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By John R. Snowden*

A Holistic Jurisprudential View of the Drug Victim

[T]he fiction represents the pathology of the law. When all goes well and established legal rules encompass neatly the social life they are intended to regulate, there is little occasion for fictions. There is also little occasion for philosophizing, for the law then proceeds with a transparent simplicity suggesting no need for reflective scrutiny. Only in illness, we are told, does the body reveal its complexity. Only when legal reasoning falters and reaches out clumsily for help do we realize what a complex undertaking the law is.¹

I. INTRODUCTION

This article considers law, one manifestation of our efforts to comprehend the consensual reality called life. A jurisprudential perspective is offered in an attempt to construct a theory which may explain the phenomenon of law. The perspective is also prescriptive: it argues that law is not entirely rational, but is also infused with other ways of knowing. Thus it may be that in a larger sense the inquiry focuses on the mind.

Law is traditionally viewed as a condition for safety and stability. Many people have argued that a particular type of stability, one that is dynamic, is required by the human mind. Freedom and liberty are valued in most legal systems; psychology suggests, however, that the mind may work against itself and history shows that law may work against freedom. The American people and the American legal system have struggled to prevent the bending of law into an endorsement of totalitarian stability.

Freedom has persisted as a value in the face of witches, anarchists, communists and pornographers. The free mind, protected by law, has survived. But today a new spectre is haunting law which poses perhaps the greatest danger yet to the free mind. Drugs, licit and illicit, seem to threaten the mind in a new and frighteningly direct manner.

This threat must be confronted directly. The law that creates

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1. L. FULLER, *LEGAL FICTIONS* viii (1967).

and restrains government must not abdicate but rather accept its responsibility to defend at all costs, even the apparent self-destruction of its constituents, the freedom of the mind. State controlled and legally regulated thought is not the slippery slope, but the crest of totalitarianism.²

The use of dope³ symbolizes a recalcitrant experience of American life in the 1970s. The author doubts that individual choice in the use of dope or drugs will seriously threaten freedom. The current phenomenon of dope, however, seems to endanger the total legal system supporting freedom.⁴ This article is a plea to the lawmakers—legislators, judges, lawyers, and citizens—to review closely and then immediately change the legal response to the “drug problem.” In short, “the use of the criminal process is wholly inappropriate.”⁵

There are certain costs associated with the drug problem. One author has noted: “Although one may reasonably conclude that the issue of whether persons should have access to drugs other than tobacco and alcohol is intrinsically not very interesting, it is likely that our penal policy is exacting costs in this area that we cannot prudently sustain.”⁶ This article focuses on a particular cost of the

2. *Staff of Senate Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, Individual Rights and the Federal Role of Behavior Modification*, 93d Cong., 2d Sess., at 182-200 (Committee Print 1974).

3. The selection of the symbol “dope” has some significance. Some scholars suggest that indeed, “What’s in a name?” may be a crucial question. A rose may not smell as sweet if called a weed. See P. HENLE, *LANGUAGE, THOUGHT, AND CULTURE* (1958). But see *PSYCHOLINGUISTICS* (S. SAPORTA ed. 1961). Indeed, it does not seem entirely unreasonable that the scourge of society might be a positive boon, or—at least a “legitimate” commercial success if originally introduced through “normal” market avenues. See generally Bonnie & Whitebread, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of Marijuana Prohibition*, 56 VA. L. REV. 971 (1970).

4. One always hesitates to widen the gap between law and the “blossoming, buzzing confusion” sometimes recognized as reality. Nevertheless, the focus here is primarily on the artificial system-construct, law. No real effort is made here to point out the human misery resulting from the law’s response to the dope experience. See generally J. KAPLAN, *MARIJUANA: THE NEW PROHIBITION* (1970); N. MORRIS & G. HAWKINS, *THE HONEST POLITICIAN’S GUIDE TO CRIME CONTROL* (1970); H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968); Skolnick, *Coercion to Virtue: The Enforcement of Morals*, 41 S. CAL. L. REV. 588 (1968); Kadish, *The Crisis of Overcriminalization*, 372 ANNALS 157 (1967). But see Junker, *Criminalization and Criminogenesis*, 19 U.C.L.A.L. REV. 697 (1972). Better yet, pick up your local newspaper.

5. MORRIS & HAWKINS, *supra* note 4, at 8. See R. QUINNEY, *THE SOCIAL REALITY OF CRIME* (1970).

6. Allen, *The Crimes of Politics: Political Dimensions of Criminal Jus-*

legal system's penal policy with regard to the dope experience.⁷ This is resulting in a severe warping of the legal system, and since every element of that coherent system affects other elements, this warping will uproot principles even at the core of American law.

The effects of this cost are pervasive:

No single law enforcement problem has occupied more time, effort and money in the past four years than that of drug abuse and drug addiction. We have regarded drugs as "public enemy number one," destroying the most precious resource we have—our young people—and breeding lawlessness, violence and death.⁸

This societal response to drugs involves an election to engage in civil war. "The concept is one that a liberal society cannot afford to harbor."⁹ The war policy prevents anything from being unjust; notions of right and wrong, justice and injustice, have no place; force and fraud become cardinal virtues.¹⁰ Moreover, wars carry with them a war psychology which

with only slight encouragement from circumstances or special pleading, can be quickly converted into a war psychosis. A society in such a mental state is not likely to achieve an accurate grasp of reality, to establish sensible priorities, or to make correct calculations of social costs involved in policy alternatives.¹¹

Our legal system is significantly infected by this war psychosis. The legal response through a penal or war policy should be changed so that core principles of the legal system may be maintained. The war policy has sent shock waves throughout the coherence of the legal system. The "drug problem," like the "Jewish problem" of past years, threatens a hideous remodeling of law.¹²

tice, Vol. 17, No. 3 University of Michigan Law Quadrangle Notes 19, 23 (1973). See Tribe, *Policy Science*, 2 PHIL. & PUB. AFFAIRS 66 (1972). The writer would note that far too many lawyers, judges, legislators, and citizens are spending countless hours enmeshed in the legal webs of the "drug problem" while society calls anxiously for their talents to be exercised in grappling with the issues of reconstructing the land of the free and the home of the brave.

7. See generally E. BRECHER, *LICIT AND ILLICIT DRUGS* (Consumers Union Report 1972); W. ELDRIDGE, *NARCOTICS AND THE LAW, A CRITIQUE OF THE AMERICAN EXPERIMENT IN NARCOTIC DRUG CONTROL* (2d ed. 1967); J. INCIARDI & C. CHAMBERS, *DRUGS AND THE CRIMINAL JUSTICE SYSTEM* (1974); N. ZINBERG & J. ROBERTSON, *DRUGS AND THE PUBLIC* (1972).
8. Richard Nixon, from the White House, March 14, 1973 (cited in INCIARDI & CHAMBERS, *supra* note 6, at 221). See also *FEDERAL STRATEGY FOR DRUG ABUSE AND DRUG TRAFFIC PREVENTION* (1973).
9. Allen, *supra* note 6, at 24.
10. T. HOBBS, *LEVIATHAN* (1651).
11. Allen, *supra* note 6, at 24. See R. BLUM, *SOCIETY AND DRUGS* (1969); T. DUSTER, *THE LEGISLATION OF MORALITY* (1970); Lindesmith, *Dope Fiend Mythology*, 31 J. CRIM. L.C. & P.S. 199 (1940).
12. See H. ADLER, *THE JEWS IN GERMANY* (1969); N. COHN, *WARRANT FOR*

II. THE PERSPECTIVE

This article does not attempt a complete statement of law in either descriptive or prescriptive terms. It seems essential, however, that the jurisprudential perspective be examined. That perspective might be named "Holistic Jurisprudence."¹³ Holism reflects the view that law is "a special but not unique effort of the human mind to make reality comprehensible and manageable"¹⁴

The world's contents are *given* to each of us in order so foreign to our subjective interest that we can hardly by an effort of the imagination picture to ourselves what it is like. We have to break that order altogether,—and by picking out from it the items which concern us [*sic*], and connecting them with others far away, which we say "belong" with them, we are able to make out definite threads of sequence and tendency; to foresee particular liabilities and get ready for them; and to enjoy simplicity and harmony in place of what was chaos. Is not the sum of your actual experience taken at this moment and impartially added together an utter chaos? The strains of my voice, the lights and shades inside the room and out, the murmur of the wind, the ticking of the clock, the various organic feelings you may happen individually to possess, do these make a whole at all? Is it not the only condition of your mental sanity in the midst of them that most of them should become non-existent for you, and that a few others—the sounds, I hope, which I am uttering—should evoke from places in your memory that have nothing to do with this scene associates fitted to combine with them in what we call a rational train of thought,—rational because it leads to a conclusion which we have some organ to appreciate? We have no organ or faculty to appreciate the simply given order¹⁵

GENOCIDE (1967); R. HILBERG, *THE DESTRUCTION OF THE EUROPEAN JEWS* (1961); Cording, *Endlösung the Jurisprudent's Role in Questions of National Policy* (unpublished paper prepared for the Jurisprudence Seminar 1973, available at the University of Nebraska College of Law). See generally J. J. GRAY, *THE NATURE AND SOURCES OF THE LAW* 96 (2d ed. 1921).

13. The roots of the perspective expounded here are the epistemology of Brand Blanshard and William Van Orman Quine, and the jurisprudence of Jerome Hall. See B. BLANSHARD, *THE NATURE OF THOUGHT* (1939); W.V.O. QUINE, *FROM A LOGICAL POINT OF VIEW* (1961); J. HALL, *FOUNDATIONS OF JURISPRUDENCE* (1973) [hereinafter cited as HALL].
14. W. BISHIN & C. STONE, *LAW, LANGUAGE, AND ETHICS* vii (1972) [hereinafter cited as BISHIN & STONE]. I must give special thanks to Professors Bishin and Stone of the U.S.C. Law Center for their magnificent work, *LAW, LANGUAGE, AND ETHICS*. Another significant and creative work strangely enough entitled *LAW, LANGUAGE AND COMMUNICATION* by Professor Walter Probert marks 1972 as a bumper year for fresh insightful jurisprudential thought.
15. James, *The Will to Believe and Other Essays* 118 (1956), in BISHIN & STONE 150. See also A. HUXLEY, *DOORS OF PERCEPTION* 22-23 (1954).

As the human grows, the mind needs to appreciate and know segments of the world's contents. These known segments are generally called "reality." Breast, love, self, and law become real as the human energy discriminately knows. The epistemological crisis asks how. Unfortunately, the answer here can only be suggestive.¹⁶

It is suggested that the mind "knows" in a functionally distinguishable, yet resultantly unifying, holistic manner. For the sake of presentation, several modes of "knowing" may be labeled experience, emotion or intuition, faith, and reason. These modes of knowing work as a unit; that is, each mode plays a vital role in the result, "I know." Nevertheless, various worldly contents seem to be optimally known through different and distinct primary modes. The primary mode of knowing the breast may be experience; knowing love may be emotion; self and God are matters of faith; and reason is the craft of law. It does not seem essential that the reader accept as true all of the primary mode reality relationships offered. A holistic jurisprudential perspective, however, advances the hypothesis that law is a reality of the mind learned through the primary mode of reason and multiple secondary modes, all working to the human result, "I know the law."

The holistic perspective rejects at the outset the hypothesis that rules are the basic fabric of law.¹⁷ The problem is not to fit one type of linear proposition, principles, within a model of other structural statements, rules.¹⁸ Holism asserts that law is part of life, the only dance there is. The dance is seemingly dynamic and forever changing—an observation that caused even Kelsen to be concerned about developing a dynamic theory of law.¹⁹ Jerome Hall, however, has illuminated the illusory dynamism of Kelsen's theory noting that it is founded solely on the internal consistency of legal rules with higher norms.²⁰

16. Suzanne K. Langer seems most likely to have created an acceptable answer via linear discourse. See S. LANGER, *PHILOSOPHY IN A NEW KEY* 88-101 (3d ed. 1957).

17. See Dworkin, *Social Rules and Legal Theory*, 81 YALE L.J. 855 (1972). Dworkin rejects at least a great deal of the positive model of law developed by H.L.A. Hart. H. HART, *THE CONCEPT OF LAW* (1961). Legal positivists are not, of course, interchangeable. See generally A. ROSS, *ON LAW AND JUSTICE* (1959); *THE WORKS OF JEREMY BENTHAM* (J. Bowring ed. 1838, reprinted 1962). J. AUSTIN, *LECTURES ON JURISPRUDENCE* (4th ed. 1879); H. Kelsen, *GENERAL THEORY OF LAW AND STATE* (1945).

18. See generally Sales, *Fitting Principles Within a Positivist Model of Law*, 53 NEB. L. REV. 58 (1974).

19. H. Kelsen, *GENERAL THEORY OF LAW AND STATE* 122 (1945).

20. HALL, *supra* note 13, at 164.

Hall seems to share the holistic perspective through his conceptions of integrative jurisprudence and law-as-action. "[L]egal directives are viewed not only as propositions having a certain structure, but also as speech-acts."²¹ This realization that the primary mode of reason is in an action context is a recognition of multiple secondary modes of knowing. The sovereign's command issued to a stranger may be primarily known through reason. But, in a situation involving strangers, other ways of knowing are present. Body language is currently of some interest, and has long been employed by those professional "behavior-liars," performing artists and politicians.²² The legal rule expressed in discursive form begins with the instant of physiological constitution. Whether that is a capitulation to unreason, to mysticism and irrationalism, or alternatively, an argument for the rationality of presentational symbolism,²³ will not be pursued in this article. What will be argued is that reason, within a context defined through multiple and random secondary modes of knowing, provides the primary means of understanding a legal proposition.²⁴

It is important that the reader understand why reason is asserted as the primary mode of knowing and testing the truth of legal propositions. Law is an enterprise among strangers. While other modes of knowing may suffice, the population explosion has led us to accept reason as the easiest and most predictable method of operation. We seem to have consented to the proposition that shared experiences or percept overlays cannot be trusted. Time, which seems to prevent all things from happening at once, tells us that love is a severely restricted communicative device. Finally, reason's distortion of faith to dogma and persecution counsels against yielding our worldly affairs to unarticulated response. We do not sleep, pray, or climb mountains with the lawmakers. Reason is the lawyer's craft, and with it the lawyer hopes to construct for a second the context of the client's plea.²⁵

The holistic jurisprudential perspective views law as a system of coherence. It wishes to build on the insights of Jerome Hall:

Instead of the traditional model of "rules first, then action," what came first was action; then, much later, perception of the generality of customs and articulation of rules, and finally, theorizing about them . . .

21. *Id.* See J. CHURCH, *LANGUAGE AND THE DISCOVERY OF REALITY* (1961).

22. See generally D. MORRIS, *THE NAKED APE* 139 (1967).

23. See LANGER, *supra* note 15; N. BROWN, *LIFE AGAINST DEATH* (1959).

24. See generally F. ALLPORT, *THEORIES OF PERCEPTION AND THE CONCEPT OF STRUCTURE* (1955).

25. See generally HALL, *supra* note 13, at 20; K. LLEWELLYN, *THE COMMON LAW TRADITION* 3-4 (1960).

In integrative jurisprudence, legal directives are viewed not only as propositions having a certain structure, but also as speech-acts. In speech-acts movements are expressed in the utterance of sounds, in gestures, and in the publication of written words. Speech-acts are acts of communication. Certain persons, members of the general public and various officials, converse with each other; their communication is comprised of talk and other actions of contemporaries as they enact, interpret, apply and enforce rules of law which, though originally speech-acts, became inert as print until they were again expressed in action. Inter-communication is not restricted to an exchange of information; it may be an act of mutual commitment, as in contract, a valuation as in legislation, an expression of emotion as, to some degree, in criminal law or, usually, a combination of these. Speech-acts are intelligible as parts of a language and in social contexts, and the study of those acts as well as of the many nonverbal movements included in law-as-action can explore many of their dynamic features.²⁶

Karl Llewellyn: "Part of law, in many aspects, is all of society, and all of man in society,"²⁷ and Felix Frankfurter: "These judges must have something of the creative artist in them, they must have antennae registering feelings and judgment beyond logical, let alone quantitative proof."²⁸

In coherence theory, knowing involves a complex assessment of an entire system of consensual realities. Holism recognizes another element—that the world contents are known randomly and in distinguishable primary and secondary modes.

From the moment of conception, the mind utilizes modes of knowing to construct a field of beliefs. Each new experience is checked against the totality of beliefs in the field at the time of validation, and a field of beliefs bounded by the world's contents develops. Each new world content to be known, tested as true, must cohere with the holistic field. No action is true because of an independent correspondence with "reality;" instead each new action is tested against a holistic field of mutually supportive beliefs.

Even the most basic and seemingly logical relations or beliefs, such as the rising of the sun in the east, are "true" only with respect to their utility in holding together the field. "Core" beliefs, and

26. HALL, *supra* note 13, at 162, 164-65.

27. K. LLEWELLYN, JURISPRUDENCE 40-41 (1962).

28. Address by Mr. Justice Frankfurter to the American Philosophical Society in 1954, cited in A. BICKEL, *THE LEAST DANGEROUS BRANCH, THE SUPREME COURT AT THE BAR OF POLITICS* 239 (1962). See also Curtis, *A Better Theory of Legal Interpretation*, 3 VAND. L. REV. 407, 422-23 (1950); Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 670 (1958); H. Hart & A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (1958) (mimeograph).

indeed the whole field, may be shattered by some possible (though perhaps unimaginable) new action. Any action may be determined to be "true," if drastic enough adjustments (changes or reformulations of beliefs, "realities") are made throughout the field.²⁹

Actors within the legal system who wish at any moment to "know the law" hypothesize an action and test the truth of that hypothesis by questioning whether it coheres with the existing body of beliefs. The entire field is in constant flux, but the dynamic effect is felt less as it moves toward the core of the field.

For example,³⁰ suppose one wishes to "know the law" with respect to the due process requirements of a welfare hearing. If we assume a case of first impression, we begin at the periphery of the field. The first checkpoint within the field may be an accepted belief regarding a selective service hearing. Progressing inward through the field one may find at the second check point, CP₂, "I believe X₂ about a criminal trial;" then CP₃, "I believe X₃ and 4 about due process of law;" CP₄, "I believe X_{5, 6 and 7} about liberty;" CP₅ "I believe X_{8, 9, 10 and 11} about justice;" CP₆, "I believe X_{12, 13, 14, 15 and 16} about the notion of good." Thus the proposition of law, often issued in directive or dispute-resolving form, is accepted as true if it coheres with the entire field of beliefs.

The theory posits something like "good" as an all inclusive and core reality in the field. As one progresses from the core toward the periphery of immediate experience, inclusivity and vagueness give way. The "good" becomes the more precise concept of justice; justice is narrowed to liberty, and liberty is reduced to due process of law.

It must be stressed that the validation is not isolated in a linear legal dimension.³¹ For instance, one checkpoint may involve a belief about Goya's sketches. Additionally, and importantly, the coherence is holistic with regard to other modes of knowing. There may be checkpoints involving matters known through faith as the primary mode—do justice, love mercy, and walk humbly with thy lord. There may be checkpoints in the primary mode of experience or emotion/intuition—"What do you think you're doing back there!"

Several figures may best illustrate the above discussion:

29. See BISHIN & STONE, *supra* note 14.

30. Refer to figures 1-5, p. 358-59 *infra*.

31. "A person's set of actions, his style of life, may exhibit many contradictions. In addition, since action exists in the world, it is subject to physical and biological laws, that is, there are factors to be considered in the coherence of actions that are irrelevant to the logic of sentences." HALL at 177, n.62. See T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1968); C.I. LEWIS, *VALUES AND IMPERATIVES* (1969).

①

Figure 1

The field is viewed at the beginning.

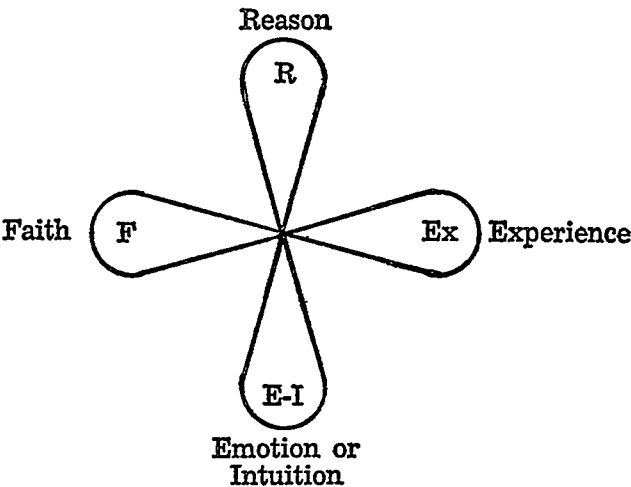


Figure 2

The field is viewed at the beginning through an enlarging device.

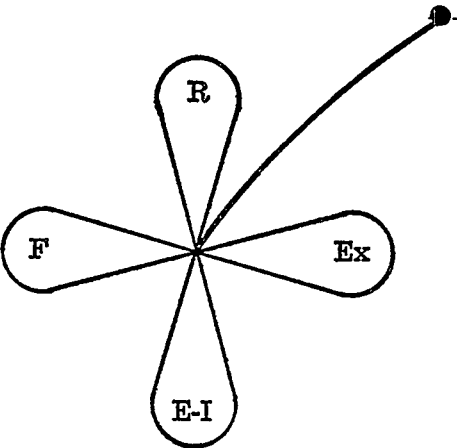


Figure 3

The field is viewed through an enlarging device at the moment of knowing the first world content, reality. The reality becomes part of the field.

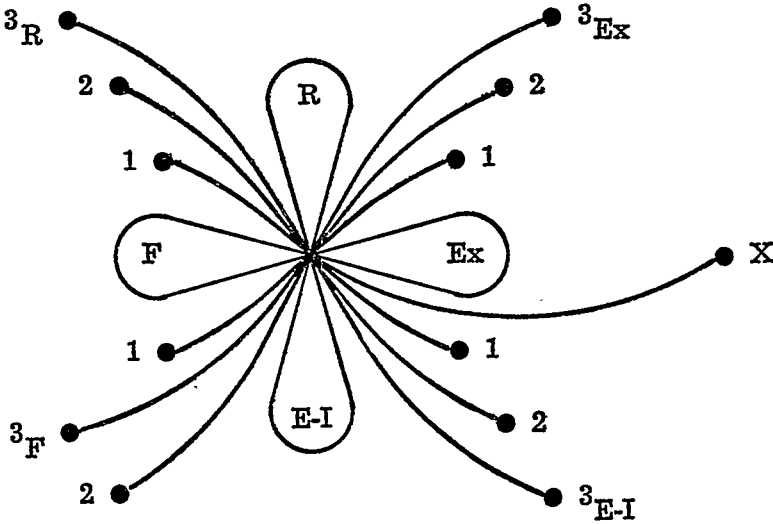


Figure 4

The field is viewed through an enlarging device at the moment of knowing world content, reality X. Coherence checks X, working toward the core at levels 3, 2, 1 and in all modes. X becomes a part of and shapes the field.



Figure 5

The field is viewed.

On many occasions the validation required to "know the law" is exceedingly simple with the actor noticing only a minor intrusion into the field. In situations involving "difficult questions" the intrusion is extensive and pushes to the core of the field. The writer would suggest that counsel's practical success is directly proportional to the degree of compliance attained in directing the other legal actors to the level selected in the field. But regardless of cognition, the dynamic effect of the field validation is always total.³²

The above discussion has attempted to sketch the more significant dimensions of a holistic jurisprudential perspective. Now, the cost hypothesis must be considered. The legal system has responded to the recalcitrant dope experience by producing actions which, in order to cohere with our field of beliefs, require drastic and rather ugly readjustments at the core of law.

32. See ALLPORT, *supra* note 24.

The logical relation between any single decision and 'the law' is exactly the same as that between any single act of a man and 'his character'. Just as 'his character' merely means a notational pattern which shows the consistency of his behaviour, so 'the law' merely means a notational pattern which shows the consistency of the decisions. And just as our view of the significance of any single act is determined by our view of his character, so our view of the significance of any given decision is determined by our view of the law. . . . It was said that the significance of the observed behavior only emerges when this behaviour is seen both in the special context in which it occurred and in the wider context of the man's behaviour generally. It may therefore be assumed that there is a certain point in time at which the data crystallize, as it were, at which we can make a proposition about the significance of a given act in the sure knowledge that we will not have to qualify or modify it subsequently. This is not so. Firstly, 'the man's behaviour generally' of course includes his future behaviour, so while he is still alive it is logically impossible to make such a proposition—if it is borne in mind that by 'his character' we mean a pattern which shows the consistency of *all* his actions, and by the significance of an act we mean what the act stands for within this pattern. As long as we cannot take account of all the man's actions every pattern which we construct must necessarily be a provisional one, subject to modification as additional data become available. It follows that any placing of a given act within such pattern must also be provisional. Secondly, even if the difficulty presented by future behaviour is removed (as by removing the man from this world), the profusion and complexity of the data to be processed, quite apart from the question of their availability, is such that it is practically impossible to attain certainty. We always remain in the sphere of hypotheses.

A. HARARI, *NEGLIGENCE IN THE LAW OF TORTS* 13-18 (1962).

III. THE CASES: THE INFECTION

In this section Nebraska Supreme Court opinions are used to represent the judicial response to the "drug problem." Other jurisdictions, state and federal, vary only in particulars and degree. Some of the cases consider issues raised by statutes directed at the dope experience. Others involve issues that merely arise in a dope context. The author finds no ground for analytic distinctions in the two situations. It will be argued that the presence of dope distorts the coherence of the legal system. Instead of forming the foundation of freedom, it becomes the servant of caprice, arbitrariness, and eventually totalitarianism.

A. Proof of Illegal Possession

In *State v. McElroy*³³ the Nebraska Supreme Court held that in the absence of a legislative declaration to the contrary, a quantity of drugs with a potential for abuse was not an essential element for the offense of unlawful possession of a controlled substance. No reason to support that decision can be found in the opinion. A search of McElroy revealed a folded opaque newspaper measuring only 1½ by 2 inches that enclosed a minute quantity of cocaine hydrochloride, container and contents together weighing only 5 milligrams.³⁴ The facts seemed to indicate that possession was knowing and intentional.³⁵ The substance was consumed in the chemical tests for cocaine.

Judge McCown, dissenting, noted that the tests did not ascertain the percentage of cocaine. The substance was not tested for purity, nor was it determined to be inactive,³⁶ and the majority seemed

33. 189 Neb. 376, 202 N.W.2d 752 (1972). *But see* *People v. Leal*, 64 Cal. 2d 504, 413 P.2d 665, 50 Cal. Rptr. 777 (1966); *Watson v. State*, 88 Nev. 196, 495 P.2d 365 (1972); *State v. Haddock*, 101 Ariz. 240, 418 P.2d 577 (1966). The general topic is annotated at Annot., 91 A.L.R.2d 810 (1963).

34. *Id.* at 377, 202 N.W.2d at 754.

35. A person knowingly or intentionally possessing a controlled substance, except marijuana, unless such substance was obtained directly, or pursuant to a valid prescription or order from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by sections 28-459 and 28-4,115 to 28-4,142, shall, upon conviction thereof, be sentenced to a term of imprisonment not less than one year nor more than two years in the Nebraska Penal and Correctional Complex, or a fine of not more than five hundred dollars, or to a term of imprisonment in the county jail of not more than six months, or be both so fined and imprisoned.

NEB. REV. STAT. § 28-4,125(3) (Cum. Supp. 1974). *See also* *State v. Ambrose*, 192 Neb. 285, 220 N.W.2d 18 (1974).

36. 189 Neb. at 379, 202 N.W.2d at 755.

to assume that 5 milligrams of cocaine, even if 100 per cent pure, was incapable of affecting an individual.³⁷ Nevertheless, there was a rather direct effect on McElroy.

If it is assumed that the current statutory scheme reflects a desire to protect the citizen from himself, or to protect the state from "undesirable" citizens,³⁸ then *McElroy* may be at least half correct. While it seems strange to protect a person by sending him to a prison environment for possessing an item that at best has only a chemical reality and no apparent use other than as a medium of expression for state chemists, the decision to imprison McElroy as an "undesirable" does exhibit minimal rationality. It is expected, however, that Americans are still somewhat taken aback by the coherence of that proposition.³⁹

What incentives are there for the unapprehended drug offender to "go straight" after *McElroy*? Would he be likely to throw away or destroy controlled substances knowing that any remaining speck would yield the same result if somehow discovered. After *McElroy*, could one rely on a finding of insufficient intent? To the trained eyes of law enforcement officials there seems always to be a seed.⁴⁰

There may be a coherence that yields a more complete understanding of *McElroy*. The writer has yet to grasp fully why lawmakers have singled out dope (illicit drugs) as an illegal form of self-abuse. Chocolate malts, prunes, marriage, children, cars, and private ownership of real and personal property, all highly conducive to abusive behavior, have somehow escaped prohibition. It seems reasonable to surmise that dope's downfall has been its unusually high success ratio, i.e., in comparison with other forms of self-abuse, the instances of the participants actually being "abused," feeling good without paying an institutionally acceptable price, are more frequent.

If failure to pay the price is the basis for the prohibition, the *McElroy* decision may make sense as a reaffirmation of the capricious and total power of the sovereign. It is not a nonsensical idea that price is not subject to reasoned elaboration or coherence.⁴¹ That you must pay a politically acceptable price, or your good time

37. *Id.* at 379, 202 N.W.2d at 755. The majority cites SOLLMAN, A MANUAL OF PHARMACOLOGY (8th ed. 1957).

38. See ADLER, *supra* note 12, at 67-82.

39. See Allen, *supra* note 6.

40. *But cf.* R. ALPERT, SEED (1972).

41. Fuller, The Forms and Limits of Adjudication (an unpublished paper presented by Professor Fuller to a group of Harvard University faculty on November 19, 1957). Excerpts from the paper may be found in Hart & Sacks, *supra* note 28, at 421.

becomes criminal self-abuse, is at least bothersome. Nevertheless, this appears to be the policy adopted as the most "liberal" semi-official institutional response.⁴²

B. Probable Cause

The *McElroy* opinion also infected concepts of privacy and search and seizure. On appeal *McElroy* additionally argued that no probable cause existed for his warrantless arrest. The court began, "Wherever an individual may harbor a reasonable expectation of privacy he ought to be free from unreasonable governmental intrusion."⁴³ The court concluded that probable cause existed because the officer involved had, by looking through binoculars, observed *McElroy* light a pipe while sitting in his van at a drive-in. To the trained and binocularized eyes of the officer the flame from the pipe indicated dope.

By finding probable cause in this situation, the court demonstrated that any statement can be held true if drastic enough changes are made in the system to which the statement must cohere. The decision offers no suggestion of the reasons why the officer trained his binoculars on the *McElroy* vehicle. Was the officer engaging in binocularized observation of everything in his path; or just homes, just drive-ins, just cars at drive-ins, just vans at drive-ins? It is not surprising that a year later the court said: "Individual rights on occasion must give way to the rights of society. This is the very purpose of law—to restrict the rights of the individual to provide protection for society."⁴⁴

C. Speedy Trial

In *State v. Alvarez*⁴⁵ the court was asked to examine the right to a speedy trial in a case where the defendant was charged with

42. See FIRST REPORT OF THE NATIONAL COMMISSION OF MARIHUANA AND DRUG ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING 127-79 (1972). The Commission's "discouragement policy" is markedly out of line with a society which adheres to the notion that the individual is the best judge of what is in his best interests. See also SECOND REPORT OF THE NATIONAL COMMISSION ON MARIHUANA AND DRUG ABUSE, DRUG USE IN AMERICA: PROBLEM IN PERSPECTIVE (1973) [hereinafter cited as DRUG COMMISSION II].

43. 189 Neb. at 378, 202 N.W.2d at 754.

44. *State v. Romonto*, 190 Neb. 825, 830, 212 N.W.2d 641, 644-45 (1973). Please, read that quote again! Individual rights may on occasion give way to the interests of society. But, can the "very purpose" of law offered grow in soil that is not prepared for such a hideous flower. Imagine the composition of that soil.

45. 189 Neb. 281, 202 N.W.2d 604 (1972).

the unlawful sale of hashish. Nebraska statutes,⁴⁶ apparently controlling, required trial within a six month period from the date of indictment or information. The time may be extended for any of the specific reasons set forth in the statutory scheme or for reasons not specifically enumerated, but only if those reasons constitute "good cause."

The court held that failure to demand a speedy trial may be considered in determining whether there was "good cause" for delay, and found that the record established "good cause" because of the court's docket congestion. The court thereby affirmed the trial court's general finding of "good cause" by balancing considerations

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46. 29-1205. **Right of accused; speedy trial.** To effectuate the right of the accused to a speedy trial and the interest of the public in prompt disposition of criminal cases, insofar as is practicable:

(1) The trial of criminal cases shall be given preference over civil cases; and

(2) The trial of defendants in custody and defendants whose pretrial liberty is reasonably believed to present unusual risks shall be given preference over other criminal cases. It shall be the duty of the county attorney to bring to the attention of the trial court any cases falling within this subdivision, and he shall generally advise the court of facts relevant in determining the order of cases to be tried.

29-1206. **Continuance; how granted.** Applications for continuances shall be made in accordance with section 25-1148, but in criminal cases in the district court the court shall grant a continuance only upon a showing of good cause and only for so long as is necessary, taking into account not only the request or consent of the prosecution or defense, but also the public interest in prompt disposition of the case.

29-1207. **Trial within six months; time; how computed.** (1) Every person indicted or informed against for any offense shall be brought to trial within six months, and such time shall be computed as provided in this section.

(2) Such six-month period shall commence to run from the date the indictment is returned or the information filed. As to indictments or informations or orders for a new trial pending on April 30, 1971, such six-month period shall commence to run from April 30, 1971.

(3) If such defendant is to be tried again following a mistrial, an order for a new trial, or an appeal or collateral attack, such period shall commence to run from the date of the mistrial, order granting a new trial, or the mandate on remand.

(4) The following periods shall be excluded in computing the time for trial:

(a) The period of delay resulting from other proceedings concerning the defendant, including but not limited to an examination and hearing on competency and the period during which he is incompetent to stand trial; the time from filing until final disposition of pretrial motions of the defendant, including motions to suppress evidence, motions to quash the indictment or information, demurrers and pleas in abatement and motions for a change of venue; and the time consumed in the trial of other charges against the defendant;

of whether an affirmative request was made by the defendant, the extent and nature of the delay, and whether the defendant had been prejudiced by the delay. In sum, the holding was that "good cause" will, "necessarily depend upon the facts in each case."⁴⁷ Consequently, as in *McElroy*,⁴⁸ *Alvarez* resulted in serious warping of the system's coherence.

Three judges dissented in *Alvarez*. Judge McCown argued that a defendant's failure to demand a speedy trial could not be considered in determining "good cause" for delay. His argument, joined in by Judge Smith, was couched in constitutional terms:

It can scarcely be doubted that the basic burden of bringing cases to trial is on the prosecution and that the responsibility is also on

(b) The period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel. A defendant without counsel shall not be deemed to have consented to a continuance unless he has been advised by the court of his right to a speedy trial and the effect of his consent;

(c) The period of delay resulting from a continuance granted at the request of the prosecuting attorney, if:

(i) The continuance is granted because of the unavailability of evidence material to the state's case, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will be available at the later date; or

(ii) The continuance is granted to allow the prosecuting attorney additional time to prepare the state's case and additional time is justified because of the exceptional circumstances of the case;

(d) The period of delay resulting from the absence or unavailability of the defendant;

(e) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance. In all other cases the defendant shall be granted a severance so that he may be tried within the time limits applicable to him; and

(f) Other periods of delay not specifically enumerated herein, but only if the court finds that they are for good cause. 29-1208. Discharge from offense charged; when. If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he shall be entitled to his absolute discharge from the offense charged and for any other offense required by law to be joined with that offense.

29-1209. Failure of defendant to move for discharge prior to trial entry of plea; effect. Failure of defendant to move for discharge prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to speedy trial.

NEB. REV. STAT. §§ 29-1205-09 (Cum. Supp. 1974).

47. 189 Neb. at 287, 202 N.W.2d at 608.

48. The *McElroy* court noted that "[t]he constitutional validity of a warrantless search can only be decided in the concrete factual context of the individual case." *Id.* at 378, 202 N.W.2d at 754.

the State to show a waiver of the right to a speedy trial. To hold that affirmative action by an accused is necessary to protect a constitutional right rather than to waive it emasculates the right just as effectively as to hold that silence or inaction imply a waiver. Both misallocate the burden of proof as well as the burden of insuring a speedy trial.⁴⁹

Judge Boslaugh, writing a separate dissent focused on another problem apparent in *Alvarez*. "[T]he operation of the statute is similar to a statute of limitations. Unlike the constitutional right [to speedy trial], there may be no balancing of considerations involved. If there are no periods of time to be excluded, the operation of the statute is automatic."⁵⁰

State v. Brown, *State v. Mai*, *State v. Skinner*, and *State v. Smith*⁵¹ were decided the same day as *Alvarez*. Each involved the same trial court as *Alvarez*, the same statutory right to speedy trial or absolute discharge, and the sale or possession of illicit drugs. Of course, the court affirmed, in each case, the trial court's finding that "good cause" for delay had existed. It should be noted that in each of these cases the trial judge had blatantly ignored the directive of the legislature by setting the trial date well beyond the six month limitation in the first instance.

D. Sentencing

In *State v. Greco*,⁵² the defendant pleaded guilty to the illegal possession of amphetamines. Defendant's act was transformed into a crime because he had not obtained the substance from one of the sovereign's licensed drug dispensers—doctor or pharmacist.

The defendant in *Greco* had no prior criminal record other than one traffic offense. The state made no recommendation, but agreed not to resist an application for probation. The trial court accepted the plea and imposed a sentence of 1 to 2 years in the State Reformatory for Women. On appeal the supreme court found that the trial court had not abused its discretion by denying probation. Judge McCown in a dissenting opinion offered the only statement which could cohere with the propositions previously explicitly accepted and adopted by the legal system. "Under the A.B.A. Senten-

49. *Id.* at 293, 202 N.W.2d at 611.

50. *Id.* at 296, 202 N.W.2d at 612. See Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967), for a discussion of the notion that constitutional principles may be balanced, while statutory rules require "automatic" application.

51. These companion cases are all found at 189 Neb. 297, 202 N.W.2d 585 (1972).

52. 189 Neb. 817, 205 N.W.2d 550 (1973).

cing Standards adopted by this court, probation should have been granted here."⁵³

E. Forfeiture of Vehicles

In *State v. One 1970 2-Door Sedan Rambler*⁵⁴ the court considered a forfeiture provision relating to the commission of a dope offense.⁵⁵ The basic statutory scheme provides for the seizure and

53. *Id.* at 819, 205 N.W.2d at 552. The A.B.A. Standards Relating to Sentencing Alternatives and Procedures were adopted by the Nebraska Supreme Court in *State v. Shonkwiler*, 187 Neb. 747, 194 N.W.2d 172 (1972). See Annot., 55 A.L.R.3d 812 (1974); A.B.A. PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES (Approved Draft, 1971).

2.2 *General principle: judicial discretion.* The sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant. 2.3 *Sentences not involving confinement.* . . . 2.3 (c) A sentence not involving confinement is to be preferred to a sentence involving partial or total confinement in the absence of affirmative reasons to the contrary.

- Id.* at 61, 64. But see *State v. Shimp*, 190 Neb. 137, 206 N.W.2d 627 (1973).

54. 191 Neb. 462, 215 N.W.2d 849 (1974).

55. **Seized without Warrant, Subject to Forfeitures; Disposal; Manner; When; Accepted as Evidence.** (1) The following shall be seized without warrant by an officer of the Division of Drug Control or by any peace officer, and the same shall be subject to forfeiture: (a) All controlled substances which have been manufactured, distributed, dispensed, acquired or possessed in violation of the provisions of sections 28-459 and 28-4,115 to 28-4,142; (b) all raw materials, products and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, administering, delivering, importing or exporting any controlled substance in violation of the provisions of sections 28-459 and 28-4,115 to 28-4,142; (c) all property which is used, or is intended for use, as a container for property described in subdivisions (a) and (b) of this subsection; (d) all conveyances including aircraft, vehicles, or vessels which are used, or intended for use, to transport any property described in subdivisions (a) and (b) of this subsection; *Provided*, any conveyance seized including aircraft, vehicles or vessels shall be released by the proper court upon a showing by the owner of record of such conveyance that the owner had no knowledge that such conveyance was being used in violation of any provision of sections 28-459 and 28-4,115 to 28-4,142; and (e) books, records and research, including formulas, microfilm, tapes, and data which are used, or intended for use in violation of the provisions of sections 28-459 and 28-4,115 to 28-4,142.

(2) Any conveyance, including aircraft, vehicles, or vessels, which is used, or intended for use to transport any property described in subdivisions (a) and (b) of subsection (1) of this section is hereby declared to be a common nuisance, and any peace officer having probable cause to believe that such conveyance is so used or intended for such use shall make a search thereof with or without a warrant.

forfeiture of all conveyances used to transport any illicit drug. At the outset it should be noted that forfeiture of an article that is

(3) All property seized without a search warrant shall not be subject to a replevin action and: (a) Shall be kept by the officer seizing such property for so long as it is needed as evidence in any trial; and (b) when no longer required as evidence, all property described in subdivision (1) (e) of this section shall be disposed of on order of a court of record of this state in such manner as the court in its sound discretion shall direct, and all property described in subdivisions (a), (b), and (c) of subsection (1) of this section, that has been used or is intended to be used in violation of the provisions of sections 28-459 and 28-4,115 to 28-4,142, when no longer needed as evidence shall be destroyed by the law enforcement agency holding the same or the Bureau of Examining Boards or turned over to the custody of the department; *Provided*, that a law enforcement agency may keep a small quantity of the property described in subdivisions (a), (b), and (c) of subsection (1) of this section for training purposes or use in investigations; *and provided further*, that any large quantity of property described in subdivisions (a), (b), and (c) of subsection (1) of this section, whether seized under a search warrant or validly seized without a warrant, may be disposed of on order of a court of record of this state in such manner as the court in its sound discretion shall direct. Such an order may be given only after a proper laboratory examination and report of such property has been completed and after a hearing has been held by the court after notice to the defendant of the proposed disposition of the property. The findings in such court order as to the nature, kind, and quantity of the property so disposed of may be accepted as evidence at subsequent court proceedings in lieu of the property ordered destroyed by the court order.

(4) When any conveyance, including aircraft, vehicles, or vessels, is seized under subdivision (1) (d) of this section, the person seizing the same shall within five days thereafter cause to be filed in the district court of the county in which seizure was made a complaint for condemnation of the conveyance seized. The proceedings shall be brought in the name of the state by the county attorney of the county in which the conveyance was seized. The complaint shall describe the conveyance, state the name of the owner if known, allege the essential elements of the violation which is claimed to exist, and shall conclude with a prayer of due process to enforce the forfeiture. Upon the filing of such a complaint, the court shall promptly cause process to issue to the sheriff, commanding him to take possession of the conveyance described in the complaint and to hold the same for further order of the court. The sheriff shall at the time of taking possession serve a copy of the process upon the owner of the conveyance in person or by registered or certified mail at his last-known address; *Provided*, any conveyance seized including aircraft, vehicles or vessels shall be released by the proper court upon a showing by the owner of record of such conveyance that such owner had no knowledge that such conveyance was being used in violation of any provision of sections 28-459 and 28-4,115 to 28-4,142. At the expiration of twenty days after such seizure by the sheriff if no claimant has appeared to defend such complaint, the court shall order the sheriff to dispose of

not itself contraband is unusual.⁵⁶ The proximity of illicit drugs again results in special treatment. A vehicle may be used in robbing, raping, and murdering without forfeiture, but here the court required the forfeiture of a vehicle in which two ounces of marijuana was found.⁵⁷

the seized conveyance.

Any person having an interest in the conveyance proceeded against, or any person against whom a civil or criminal liability would exist if such conveyance is in violation of the provisions of sections 28-459 and 28-4,115 to 28-4,142 may, within twenty days following the sheriff's taking of possession, appear and file answer or demurrer to the complaint. The answer or demurrer shall allege the interest or liability of the party filing it. In all other respects the issue shall be made up as in other civil actions.

When any conveyance is ordered sold by the court, the proceeds from the sale less the legal costs and charges shall be paid to the county treasurer for disposition in the manner provided for disposition of license money under the Constitution of this state. Whenever the condemnation of the conveyance is decreed, the court shall allow the claim of any claimant to the extent of such claimant's interest, for remission or mitigation of such forfeiture if such claimant proves to the satisfaction of the court (1) that he has not committed or caused to be committed an offense in violation of the provisions of sections 28-459 and 28-4,115 to 28-4,142 and has no interest in any controlled substance referred to in sections 28-459 and 28-4,115 to 28-4,142; (2) that he has an interest in such conveyance as owner or lienor or otherwise, acquired by him in good faith; and (3) that he at no time had any knowledge or reason to believe that such conveyance was being or would be used in, or to facilitate, the violation of the provisions of sections 28-459 and 28-4,115 to 28-4,142.

When a decree of condemnation is entered against any conveyance, court costs and fees and storage and other proper expenses shall be charged against the person, if any, intervening as claimant of the conveyance. When a conveyance is sold under court order, the officer holding the sale shall make a return to the court showing to whom the conveyance was sold and for what price. This return together with the court order shall authorize the county clerk to issue a title to the purchaser of the conveyance if such conveyance requires such title under the laws of this state.

NEB. REV. STAT. § 28-4135 (Supp. 1974).

56. See generally NEB. REV. STAT. § 28-1131 (Supp. 1974) (forfeiture of illegally used "police radio"); NEB. REV. STAT. § 54-726.04 (1968) (infected swine); NEB. REV. STAT. § 66-433 (1971) (vehicles used to illegally transport motor vehicle fuels). NEB. REV. STAT. § 29-820 (1964) generally provides for the return of seized property on order of the court.
57. 191 Neb. at 467, 215 N.W.2d at 852. The legislature also provides special educational programs for drug offenders that are somehow not needed for robbers, rapers, and murders. NEB. REV. STAT. § 28-4,125(6) (Supp. 1974) provides:

If a person is convicted of a violation under this section, as a part of the sentence he shall be required during the period of confinement to attend a course of instruction conducted by the department on the effects, medically, psychologically and

Reasoning in the usual fashion for dope cases, the court stated that due process depends on the setting, and concluded that "the present situation is one where a valid governmental interest justifies the seizure upon the discovery of contraband."⁵⁸ The majority argued that the statutory requirement that a forfeiture complaint be filed within five days after seizure combined with notice and hearing met the tests of due process.⁵⁹ The deprivation of property prior to hearing was justified on the grounds that unless the vehicle was seized, it could be removed from the court's jurisdiction or used in further criminal activities.⁶⁰

Judge McCown dissented arguing no important governmental interest justified seizure before notice and hearing. Moreover, if notice and hearing are to serve any purpose, they must be granted at a time when deprivation of property may still be prevented. Judge McCown also touched, but did not expand upon, the problems created by section 28-4,136 of the Nebraska statutes.⁶¹ That statute

socially, of the misuse of controlled substances. He shall also be required to receive medical treatment, while so confined, for the effect upon him of controlled substances. If a person is placed on probation, as a condition of probation he shall attend and complete an identical course of instruction conducted by the department and pay a fee of five dollars for the course. As a further condition the person shall be required to receive medical treatment for the effects of controlled substances abuses.

See also NEB. REV. STAT. § 28-4,138 (Supp. 1974). The section provides a general "educational" program to prevent and deter misuse and abuse of controlled substances.

58. *Id.* at 464, 215 N.W.2d at 851. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), *reversing*, 363 F. Supp. (D.P.R. 1973). But see *City of Everett v. Slade*, 83 Wash. 2d 80, 515 P.2d 1295 (1973). *Slade* attempted to follow *Fuentes v. Shevin*, 407 U.S. 67 (1972), and held a Washington forfeiture statute unconstitutional on due process grounds. The United States Supreme Court refused to hold a similar statute in *Calero-Toledo* to be unconstitutional. Since *Slade* and *Calero-Toledo* another state court has stepped forward to reject the legitimacy of forfeiture. See *State v. One Porsche*, 526 P.2d 917 (1974).

59. *Id.* at 465, 215 N.W.2d at 851.

60. *Id.* See 416 U.S. 663.

61. **Complaint; burden of proof; liability.** (1) It shall not be necessary for the state to negate any exemption or exception set forth in sections 28-459 and 28-4,115 to 28-4,142 in any complaint, information, indictment or other pleading or in any trial, hearing, or other proceeding under the provisions of sections 28-459 and 28-4,115 to 28-4,142 and the burden of proof of any such exemption or exception shall be upon the person claiming its benefit.

(2) In the absence of proof that a person is the duly authorized holder of an appropriate registration or order form issued under the provisions of sections 28-459 and 28-4,115 to 28-4,142, he shall be presumed not to be the holder of such registration or form, and the burden of proof shall be upon

provides that the owner of the vehicle has the burden of proof in establishing the forfeiture exception and that he had no knowledge that the conveyance was being used in violation of the law.

The ease with which the majority disposed of the constitutional due process aspects of the case may explain their drastic construction of the statutory language "to transport." "Transport" was construed to include the situation where, as here, the vehicle was transporting a human who had possession of illicit drugs. Judge Clinton in a separate dissenting opinion reasoned that because the Nebraska statute omitted the language, "or in any manner to facilitate the transportation . . ." ⁶² as found in the federal statute ⁶³ which he

him to rebut such presumption.

(3) No liability shall be imposed by virtue of the provisions of sections 28-459 and 28-4,115 to 28-4,142 upon any duly authorized state officer, engaged in the enforcement of the provisions of sections 28-459 and 28-4,115 to 28-4,142, who shall be engaged in the enforcement of any law or municipal ordinance relating to controlled substances.

NEB. REV. STAT. § 28-4136 (Supp. 1974).

62. **Forfeitures.**

(a) Property subject. The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this subchapter.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1) or (2).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2), except that—

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter II of this chapter; and

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State.

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.

21 U.S.C. § 881(a) (1970).

63. 21 U.S.C. § 881(a) (4) (1970).

thought spawned the Nebraska act, it could only mean that the Nebraska legislature did not intend to equate human possession in a vehicle with the phrase "to transport."⁶⁴ Judge Clinton argued:

If, for example, the Legislature intended to include only those cases where the purpose of the substance being in the car was to move the substance from one point to another then a limited definition of transport is required. A homely illustration might make the point. If one takes several bags of groceries from the supermarket to one's home it can be readily stated that he is using the automobile "to transport" the groceries. On the other hand, if one keeps a box of kleenex in the glove compartment for use when needed, can it really be argued that the automobile is being used "to transport" the kleenex.

In short, I would accept the defendant's argument that the forfeiture provisions of the statute were aimed at trafficking in controlled substances. In this case the quantity of marijuana found in the car was very small. Certain other evidence, residue of smoked marijuana, the packaging method indicate the substance was in the car for use. There was no evidence that the owner was dealing in drugs.⁶⁵

Statutes should be construed in their entirety. The question presented by the *Rambler* case involves not only the construction of "to transport," but also the meaning and purpose underlying the entire statutory scheme of the Uniform Controlled Substances Act. The perspective sketched at the beginning of this article suggests that particular questions must be analyzed in the context of all the law. It should be reiterated that:

[A]ll legal questions are fundamentally like those of the penumbra. It is to assert that there is no central element of actual law to be seen in the core of central meaning which rules have, that there is nothing in the nature of a legal rule inconsistent with *all* questions being open to reconsideration in the light of social policy.⁶⁶

Such an analysis would conclude that most of the controlled substance act is not just bad law, but not law; it would be invalid, or as phrased in our legal system, unconstitutional.⁶⁷ At the least,

64. 191 Neb. at 468-69, 215 N.W.2d at 853.

65. *Id.* at 469, 215 N.W.2d at 853.

66. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 615 (1958). The proposition quoted is what Hart was attempting to deny.

67. "Recognition of the fallacy or irrelevance of positivist theories of the validity of law carries us some distance towards the discovery of a sound theory, but something more than reference to experience and the ordinary use of moral language is needed even if there is no escape from appeal to that court. The first step in elucidation of the 'validity' of law follows recognition of the fact that the meaning of that term and the appropriate tests depend on the adopted theory of law. For example, in a positivist theory it is irrelevant to ask if a command, order, directive or commendation is valid in the sense

it is obvious that section 28-4,135 of the Nebraska statutes⁶⁸ involves the seizure and forfeiture of all controlled substances, all raw materials or equipment used to process controlled substances, all containers for controlled substances, and all conveyances used to transport the controlled substances or raw materials. The more coherent construction of section 28-4,135, in light of the purpose of the entire controlled substance act, is that the conveyances subject to seizure and forfeiture are those which have been designed to conceal illicit drugs. For example, conveyances with false panels, hollow bumpers, etc. would be within the scope of the statute.

Such a construction coheres with the statutory definition of "common nuisance," with the general premise that property not contraband itself is to be returned after seizure, and with the avoidance of serious constitutional questions. Certainly it coheres better with the underlying purpose of the statute, recognized by Judge Clinton, to control drug trafficking. The statute may then avoid problems of punishment by aiming at an activity rather than a person. As stated by Judge Clinton, "the practical effect of [a] proceeding is the forfeiture by the defendant of a car worth several thousand dollars and that is an additional penalty which I do not believe the Legislature contemplated in this situation."⁶⁹

The court's decision leaves local prosecutors and police in a situation where they can use the threat of forfeiture to trample the human and constitutional rights of citizens.⁷⁰ An apprehended sus-

of being true or false. One may ask if it is true that a judge entered this or that order, but it seems foolish to talk about the truth of the command—if that means talking about it in the way one talks about the truth of Boyle's law. But in none of the natural law or sociological theories is positive law viewed as comprised only of commands. The "reality" of the classical theory may be interpreted simply as a symbol of the facts and reasons adduced in support of a moral principle or judgment and, also, to mean that sound valuations have a distinctive quality or feature that is suited to relevant situations. . . . [A] more inclusive theory of law was suggested, in which its qualitative and factual, as well as its structural dimensions were indicated. . . . [T]he present thesis is that the "validity" of law must not only include, it also must extend beyond, logical validity. Of course, the validity of law in this enlarged view is not demonstrable in the rigorous way in which the fallacy of the purely empirical proposition is established, but there are parallels, perhaps strict analogies, between the modes of proof and the related meanings of truth and validity.

HALL, *supra* note 13, at 72-73.

68. See Note 55 *supra*.

69. 191 Neb. at 470, 215 N.W.2d at 853 (Clinton, J., dissenting). If this is indeed an additional criminal penalty there are most serious constitutional questions involved.

70. See generally Annot., 50 A.L.R.3d 172 (1973).

pect may be convinced to not assert any number of rights in a desperate attempt to avoid forfeiture. Force and fraud have been allowed as virtue.

F. Prosecutorial Misconduct

In *State v. Brooks*,⁷¹ the defendant appealed from a conviction for unlawful possession of heroin. The prosecutor had engaged in two glaring examples of misconduct at trial. Nevertheless, by drastically uprooting decisions previously considered to be at the core of the legal system the court affirmed the conviction.⁷²

Twenty-five years before *Griffin v. California*,⁷³ the Nebraska Supreme Court in *Bruntz v. State*⁷⁴ reversed a conviction because of the prosecutor's comment on the defendant's refusal to testify. In *Bruntz* that comment was the sole ground for reversal. Section 29-2011 of the Nebraska statutes⁷⁵ prohibits prosecutorial comment upon the accused's failure to testify and has been in effect since 1913. Yet the *Brooks* court found that the prosecutor's statement regarding defendant's refusal to take the witness stand⁷⁶ was inadvertent rather than deliberate,⁷⁷ and affirmed the lower court's decision. Judge McCown, dissenting as he had in all of the cases discussed here, noted that the effect on a defendant's rights does not depend on whether a statement was intentionally made.

In his closing argument the prosecutor stated that "he was personally convinced of the Defendant's guilt."⁷⁸ Such a statement

71. 189 Neb. 592, 204 N.W.2d 86 (1973).

72. The discussion of *Brooks* focuses on the issues of prosecution misconduct. *Brooks* also features a serious search and seizure question.

73. 380 U.S. 609 (1965).

74. 137 Neb. 565, 290 N.W. 420 (1940).

75. **Witnesses; Competency; Impeachment; Interest; Crime Commission; Accused as Witness; Failure to Testify; Effect; Comment.** No person shall be disqualified as a witness in any criminal prosecution by reason of his interest in the event of the same, as a party or otherwise, or by reason of his conviction of any crime, but such interest or conviction may be shown for the purpose of affecting his credibility. In the trial of all indictments, complaints and other proceedings against persons charged with the commission of crimes or offenses, the person so charged shall, at his own request, but not otherwise, be deemed a competent witness; nor shall the neglect or refusal to testify create any presumption against him, nor shall any reference be made to, nor any comment made upon such neglect or refusal.

NEB. REV. STAT. § 29-2011 (1964).

76. The prosecutor stated that "there is no evidence in the record about Mr. Brooks saying anything, because he did not take the stand." 189 Neb. at 595, 204 N.W.2d at 88.

77. *Id.*

78. *Id.* at 594, 204 N.W.2d at 88.

is contrary to Disciplinary Rule 7-106(C) (4) of the Code of Professional Responsibility⁷⁹ adopted by the Nebraska Supreme Court April 10, 1970. In *Wamsley v. State*,⁸⁰ the court had held such comments to be improper and generally prejudicial unless the belief is expressed as a deduction from the evidence. The record in *Brooks* did not show the assertion to be such a deduction.⁸¹ Nevertheless, the court found that the failure to grant a mistrial was not erroneous.

Finding clear evidence of guilt, the court held that "[u]nder the circumstances in this case we determine that the denial of a mistrial was within the discretion of the trial court."⁸² Thus, the recal-

79. **DR. 7-106 Trial Conduct.**

- (A) A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling.
- (B) In presenting a matter to a tribunal, a lawyer shall disclose:
 - (1) Legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel.
 - (2) Unless privileged or irrelevant, the identities of the clients he represents and of the persons who employed him.
- (C) In appearing in his professional capacity before a tribunal, a lawyer shall not:
 - (1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.
 - (2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.
 - (3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.
 - (4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.
 - (5) Fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply.
 - (6) Engage in undignified or discourteous conduct which is degrading to a tribunal.
 - (7) Intentionally or habitually violate any established rule of procedure or of evidence.

ABA CODE OF PROFESSIONAL RESPONSIBILITY (1974).

80. 171 Neb. 197, 106 N.W.2d 22 (1960). See generally Annot., 50 A.L.R.2d 766 (1956).

81. 189 Neb. at 598, 204 N.W.2d at 89-90 (McCown, J., dissenting).

82. *Id.* at 595, 204 N.W.2d at 88.

citrant dope experience entering at the periphery of the legal system again resulted in gross distortion of principles at the system's core. Judge McCown's dissent illuminated the problem. "In the words of this court in *Bruntz v. State*, 'If we treat violation indulgently, we shall soon—in the words of Pope—'first endure, then pity, then embrace.'"⁸³

G. Drugs and the Legal Order

The cases discussed above have accepted legal propositions in the context of the recalcitrant dope experience that, in order to cohere, have occasioned drastic and ugly readjustments in the core concepts of law. Life in America has been remodeled by the new law which supports the informer, the narcotics agent, and the secret police. Judicial decisions now sustain an unlimited sovereign, countenance judicial failure to follow legislative directives designed to protect an accused, endorse prison terms for possessing without a prescription a drug used by thousands, construe a statute to impose a forfeiture of an automobile where a misdemeanor is the only related criminal offense, and embrace glaring prosecutorial misconduct where guilt of the accused is otherwise thought to be clear. The illicit drug experience at the periphery of the holistic field of beliefs regarding law has produced a dysfunction in which reason has been displaced by a war psychosis as the primary mode of knowing. Law in particular, and society in the larger sense, has become the victim.

The "drug problem" is in many ways similar to the "Jewish problem." It has the potential, and has in fact begun, to destroy law as it has been known. The inherent dynamics of knowing are effecting a remodeled system of law and society that becomes increasingly similar to the legal system of a police state such as Nazi Germany.⁸⁴ The citizens of Germany quietly acquiesced in their leaders' scheme to gain absolute and irrational power by pointing to the Jew as the cause of all problems. The legal profession acqui-

83. *Id.* at 598, 204 N.W.2d at 90 (McCown, J., dissenting).

84. See generally *United States v. Robinson*, 414 U.S. 218 (1973); *Gustafson v. Florida*, 414 U.S. 260 (1973); *State v. Holmberg*, Docket No. 39680 (unpublished opinion, Supreme Court of Nebraska, July 24, 1974). The writer, by use of the term "police state", does not mean to imply any inherent fascism in law enforcement officials. The police should be the citizens' friend and supporter. And the citizen should be the friend and supporter of the police. Unfortunately, the current legal structure, particularly the legislative directives establishing ever increasing criminality makes this extremely difficult in too many situations.

esced.⁸⁵ Those who spoke out were silenced. You pay your money and you take your choice.

IV. HOW DID IT HAPPEN HERE?

Most of our institutional officers (whether judges, legislators, or executives) and most of our citizens are not pernicious persons. They are warm, alive, and human beings who espouse and act in other contexts upon the beliefs threatened by the drug laws. It seems reasonable to ask why, then, the current situation exists. I suggest that in most instances the cause is not maleficence, but rather lies in the perception of what I have called the recalcitrant dope experience.⁸⁶

Motivation plays a large role in what one perceives.⁸⁷ Need, drive, tension—the emotional elements—bring percepts out of the blur of reality into an integrated focus. The child's differentiation between friendly and hostile voices is a prime example of tension or need controlling the perceptual processes. The structure we think we see in the world is a result of practical necessity, and the selective awareness of the adult is primarily a matter of needs for peace, stability, and satisfaction. In this way the perceived

85. See generally Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 644-48 (1958); Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 615-21 (1958).

86. Like Alice on the other side of the looking glass, our two year examination of drug use, misuse and "abuse" has given us a constantly reinforced perception that all is not as it seems and that beliefs and realities are not always equal. All too often, familiar guideposts and landmarks, which we assumed could give us direction and purpose, faded, changed shape or simply disappeared when carefully scrutinized. All too often, plans and policies conceived in good will and high hopes had unanticipated negative aspects which created as many problems as they did solutions.

DRUG COMMISSION II at 1.

See C. REASONS, *THE CRIMINOLOGIST, CRIME, AND THE CRIMINAL* (forthcoming from Goodyear Publishing Company, Pacific Palisades, 1974); Reasons, Dope, Fiends, and Myths (paper presented at the American Sociological Association's Annual Meeting, August, 1972, New Orleans). The Reasons paper surveyed: (1) Reader's Guide to Periodical Literature 1890-1970, (2) International Index 1907-1970, and (3) The Federal Narcotic's Bureau's Annual Report 1930-1967. Reader's Guide presented dope myths 43 per cent of the time, International Index 52 per cent of the time, and the Bureau 98 per cent of the time.

87. The discussion of motivation, perception, and autism relies on G. MURPHY, *PERSONALITY* (1947). Again I am indebted to Professors Bishin and Stone for the introduction. See BISHIN & STONE, *supra* note 14, at 811-17. The discussion here is not complete, but suggests only what seem to be essential points.

world mirrors to a great extent the organization of the internal pattern of needs.

Precepts once integrated crystallize and resist change; new evidence, new phenomena are often unassimilable. Consequently error becomes standardized, and new percepts must frequently be sought by the novice or crackpot.⁸⁸ Of course, the outer world can never be so completely unstructured that perception becomes solely a function of the perceiver. On the other hand, it is never so structured of its own nature that the perceiver's role is obliterated. There is, then, a constant dialectic between emphasis on outer factors and emphasis on internal factors, so that there is a dynamic variation in the degree to which emotional elements influence the organization and cognition.

The major part of institutional and societal cognition of the "drug problem," again like the "Jewish problem," is an autism. The cognitive processes have been pushed in the direction of need satisfaction. A true autism occurs when the emotional elements markedly distort the cognitive picture of reality and the observer is significantly misled by the distortion. Unfortunately, the observer is rarely aware of what is happening.

Autisms are culturally shared. One's community status is largely dependent on his shared perceptions with other people of the community. Moreover, autism occurs not only in perception, but in all cognitive processes. If there is a central motivating affective ingredient, it is security, the need to be safe in the midst of the silent majority.

What needs, drives, or tensions have occasioned the autistic responses of our institutional officers? What affective elements would be so strong that then cause the drastic warping and uprooting of core legal principles? The question is not particularly difficult; the answer is particularly sad, tragic, and consequently seldom given.

Law by its nature restricts freedom. Law is responsibility, "freedom from," a notion that responds to fear. Hobbes viewed law as a condition of peace, a pact to prevent and defend against a state of war. But the state of war is the state of freedom, and the conception of war of every person against every person is premised on fear.

It is to the credit of law, and reason as a mode of knowing, that our fundamental law attempts to check fear responses to freedom. All of our great constitutional guarantees have been tested

88. *Id.* See also T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1964).

in climates of fear that the freedom they defend must be sacrificed in order to secure "freedom from" some new and omnipotent danger. It would be nice to conclude that the fundamental law has consistently withstood those challenges. The nature of law as a restriction on freedom, however, tends toward increasing dents in the paradox of fundamental law. The paradox can be lived with, but to do so it is essential that the nature of the paradox be understood and that every opportunity be exercised to minimize the irony. It is in this respect that the American legal system has been successful even in the midst of defeat.

It should perhaps be noted that many of the great cases (such as *Griswold v. Connecticut*)⁸⁹ exhibit difficulty in showing the world any single linear discourse that can achieve a status as a categorical imperative.⁹⁰ To the writer, however, they seem holistically and coherently true. Moreover, principled rationality played a major role in the knowing that reached the result.

This article has argued that fear has effected a "war psychosis" which is causing an ugly distortion in the principled rationality that has traditionally been the prime mode of knowing in the legal system. The fundamental law has not successfully withstood the challenge of this new danger which seems to pose a peculiar threat to reason itself. It is indeed ironic that it is not dope but fear that threatens the rationality of the legal system and society that stand as the guardian of freedom.

The law is the serpent that eats his own tail. Perhaps human-kind is destined to remain tied to the wheel of desire, ego, and fear. But humans and human legal systems are holistic, and they share emotions other than fear. Clarence Darrow struggled against autistic response, whether occasioned by fear, hate, or ignorance, throughout his professional career. In his closing argument in the defense of Nathan Leopold and Richard Loeb, Darrow represented much of the linear discourse of reason that today has become the legal rationale which denies institutionalized death a role in the sovereign's criminal law. And, although as a lawyer he relied on reason as a prime mode of knowing, he realized that reason is not, and cannot be, isolated or insulated from life. His closing words to the court in that case are instructive.

I was reading last night of the aspiration of the old Persian poet, Omar Khayyam. It appealed to me as the highest that I can vision. I wish it was in my heart, and I wish it was in the hearts of all.

89. 381 U.S. 479 (1965).

90. See A. WECHSLER, *PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW* (1961); A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

"So I be written in the Book of Love,
I do not care about that Book above,
Erase my name or write it as you will
So I be written in the Book of Love."⁹¹

This article has suggested that a reorganization of thoughts is in order as an approach to the recalcitrant dope experience and its victimization of core concepts of American law. It is the function of those concepts to support a reasoned defense of freedom in the face of fear. These are the concepts which attempt to ensure the uncertainty and beauty of life against the bleak and cheerless stability of a totalitarian existence. Of course, to know liberty is also to have known love. I can offer nothing better than a rephrasing of Darrow's insight. Search for those propositions which are at the core of our total field. Hypothesize them and test them. Listen to our children laugh, hug each other, and accept no assertion not cohering with love.

91. FAMOUS AMERICAN JURY SPEECHES (C.E. Hicks ed. 1925).

APPENDIX

This appendix attempts to present an annotated bibliography of articles in legal or law related periodicals which have considered the "drug problem." Approximately the last ten years of writings have been reviewed. The selection and summaries were not intended to substantiate the views offered in the body of the paper, nor is it intended as an authoritative index. It is hoped that a review of the appendix will, however, support the thesis urged in the text that our drug laws are a national, state, and local disgrace; that they tend toward the destruction of notions of law, justice, and virtue; and that they must be changed at once to help pull America out of a "war psychosis."

Law is, of course, maleable. The hammer of the drug laws has shaped a medieval gargoyle. Conservationists are attempting to aid the "real" American Eagle, but that bird must not perish in any reality.

The author wishes to thank and gratefully acknowledge Ms. Gina Dunning and Ms. Harlene Holz for their assistance preparing this bibliography.

1. Aronowitz, *Civil Commitment of Narcotic Addicts*, 67 COLUM. L. REV. 405 (1967).
CONCLUSION: Involuntary commitment is not justified on the basis of current knowledge.
LEGAL ARGUMENTS: (1) Deprivation of liberty without having been convicted of a crime and (2) difficulty of obtaining appropriate evidence.
2. Atkins, *Legal aspects of vocational rehabilitation of drug addicts*, 2 CONTEMP. DRUG PROBLEMS 607 (1973).
OVERVIEW: Discussion of various legal protections and non-protections of people involved in drug treatment programs.
POSITION: Every consideration should be made to ensure the privacy of those in drug treatment programs. Counter productive legal impediment (for example, revoking drivers licenses of those convicted of drug use thereby severely limiting employment possibilities) should be removed.
3. Bartles, *Better Living Through Legislation: The Control of Mind Altering Drugs*, 21 U. KAN. L. REV. 439 (1973).
POSITION: Use of heavy criminal sanctions to eliminate drug abuse is costly and unwise. To minimize the problem it must be recognized that because something is called a drug does not mean that it must be destroyed before it destroys society.
4. Baumgartner, *The Effect of Drugs on Criminal Responsibility, Specific Intent, and Mental Competency*, 8 AM. CRIM. L.Q. 118 (1970).
CONCLUSION: Drugs or addiction alone is generally insufficient to establish a defense of insanity. If proved, however, they may be sufficient to preclude intent or reduce the charge. Alcohol or drug induced incapacity is frequently accepted in instances of "involuntary" confessions and waiving constitutional rights, but these situations are subject to "special judicial scrutiny."

5. Bennett, *Drug Addiction and Its Effect on Criminal Responsibility*, 9 WAKE FOREST L. REV. 179 (1973).

VIEW: A person under the influence of narcotics, voluntarily taken, should not be held responsible for criminal acts if a specific criminal intent is required as an element of that crime and the intoxicated condition prohibits the formation of intent.

6. Bevans, *International Conventions in the Field of Narcotic Drugs*, 37 TEMP. L.Q. 41 (1963).

THEME: A summary of international conventions and resulting agreements concerning the control of narcotics manufacture, sale (import-export) and use of drugs.

7. Bonnie & Whitebread, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971 (1970).

SUMMARY: This is an extensive history of marijuana statutes and a discussion of cases arising thereunder. It is argued that most of the laws were passed without knowing the truth about the effects of marijuana.

LEGAL ARGUMENTS: (1) Due process and equal protection, *id.* at 1128; (2) cruel and unusual punishment, *id.* at 1133; (3) "status" argument based on *Robinson v. California*, 370 U.S. 660 (1962) and *Powell v. Texas*, 392 U.S. 514 (1968), *id.* at 1141; (4) free exercise of religion, *id.* at 1142; (5) right of privacy, *id.* at 1145; (6) ninth amendment, *id.* at 1147; and (7) inappropriate use of police power, *id.* at 1149.

8. Bowman, *Narcotic Addiction and Criminal Responsibility Under Durham*, 53 GEO. L.J. 1017 (1965).

THESIS: Drug addiction is an illness or disease; use does not prove addiction.

LEGAL ARGUMENT: The jury should be given the insanity instruction when determining criminal responsibility while under the influence of narcotics.

9. Boyko & Rotberg, *Constitutional Objections to California's Marijuana Possession Statute*, 14 U.C.L.A.L. REV. 773 (1967).

VIEW: The author criticizes the California statute requiring a mandatory minimum sentence of one year because: (1) marijuana is not addictive and no worse than alcohol or tobacco; (2) use leads neither to use of hard drugs or other crimes; and (3) the statute probably does not meet equal protection standards, see 787-88, substantive due process, see 790-91, and invades one's right to privacy, see 792.

10. Brown, *Narcotics and Nalline: Six Years of Testing*, 27 FED. PROBATION, June, 1963, at 27.

PREMISE: Nalline is a drug administered to a drug offender suspect for quick confirmation of status.

CAVEAT: The test must be carefully administered to minimize pain and discomfort if it is to be acceptable to courts and meet modern law enforcement standards.

11. Bruen, *Three Faces of Danger from Drugs*, 42 N.Y.S.B.J. 612 (1970).

THESIS: The drug problem is a result of lowered moral standards of society and pseudo-sophisticated pseudo-scientific ideas of the older generation that reject the values of the Judaeo-Christian religion. He believes "No treatment can be effective to cure an individual's drug problem which does not face the problem which causes the individual to rely on drugs." *Id.* at 620.

12. Burnett, *Crisis in Narcotics—Are Existing Federal Penalties Effective*,

10 WM. & MARY L. REV. 636 (1969).

THESIS: Despite a call for stricter penalties for drug abuse it is "sheer fancy" to believe they act as a deterrent.

LEGAL ARGUMENTS: (1) Overbroad drug laws; (2) insanity as a defense of the victim; and (3) eighth amendment questions of cruel and unusual punishment.

13. Cahill, *A Joint Move Against Narcotics*, 7 TRIAL, May-June, 1971, at 15.

SUMMARY: Drug abuse is a serious problem with no simple answer. The New Jersey plan includes a uniform law that treats all drugs alike, aims heavily at pushers, provides for an enlarged rehabilitation program (including expanded methadone treatment), and an extensive education program for the schools.

14. Cahn, *Control Can't Wait for Social Changes*, 4 TRIAL, April-May, 1968, at 41.

THESIS: "When we speak of the dangers of drug abuse and drug addiction, ours is a discourse of desperate urgency, for the stakes in our struggle against the social cancer are not only wasted lives and human suffering but, indeed, the foundations of social order and very survival of political democracy itself. . . . Our growing drug culture represents not only a mortal threat to political democracy, it is also the irreconcilable force of freedom in personal life, the implacable enemy of moral self-determination."

15. Cancellaro & Harriman, *Narcotic Addiction and Legal Responsibility: A Dilemma*, 19 WAYNE L. REV. 1041 (1973).

THESIS: There is much confusion between legality and justice with respect to drug use. The law regarding narcotics has a flip-flop tendency seemingly without consistency or rationale.

VIEW: A balance is needed between limitations on individual rights and making the best treatment available to drug users.

16. Card, *Aspects of British Drugs Legislation*, 20 U. TORONTO L.J. 88 (1970).

SUMMARY: The British Dangerous Drugs Acts are aimed at prevention and control, not punishment. Addiction is considered illness, not a crime, and doctors may prescribe drugs for addicts. Unauthorized possession is an offense, however, with a maximum penalty of £ 1,000 and/or imprisonment for 10 years on conviction or indictment, £ 250 and/or imprisonment for 12 months on summary conviction. It has been recommended that the punishment be substantially reduced.

17. Cazalas, *Addiction in the United States: A Medical—Legal History*, 18 LOYOLA L. REV. 1 (1972).

CONCLUSION: Since 1914 when United States first began to regulate narcotic drugs the treatment goal of total abstinence has been an overwhelming failure. Methadone maintenance has proved more successful than previous approaches.

SUGGESTIONS: (1) drug education, (2) law enforcement and customs, (3) medical treatment and (4) rehabilitation research.

18. Cazalas & Bucaro, *Methadone Maintenance Blockade Treatment: A Solution for Addiction*, 16 LOYOLA L. REV. 1 (1970).

THESIS: Drug addicts are "ill human beings" who should be reintegrated into society.

SUGGESTIONS: Addicts should be allowed a choice of methadone maintenance or "cold turkey" drying out. The public should be educated so they do not rely on the "crutch" of drugs.

19. Celler, *An Alternative Proposal for Dealing with Drug Addiction*, 27 *FED. PROBATION*, June, 1963, at 24.
 PREMISE: The White House Conference proposal for a federal program of civil commitment is too restrictive because those who need it would be ineligible.
 SUGGESTION: Money should be given to the states for hospitalizing and rehabilitating addicts.
20. Chapel & Taylor, *Drugs for Kicks*, 16 *CRIME & DELINQUENCY* 1 (1970).
 CONCLUSION: Legal restrictions for glue sniffing and related "highs" would probably only force it underground.
21. Clark, *Drugs and the Law*, 18 *LOYOLA L. REV.* 243 (1972).
 CONCLUSION: The basis for current marijuana laws has been proven to be false and thus legislatures should repeal the laws. License laws should be substituted. "Indeed, in an appropriate case, the Supreme Court might find it difficult to uphold a prosecution for possession under the present law." *Id.* at 247.
22. Cohen, *Control of Drug Abuse*, 34 *FED. PROBATION*, March, 1970, at 32.
 SUMMARY: An overview of the illicit use of stimulants, sedatives, hallucinogenic and allied drugs.
 RECOMMENDATIONS: (1) abolish mandatory sentence; (2) make possession and use of marijuana and hallucinogenics misdemeanors; (3) make a decision reflecting the medical aspect of the problem; (4) conduct intensified marijuana research; (5) support federal education and research development; and (6) establish treatment facilities.
23. Cohns & Lieberman, *Cannabis: A Forensic-Medical Review*, 24 *SW. L.J.* 446 (1970).
 POSITION: Given the medical "truth" about marijuana and the "fact" that present repressive marijuana laws do not work, the suggestion that the laws, and especially the mandatory minimal sentence, be revised or repealed should be given serious consideration.
24. Corso, *Legislative Solution to Narcotic and Drug Addiction*, 12 *CATHOLIC LAW*. 125 (1966).
 POSITION: The drug problem in New York has caused a dramatic increase in crime. The New York Legislature's plan for combatting it is close control of legal distribution and commitment of addicts to effect a cure.
25. Cuskey & Krasner, *The eyes of the beholder: the drug addict as criminal, patient or victim*, 2 *CONTEMP. DRUG PROBLEMS* 579 (1973).
 PREMISE: The primary difference between licit drugs of abuse and illicit drugs lies in how they are defined, perceived, and reacted to by legislatures and has little to do with chemistry, psychology or potential for danger.
 THEME: Classification of the drug user as a criminal, patient or victim determines what kind of help they will or should receive.
26. Decker, *The Official Report of the National Commission Studying Marijuana: More Misunderstanding*, 8 *U. SAN FRANCISCO L. REV.* 1 (1973).
 OVERVIEW: The policy of criminalizing marijuana has created serious philosophical, legal, criminal and law enforcement problems that society has been incapable of solving. The partial prohibition of the Presidential Commission reveals no workable solution.
27. Di Suvero, *Drug Offenses and the New Penal Law*, 32 *BROOKLYN L. REV.* 287 (1966).
 LEGAL THEORIES: (1) In view of Robinson's holding that addiction is an illness, punishment for use and possession also violate the eighth

and fourteenth amendments' prohibition against cruel and unusual punishment because the status necessarily requires the other two; (2) the quasi-criminal approach of commitment for rehabilitation may be contrary to due process requirements; (3) it is questionable whether detention of non-criminal addicts is justifiable under the police power.

28. DuPont, *How Corrections Can Beat the High Cost of Heroin Addiction*, 35 FED. PROBATION, June, 1971, at 43.

THESIS: Treatment in corrections setting, especially the methadone treatment, can be and is successful in reducing crime.

29. El-Kayal, *A Comparative Study of Narcotics and the Law in the United Arab Republic and the United States*, 20 DE PAUL L. REV. 859 (1971).

SUGGESTION: Law enforcement should focus on traffickers and not on use and possession. Addiction should be treated as an illness with civil commitment where necessary to encourage rehabilitation. The best attack is education of the non-user and improvement of conditions that cause turning to drugs.

30. Fahey, *The Enforcement of the Illinois Felony Marijuana Law in Georgia*, 1971 WASH. U.L.Q. 281.

OVERVIEW: The results of a survey and study of police and court activity on marijuana law enforcement are included. Attention was directed toward the role of race in selective enforcement. The article takes notice of police dilemma regarding personal constitutional rights versus duty to maintain law and order.

31. Ford, *LSD and the Law: A Framework for Policy Making*, 54 MINN. L. REV. 775 (1970).

POSITION: The present laws concerning LSD are unnecessary, ignorant, and ineffective reactions to unfounded fears. Medical and scientific research is offered as "proof."

PROPOSAL: A state or federal controlled use to individuals and researchers until "a general improvement of the quality of American society . . . came to pass (when) either the need which LSD fills would disappear or its usage would become simply one very minor aspect of social life." *Id.* at 804.

32. Frankel, *Narcotic Addiction, Criminal Responsibility and Civil Commitment*, 1966 UTAH L. REV. 581.

THESIS: Drug addiction is primarily a medical-social problem found among those with personality weakness and social, economic, cultural and familial deprivation causing frustrations. It is also found among those with access to supply (doctors and nurses).

LEGAL ARGUMENTS: (1) Criminal punishment is ineffective; and (2) due process question.

33. Greenstein & DiBianco, *Marijuana Laws—A Crime Against Humanity*, 48 NOTRE DAME LAW. 314 (1972).

POSITION: Marijuana laws are currently destroying more lives than the drug itself might do 40 years in the future. It should be legalized and controlled as is alcohol because "once a large number of people have decided that they will persist in the use of an intoxicant, government should not continue to criminalize the users of that drug." *Id.* at 332.

LEGAL ARGUMENT: It is probably unconstitutional to prohibit private use. *Id.* at 326. Penalties are illogical, *id.* at 320-22, especially since they are based on currently disproven "facts" and fears.

34. Grinspoon & Hedblom, *Marijuana and amphetamines: A Mirror Image*, 2 CONTEMP. DRUG PROBLEMS 665 (1973).

POSITION: Amphetamines have a high potential for psychological, physical, and social harm and should be tightly controlled.

35. Grupp & Lucas, *The "Marihuana Muddle" as Reflected in California Arrest Statistics and Dispositions*, 5 LAW & SOC'Y REV. 251 (1970).

OVERVIEW: Statistics presented show the arrests each year for marijuana are increasing, but while the disparity between arrests and convictions continues to widen, severity of punishment is declining.

CONCLUSION: "Continued effort to attempt to enforce and to expect enforcement of a law which attempts to regulate behavior that increasing numbers of persons participate in or tolerate, a law whose wisdom is questioned by persons representing a broad spectrum of lay and professional segments of our society and which appears to be largely unenforceable, can only lead to further disrespect for and attenuation of the law enforcement process." *Id.* at 266.

36. Haig, *Drugs: Some New Prospectives*, 1 CAN. B.J., Oct. 1970, at 1.

SUMMARY: Almost everyone in modern society is a drug user—aspirin, cough medicine, pep pills, etc. Those who use drugs for non-medical reasons do so to: avoid stress; escape; have new experiences; achieve improved understanding; and achieve a sense of belonging or to express independence or hostility. This is at great cost to society, and while some argue marijuana is less harmful than alcohol, society would be better off without either.

SUGGESTIONS: Understand those who abuse drugs and try to cure the source of the problem.

37. Heller, *A Conflict of Laws: The Drug Possession Offense and the Fourth Amendment*, 26 OKLA. L. REV. 317 (1973).

THEME: Society must choose either to stop enforcing the possession offense or give up constitutional protections on privacy.

PREMISE: Search and seizure rules affect police paperwork more than they influence police practices.

38. Hoff, *Drug Abuse*, 51 MTL. L. REV. 147 (1971).

THESIS: Though there may be some need to prohibit "hard" drugs and hallucinogens (mostly medical considerations) marijuana laws should be loosened or repealed and regulated as alcohol.

LEGAL ARGUMENT: Prohibiting marijuana use should require a compelling state interest. Equal protection guarantees of *Skinner v. Oklahoma* and zones of privacy as defined in *Griswold v. Connecticut* raise serious questions. The military even thinks marijuana is not criminal.

39. Homes, *Drug Addiction: Law and Attitudes*, 18 LOYOLA L. REV. 39 (1971).

THESIS: Drug legislation reflects society's desire to reinforce their moral position rooted in the Puritan ethic. Addicts are classified as evil and therefore conflict with the good society seeks to establish and maintain. They are isolated as a class, first in thought and then physically as individuals by civil or criminal commitment to protect society.

40. Huberty, *Civil Commitment of the Narcotic Addict: Evolution of a Treatment Method*, 18 CRIME & DELINQUENCY 99 (1972).

SUMMARY: Civil commitment has a much higher success rate than does criminal commitment. So far it has survived *Robinson's* "cruel and unusual punishment" tests. The New York Court of Appeals, however, upheld an addict's constitutional rights to remain silent, have an attorney present, and other safeguards. *Matter of James*, 54 Misc. 2d 514, 283 N.Y.2d 126 (Sup. Ct. 1968). Some argue that there is a

right not to be treated while others say if there is such a right, social costs of addiction might outweigh the right, especially if there is a high life risk. *Id.* at 107-08.

41. Hughes, *United States Narcotics Laws*, 1964 CRIM. L.R. 520.

VIEW: The drug problem in the United States is self-made because drug use has been made a crime. There is no justification for believing marijuana leads to the use of heroin and other drugs. Further, it is doubtful that drugs lead to criminal activities, but even if true, penalties based on puritanical views are too strict.

SUGGESTION: Give drugs away as in Britain.

42. Hurley, *Anti-Narcotic Testing: A Physician's Point of View*, 27 FED. PROBATION, June, 1963, at 32.

PREMISE: Anti-narcotic testing is useful in controlling and detecting post addiction use problems.

43. Irwin, *A rational approach to drug abuse prevention*, 2 CONTEMP. DRUG PROBLEMS 3 (1973).

SUGGESTION: There seems no clear instance in which punishment for the infraction of the law is more harmful than the crime or the laws more detrimental to the needs of society than the present drug abuse control laws.

44. Jacobson, *Alcoholism and Drug Abuse*, 7 TRIAL, May-June, 1971, at 13.

SUGGESTION: Legalization of marijuana, regulation and education are the best ways to deal with the problems resulting from the large number of students and Vietnam veterans who have used and do use marijuana.

45. Kinsley, *Legal Control of Narcotics*, 23 FOOD DRUG COSM. L.J. 306 (1968).

THESIS: Current devices used to control origin, possession, sale and to restrict the market are ineffective.

SUGGESTION: "We need thought, study and action to provide on the same compulsory basis for the psychological and psychiatric treatment of the non-addicts users of narcotics and of dangerous drugs." *Id.* at 311.

46. Kleeman & Posner, *The Comprehensive Drug Rehabilitation and Treatment Act: Treatment in Lieu of Prosecution*, 56 MASS. L.Q. 171 (1971).

OVERVIEW: A section by section analysis of Massachusetts' law providing for treatment for the addict or habitual user.

47. Kramer, *The State Versus the Addict: Uncivil Commitment*, 50 B.U.L. REV. 1 (1970).

CONCLUSION: "Dependence on opiates is a sufficient threat to our society as a whole and to the individuals within our society that substantial efforts to control, and if possible, eliminate it are justified. However, efforts to control or eliminate illegal opiate use can be carried out in such a manner and to such a degree that the cure is worse than the disease. . . . The trouble with the California Civil Addict program . . . is not merely that it violates the spirit, if not the letter, of the Supreme Court decision in *Robinson v. California*, but also that it does not work." *Id.* at 21-22.

48. Kuh, *Civil Commitment for Narcotic Addicts*, 27 FED. PROBATION, June, 1963, at 21.

PREMISE: Drug use and addiction is a contagious disease.

SUGGESTION: Quarantine user and give firm supervision to former addict with civil commitment voluntarily or after arrest.

49. Lang, *Narcotics Legislation—A Total Approach*, 12 CATHOLIC LAW. 131 (1966).

THEME: The article discusses the legal justification of New York's drug legislation dealing with the "pernicious criminal and social problem."

VIEW: Civil commitment is justified under the police power.

50. Lang, *The President's Crime Commission Task Force Report On Narcotics and Drug Abuse: A Critique of the Apologia*, 43 NOTRE DAME LAW 847 (1968).

THESES: Society has the right, and perhaps the duty, under the police power to protect itself from effects of drug abuse. This includes incarceration for possession and sale, as well as civil commitment for the addict.

SUGGESTION: An improvement could be made by properly classifying "hard and soft" drugs and adjusting penalties. The argument that marijuana is not as bad as alcohol is not acceptable because alcohol is admittedly "bad" and society need not tolerate an additional wrong merely because one is accepted.

51. Laughlin, *LSD-25 and Other Hallucinogens: A Pre-Reform Proposal*, 36 GEO. WASH. L. REV. 23 (1967).

THESES: Hallucinogens are a means of escaping society's restrictions and realities, but are bad only because they are illegal. Legalization would put many criminals (users, pushers, and organized crime) out of business.

LEGAL OBJECTION: Freedom of religion and possible conflict with United States v. Seegar definition of "religious belief" as "fundamental personal right."

52. Levine, *Narcotic Addiction as Viewed by a Federal Narcotic Agent*, 28 FED. PROBATION, Dec., 1964, at 30.

THEME: Traffickers should be jailed and users confined for treatment. The author's primary concern is for the safety and welfare of nonaddict contemporaries of addicts.

53. Lynch, *The Pharmacology of Addicting Drugs*, 12 CATHOLIC LAW. 121 (1966).

THESES: Narcotic addiction is a *health* problem (as distinguished from a medical problem because it is *bad* for the individual) and should be eradicated by law to prevent further increase.

54. Lynch, *The California Narcotic Addict Rehabilitation Law*, 12 N.Y.L.F. 369 (1966).

TOPIC: The California statute allows involuntary commitment of those persons addicted, or those who by reason of repeated narcotics use are in immediate danger of becoming addicted.

LEGAL BASIS: The statute is constitutional under state police power and affords procedural due process.

55. McDonald, *A Judge Looks at Drug Addiction*, 7 TRIAL May-June, 1971, at 16.

CONCLUSION: Drug addiction is "a dangerous disease for which there is no specific cure presently known to the civilized world. It is more dangerous than cancer . . . it is the new bubonic plague and spreads on contact". *Id.* "Quarantine" by way of civil or criminal commitment is as necessary as for diphtheria or leprosy.

56. McMorris, *The Decriminalization of Narcotics Addiction*, 3 AM. CRIM. L.Q. 84 (1965).

THEME: Narcotics users should be cared for as persons with an illness and not as criminals. Rehabilitation centers, even for those con-

victed of crimes, are the best answer.

LEGAL BASIS: Cruel and unusual punishment based on Robinson v. California, 414 U.S. 218 (1973).

57. Murray, *Psychology and The Drug Addict*, 12 CATHOLIC LAW. 98 (1966).
THESIS: Drug addiction is an illness; not until 1914 was use considered criminal or immoral.

58. Oliver, *A Judge Looks at LSD*, 32 FED. PROBATION, March, 1968, at 5.
VIEW: There may be some question as to the advisability of a law prohibiting LSD. When enforcing the provisions of the law against an admitted user the judge fortunately has been given discretion to act on a case by case basis as the circumstances of the defendant warrant.

59. Robertson & Teitelbaum, *Optimizing Legal Impact: A Case Study in Search of a Theory*, 1973 WIS. L. REV. 665.

PREMISE: Law makers should adopt a cost-benefit theory to keep their theories and policies in the real world.

ARGUMENT: Legal effectiveness depends on (1) identification of the problem and determination of means for solving it; (2) communication of the law to persons affected, especially implementors; (3) incentives to obtain desired results; and (4) official and non-official mandates for implementation.

60. Rosenbloom, *Drug Addiction: A Personal View*, 54 KY. L.J. 268 (1966).

VIEW: Drug addicts (particularly Jewish) exhibit certain common characteristics indicating a poor social adjustment, poor family background, no father, overindulgence, and deviant sexual behavior, among others.

SUGGESTIONS: Alternatives to institutionalization include (1) treatment as medical case (2) Synanon-type half-way houses, and (3) outpatient clinics.

61. Rosenthal, *Two Problems and a Lesson for the Draftsman of Drug Crimes Legislation*, 24 SW. L.J. 407 (1970).

The first problem is the value and place of the theory of deterrence as it relates to the sale and use of drugs themselves and the deterring effect of drug penalties on other crimes. The second problem relates to the response of the law to distributors and users as groups.

CONCLUSION: Laws have costs as well as benefits. The costs of having a law, particularly with respect to marijuana use, outweigh the benefits and would probably do so if only sales were prohibited.

62. Rotenberg & Sayer, *Marijuana in the Houston High Schools—A First Report*, 6 HOUSTON L. REV. 759 (1969).

OVERVIEW: A report on activities of police and school authorities in efforts to curb marijuana use and their effectiveness (or ineffectiveness). The report is based on interviews from police, school personnel, students and parents.

THESIS: Most activities are at least ineffective and in many cases unconstitutional.

63. Skinner, *Drug Abuse: An Opportunity for Drug Lawyers*, 26 FOOD-DRUG COSM. L.J. 111 (1971).

POSITION: Lawyers should be active in helping to keep drug law enforcement and reform in pace with society. In so doing they meet the problems before they become clients and cases.

64. Smith, *Marijuana and Health: Quest for a Public Policy*, 7 TRIAL 20 (May/June 1971).

OVERVIEW: An unemotional summary of pattern of use and effects and possible future problems resulting from continued use of marijuana.

65. Stern, *Marihuana and the Law—Will the Real Issues Please Stand Up*, 11 CRIMINOLOGY 275 (1973).

VIEW: The issue is not marihuana smoking as a health hazard but whether millions of people who use marihuana should be made criminals. Discussion should center on the overreaching of government.

66. Sternberg, *Synanon House—A Consideration of Its Implications for American Correction*, 54 J. CRIM. L.C. & P.S. 447 (1963).

THEME: Half-way houses appear to work for drug addicts but may be ineffective in dealing with other criminals because drug addiction is not a crime per se and addicts need a unique kind of rehabilitation.

67. Whitebread & Stevens, *Constructive Possession in Narcotics Cases: To Have and Not Have*, 58 VA. L. REV. 751 (1972).

POSITION: The various tests the courts have formulated of constructive possession in narcotics cases have failed to provide meaningful response, clouded judicial decision making with conclusory labels and created a morass of confusion and inconsistency not found when possession statutes are applied to objects other than drugs.

68. Tauro, *Marijuana and Relevant Problems—1969*, 7 AM. CRIM. L.Q. 174 (1969).

VIEW: As judge in *Commonwealth v. Leis*, 69 Mass. Adv. Sh. 97 (1967). Tauro held marijuana to be harmful and dangerous, use and possession were not fundamental rights, prohibition was within the police power and was not a denial of equal protection.

THESIS: On the basis of what is now known and understood marijuana is dangerous; it has no positive attributes and it need not be proven addiction leads to criminal activity or hard drugs.

69. Tedrow, *Drug Registration Abroad*, 37 TEMP. L.Q. 59 (1963).

THEME: A more uniform system of drug registration should be implemented in all countries so medical disasters, such as the thalidomide tragedy, could be avoided while keeping dangerous but useful drugs available.

70. Washington, *Adverse Legal Implications of Heroin Maintenance*, 4 N. CAR. CENTRAL L. REV. 255 (1973).

SUGGESTION: Heroin maintenance is not the answer to the drug problem. A more honest approach would involve the actual decriminalization of all narcotics possession laws.

CONCLUSION: Causes of action, such as tort liability for failure to act and malpractice, could be brought by addicts against heroin maintenance programs.

71. Weiss & Wizner, *Pot, Prayer, Politics, and Privacy: The Right to Cut Your Own Throat in Your Own Way*, 54 IOWA L. REV. 709 (1969).

THESIS: Drug use falls within the freedom of expression of the first amendment.

SUMMARY: The article includes an analysis of decisions regarding freedom of religion and how drug use fits within it. Also, there is a section on "the right to be self-destructive" as associated with freedom of religion and the criminal law. See *id.* at 730-35.

72. Whitford, *The Physician, the Law and the Drug Abuser*, 119 U. PA. L. REV. 933 (1971).

THESIS: For the treatment and rehabilitation approach to work the addict must be allowed to seek medical aid without fear of discovery, especially through doctor-patient confidences.

73. Wildes, *The United States Immigration Service v. John Lennon: The Cultural Lag*, 40 BROOKLYN L. REV. 279 (1973).
SUMMARY: The exclusionary provisions keeping John Lennon out of the country for possession of hashish are at best unreasonable and possibly unconstitutional.
74. Wood, *Preventive Law: The California Rehabilitation Center*, 2 SAN DIEGO L. REV. 54 (1965).
SUMMARY: The California addiction control and treatment program operates on much the same basis as mental commitment. Both criminal and non-criminal addicts are involved.
75. Young Lawyers' Conference, *Drugs: Survey Results and Recommendations*, 1 CAN. B.J., Oct. 1970, at 5.
OVERVIEW: A short summary of a survey of 257 Canadian lawyers indicating marijuana should be separated from the other drugs in regulation and though it should not be legalized, the severity of punishment should be reviewed.
76. Zinberg, *Why now? Drug use as a response to social and technological change*, 1 CONTEMP. DRUG PROBLEMS 747 (1972).
THESIS: Drug use is a vehicle of response rather than an end in itself. "In 1925 today's cannabis smoker might have gone to a speakeasy for a drink. In 1905 he might have bought himself a boater. In 1885 he might have gone West." *Id.* at 781.
77. Note, *Rehabilitation of Drug-Dependent Persons*, 21 CLEV. ST. L. REV. 180 (No. 3, 1973).
OVERVIEW: There seems to be no doubt that the state has power to punish or at least do something about drug related problems through the police power. Criminal commitment has not worked, and civil commitment is the new approach. There is a split of authority as to whether *Miranda* rights are available in civil commitment procedures.
78. Comment, *The Iowa Controlled Substances Act and the Accommodation Defense*, 59 IOWA L. REV. 640 (1974).
TOPIC: Constitutional flows in Iowa's accommodations defense include placing burden of proof on defendant, deprivation of jury trial and violation of the right against self incrimination.
79. Note, *The Armed Forces' Narcotic and Drug Detection and Rehabilitation Program: An Analysis of Some Legal Issues and Problems*, 7 NEW ENG. L. REV. 333 (1972).
OVERVIEW: The Note examines the Military Narcotics and Dangerous Drug Program and raises questions of possible fifth amendment violations.
SUGGESTION: Despite its shortcomings, the Military Program should not be rejected but improved upon by assuring that the civil liberties of the individual are respected.
80. Note, *Diversions of Drug Offenders in California*, 26 STAN. L. REV. 923 (1974).
VIEW: The California diversion statute represents a significant step towards a more human treatment of drug abusers but several provisions of the statute are either unconstitutional on their face or as applied.
81. Comment, *Marijuana Possession and the California Constitutional Prohibition of Cruel or Unusual Punishment*, 21 U.C.L.A.L. REV. 1136 (1974).
CONCLUSION: A criminal law authorizing incarceration of enormous numbers of otherwise law abiding citizens for the commission of a

relatively harmless, nonviolent and victimless act is unusual in any sense of the word.

82. *Marijuana Laws: An Empirical Study of Enforcement and Administration in Los Angeles County*, 15 U.C.L.A.L. REV. 1499 (1968).

SUMMARY: This article is a study of arrests and disposition of marijuana offenders. It suggests the harm caused by marijuana is not worth the time, energy, and money spent by the police and courts when there are other pressing problems, but declines to make the statement openly.

83. *Contemporary Problems of Drug Abuse: A National Symposium for Law and Medical Students*, 18 VILL. L. REV. 787 (1973).

OVERVIEW: Various views and solutions were presented by numerous participants.