. *Marihuana*

With marihuana, the pivotal issue is social reality. The Federal Bureau of Narcotics and associated international agencies have characterized the marihuana user as both addicted and likely to be socially dangerous. That is the ostensible rationale for our present policy. The evidence, however, points to the contrary. Marihuana use is neither addictive nor especially socially dangerous, *if by socially dangerous we mean the sort of violent and destructive behavior suggested by Bureau propaganda.* Marihuana can be an intoxicating substance—an alternative to the use of beverage alcohol.

The most sophisticated argument for continuing present punitive policies is that the current widespread use of beverage alcohol already presents enough problems, and that the legalization of marihuana would only further burden the society.[29] This "sophisticated" argu-

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26 *Id.* at 53.

27 Bouquet, *Cannabis*, 3 BULL. NARCOTICS 22 (1951); Bouquet, *Cannabis*, 2 BULL. NARCOTICS 14 (1950).

28 R. WALTON, MARIHUANA, AMERICA'S NEW DRUG PROBLEM (1938).

29 U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, NARCOTIC DRUG ADDICTION

ment, however, is unconvincing. First, marihuana is an alternative to alcohol. It is quite possible that a portion of those who use beverage alcohol would switch to marihuana. Secondly, marihuana appears to be less productive of violent and belligerent behavior than beverage alcohol.[30] Granted that these effects may not inhere in the character of the drug, but rather in the rituals associated with its use, contemporary evidence indicates that the effects of marihuana are less socially dangerous than those associated with alcohol.[31]

There is a nice question, on both constitutional and moral grounds, as to the limits of criminal law in sanctioning certain behaviors in anticipation that these will produce *others* of danger to society. The issue becomes one of probability. If the occurrence of behavior *A* is very likely to produce behavior *B*, about which there is no question as to its social dangerousness, then the sanctioning of behavior A is reasonable. If, on the other hand, the relationship between the first act and the second is highly attenuated, then the sanctioning of the first, in the anticipation of the occurrence of the second, becomes unfair. Regarding marihuana, the second model, from all the evidence, seems to be the true one.

If that is granted, then criminal sanctions for the use of marihuana would seem to be arbitrary and unfair. Restrictions on marihuana use should resemble those regarding alcohol. Marihuana use would not be "legalized," but its use legally regulated rather than punished. For example, statutes might make it a crime to drive an automobile under the influence of marihuana. The sale of marihuana to minors might be punished. The total prohibition of marihuana, however, especially with the penalties now imposed for sale, possession, and use, are unreasonably harsh. People are punished with similar or greater severity for using a substance that is mildly intoxicating as for the commission of violent and destructive acts.

To suggest such a policy is not to ignore the need for further research. Research on marihuana use has been inhibited by our legal attitude. Since the principal issue for the justification of present law and policy seems to be the perception of social reality, a major study of marihuana users on a national scale is needed. The study should encompass both

PROBLEMS 47 (1958) (Dr. Lawrence Kolb responding to question regarding potential harmful effects of marihuana).

30 *See* New York City, Mayor's Committee on Marihuana, The Marihuana Problem 38.17 (1944) (on file in the University of Southern California Law Library).

31 For the most careful recent discussion of the effects of marihuana *see* Murphy, *The Cannabis Habit: A Review of Recent Psychiatric Literature*, 15 BULL. NARCOTICS (1963).

lower and middle class users. Such a study would concentrate upon learning about the genesis of use, the subjective meanings of use to users, the reported effects of use, the social backgrounds of users, and the effects of law on use. If we assume that the marihuana laws will remain in effect for a period of time, a principal concern should be the consequences of marihuana laws upon the authoritativeness of criminal law for those portions of the population that use marihuana. If present policies are continued, one of the most serious consequences of legal prohibition of marihuana will be the continuing alienation of the user from other moral norms of the community, and especially from the moral authority of the criminal law. We faced this issue during the prohibition era and we face it again over marihuana.

2. *Narcotics*

Similar criticisms can be made regarding our policy on opiates. Chein, Gerard, Lee, and Rosenfeld's *The Road to H*, offers a detailed, scientifically sound study of narcotics use and addiction among adolescent drug users in New York City.[32] Its policy conclusions are most persuasive. The authors argue for a policy of total medical discretion, somewhat as follows: One way to "solve" the problem of opiate addiction would be to destroy all addicts. An alternative solution is to detain addicts in so-called rehabilitation centers until they are "cured." Aside from its economic and social cost, such a policy is inhumane. In effect, it proposes the establishment of leper colonies for addicts. Unless the addict stops taking narcotics he is to be detained, against his will, for an unlimited period of time. The addict is defined as an occupant of a sub-human status—entitling us to banish him from human society.

Why should we do this? The argument runs that the narcotics addict commits crimes. The reason he commits crimes, however, has little to do with his addiction, per se. He may be the sort of person who commits crimes anyway, or if he commits crimes in connection with his addiction, he does so because he needs to raise money to obtain narcotics. For a class of narcotic addicts, the absence of narcotics produces painful symptoms, and it is quite true that by cutting off a legal means of supply for the addict, he is driven into criminality. Regarding narcotic addicts, Goldsmith's statement that "written laws are frequently not the consequences of vicious morals in a state, but the causes,"[33] seems most fitting.

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32 I. CHEIN, D. GERARD, R. LEE, & R. E. ROSENFELD, THE ROAD TO H. NARCOTICS, DELINQUENCY, AND SOCIAL POLICY (1964).

33 *See* P. WOLFF, *supra* note 25, at 48 (alluding to Goldsmith's view).

Another reason for our punitive policy is the idea that narcotics addiction is contagious. The Chein study responds that there is not the slightest reason to suppose that a policy of total medical discretion would increase the number of addicts. If anything, it would tend to inhibit the introduction of new cases. The authors argue that the logic of the expectation of an increase in narcotics addiction following a policy of total medical discretion is overly simple. This argument runs thus: a person who takes a narcotic must have received both the idea of taking it and the supply from someone else; therefore, addiction is contagious; therefore, every addict is the narcotics' analogue of a "typhoid Mary"; therefore, anything which makes it easier for addicts to get along in the open environment will bring with it an epidemic; therefore, permitting physicians to use their discretion in prescribing narcotics for addicts is bound to increase the number of addicts.

The authors point out that these non-sequiturs overlook some relevant facts: (1) that many habitual users sought the initial supply on their own; (2) that the attempt to convert others is not induced so much by missionary zeal as by a practical adaptation to the problem of maintaining supplies under current public policy; (3) that an addict who would impulsively or out of a desire to seem important share his legally obtained supply of narcotics with others would also be endangering his own supply; (4) that the pushers in high use gangs tend to "lay off" the most vulnerable acquaintances—fellow gang members who have recently returned from hospitalization or imprisonment; (5) that one factor making the use of narcotics attractive in delinquent sub-culture is precisely the fact that it is illegal; (6) that it takes much more than an occasional shot to make an addict, addiction also demanding a high degree of personal alienation and psychopathology in addition to repeated use; (7) that even under the completely open market prior to the Harrison Act the epidemiology of addiction was self limiting; and (8) that of those listed as addicts by the Federal Bureau of Narcotics sixty-five per cent are not again heard from for at least five years as users of narcotics.

The Chein Study accepts with equanimity the possibility that many addicts who would take advantage of the opportunity to obtain narcotics from physicians might supplement their supplies on the illegal market. Its authors agree that no true addict is content with maintenance doses because such dosage levels do not satisfy his craving; because of the effects of tolerance, they do not ease his anxiety, they do not give him release from tension or provide the experience of the "high."

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But the authors argue that the physician should help the addict in his drug-taking strategy much as physicians help the diabetics in their insulin-taking program. The physician can work with the addict, switching drugs from time to time, helping him with planned and optimally spaced withdrawal, mixing drugs, or whatever it takes. Thus, it would be quite feasible to reduce the addict's inducement to resort to an illegal market to a minimum—not entirely, but a minimum.

The Chein group also accepts the idea that there will be a class of physically disabled persons. But they argue that such a class exists already, and that its size will be reduced significantly through a policy of medical discretion. If addicts are permitted to maintain their habits, many will be able to lead useful lives, since a principal impediment of their capacity to operate as useful citizens is their need to obtain drugs illegally. The argument of the Chein research team is not that a policy of medical discretion will "solve" the drug addiction problem, but that it is the most humane policy to ameliorate an extremely persistent social problem.

C. *Conclusion*

This sketchy assessment of "effects" and "cure" demonstrates that the central *sociological* problem is analyzing the process of the construction of social reality, especially by authorities. To suggest that sociologists study such processes does not mean that they should not study the phenomena that are the subject of legislation. On the contrary, such studies are important and necessary. But what must be realized is that the terms of such studies are as significant to their outcome as the findings. These terms or concepts are by no means obvious, and the task of the sociologist may be as much to order the phenomena as it is to conduct research in terms of definitions of the phenomena that already prevail. Depending upon how the phenomena are given meaning, they will have a variable effect in the legislative process. If research is conducted in terms of such questions as whether a given behavior weakens moral fiber, the findings are being prejudiced. Similarly, the use of pharmocological constructs may also "bias" our findings. In this area, especially, the task of the social scientist is to present alternative definitions of phenomena, especially deriving from the subjective viewpoint of the actor, as well as from the viewpoint of the authorities.

Using these alternative constructions as a base, it should then be possible to examine the point of view of the authorities, to understand how they define such ideas as effects and cures, and how they introduce these ideas into the legal order. We must understand how officials and

legislators decide that a behavior is "harmful," how they foster studies that will necessarily develop certain kinds of conclusions. To what extent are such judgments shaped by hidden or explicit values? By relations with a real or supposed constituency? By relations with other legislators? By relations with governmental agencies? Social science findings may be given short shrift in legislative setting, under the pressure of alternative commitments. There may well be a mistrust of science as a method for validating reality. In short, the behavior and attitudes of officials and legislators is as legitimate an object of study as, for example, the behavior of marihuana and drug users; and may be more important in understanding how "scientific" findings regarding the effects of "deviant" behavior are incorporated into the promulgation and administration of law in this area.

III. Societal Consensus and Morals Legislation

In addition to claiming that certain usages result in harmful effects, a position demanding enforcement of conventional morality through criminal law typically involves a claim that convention coincides with custom. "Immorality," contends Sir Patrick Devlin "is what every right-minded Christian person presumes to be immoral." According to this position, the behavior in question, whether it be homosexuality, adultery, fornication, gambling, or drinking, cannot be a matter of individual choice, because conventional morality is the glue holding society together. Therefore it must be enforced by the use of "those instruments without which morality cannot be maintained. The two instruments are those of teaching, which is doctrine, and of enforcement, which is the law."[34]

One serious problem of this position is its assumption of customary morality in a differentiated society composed of groups having primary identification along ethnic, religious, racial, educational, occupational, and status lines. There are some behaviors which, in line with a traditional conception of *mala in se*, are customarily regarded as immoral, *e.g.*, murder, robbery, theft. Thus, for those who advocate criminal enforcement on moral grounds the problem is to demonstrate to the society at large that the behavior to be proscribed is indeed inherently evil. In so doing, there is usually reference both to fact and to custom. Suppose, however, that the argument from fact is distorted or overstated. One response is simply to dismiss such argument out of hand.

[34] P. Devlin, The Enforcement of Morals 25 (1965).

But that would be missing the sociological significance of these sorts of contentions. If we wish to achieve a deeper understanding of the relation between societal consensus and the legislation of morals, the arguments of those whose evidence does not fit the facts should not be merely dismissed. Their position may represent an identifiable kind of political response which does not stem solely from a psychological base or a failure of reasoning. A sociological analysis requires that we distinguish among different kinds of motives and examine what a position on morals may represent to its holders. Or, why is there a claim of public support for the position?

A. *Morality and Social Dominance*

When an automobile manufacturer attempts to effect a reduction in the excise tax on automobiles, or when an oil and gas producer seeks to maintain or increase depletion allowances, such conduct may be challenged, but it is understood as rational by all interested parties. The self-interested profit motive is easily comprehended, with no questions asked as to *why* the entrepeneur is behaving as he does—even by those who oppose him. There may be conflict between consumer lobbies and producer lobbies, or between different industries interested in increasing their own profits, but the motives of each are conventional and understandable to all. By contrast, the motives of those engaged in moral advocacy are not so clear, precisely because they do not fall clearly into the domain of apparent self-interests that are usually thought to motivate human effort. In the past decade, there has been an increasing interest on the part of sociologists, especially those concerned with deviance and social control, to interpret the basis of such motivation.

This concern reflects an emphasis on the study of deviant behavior that places less stress on the "deviant" and his personal characteristics as the "cause" of deviant behavior, than upon the reaction of a society or of other individuals which define the behavior in question as deviant. Thus, Howard S. Becker has argued in his influential book, *Outsiders*, that:

> Social groups create deviance by making the rules whose infraction constitutes deviance, and by applying those rules to particular people and labeling them as outsiders. From this point of view, deviance is not a quality of the act the person commits, but rather a consequence of the application by others of rules and sanctions to an 'offender.'

> The deviant is one to whom that label has been successfully applied; deviant behavior is behavior that people so label.[35]

Similarly, John Kitsuse has suggested as a central problem for theory and research in the sociology of deviance the following:

> What are the behaviors which are defined by members of the group, community, or society as deviant, and how do those definitions organize and activate the societal reactions by which persons come to be differentiated and treated as deviants? In formulating the problem in this way, the point of view of those who interpret and define behavior as deviant must explicitly be incorporated into a sociological definition of deviance. Accordingly, deviance may be conceived as a process by which the members of a group, community, or society (1) interpret behavior as deviant, (2) define persons who so behave as a certain kind of deviant, and (3) accord them the treatment considered appropriate to such deviants.[36]

Becker, in particular, has been interested in analysis of the motivations of individuals or social groups that "create" deviance, especially those that "create" crime. He regards people who take the initiative in reordering the content of rules as "moral entrepeneurs," the prototype being the crusading reformer. Becker is not ungenerous in assessing the motives of moral crusaders. He recognizes that they possess not only the motive of the meddling busybody but also the spirit of the humanitarian. "It is appropriate," he writes, "to think of reformers as crusaders because they typically believe that their mission is a holy one. The prohibitionist serves as an excellent example, as does the person who wants to suppress vice and sexual delinquency or the person who wants to do away with gambling."[37]

The motivation of moral entrepreneurship is explored in greater detail in Joseph Gusfield's analysis of the temperance movement. The movement to suppress the use of alcoholic beverages was part of a general effort to improve the human condition. "Temperance" supporters were to be found prominently in such related movements as sabbatarianism, abolition, women's rights, agrarianism, and in humanitarian attempts to improve the lot of the poor. There was a great concern, especially on the part of the WCTU, to improve the welfare of the lower classes, to secure penal reform, to shorten working hours,

35 H. BECKER, OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE 9 (1963).

36 Kitsuse, *Societal Reaction to Deviance: Problems of Theory and Method* in THE OTHER SIDE: PERSPECTIVES ON DEVIANCE 88 (H. Becker ed. 1964).

37 H. BECKER, OUTSIDERS, *supra* note 35, at 148.

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38 J. GUSFIELD, SYMB
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to raise wages for workers, to improve working conditions, to abolish child labor, and to protect working girls from the exploitation of men.[38]

For those whose immediate interests are being gratified within the framework of the established and operative social system, the intense dedication of a moral crusader may appear erratic and beyond understanding. But if the crusader's concern with a moral issue is perceived as symbolic of the preservation or assertion of a style of living that represents a configuration of values, then the crusader may be rational in his own terms. Stated another way, today the weight of "liberal and informed thinking" on the subject of drinking would doubtless argue that while social drinking may sometimes result in medical and social problems, the use of alcoholic beverages should not be prohibited by criminal law. But from the viewpoint of the prohibitionist advocate of the early twentieth century, the issue of national prohibition was not merely a question of drinking; it involved a test of strength between conceptions of social order: on the one side, the social order associated with the villages and farms and sectarian and fundamentalist Christianity; on the other side, the threat posed by the ever increasing social influence and style of urban life, of industrialization, of a Romanized and Anglicized Christianity, and of immigration. *Thus, for the prohibitionist, legalization of social drinking represented the subversion of a way of life.* As Walter Lippman wrote in 1927, when it was becoming increasingly evident that the dominion of rural America was waning in American life:

> The evil which the old fashioned preachers ascribe to the Pope, to Babylon, to atheists, and to the devil, is simply the new urban civilization with its irresistable scientific and economic and mass power. The Pope, the devil, jazz, the bootleggers, are a mythology which expresses symbolically the impact of a vast and dreaded social change. The change is real enough. . . .
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> The defense of the Eighteenth Amendment has, therefore, become much more than a mere question of regulating the liquor traffic. *It involves a test of strength between social orders, and when that test is concluded, and if, as seems probable, the Amendment breaks down, the fall will bring down with it the dominion of the older civilization.* The Eighteenth Amendment is the rock on which the evangelical church militant is founded, and with it are involved a whole way of life and an ancient tradition. The overcoming of the Eighteenth Amend-

38 J. GUSFIELD, SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT 3 (1963).

ment would mean the emergence of the cities as the dominant force in America, dominant politically and socially as they are already dominant economically.[39]

The absence of societal consensus did not deter the ardent advocate of prohibition. On the contrary, that public opinion seemed increasingly to be marshalled against his cause spurred him to advocacy. Public opinion was for him not irrelevant but subject to a different interpretation than the "moderate liberal" would make of it. The growth of the "forces of evil" demanded an even greater commitment to the good cause, which was the dominance of sectarian Christianity in the echelons of government, in the respect accorded to his way of thinking, in the social position of the sectarian Christian in the community.

But the Wickersham Commission observed in 1931 that:

> It is safe to say that a significant change has taken place in the social attitude toward drinking. This may be seen in the views and conduct of social leaders, business and professional men in the average community. It may be seen in the tolerance of conduct at social gatherings which would not have been possible a generation ago. It is reflected in a different way of regarding drunken youth, in a change in the class of excessive drinkers, and in the increased use of distilled liquor in places and connections where formerly it was banned. It is evident that, taking the country as a whole, people of wealth, business men and professional men, and their families, and, perhaps, the higher paid workingmen and their families, are drinking in large numbers in quite frank disregard of the declared policy of the National Prohibition Act.[40]

The subjective side of the sense of status decline is given by one of Joseph Gusfield's W.C.T.U. interviewees who lamented: "We were once an accepted group. The leading people would be members. Not exactly the leading people, but upper-middle class people and sometimes the leaders. Today they'd be ashamed to belong to the WCTU. . . . Today it's kind of lower-bourgeois. It's not fashionable any longer to belong."[41]

Such a statement discloses something fundamental about the relation between societal consensus and the regulation of public morality. For those who affirm a strong moral position, the capacity to regulate

39 W. LIPPMAN, MEN OF DESTINY 28-31 (1927).

40 NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON THE ENFORCEMENT OF THE PROHIBITION LAWS OF THE UNITED STATES, H.R. Doc. No. 722, 71st Cong., 3d. Sess. 21 (1931).

41 J. GUSFIELD, *supra* note 38, at 129.

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42 Gusfield, *Moral Pa*
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44 *Id.* at 192.

45 *Id.* at 117-23.

public morality may document their status in society. In contrast to conventional politics, power is required to achieve status, not to achieve wealth. As Gusfield puts it in a later elaboration of his thesis, "The fact of affirmation through acts of law and government expresses the public worth of one set of norms, of one sub-culture vis-a-vis those of others."[42]

The greater the commitment to a declining way of life, the more important is validation of public recognition through public power. Genuine custom requires less State support than mere convention, which is spurious custom. Thus, in this instance the once dominant WCTU'er reveals the personal psychology of the deviant. She is now the "outsider," by social definition. Drinking has become part of the American way of life, and those who continue to seek its prohibition are ejected from its mainstream.

B. *Responses to Criminal Enforcement*

The debate over the Wolfenden report[43] illustrates several types of response to questions of societal morality. In June of 1957, the Wolfenden Committee recommended that homosexual acts between consenting adult males should be taken out of the criminal law. There were certain individual reservations, but only one dissent from the main recommendation. Mr. James Adair's dissent[44] is long and detailed, but can fairly be characterized as straightforward disapproval and opposition. Homosexuality represents for him not a medical or a social problem, but a moral failure. Thus, an alteration of the criminal sanction can only have a detrimental effect on the developing characters of young people.[45] Like many of those who advocated prohibition, he is clearly a man of high moral principle who does not care to see his conception of social order diluted. Mr. Adair's dissent typifies the critical response that regards any change as a threat to cherished fundamental values.

Sir Patrick Devlin's initial response was likewise fearful of the subversion of a way of life. Sir Patrick drew an analogy between the

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42 Gusfield, *Moral Passage: The Symbolic Process in Public Designations of Deviance*, 15 SOCIAL PROB. 175, 178 (1967).

43 GREAT BRITAIN'S COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, THE WOLFENDEN REPORT (published in the United States by Stein and Day with the permission of Her Majesty's Stationery Office 1963) (hereinafter cited as WOLFENDEN REPORT).

44 *Id.* at 192.

45 *Id.* at 117-23.

suppression of vice and the suppression of surversive activities, writing as follows:

> Society is entitled by means of its laws to protect itself from dangers, whether from within or without. Here again I think that the political parallel is legitimate. The law of treason is directed against aiding the king's enemies and against sedition from within. The justification for this is that established government is necessary for the existence of society and therefore its safety against violent overthrow must be secured. But an established morality is as necessary as good government to the welfare of society. Societies disintegrate from within more frequently than they are broken up by external pressures. There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions. The suppression of vice is as much the law's business as the suppression of subversive activities; it is no more possible to define a sphere of private morality than it is to define one of public subversive activity.[46]

Even Devlin's sympathizers, to say nothing of his critics, find this emphasis difficult to defend. Eugene V. Rostow, in an article that is generally laudatory to Devlin, regrets the analogy and asserts that the wise rule is for the law to do as little as possible in the political sphere of morals.[47]

Rostow is equally critical of another of Devlin's themes—namely, his outspoken and affirmative view of the primacy of the Christian religion in the law. Although Devlin later speaks of practicality, he appears in his first lecture to reflect the thinking typical of those who assert the dominance of their own moral position, and who are willing to use all means available, including the sanctions of the criminal law, to maintain their hegemony. As he says:

> Society cannot live without morals. Its morals are those standards of conduct which the reasonable man approves. A rational man, who is also a good man, may have other standards. If he has no standards at all he is not a good man and need not be further considered. If he has standards, they may be very different; he may, for example, not disapprove of homosexuality or abortion. In that case he will not share in

46 P. DEVLIN, THE ENFORCEMENT OF MORALS 13-14 (1965).

47 E. ROSTOW, THE SOVEREIGN PREROGATIVE: THE SUPRPME COURT AND THE QUEST FOR LAW 45 (1962).

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48 P. DEVLIN, *supra*
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53 *See* Williams, *Flee*

> the common morality; but that should not make him deny it is a social necessity. A rebel may be rational in thinking that he is right but he is irrational if he thinks that society can leave him free to rebel.[48]

The other main line of criticism of the Wolfenden recommendations reflected a practical orientation, questioning whether the report was not "way ahead of public opinion." The report itself took account of public opinion as a factor, but did not consider it determinative unless a legal enactment is "markedly out of tune" with public opinion.[49] The committee did not, however, regard its recommendations as being in that class:

> We have had to consider the relationship between law and public opinion. It seems to us that there are two over-definitive views about this. On the one hand, it is held that the law ought to follow behind public opinion, so that the law can count on the support of the community as a whole. On the other hand, it is held that a necessary purpose of the law is to lead or fortify public opinion. Certainly it is clear that if any legal enactment is markedly out of tune with public opinion it will quickly fall into disrepute. Beyond this we should not wish to dogmatise, for on the matters which we are called upon to deal we have not succeeded in discovering an unequivocal public opinion, and we have felt bound to try to reach conclusions for ourselves rather than to base them on what is often transient and seldom precisely ascertainable.[50]

Public opinion polls seemed to confirm the acute division of opinion anticipated by the committee. The Gallup poll reported 47% believed homosexuality should be a crime, 38% believed homosexuality should not be a crime, and 15% were undecided.[51] A pool taken by the *Daily Mirror* of its readers found 50% to favor a change in the law.[52] Two national dailies, however, the *Daily Express* and the *Daily Mail* came out vehemently and implacably against the report.[53] C. H. Rolph commented in the *New Statesman* that the "startled vehemence of the attack on the proposal" by parts of the press would be more important in determining parliamentary response than the results of polls. "Despite the News Chronicle and Daily Mirror public opinion polls,

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48 P. DEVLIN, *supra* note 46, at 24-25.

49 WOLFENDEN REPORT, at 16.

50 WOLFENDEN REPORT, at 10.

51 LONDON NEWS CHRONICLE, Sept. 10, 1957, at 17, col. B.

52 Rolph, *Wolfenden Revisited*, 44 NEW STATESMAN 378 (1957).

53 *See* Williams, *Fleet Street Notebook*, 44 NEW STATESMAN 310 (1957).

showing respectively 38 percent and nearly 50 per cent in favor of a change in the law, no government will be likely to propose it until much more work has been done on public opinion."[54]

Rolph was correct. In matters of public morals, a vocal minority may prove politically more effective than a majority, especially if the majority has no vested interest in the outcome. In the controversy the polls were almost never cited as evidence. Most participants in the controversy relied on more impressionistic criteria, such as press reaction or public statements of well known individuals and organizations. For example, Archbishop Fisher of Canterbury, after the Church Assembly voted 155 to 138 in favor of the Report, said that the decision the assembly had taken with regard to the recommendations about homosexuality probably represented fairly the opinion of the vast number of the people.[55] The *Times* later quoted this opinion in a leading article, arguing that "the majority of well-informed people are now clearly convinced that these laws are unjust and obsolete. . . ."[56]

The Conservative Government, however, took a different view. The Lord Chancellor told the House of Lords in the first Wolfenden debate that "the Government did not think that the general sense of the community was with the committee in this recommendation."[57] Shortly before the 1960 debate in the House of Commons this conservative position was challenged in an editorial of the *Times*,[58] and in articles by Wolfenden[59] and A. L. Ayer. Ayer wrote:

> It has been said . . . that public opinion is not ready for the change. As a statement of fact this is not easy to discuss since no scientific inquiry into the state of public opinion on this question has been undertaken. It is not known what answers people would give if the issue were put to them clearly. I think it probable indeed that a majority would be found to disapprove of homosexuality. . . . But from the fact that a person disapproves of homosexual practices it does not follow that he thinks they should be treated as crimes. Such evidence as there is available, for example of the public's reaction to the Montagu case, does not suggest that there is general satisfaction with the way the law now operates, or a strong majority opinion that it should not be changed.

54 Rolph, *supra* note 52, at 373.

55 THE TIMES (London), Nov. 15, 1957, at 7, col. 1 (here, as in all following quotations from THE TIMES, we are quoting the TIMES' paraphrase).

56 THE TIMES (London), Nov. 20, 1957, at 5, col. 3.

57 THE TIMES (London), Dec. 5, 1957, at 2, col. 6.

58 THE TIMES (London), June 29, 1960, at 7, col. 6.

59 Wolfenden, *Ahead of Public Opinion?* 47 NEW STATESMAN 941 (1960).

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> Moreover, even if it were established that the majority of the public was in favor of leaving things as they are, this would not relieve the members of parliament from the responsibility of forming their own judgments and acting in accordance with them. They should take the state of public opinion into account, but they have not to be entirely guided by it. It is not and should not be a principle of government that social reform must wait upon a favorable plebiscite.[60]

But in the House of Commons conservative speakers repeated the notion that there would be "grave dangers attaching to general relaxation of the deterrent"[61] and that "great harm would be done."[62] Labour MP Dr. Broughton suggested that homosexuals are "behind the present small wave of pressure. Was it not possible that they wished to ignore public opinion?" Home Secretary Butler stressed the necessity to educate public opinion, but he also developed a new justification for non-action: "In a period when religious and ethical restraints were weak . . . the criminal law acquired a special significance." It could not be abolished or liberalized as long as the "second line of defense," i.e. the ethical restraint, is not strong enough.[63]

Four years later, the then Home Secretary Brooke still took the same stand.[64] But supporters of the Wolfenden Report began now to insist that there had been a change in public opinion. The chairman of the Council of Churches advisory group on sex, marriage, and the family, Mr. Greet, argued at the annual meeting of the Council of Churches as follows: The main reasons for the parliamentary inaction "was the memory of the national controversy which raged at the time of the publication of the report and the evidence of a large body of opinion variously expressed in highly emotional terms against the opinion of the Wolfenden Committee. . . . Members of the group were unanimous that there has been as steady movement both within society generally and more particularly within the churches that was closer to the general standpoint of the committee."[65] When Mr. Abse, the

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60 Ayer, *Homosexuals and the Law*, 47 NEW STATESMAN 908 (1960).

61 Remarks of M. P. Shepherd, THE TIMES (London), June 30, 1960, at 5, col. 4.

62 Remarks of M. P. Lagden, *id.* at col. 6.

63 THE TIMES (London), June 30, 1960, at 5, col. 1.

64 This is an important matter, but it is essentially one in which the Government must take account of the climate of public and parliamentary opinion. A motion calling for the implementation of the Wolfenden Committee recommendations was heavily defeated on a free vote in this house in 1960, and I have no evidence that there has been any material change in the balance of opinion since then.
THE TIMES (London), April 17, 1964, at 4, col. 1.

65 *Id.*, Oct. 22, 1964, at 8, col. 2.

Labour MP, tried to introduce a private bill on homosexuality in 1965, he said he believed that public opinion had changed.[66] What may ultimately have proved most persuasive in a political sense was a letter to the *Times*, May 11, 1965, signed by Lord Devlin and other Lords, emphasizing the alteration in public opinion, as reflected in the endorsement of the Wolfenden proposal by leading groups, especially by leading church groups, and urging the Labour Government to act.[67] This letter suggests that although the public opinion polls may not have had a direct effect, their findings may have influenced leading groups in the community, which, in turn, influenced some of those initially opposed to the report, such as Lord Devlin. Final passage of a bill legalizing consenting relations between adult homosexuals came in the summer of 1967.[68]

C. *Conclusion and Research Suggestions*

Social order is both a constant and a variable. It is a constant insofar as all societies require a measure of regularity and predictability. It is a variable insofar as a wide variety of social organization and rules have been demonstrated to satisfy that need. Social order in the sense of regularity and predictability of behavior, of an ongoing functioning society, does not require, for example, the rule of capital punishment,

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[66] *Id.*, May 12, 1965, at 7, col. 4.

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> Sir,—In 1957 the Wolfenden Committee recommended, after three years' study of the evidence, that homosexual behaviour between consenting adults in private should no longer be a criminal offense. This proposal has been endorsed by the British Council of Churches, the Church Assembly, and the Moral Welfare Council (now the Board of Social Responsibility) of the Church of England, a Roman Catholic Advisory committee appointed by the late Cardinal Griffin, the Methodist Church, and leading spokesmen of many other Christian denominations, as well as prominent humanists. It has received the support of the Howard League for Penal Reform and the Institute for Study and Treatment of Delinquency, and also of other experts in criminology, including several judges, as well as of very many doctors, psychiatrists and social workers.
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> The great majority of national daily and weekly newspapers have strongly and consistently advocated the reform. In February of this year a resolution calling for its enactment was passed by the Liberal Party Council, and it has also been supported by many individuals and groups in both the Labour and Conservative Parties. Seven years ago a distinguished list of signatories wrote in your columns that the existing law clearly no longer represented either Christian or Liberal opinion in this country, and that its continued enforcement would do more harm than good to the community as a whole. We hope that in response to the Motion calling attention to the Wolfenden Committee's recommendations, which Lord Arran is to move in the House of Lords on May 12 Her Majesty's Government will now recognize the necessity for this reform and will introduce legislation.

Id., May 11, 1965, at 13, col. 4.

[68] In July, 1966, the House of Commons gave the "Sexual Offences Bill"—introduced as a private bill—a 244 to 100 majority at first reading. *See Id.*, July 6, 1966, at 7, col. 3.

or a criminal sanction against the use of alcoholic beverages, or the sale of goods for private profit. Yet the history of human society is not the history of disinterested inquiry. On the contrary, men will fight, often in the name of truth and necessity, for the preservation of myths, legends, and beliefs that constitute a cherished way of life. In the process, reason becomes tarnished, and ideology contaminates fact and judgment.

The task of the social scientist is primarily to separate fact and judgment and value. This is especially necessary in the area of law and morals, because moral judgments are frequently sustained on the basis of presumed facts, some of which the social scientist can find only with difficulty. More important, even if facts are found, their relevance may be more or less salient, depending upon those who are utilizing the facts for decision-making. For example, it would seem relevant from the British experience with the Wolfenden report to have studies of public opinion on the issue of law and morals. From this, however, it should not be inferred that public opinion ought to be dispositive as to policy. But we may assume that on various issues, public opinion will be divided and will depend on the alternatives presented to those interviewed. For example, instead of asking whether or not homosexuality ought to be taken out of the criminal law, alternatives might be offered the interviewee, such as having the behavior in question regulated by medical doctors, or social workers, or psychologists. There is surely a difference between simple removal from criminal law and an alternative that permits some degree of regulation. It would also be important to know more about the basis of public opinion than a simple pro or con question would suggest: how well informed was the interviewee? what was the apparent basis for his opinion?

From our brief review, we may anticipate five different postures that may be taken toward the issue of morality enforcement through criminal law, along two dimensions—strength of moral feeling, and persuasability by fact. One is represented by the *absolute moralist*. He is apt to have a rigid conception of social order. Facts are not likely to be of particular importance in shaping his opinion, except as they serve to reinforce previously held conceptions. Attitudes toward community morality are based almost exclusively upon a sense of outrage and moral indignation, resulting in *moral condemnation*.

Closely linked to this position is that of the *conservative moralist*. The conservative moralist is more responsive to fact than the absolute

moralist, especially if the facts are presented by highly respectable and assuredly moral sources, such as church groups. He is open to persuasion, but only if he is convinced that the conventional interpreters of morality support liberalization. Sir Patrick Devlin's response to the Wolfenden report exemplifies the position of the conservative moralist.

The position taken in the Wolfenden report itself may be described as *pragmatic moral pluralism*. It does not agree with, but recognizes and affirms the possibility of varying moral positions and is concerned primarily with the consequences of legal proscriptions. At the same time, it takes a definite stand on morality of the behavior in question.

By contrast, a *pragmatic amoral pluralism* concentrates principally upon an appraisal of facts, neither affirming nor denying the morality of the behavior in question. Scientific evaluations on the use of various drugs or alcohol typically have this quality. Such analyses are not concerned with whether the behavior in question is morally desirable or reprehensible, but with the actual positive or negative effects on those involved. For the pragmatic amoral pluralist, the issue is decided strictly on merit.

Finally, there will be those in the population who *condone* the behavior. Certainly, in the prohibition controversy, many of those who opposed national prohibition did so on the grounds that social drinking was a private matter, that they enjoyed drinking, and thought that others might like it as well. People who regularly use beverage alcohol and serve it in their homes regard social drinking as a pleasurable leisure time activity. Clearly the same attitude would be held by some toward gambling, drugs, and various sexual activities. *Condonation* is not usually associated with the moral fervor of condemnation, although it may sometimes be, especially when the activity in question represents a way of life to the individuals involved. Most important, however, those who condone an activity are likely to do so on subjective grounds, and may not be particularly interested in facts revealing the harmful effects, if any, of the activity.

These categories are not to be taken as definitive, or as entirely mutually exclusive, since they may vary with the social role the individual is playing. It is by no means impossible for an individual to take a public position of moral condemnation, for political reasons, and yet condone the activity privately. Opinion surveys have difficulty measuring every nuance of human activity and attitude; but they can be highly suggestive and provide us with an initial topography in this area that would clearly be relevant to the development of legislation.

Another type of study suggested by our review is of the history, psychology, and sociology of moral reform. One type of study is exemplified by Gusfield's analysis of the WCTU, another by Becker's review of the marihuana tax act, as well as several other studies by political scientists and historians on the prohibition movement. Closely related to these would be studies of the history and sociology of codification in the criminal law, and the social interests that assert themselves in criminal code revisions. Although there have been several such revisions, no studies are available of the revision process, including legislative response. Not only would such studies be of scholarly value, but they would also serve to make legislative decision-makers more conscious of the forces that affect their decisions.

Finally, the whole issue of societal consensus and morals legislation suggests studies of the consequences of social conflict and controversy on community sentiment and sense of solidarity. Although it is frequently assumed that conflict on moral issues will lead to community disorganization, there is a distinguished body of sociological thought that argues to the contrary. Thus, following Durkeim and Simmel, Coser has argued that both conflict and crime arouse the community into an explicit examination of its norms, thereby contributing to the revival and maintenance of common sentiments.[69] Viewed this way, the occurrence of certain crimes and political conflict may contribute to a greater community consensus than existed prior to the controversy. Certainly, community contorversies over morals legislation lend themselves to study from this perspective.

IV. The Theory of Enforcement

The recognition that substantive criminal law may have undesirable effects on the enforcement process is not new. Sir Robert Peel, creator of the first metropolitan police force, was profoundly aware of the problem that a broad ambit of enforcement might create for law enforcement agencies. Although Peel is widely known for his introduction of police into the industrializing society of nineteenth century England, it is not generally known that he undertook to revise the criminal law of England before introducing his bill to form a metropolitan police force. The problems faced by Peel in a rapidly industrializing nineteenth-century society bore some notable similarities to the urban problems of an automating twentieth-century society.

To buttress his argument for the necessity of a police force, Peel compared population statistics with crime statistics from London and

[69] *See* L. Coser, The Functions of Social Conflict (1956).

Middlesex, arguing that crime was increasing at a faster rate than population. In the period 1821 to 1828 Peel pointed out, population had increased 15-1/2 per cent while criminal committals in London and Middlesex had risen by 41 per cent. Peel was not unaware, however, that the range of acts considered criminal was exceedingly severe, and that a police force would be hampered by the necessity of enforcing unpopular, inconsistent, and harsh strictures. According to Charles Reith, the leading British historian of police:

> Peel realized what the Criminal Law reformers had never done, that Police reform and Criminal Law reform were wholly interdependent; that a reformed Criminal Code required a reformed police to enable it to function beneficially; and that a reformed police could not function effectively until the criminal and other laws which they were to enforce had been made capable of being respected by the public and administered with simplicity and clarity. He postponed for some years his boldly announced plans for police, and concentrated his energies on reform of the law.[70]

During the 1820's Peel first consolidated the laws relating to theft, offenses against the person, and forgery. For example, there had been 130 statutes relating to larceny. He condensed them into one act, and also drastically reduced penalties. Under these reforms, the death penalty was abolished for more than 100 offenses, leaving capital punishment for only the more serious felonies; there were similar mitigations in less serious crimes.[71]

The twentieth century United States, by contrast, has expanded the boundaries of the criminal law, especially for drug offenses, and has increased penalties. With the passage of the Harrison Act in 1914, Congress embarked upon a policy prohibiting legal access to narcotic drugs by those addicted to such drugs. This policy has been reaffirmed and strengthened by subsequent federal and state legislation and has served as the model for policy regarding not only opiates, but marihuana and other "intoxicating" substances.[72] Such policies were instrumental in creating the Federal Bureau of Narcotics which in turn has

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70 C. REITH, THE POLICE IDEA: ITS HISTORY AND EVOLUTION IN ENGLAND IN THE EIGHTEENTH CENTURY AND AFTER 236 (1938).

71 For example, Peel reduced the penality for fishing in another person's water from seven years transportation to an obligation to pay three times the value of the fish caught.

72 Ploscowe, *Some Basic Problems in Drug Addiction and Suggestions for Research*, in DRUG ADDICTION: CRIME OR DISEASE 15 (1st ed. Joint Committee of the American Bar Association and the American Medical Organization, 1961).

advocated increasingly stringent law enforcement and more severe penalties as answers to drug addiction problems. The Bureau has for years supported the theory and policy that if penalties for narcotic use were made strong enough, and if the laws were enforced strictly enough, drug addiction, the drug traffic, and marihuana use would disappear from the American scene.

A review of the literature in this area reveals not a single social scientist who supports the theory and policy of the Federal Bureau of Narcotics, *i.e.*, the theory that increasingly stringent punishments and law enforcement will solve the problem of narcotics addiction.[73] There are various difficulties with assumptions of the theory, but one overwhelming conclusion—it does not work. The problem is well summarized in the statement of Senator Thomas J. Dodd during the 1962 proceedings of the White house Conference on Narcotic and Drug Abuse:

> In 1956, as a result of widespread national dissatisfaction with the growth of narcotic addiction, especially among juveniles, and because of deep frustration over the apparent failure of existing legislation to deal with the problem, a new Narcotic Control Act was passed into law. This law contained three major innovations that were expected to have a tremendous deterrent effect on narcotic racketeers.
>
> First: It removed from the hands of judges all discretion in the sentencing of convicted narcotic offenders by providing a mandatory minimum sentence of 5 years for the first offense and 10 years for subsequent offenses, with maximum penalties of 20 years for the first offense and 40 years for subsequent offenses.
>
> Second, it removed all possibility of parole for narcotic offenders, thus putting them in a special category in our Nation's Federal prisons.
>
> Third, it emphasized the concern of Congress over Juvenile drug use by providing up to life imprisonment or even death for adults convicted of selling narcotics to a juvenile under the age of 18.
>
> To demonstrate the severity of this law, it should be pointed out that an illegal narcotic transaction normally involves several violations of the act, each of which could be punishable by a mandatory 5-year sentence. Thus, a first offender could be, and frequently has been sentenced to 20 or 30 years for a first offense.
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> When Congress passed the Narcotic Control Act of 1956 it radically

[73] *See, e.g.*, I. CHEIN, THE ROAD TO H: NARCOTICS, DELINQUENCY, AND SOCIAL POLICY (1964); W. ELDRIDGE, NARCOTICS AND THE LAW: A CRITIQUE OF THE AMERICAN EXPERIMENT IN NARCOTIC DRUG CONTROL (1962); L. KOLB, DRUG ADDICTION: A MEDICAL PROBLEM (1962); A. LINDESMITH, THE ADDICT AND THE LAW (1965); E. SCHUR, NARCOTIC ADDICTION IN BRITAIN AND AMERICA: THE IMPACT OF PUBLIC POLICY (1962).

departed from the existing trend in State and Federal criminal legislation, a trend toward the individual treatment of convicted offenders with a view to their eventual rehabilitation. Congress made this departure because it felt that the peddling of narcotics was so vicious, dangerous, and contagious a crime that unusually severe and rigid methods were necessary and justified in dealing with it. If the passage of several years under this act had been accompanied by a marked decreased in narcotic crimes, we might say that the law could have justified itself. For after all the primary purpose of law enforcement is the protection of the public; the care and rehabilitation of criminals, however important, must be subordinate. But has the law been effective?

We have now had several years of experience under it. Its degree of effectiveness is a matter of dispute. The 1956 law has proved helpful in the jailing of several large-scale narcotic racketeers. Yet the growth of drug traffic continues.

The dispute is heightened by the fact that available information on the spread of narcotic addition is completely contradictory. The Federal Bureau of Narcotics tells us that there are 46,798 drug addicts in the entire country. But testimony before the Senate Subcommittee to Investigate Juvenile Delinquency by responsible city and State officials indicates that there may be as many as 50,000 addicts in the city of New York alone, and from 15,000 to 20,000 addicts in the State of California alone.

Only last week the executive director of the New York City Youth Board told our subcommittee that 25 per cent of the children studied by the youth board are involved in the use of drugs ranging all the way from heroin to marihuana, pep pills, goof balls, and other varieties. He told of entire neighborhoods where children were exposed to narcotic pushing "as part of their daily life." In his opinion and in the opinion of countless people with whom I have talked, who deal with this problem on a day-to-day basis, there are more narcotics illegally available today than ever before.

Therefore, I think it is clear that the severe mandatory sentencing provisions of existing law have not had the deterrent effect that was hoped for.[74]

Senator Dodd's statements should not come as a surprise to sociologists in this area, especially Alfred Lindesmith, who had for years been critical of the assumptions of the Federal Bureau of Narcotics' enforcement theory. The remainder of this section shall raise some critical questions about the assumptions underlying the theory of stringent enforcement.

[74] Proceedings of the White House Conference on Narcotic and Drug Abuse 229-30 (on file in the University of Southern California Law Library).

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[75] Blumer, *Society as Sy*
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A. *Sanctions and Deterrence*

By creating ever increasing penalties, enforcement theory assumes that the more severe the penalty, the greater its deterrence value. There are a variety of difficulties with that easy assumption. First, all potential defenders will not calculate the threat of sanctions with the same precision. A potential violator of food and drug regulations may not make the same sort of calculations as a professional con-man. Neither will an opium addict make the same calculations as a marihuana user. Secondly, potential offenders may use different yardsticks. The subjective meaning of a period of imprisonment may well differ depending upon the type of crime. Third, even assuming a process of rational calculation, the size of a penalty constitutes only one part of the equation. Equally important is the probability that enforcement will take place. If a potential offender is to make a rational calculation, how is he to weigh the size of penalty against the probability of enforcement? Is a penalty of one year, with a chance of one in one hundred of being caught, a greater or lesser deterrent than a penalty of five years with a chance of one in one thousand of being caught?

A number of sociologists, especially those of the "symbolic interaction" school, take the view that people act by interpreting their situation and then adjusting their behavior in such a way as to deal with their subjective evaluation of the situation.[75] For example, to understand how the policeman responds to the sanctions imposed by the "exclusionary rule," we must assume the viewpoint of the policeman himself. The exclusionary rule to the policeman is not a cut-and-dried sanction but is regarded instead as an added feature of his general social situation. He will use his general understanding of his role and the resources it provides to cope with the sanctions contemplated by the exclusionary rule. Similarly, to understand the meaning of sanctions to the potential offender, we must place ourselves in his position. Ideally, this would be done by taking the actual living role of the potential offender. It is fairly easy to take for the sociologist the living role of the policeman because this is a legal activity. By contrast, the sociologist finds it more difficult to take the actual role of the deviant. Enough literature is available, however, to suggest how the narcotics and marihuana user and homosexual views their unlawful behavior and the sanctions that are intended to deter it.

In the process of legislating, lawmakers very likely go through a

75 Blumer, *Society as Symbolic Interaction*, in HUMAN BEHAVIOR AND SOCIAL PROCESSES: AN INTERACTIONIST APPROACH 172 (A. Rose ed. 1962).

process of reasoning similar to that of the "action" sociologist. They ask, for example, whether if faced with a 20-year penalty, they would themselves use drugs. But phrasing the question in that way does not reveal what the lawmaker actually wants to find out, *i.e.*, the subjective meaning of drug use to the potential offender; it reveals only the subjective meaning of drug use to the lawmaker. One way of putting oneself into the position of the potential offender is to translate the abstraction of such terms as "opiate addiction," "marihuana use," "homosexuality," into the reality of an already experienced everyday behavior. For example, the lawmaker might ask himself how he would respond to penal sanctions forbidding the smoking of cigarettes, the drinking of coffee, sexual orgasm, or any other commonly practiced activity which, if "excessively" indulged in, *might* lead to social and personal harm.

If a hypothetical lawmaker were to do this, he would first observe that penal sanctions are not necessarily the most compelling. For instance, regarding cigarette smoking, there has been an increasingly confirmed threat of cancer, severe cardio-vascular impairment and, more recently, a general tendency to shorten life. These are heavy sanctions, and if any of them were to be meted out by the State as a calculated retribution for smoking cigarettes, they would probably be regarded as cruel and unusual punishment. Yet these sanctions give every appearance of having had little effect upon the prevalence of cigarette smoking by the American population. The question is why not?

One reason is the abstract character of the sanction; the sanction is not a certainty but is instead a probability. The man who coughs heavily or turns up a suspicious looking sore in his mouth is one for whom the potential of death and disease is more likely to seem a reality. His response may be to "cut down," at least temporarily. Some stop, of course, and of those who do, even for a period of years, there are relapses. Similarly, there are people who use marihuana repeatedly, who use opium repeatedly, who engage in homosexual activities repeatedly, and who rarely, if ever, are caught. Marihuana usesrs and homosexuals, especially, may continue in their use or their activity for many years without even coming into contact with law enforcement.

In addition, those who regularly use opiates, or marihuana, or who regularly engage in homosexual activities, or who regularly smoke cigarettes or drink coffee develop a set of meanings and definitions as-

sociated with the activities that make legal penalties seem especially abstract and irrelevant. The coffee drinker or smoker may plead that he cannot "get started" in the morning without nicotine or caffeine. Similarly, the illegal drug-using "outsider" develops a shared set of responses and definitions including "a special language or argot, certain artifacts, a commodity market and pricing system, a system of stratification, and ethical codes."[76] These shared responses and definitions serve to moderate the salience of prohibitory laws. Like the exclusionary rule for the policeman, the laws take their place as another of life's obstacles to be overcome. For people who are committed to a certain activity, such as driving an automobile, associated dangers—that is, sanctions—are relevant but are not necessarily determinative in forestalling the activity. Usually, instead of changing his way of life, the individual adjusts his life so as to decrease the possibilities of the threatened sanction.

We may also inquire why the particular activity is so compelling. This is not so difficult to understand if it realized that we all engage in activities which we cannot justify on rational grounds. Men who have suffered coronary attacks will continue to work at a harder pace than the doctor orders, even though the threat of death is very real. Men frequently behave in terms of a felt need which may, to those not experiencing the same situation, seem highly irrational. *The behavior of the "deviant" is not so exotic if we place ourselves in his total life situation, not merely if we ask how we would respond to his sanctions.* Narcotics laws, for example, require that the addict, who will experience serious withdrawal symptoms if he stops using narcotics, terminate his use immediately. Some addicts, in the face of these laws, have doubtless done so. In general, however, the addict does not terminate his use. Instead, he tries to find alternate means to continue his use—means which will result in a minimal possibility of legal sanction.

For these reasons—the difficulty of making rational calculations, the fact that sanctions are not necessarily invoked, that sanctions may be mitigated in the process of enforcement, that sanctions are abstract, that "deviants" develop a set of shared definitions that make sanctions even more irrelevant, that the activity being sanctioned is regarded as compelling—an increase in penalties is not likely to dissuade most "deviants" from continuing their illegal activity. Of all these reasons perhaps the most important is the "deviants' " definition of the activity.

[76] Ray, *The Cycle of Abstinence and Relapse Among Heroin Addicts*, in THE OTHER SIDE: PERSPECTIVES ON DEVIANCE 164 (H. Becker ed. 1964).

During prohibition many drinkers felt that forbidding drinking was an arbitrary assertion of State authority, based upon an unrealistic conception of alcohol and its effects. The accuracy of that assertion aside, it is important to understand that for sanctions to be meaningful they must be considered by potential violators as having a rational basis. Usually, when a sanction is invoked for a given activity, reasons are given for sanctioning the activity. If large groups in the population do not believe that the activity is wrong or harmful, especially if the "reasons" do not stand up to experience, the rule loses its authoritative character. Young people, especially, are likely to test the "reasoning" behind the rule. If drinking is forbidden, then the young will try it and measure the effects upon them as against the effects implicitly asserted by the threat of legal sanction. The same is true of marihuana. If the behavior seems not so very "harmful," or if its harmful effects seem susceptible to control, the criminal law tends to lose its authoritative character. "Because I said so" or "if you don't you'll be punished" does not usually suffice as "reasons," either in child rearing or legislation. To be effective, authority must be "legitimated" through both consent and rationality—a genuine understanding of the *total* situation. By contrast, pure *coercion* is apt to be far more limited in its capacity to enjoin behavior.

B. *Moral Authority and Enforcement Practices*

"A legislature," writes Henry Hart, "deals with crimes always in advance of their commission (assuming the existence of constitutional prohibitions or practices excluding ex post facto laws and bills of attainder). It deals with them not by condemnation and punishment, but only threat of condemnation and punishment, *to be imposed always by other agencies*. . . . In the event of a breach or claim of breach, both the primary and remedial parts must be interpreted and applied by the various officials—police, prosecuting attorney, trial judges and jurors, appellate judges, and probation, prison, and parole authorities—responsible for their enforcement. The attitudes, capacities, and practical conditions of work of these officials often put severe limits upon the ability of the legislature to accomplish what it sets out to accomplish."[77]

Nowhere does the interpretation and application of legislative enactments result in greater problems for the enforcement machinery than in the enforcement of morals. It is easy enough to pass a law condemning a given activity. It may be extremely difficult to carry out enforce-

[77] Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401 (1958).

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ment of such a law, while at the same time adhering to constitutional standards of legality. Writing in 1935, Thurman Arnold had some cogent observations on the effect of the national prohibition law on the operations of law enforcement machinery:

> Before . . . prohibition . . . the problem of search and seizure was a minor one. Thereafter, searches and seizures became the weapon of attack which could be used against prohibition enforcement. For every "dry" speech on the dangers of disobedience, there was a "wet" oration on the dangers of invading the privacy of the home. Reflected in the courts the figures are startling. In six states selected for the purpose of study we find 19 search-and-seizure cases appealed in the 12 years preceding Prohibition and 347 in the 12 years following.[78]

If there is one point on which all observers of the operation of the laws prohibiting narcotics use, marihuana use, and homosexuality would agree, it is on the difficulty of enforcing these laws within the trend of the developing standards of constitutional legality.

If the central task of the administration of criminal law is to balance the conflicting principles of order and of legality, the dilemma of the police is heightened to the extent that they are required to enforce a rigid conception of order. The policeman's job is one of the most dangerous, if not the most dangerous, in the community. The element of danger in his work requires that he be especially attentive to signs indicating a potential for lawbreaking. By creating a class of lawbreakers, such as narcotic addicts, the legislature in turn increases the danger the policeman's work. If narcotics addicts are people with a high potential for becoming thieves and robbers, then what the legislature has done is to "criminalize" the environment. By so doing, the legislature reinforces the tendencies of police to be suspicious and also reinforces the demands that they be given greater latitude within the area of law enforcement. The policeman is an *authority* and he understandably wishes to exercise that authority in order to remove criminals from the social scene. These two elements in the policeman's role—that is, the elements of danger and authority—unavoidably combine to frustrate procedural regularity. If it were possible to structure social roles with specific qualities, it would be wise to propose that the combination of danger and authority should never, for the sake of the rule of law, be permitted to coexist. Danger typically yields self-defensive attitudes and conduct that strain to be controlled because danger so easily arouses fear and anxiety. Authority under such conditions becomes a resource

78 T. ARNOLD, THE SYMBOLS OF GOVERNMENT 164 (1935).

to reduce perceived threats rather than a series of reflective judgments arrived at calmly. Thus, in the process of enforcing "unenforceable" laws, the policeman necessarily has a tendency to undermine the moral authority of the criminal law. He does this as a self-protective matter, not because he is especially sadistic or pathological. Rather, the more the community imposes upon the policeman an obligation to reduce criminality, which the community itself defines, the more likely will the policeman behave in ways that are detrimental to the rule of law. As a spokesman for the Federal Bureau of Investigation recently stated the issue:

> The criminal code of any jurisdiction tends to make a crime of everything that people are against, without regard to enforceability, changing social concepts, etc. . . . The result is that the criminal code becomes society's trash bin. The police have to rummage around in this material and are expected to prevent everything that is unlawful. They cannot do so because many of the things prohibited are simply beyond enforcement, both because of human inability to enforce the law and because, as in the case of prohibition, society legislates one way and acts another way. If we would restrict our definition of criminal offenses in many areas, we would get the criminal codes back to the point where they prohibit specific, carefully defined, and serious conduct, and the police could then concentrate on enforcing the law in that context and would not waste its officers by trying to enforce the unenforceable, as is now done.[79]

One of the most serious dangers, and also one of the most difficult to establish, is the possibility that police will use their authority to harass those whom they consider to be petty offenders because they cannot gain evidence to convict in court. A recent study of the enforcement of homosexuality laws indicated that police departments were not averse to harassing homosexuals as a way of controlling this behavior. Again, this policy is based upon a theory of enforcement. The study, which reviewed police policies in Los Angeles County, reported that in the large municipalities the policy seems to be one of quasi-toleration:

> For instance, in one area notorious for its homosexual bars, the local police department takes no action other than occasional decoy operations that tend to suppress only the most offensive overt conduct. In less populous cities the policy toward these bars is less tolerant. Many

[79] The President's Commission in Law Enforcement and Administration of Justice, Task Force Report: The Courts 107 (Mar. 13, 1967) (on file in the University of Southern California Law Library).

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[82] *Id.* at 115.

> of the smaller agencies admitted that they use harassment as an effective tool to deter suspected homosexuals from frequenting their bars. It does not appear that policies toward bars is a reflection of public opinion because all agencies reported that citizen complaints against these bars are rare. Rather, the attitude of enforcement agencies in larger communities is that if homosexuality is suppressed at one location it will soon develop elsewhere in that community, so that it is preferable to allow homosexual bars to exist where they are known and can be kept under observation. Agencies in smaller communities do not face the same problem and may be more protective of their community's reputation. Harassment is an effective device for safeguarding this reputation because it succeeds in eliminating homosexuals from the community without the publicity which attends arrest, trial, and conviction.
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> Although harassment is an effective suppression technique for the smaller community it does not solve the overall problem. Presumably the homosexual will go to restrooms and bars where his identity is not known thus increasing enforcement problems in areas where harassment is not practiced.[80]

The problem of introducing these sorts of police techniques at low levels of visibility is fairly clear. One consequence is to communicate to the population that is being "harassed" that law enforcement is not a regularized, authoritative procedure, but is subject to the arbitrary behavior of authorities. If the criminal law is to maintain its moral authority, it can ill-afford the appearance of arbitrary enforcement.

C. *Crimes Without Victims*

The problem of low visibility decision-making and police corruption is especially salient in so-called "crimes without victims."[81] This distinction has become increasingly important in criminological theory, because both theories of criminality and theories of enforcement do not apply equally well to "victim" and "victimless" crime.[82] Ordinarily, crime and the criminal is visualized as an involuntary interaction containing an element of assault. The "criminal" is a man who strikes at a victim and takes off with ill-gotten gains. Thus, a survey asking respondents to rate the seriousness of thirteen crimes showed the two with clearest implication of assault—child beating and assault with a

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80 Mosk, *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 U.C.L.A. REV. 643, 723 (1966).

81 E. SCHUR, CRIMES WITHOUT VICTIMS: DEVIANT BEHAVIOR AND PUBLIC POLICY (1965).

82 *Id.* at 115.

deadly weapon—to rank highest in "seriousness" of offense. The prototypical criminal is a robber, a man who violates persons and property. Such a conception of criminality, however, also implies a conception of the role of police in society. Police are perceived as *protectors* of individuals who have been wronged by other individuals, and the police represent an organized social institution for coming to the aid of victimized individuals. By contrast, in victimless crime the *collectivity* is the victim rather than the individual. This fact leads to a number of unanticipated consequences that tend to undermine enforcement.

When a policeman investigates a strong-arm robbery, or a burglary, or a rape or a forgery, he ordinarily does so at the request of an aggrieved citizen. The prototypical crime implies a conception of policing in which the police are a community *resource* to be called upon by a citizen, the way citizens call upon firemen to help them control fires. Every control system, however, depends upon an awareness that something is out of order. The offending event must somehow be observed and reported before sanctioning processes can be invoked. The potential efficiency of a control system, varies, therefore, with its capacity to receive or observe reports of offense. If two men fight one another in private, and do not report the occurence of the fight, authorities cannot sanction either, even if the behavior of each transgressed legal boundaries. Many rule violations are of course socially managed in this fashion, the disputants preferring to settle matters privately. Although the State may have a technical interest in enforcing all violations of criminal law, in fact, prosecution will rarely take place without a citizen complainant. Since control of vice typically involves crimes for which there are no citizen complainants, vice control requires that police themselves locate offenses. The community may or may not support the idea that such activities ought to be "crimes"—that is an independent question of some complexity. It is clear, however, that the community does not and cannot support, in the day to day work of enforcement of victimless crimes, the elemental need of ascertaining and reporting that an offense has been committed.

Several problems are raised by the "isolated" character of the "morals" legislation and of the pattern of enforcement. One of these is suggested by Senator Dodd and by students of criminal statistics: the difficulty of obtaining any sort of reliable estimate either of the incidence or prevalence of offenses committed, or of the effectiveness of enforcement. Each occasion that an individual lights up a marihuana cigarette, or, in some jurisdictions, places a bet, a crime has been com-

mitted. A fairly reliable estimate can be made of the number of burglaries committed, even though some that have been reported have not occurred, and some that have occurred have not been reported. But since by definition, crimes without victims are not reported, pending the introduction of more sophisticated research techniques, only very general and impressionistic estimates can be made of the extent of narcotics, gambling, marihuana, abortion, and homosexuality offenses. Thus, the theory of enforcement of such crimes through ever more stringent penalties is difficult to verify.

This feature of the theory, however, can lead to further consequences. One is the relative ease with which the police themselves may become part of the underworld and share in its corruption and profits. The most direct illustration occurs when police themselves become criminals. For example, in New York recently, six key narcotics officers —one federal agent, two investigators from the Nassau County District Attorney's Office and three New York City detectives—were indicted by a Federal Grand Jury for selling narcotics to peddlers. According to their chief, the three city detectives were selected for assignment to the prestigious Special Investigating Unit on the basis of "alertness, intelligence, aggressiveness—all the qualities that make for a good detective."[83]

Graft is a less dramatic but probably more pervasive form of corruption. In some police departments, graft is openly acknowledged as a "way of life." It is all too easy, for example, to have a numbers racket or a bookmaking racket flourishing in a city and for the police, at the same time, to arrest defendants periodically on charges of bookmaking and conducting a numbers operation.

"Organized" crime may exist on a large scale, and its existence can be aided by police cooperation. But to uncover the details of the collaboration is difficult. In studying one city that experienced a lawless collaboration between police and the criminal underworld, the writer was interested by the means the police used to justify it and, at the same time, to maintain a conception of themselves as responsible and able craftsmen, doing their job.[84] Faced with the human problem of justifying the morality of personal "misbehavior," these police did not see themselves as being crooked, or especially disreputable, but instead distinguished relative degrees of immorality among crimes of vice.

83 N.Y. TIMES, Dec. 14, 1967, at 1, col. 1.

84 J. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY ch. 10 (1966).

One detective interviewed described bookmakers and numbers operators as especially reliable and trustworthy, insisting that the police named by a bookmaker in a famous case as having been "on the take" were, in fact, men who had refused to cooperate with the professional gambler.

In enforcing crimes of vice, police may not only become involved in the operations of the underworld, but they may be encouraged to make moral judgments as to which behaviors require enforcement. For many police, gambling evidently does not appear to be a seriously wrong activity, even if it is illegal. As the same detective stated: "Hell, everybody likes to place a bet once in a while." This policeman insisted, however, that there was no payoff from prostitutes, although he perceived prostitution as inevitable and "therefore" not especially immoral. From his point of view, the main reason for enforcing prostitution laws was his own self-interest. Unlike gamblers, he felt, prostitutes could not be counted on to protect the policeman in case of an investigation. Prostitutes were especially thought to be involved in narcotics use, and as a result, they would easily "fold" if pressed for information by a state investigator. Thus, taking money from prostitutes was not seen so much as an immoral act, as a threat to the continuance of one's career as a policeman. One of the consequences, therefore, of the isolation of the enforcement of "crimes without victims" and the difficulty of ascertaining its extent, is the inviting possibility that police may consider supplementing their income through cooperation with the underworld. In addition, the selection of cooperation will be based in part upon the moral conceptions of the policeman developed in the situation, in part upon previously held moral conceptions, and in part upon the expediency of cooperation. In the situation of isolation from citizen complainants, therefore, the community loses control over the direction of the discretionary behavior of the police. It is arguable, for example, that gambling is more harmful to the community than marihuana use. But if marihuana use is not part of the experience of the policeman, the exotic marihuana user has not the same "opportunity" to corrupt the policeman as the gambler. The "complaint" may serve a very important function in the administration of criminal law, in that it directs the activities of law enforcement to those asocial acts that are most disturbing to the citizenry. Absent the complaint, police "discretion" is given freer rein, and the "morality of the community" comes to be represented in the personal morality of the policeman by default.

D. *The Informer System*

The enforcement pattern associated with crimes without victims makes wide police discretion inevitable. Since there are few citizen complainants, the enforcement of vice laws typically requires that the police "drum up their own business." They must find out whether infractions have been committed, and to do this they must utilize informants. To replace the structure of citizen complaint that lies at the base of prototypical crime and its enforcement, the enforcement of victimless crimes requires the police to construct an intelligence system that utilizes "informants, spies, stool pigeons and agent provocateurs."[85] The interesting issues here are the conditions under which it is possible for police to have reciprocal relations with informers, the strategies police engage in to create these conditions, and the consequences of such strategies for the theory of enforcement.

The sort of men who have information valuable to police regarding the commission of victimless crimes, are usually not motivated to inform by altruistic considerations. The informer-informed relation is a matter of exchange in which each party seeks to gain something from the other in return for certain desired commodities. In narcotics enforcement, informers are usually addicts themselves, who "cooperate" with police because they have been caught doing something illegal and want a reduction in charges or some sort of "break" in the criminal process. As Harney and Cross say:

> It is almost the universal practice of the police, prosecutors and courts to recognize the valuable assistance to law enforcement in this attitude of the informer. This recognition is usually translated into a practical manner as a recommendation for a lesser sentence, a more favorable consideration for parole or probation, the acceptance of a plea to a lesser count in the indictment or through some other favorable action within the discretion of the prosecution.[86]

Sometimes, of course, informers are paid off with money; however, the prevailing practice is like that described by Harney and Cross. That practice requires the "creation" of a commodity to exchange for the information of the informer. There is a bargain and exchange between the informer and the police, the latter maximizing their bargaining position by making use of the authority given them by the state. The

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85 Donelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agents Provacateurs*, 60 YALE L.J. 1091, 1119 (1951).

86 M. HARNEY & J. CROSS, THE INFORMER IN LAW ENFORCEMENT (1960).

police will usually try to arrest a prostitute or an addict on whom evidence is certain to be obtained. The evidence then becomes a value added to the policeman's bargaining position. Instead of ignoring the infractions of persons who have acted as informers, the police can usually control the informer only by invoking the law. Thus, in order to maintain good relations with an addict whom he knows, the policeman does not usually disregard narcotics use by the addict. On the contrary, the arrest of such an addict then becomes a "good pinch." It gives the policeman legal authority over the addict and the "favorable action within the discretion of the prosecution," described by Harney and Cross, is transformed into a commodity to purchase information.

When the question is raised, therefore, of the consequences of the strategy police engage in while they deal with informers, we see that the increases in penalties that have accompanied the enforcement theory offers the narcotic policeman more to work with as an anticipated reward for the informer. High penalties for relatively minor violations, such as the possession of narcotics equipment or of a marihuana cigarette, increase the capital assets of the policeman and thereby create the conditions under which the information system will work most effectively.

Policemen themselves rarely make this point, preferring instead to support high penalties purely on the grounds of deterrence; but a perfectively evident consequence of a punitive narcotics policy is its contribution to the smooth functioning of the narcotics information system by providing that system with requisite inputs. Such practices, when viewed in terms of the overall theory of the enforcement system, suggest that enforcement will vary with the value of the information that an addict is able to give to the police. Thus, the information system and its concomitant propensities to have high sentences and charge reductions indicates to those who are involved in the social system of addiction that they may take the police system of enforcing crimes into account. In such a process, the very operation of the information system may help to undermine the salience of the criminal sanctions that are intended to deter criminality in this area, since these sanctions can be modified by "cooperating" with police.[87]

E. *Social Class, Moral Authority, and Crimes Without Victims*

One of the aims of the criminal law is to achieve equal enforcement regardless of race, religion or economic position. This is an extremely difficult goal to achieve in a stratified and racially constructed society.

[87] J. SKOLNICK, *supra* note 84, at ch. 6.

There is reason to believe, however, that victimless crimes are especially susceptible to discriminatory enforcement against those occupying lower social class positions. In writing about abortion, Schur states:

> In upper class, "sophisticated" circles, an unwanted pregnancy may be viewed merely as an inconvenience. There may be some women in this category who can "handle such a problem" with relative ease and dispatch. . . . Such women are in the best position to secure competent and perhaps even legal termination of pregnancy. The woman of less means and worldliness is much worse off.[88]

Similarly, in commenting upon enforcement of the national prohibition law, the Wickersham report noted that:

> It is easier to detect and apprehend small offenders than to reach the well organized larger operators. It is much easier to padlock a speakeasy than to close up a large hotel where important and influential and financial interests are involved. Thus the law may be made to appear as aimed at and enforced against the insignificant while the wealthy enjoy immunity. This feeling is reinforced when it is seen that the wealthy are generally able to procure pure liquors, while those with less means means may run the risk of poisoning through the working over of denatured alcohol, or, at best, must put up with cheap, crude, and even deleterious products. Moreover, searches of homes, especially under state laws, have necessarily seemed to bear more upon people of moderate means than upon those of wealth or influence.[89]

Alfred Lindesmith reports on differential enforcement of narcotics law according to social class as follows:

> When the addict is a well-to-do professional man, such as a physician or lawyer, and is well spoken and well educated, prosecutors, policemen, and judges alike are especially strongly inclined to regard him as an "unfortunate" or as a "victim" of something like a disease. The harsh penalties of the law, it is felt, were surely not intended for a person like this, and by an unspoken agreement, arrangements are quietly made to exempt him from such penalties.
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> Outstanding examples of such favored treatment of users from the upper classes are provided by Mr. Anslinger, former head of the Bureau of Narcotics, who, according to his own account, arranged to keep an addicted member of Congress, as well as a prominent Washington society lady who was addicted to demerol, out of the hands of the police. At lower levels, it is common for narcotics agents not to arrest doctors or

88 E. SCHUR, *supra* note 81, at 45.

89 National Commission on Law Observance and Enforcement, Report on the Enforcement of the Prohibition Laws of the United States, H.R. Doc. No. 722, 71st Cong., 3rd Sess. 21 (1931).

> nurses who are addicted, but to turn them over to the medical profession. A narcotics agent in the Toledo area frankly reported to his superiors that 18 physicians, druggists, and nurses in his care were not prosecuted but "were treated for addiction in lieu of prosecution." Common justifications offered for this practice are that these addicted nurses and doctors do not resort to serious crime to obtain drugs and that they are valuable and productive members of the community. The only reason that users in the medical profession do not commit the crimes against property which other addicts do, is, of course, that drugs are available to them from medical sources.[90]

The enforcement of crime without victims is inherently constituted so as to increase the probability of arbitrary enforcement. Instead of acting in his traditional role as protector of those who have been victimized by an assailant, the policeman is placed in the position of surrogate complainant for an anonymous and perhaps nonexistent third party. Thus, the existence of such crimes offers the services of countless trained men on behalf of remotely offended citizens.

Both Lindesmith and the Federal Bureau of Narcotics perceive the broad mandate that is offered to police where there is no citizen complaining. The police, in effect, are required to develop a rationale for discretionary judgments, a rationale that "creates" victims. Anslinger and Tompkins write, for example, that:

> The great majority of addicts are parasitic. This parasitic drug addict represents a continuing problem to the police through his depredations against society. He is a thief, a burglar, a robber; if a woman, a prostitute or a shoplifter. The person is generally a criminal or on the road to criminality before he becomes addicted. Once addicted he has the greatest reason in the world for continuing his life of crime. Most policemen recognize that one of the best ways to break up waves of pocket-picking, petty thievery and burglary in a community is by making a round-up of narcotic addicts. Often, a long term of imprisonment for a narcotic addict on narcotic charges will rid the community of a burglar or thief for that period.[91]

For Anslinger and Tomkins, addiction constitutes a status, the status of criminal. They do not even recognize degrees of criminality, that individuals may have participated first in minor offenses before becoming addicts, and later in major offenses to sustain their habits. For them, the addict is a non-person, virtually unentitled to civil rights or

[90] A. LINDESMITH, *supra* note 73, at 90.

[91] H. ANSLINGER & W. TOMPKINS, THE TRAFFIC IN NARCOTICS § 170 (1953).

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[92] H. BECKER, OUTSI

liberties. They should be rounded-up and put away. Addicts, according to this view, are not only guilty of such crimes as burglary and robbery without ever having been accorded a trial; addicts are guilty without the requirement of an accusation, but simply as members of a *criminal class*. Such an approach obviously violates fundamental principles of constitutional legality. It corrupts both the citizenry and the police and in the process cannot help but reduce the moral authority of criminal law, especially among those portions of the citizenry who are particularly liable to arbitrary treatment.

F. *Research Suggestion*

Research on the theory of enforcement should concentrate upon three phenomena: (1) the nature and characteristics of deviant groups, and (2) the actual operation and (3) rationale of enforcement agencies. Regarding the study of deviant behavior, Howard S. Becker wrote in 1963 that, "We do not . . . have enough studies of deviant behavior. We do not have studies of enough kinds of deviant behavior. Above all, we do not have enough studies in which the person doing the research has achieved close contact with those he studies, so that he can become aware of the complex and manifold character of the deviant activity."[92] The statement holds for 1968 and will probably hold for years to come.

Becker suggests some of the technical problems associated with study of deviant behavior. A principal difficulty is that deviant behavior is subject to sanctions—it may well be punished if revealed, and so it tends to be kept hidden and not exhibited or bragged about to outsiders. At the same time, the researcher must gain the confidence of those he studies. He must participate intensively and continuously with them. This process of achieving confidence is very time consuming and may ultimately prove fruitless.

It would seem helpful, therefore, to have a social science research privilege. With the privilege, the social scientist then could be considered legally to have the same type of confidential relationship to his subjects that the doctor or lawyer has to his client, or the priest has to his penitent. The extension of such a privilege to the social scientist should not be considered merely as a means of "protecting" the deviant. The social scientist in his professional capacity is not a law enforcement official and neither protects nor exposes the deviant. He is, however, expected to study the rationalizations and justifications a group offers

92 H. BECKER, OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE 168 (1963).

for doing the things it does, as a way of eliciting and understanding the meaning of deviant behavior and sanctions for the group being studied. It may be extremely difficult for the social scientist to study the process of deviance, if there is an ambiguity as to the nature of his role on the part of those studied, as well as on the part of the general community. By providing the conditions under which increasingly accurate and responsible information can be obtained, a social science research privilege should substantially contribute to the pool of reliable information required by the scientific and civic community.

A research privilege would be useful not only in studying such groups as narcotic addicts, homosexuals, and marihuana users, but would also be valuable in studying enforcement practices. We are all aware that law enforcement officials sometimes operate on the edges of legality, but it is extremely difficult to determine how, why, where, and under what conditions such practices occur. If our response to such practices is the quick, easy, and traditional one of condemnation, we may find that we are relying upon a very inefficient means for eliminating such practices, if that is our goal. Law enforcement officials are entitled to the same sort of empathetic understanding of their situation as are any other subjects of the social scientist. A social science research privilege would be especially important in this area, where the subjects are apt to be extremely sensitive to systematic inquiry. A research privilege would at least communicate that the goal of the social scientist is not "investigation" in the prosecutorial sense, but rather inquiry in the scientific sense. Most of us violate rules and have developed systems of justification for their violation. Sometimes, these systems of justification may make a good deal of sense under prevailing conditions, but we will not know how to describe these conditions unless we are able to experience them through the perspective of the actors being studied. A research privilege would contribute considerably toward this end.

The Federal government should also encourage its enforcement agencies to permit responsible social scientific inquiry into their practices and operations. Law enforcement is a public responsibility, not a private one. Like all agencies of government, law enforcement agencies seek favorable publicity and usually open their doors only to those who can be counted upon to provide a favorable portrait. Studies of law enforcement agencies usually read like "authorized" biographies, reflecting the image that the subject would like to present to the world, instead of a searching and revealing portrait. There ought, for example, to be an objective study of the Federal Bureau of Narcotics, its history,

development and operations. Unless such studies are supported, and unless it is understood that they cannot be a glorification of the actors, we cannot begin to develop an understanding of the nature and role of law enforcement in modern society.

Studies of deviance and studies of control agencies ought to have as a principal theoretical concern the study of the conditions under which rules come to be regarded as authoritative, that is, as rational, fair, and necessary for community life.[93] This concern is the very essence of understanding any system of rules and their enforcement. We therefore need to know (a) how rules are promulgated; (b) how they are applied; (c) how their promulgation and application derives from the actual situation in which the rules are being enforced or from external considerations; (d) how mechanisms for controlling rule enforcers operate; and finally (e) how the rules and their enforcement are perceived by those upon whom they are being enforced. The theory of enforcement, as we have suggested, rests upon certain assumptions as to the rationality of the rules, the consequences of enforcement practices, and the meaning of the rules for those to whom they applied. Unfortunately, there are more assumptions in this area than reliable information.

V. Conclusion

This article has attempted to examine the sorts of claims usually advanced by those advocating employment of the criminal law to diminish or control "immoral" behavior. The claims are typically fourfold: First, that the behavior results in personal and social damage; second, that incarceration will aid in restoring the personality, in repairing the damaging conduct; third, that "social integration" requires the elimination of the conduct in question; and finally, that penal sanctions will in fact result in deterrence. We have attempted to elucidate some of the assumptions underlying these claims and to check the validity of such assumptions, as well as the reasons for their existence where invalid.

As for the first claim of damage, it difficult to substantiate. Especially in the area of morality, seemingly "objective" criteria may be quite misleading as a ground for social policy, since they are based upon a normative model of quiescent physical activity and perfect health.

The real policy issue is always one of priorities. Almost every human behavior has certain negative side effects. If you ask the man who owns

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93 Selznick, *Sociology of Law* (for the International Encyclopedia of the Social Sciences (forthcoming ed.)

one, he would really rather drive a motor vehicle, even though he risks his life and that of his family every time he piles the household into the family's sedan for the pleasures of a Sunday picnic. Viewed in this fashion the attempt to suppress other forms of "hedonism" through criminal law is best analyzed as a manifestation of status politics, rather than of rational social policy. The question then becomes, for example, not whether drinking or marihuana use or gambling ought to be outlawed, but rather how and why a particular group was able to attach criminal penalties to a "borderland" area of criminal law. Again, in this view, the idea of "rehabilitation" may become a culture bound mockery, as in the instance of Prohibition, when the Roman Catholic was never "habilitated" to total abstinence from alcoholic beverages in the first place. Concepts of social order and social harm appear often to be based far more upon values than upon science, with such seemingly scientific notions as the "need for social integration" introduced as a method of argument for achieving a desired conception of social order.

Finally, we examined the *rationale* behind the theory of enforcement as it relates to crimes lacking citizen complainants. A number of criticisms may be drawn. First, such crimes lead to patterns of enforcement that are singularly capable of producing arbitrary and unlawful police behavior. Since the "victims" of the activity are those who willingly engage in it, the police are required to develop an informer system. Such a system demands "inputs," that is, commodities for an exchange of information. Typically these include some sort of indulgence drawn from the policeman's power position in the criminal procedural process—non-arrest, charge reduction, recommendation for lesser sentence. Such a system also demands ever higher penalties, since the capacity to reduce penalties constitutes the "capital goods" of the morality policeman's trade.

The informer system likewise implies close contact with purveyors of the forbidden, such contacts being fundamental to policing activities. In the process of becoming an established part of the underworld system, police may themselves learn to share in its values and rewards. Certain forms of graft have been endemic to certain "old-line" police departments. There are indications that even narcotics police, traditionally freer of corruption and more "professionalized," are succumbing to the features of secrecy and built-in temptations that characterize narcotics enforcement.

Lastly, the evidence indicates that enforcement does not work. Policing agencies periodically attribute failure to insufficient personnel and

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lack of penalties. Usually, they are rewarded with higher penalties and more personnel for enforcement. As a result, penalties for possession and sale of such a widely used drug as marihuana exceed those for such crimes as robbery.

We have attempted to suggest why enforcement cannot work in the "victimless" crime area, by explicating some of the assumptions underlying it. In addition to the "structural" difficulties associated with the necessity for an informant system, the urge to punish criminally takes place only when there is a perceived social problem. Usually this social perception occurs only after there is sufficient widespread activity—drinking, marihuana use, homosexuality—to also lay the foundation for a counter culture, with its own set of values, symbols, and meanings of objects and events. Typically, these symbolic interpretations serve to vitiate the negative definitions of the activity offered by constituted authority. Furthermore, the negative attitudes toward constituted authority are likely to "spill over" into areas other than the particular behavior the society is attempting to suppress through criminal law, thereby creating generalized hostilities toward authority and, as it were, strengthening the "enemy." Where two belief systems are in conflict, the attempt by the one to suppress the other may, because of inherent limitations of force as a means of social control, inadvertently result in strengthening the opposed system.