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President's Crime Commission Task Force Report on Narcotics and Drug Abuse: A Critique of the Apologia

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THE PRESIDENT'S CRIME COMMISSION TASK FORCE REPORT ON NARCOTICS AND DRUG ABUSE: A CRITIQUE OF THE APOLOGIA

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I. Introduction

In an obviously apologetic fashion, manifesting some discomfort, the Report of the Task Force on Narcotics and Drug Abuse began:

> This Commission has not and could not have undertaken to duplicate the comprehensive study and report on drug abuse so recently completed by another Presidential Commission. Yet any study of law enforcement and the administration of criminal justice must of necessity include some reference to drug abuse and its associated problems. In the course of the discussion in this chapter, recommendations are made where they seem clearly advisable. In many instances these recommendations parallel ones made by the 1963 Commission.[1]

The President's Commission properly assumed that "drug traffic and abuse were growing and critical national concerns."[2] It recognized that opiate addiction was widespread, especially in big city ghettos, and that depressant, stimulant, and hallucinogenic drugs were the subject of increased abuse, particularly by students. The Commission also mentioned the role of organized crime in narcotic traffic and attempted to discuss the relationship between drug abuse and other crimes.

Structurally, the Commission broke down its Report into the following categories: drugs and their regulation, enforcement, drug abuse and crime, marijuana, treatment, civil commitment, medical practice and addiction, and education. Four recommendations in the field of enforcement and three recommendations in the field of research and education were made. With regard to enforcement, the Commission recommended an increase in the staffs of the Bureau of Customs and the Federal Bureau of Narcotics, the adoption of state drug abuse control legislation, the amendment of federal drug abuse control laws with respect to record-keeping, and the revision of sentencing laws to provide more flexibility. In the area of research and education, the Commission recommended research with respect to the regulation of drugs, research by the National Institute of Mental Health on the use of marijuana, and the development of educational materials.

While it is difficult to quarrel with these recommendations, primary attention should focus on what the Commission did not do, the questions to which it did not address itself in any meaningful fashion, the lack of depth of the Report,

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1 THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: NARCOTICS AND DRUG ABUSE 1 (1967) [hereinafter cited as TFR ON NARCOTICS].

2 *Id.*

and, particularly in the enforcement area, the failure to discuss the peculiar problems of drug enforcement in relation to the major problems facing law enforcement in general. Drug abuse is more than a combination of police, medical, federal, and state matters. It is, in the deepest sense, a philosophical and societal problem which must be viewed not only in the light of its manifestations in the United States but in the rest of the world as well, and in its proper historical perspective.

II. Drugs — History, Liberty, and Society

Prohibitions against drug abuse are not found in the Ten Commandments, nor was the possession or sale of narcotic drugs a common law crime. We must therefore ask these questions: What are the dangers of narcotic and drug abuse to society and the individual? In light of those dangers, if any, does society have the right to regulate and control drug use and drug traffic to the point of imposing penal sanctions for failure to comply with such regulations? Does society have the right to treat narcotic addicts by means of compulsory commitment and treatment procedures in the absence of any evidence of specific violations of law?

In his essay, *On Liberty,* John Stuart Mill wrote:

> the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forebear because it will be better for him to do so, because it will make him happier, because in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him, must be calculated to produce evil to someone else. The only part of the conduct of anyone, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.[3]

At first glance, it would seem that Mill's strictures would give solace to those who maintain that if narcotic addicts choose to destroy themselves by using drugs, it is a right to which they, as members of a free society, are entitled. But the nature of narcotic addiction and its history prove otherwise. Physiologically and emotionally the drug process and the drug life create a situation opposed to the exercise of free will, a dependency and enslavement which nullify the ability to choose. As was pointed out by Dr. William Park in a study of drug addiction in China in 1899,

3 J. S. MILL, *On Liberty* in ON LIBERTY, REPRESENTATIVE GOVERNMENT, THE SUBJECTION OF WOMEN 15 (Cumberlege ed. 1912).

> [o]pium is no respecter of persons. It enslaves everyone who comes under its influence, be he an Englishman or a Chinese, black or white, young or old, rich or poor, bond or free, whether he swallows it or smokes it, or injects it hypodermically, and an overdose of it will kill the prince or the pauper.[4]

And as Mill himself said:

> But by selling himself for a slave he abdicates his liberty; he . . . therefore defeats, in his own case, the very purpose which is the justification of allowing him to dispose of himself. . . . The principle of freedom cannot require that he should be free not to be free.[5]

Secondly, and this is more important in Mill's terms, is the fact that narcotic addiction does have ramifications beyond the self-destruction of the addict. Narcotic addiction is a threat not merely to the addict himself but to the fabric of society in general. It is primarily for this reason that society must be concerned with drug addiction, and it is for this reason that society does have the right to institute measures such as compulsory civil commitment to protect itself.

As Mr. Richard H. Blum points out in his consultant paper to the Task Force Report,[6] it is immaterial that there are conflicting studies about whether or not addicts are involved in violations of the law before or after their addiction.[7] Narcotic addiction is a contagion that poses a grave societal hazard whether or not addicts commit crimes to support their habit. The lesson of history in this regard is clear and uncontradicted. In 1767, the East India Company, a predecessor to the Mafia in drug trafficking, began exporting opium from India to China as a revenue-raising device for Her Majesty's government. The use of opium became so widespread in China, and its devastating effects on the population became so apparent, that in 1820 the Chinese authorities banned its importation. This led to the tragic Opium Wars of the 1840's and the subsequent English victory opening Chinese boundaries to narcotic traffic.

In the early 1800's, a pharmacist's assistant separated a substance from opium and aptly named it "Morphium" after Morpheus, the god of dreams. During the Civil War, army doctors used this substance so frequently that many soldiers became addicted. So marked was the increase in morphine addiction in the United States after the War that it soon became known as the "army disease." Then the ready availability of opium in patent medicines without prescription, the development of the hypodermic needle, and the growth of opium smoking in the West, spread by Chinese who were brought in to help build railroads, combined to create a situation of epidemic proportions by 1900.

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4 W. PARK, OPINIONS OF OVER ONE HUNDRED PHYSICIANS ON THE USE OF OPIUM IN CHINA 88 (1899).

5 MILL, *supra* note 3, at 126.

6 *See* TFR ON NARCOTICS 40.

7 *Id.* at 55-57. Actually, there is no conflict at all. The studies are from the 1930's, when there was one pattern of opiate addiction in the United States, and the post-World War II period, when there was a new and distinct pattern of addiction in the United States.

This problem, however, was confined mainly to the South and primarily involved whites, a high percentage of whom were women.[8] The development of heroin (originally proposed as a cure for morphine addiction) greatly increased the problem, and by the turn of the century it was estimated that there were more than 200,000 narcotic addicts in the United States. The spread of this contagion ultimately led to federal legislation: the Food and Drug Act of 1906[9] and the Harrison Act of 1914.[10] Possibly as a result of this legislation, between 1914 and World War II there was a marked decline in addiction despite a rapid population growth. During this period, morphine was the most popular drug. It was only after World War II that heroin addiction started to become prevalent in our urban areas.

Thus, as was pointed out by Dr. John Ball,[11] we have two quite distinct patterns of narcotic addiction in the United States. One addiction pattern, the one of gravest concern, is manifested by young heroin users who come predominantly from large metropolitan centers and often engage in unlawful activities which are related to their addiction. The other pattern is typified by the middle-aged southern white who uses morphine and paregoric, often obtaining his drugs through quasi-legal means. This second pattern preceded the passage of the Harrison Act in 1914 and has decreased materially since that time. The point to be emphasized, however, is that the pre-World War II non-criminal, morphine pattern and the post World War II criminal, heroin pattern were both legitimate objects of societal concern and action.

The basic premise that drug addiction is a proper matter for general concern is supported by racial statistics also. There are many who feel that narcotic addiction, in view of its prevalence in urban ghetto areas, is primarily a Negro problem. According to the Federal Bureau of Narcotics, however, at the end of 1966 Negroes constituted 50 percent of all addicts in the United States. Forty-nine percent were white.[12] Significantly, there has been a steady decline in newly reported cases of Negro addiction since 1955 and a concomitant rise in cases of addiction among whites. This is most dramatically illustrated by the racial composition of the addict group with which we are very concerned today — the group composed of those under 21 years of age. In December of 1966, according to the Federal Bureau of Narcotics, only 25.2 percent of the active narcotic addicts under 21 years of age were Negro; 74.6 percent were white.[13] While it is recognized that these statistics are in no way complete (and, indeed, one of the major endeavors in the area of drug abuse must be the obtaining of greater accuracy in statistical reporting), the very fact that law enforcement efforts are, of necessity, centered in the minority group, high crime rate

8 Eugene O'Neill's play, *Long Day's Journey into Night,* graphically and dramatically portrays the effect of addiction on a family.
9 34 Stat. 768 (1906).
10 38 Stat. 785 (1914).
11 Ball, *Two Patterns of Narcotic Drug Addiction in the United States,* J. CRIM. L.C. & P.S. 203 (1965).
12 TRAFFIC IN OPIUM AND OTHER DANGEROUS DRUGS, TREASURY REPORT BUREAU OF NARCOTICS 51 (1967).
13 *Id.* at 53.

areas indicates that teenage white addiction may be even greater than these figures show.[14]

The conclusion to be drawn with respect to this plethora of racial statistics is that addiction does not respect racial origin. We delude ourselves if we gear our educational treatment and enforcement efforts along racial lines alone.

III. Penal Law and Civil Commitment

Accepting the premise that society has the right and, indeed, the obligation to curb narcotic abuse, the question to be answered is: What forms of intervention are most effective and humane? Clearly, penal sanctions for the possession and sale of narcotic drugs are within the purview of the police power of the state. As the Supreme Court of the United States pointed out in *Robinson v. California:* "Such regulation, it can be assumed, could take a variety of valid forms. A State might impose criminal sanctions, for example, against the unauthorized manufacture, prescription, sale, purchase, or possession of narcotics within its borders."[15] The use of penal sanctions has been the primary method of regulation by both the federal government and the states. However, most persons who are apprehended in connection with violation of narcotic laws are either users or small-scale sellers. This leads to either the "revolving door" problem: *i.e.,* a short-term period of incarceration, return to the community, re-arrest, and return to prison for another short term, or inordinately long jail terms for users who are relatively low on the scale of culpability in narcotic traffic.

A new type of intervention that is currently emerging adopts a plan of compulsory commitment for meaningful treatment instead of meaningless incarceration. The compulsory treatment approach is geared not only to the offender convicted of a crime but is also directed at the narcotic addict who is not the subject of criminal charges. This utilization of treatment procedures for convicted offenders and for those arrested addicts who volunteer for such assistance has received general approbation, with Professor Aronowitz's caveat that no treatment period should be longer than that allowed for a conviction of the crime itself.[16] This outlook reflects a "time syndrome," *i.e.,* any amount of societal control or management of the life of an individual constitutes "doing time," whether it be straight jail time or a rehabilitative process.

The problem of involuntary civil commitment where no criminal charges are pending is an area of primary concern to those who seek to protect civil liberties. The Task Force did address itself to the pros and cons of civil commitment and concluded:

> [T]he Commission believes that involuntary civil commitment offers sufficient promise to warrant a fair test. But it must not become the civil

14 For example, in the Borough of Queens in New York City, whites constitute most of the addicts.

15 370 U.S. 660 (1962).

16 This outlook reflects a "time syndrome," *i.e.,* any amount of societal control or management of the life of an individual constitutes "doing time," whether it be straight jail time or a rehabilitative process.

> equivalent of imprisonment. The programs must offer the best possible treatment, including new techniques as they become available, and the duration of the commitment, either within or outside an institution, must be no longer than is reasonably necessary.[17]

This makes good sense. Even if, in Mill's terms, it has been established that narcotic addiction is a threat not only to the addict but to others, a just and fair society cannot sanction this extreme remedy unless civil commitment programs are entirely geared to the rehabilitative process. In the *Robinson* case, the majority of the Supreme Court declared: "In the interest of discouraging the violation of such laws, or in the interest of the general health or welfare of its inhabitants, a State might establish a program of compulsory treatment for those addicted to narcotics." (Footnote omitted.)[18] Mr. Justice Douglas, concurring, said: "The addict is a sick person. He may, of course, be confined for treatment or for the protection of society." (Footnote omitted.)[19]

I submit that both Mr. Justice Stewart and Mr. Justice Douglas should have insisted that the protection of society and the treatment of the addict are both essential ingredients of a constitutionally feasible treatment program rather than alternative justifications. Such a view obviously entails the use of flexible treatment programs geared to the determination of which types of programs benefit which type of addict. It also involves a constant awareness on the part of the courts and the administrators of such programs of the nature and quality of the treatment.

IV. Other Dangerous Drugs — Hard and Soft

Comments made about opiates and society's responses to their abuse are not necessarily valid when made about other dangerous drugs plaguing America today. Cultivation of opium has been reported as far back as seven centuries before Christ. Despite many unknowns in this area, there is indeed a large body of knowledge and historical perspective about opiate abuse. Widespread abuse of amphetamines, hallucinogens, barbiturates, and tranquilizers, however, is relatively new and poses fresh problems of understanding, regulation, and control. It may be said that while opiates are drugs of retreat, hallucinogens and stimulants are drugs of rebellion. We need, as the Commission has pointed out,[20] much more data to determine if a similar degree of criminality attends the use of "soft drugs" as attends heroin abuse. I suspect not. Unlike the case of heroin, millions of legitimate medical prescriptions are issued every year for stimulants, depressants, and tranquilizers. Unlike the situation with respect to heroin, there is evidence to indicate that many people can function on a socially acceptable level despite use of these drugs. Finally, unlike the opiate situation, it appears that soft drug abuse is often a phase rather than a long term involvement.

17 TFR ON NARCOTICS 17.
18 370 U.S. 660, 664-65 (1962).
19 *Id.* at 676.
20 TFR ON NARCOTICS 14.

V. A Statutory Guideline

From the empirical data available, it must be concluded that "soft drugs" are proper subjects of government regulation and control. It is important, however, that legislation in this area, particularly penal legislation, be selective, sophisticated, and structured in an intelligent manner. While the Commission, in discussing this problem, urged "further development of a sound and effective framework of regulatory and criminal laws with respect to dangerous drugs,"[21] they did not pose specific suggestions. I submit that New York's newly revised Penal Law[22] provides a proper framework for an effective statutory structure. Article 220 of this law, entitled "Dangerous Drug Offenses," divides dangerous drugs into four basic categories: narcotic drugs, depressants, stimulants, and hallucinogenic drugs. It provides varying degrees of penalties for both possession and sale of these dangerous drugs, but, in general, narcotic drug violations carry very high penalties, and other dangerous drug violations carry more moderate penalties. Unfortunately, the definition of narcotic drug in the Penal Law makes a cross-reference to the definition of narcotic drug in the Public Health Law,[23] which, as in many other states, includes marijuana within its purview. This creates many problems, one of which is that, as concern with heroin abuse rises and penalties are increased, penalties for the use of marijuana are increased concomitantly, which results in what I call "legislative." Such a result is unfortunate since judges, district attorneys, and, indeed, law enforcement officials in general recognize that marijuana violations do not contain the same measure of societal threat as heroin violations.[24] It would be appropriate, therefore, in devising a regulatory scheme, to place marijuana in the same category as LSD and other hallucinogens. This also seems logical in view of the frequent cases of multi-habituation with respect to marijuana and dangerous drugs. Marijuana, for example, is often used in conjunction with amphetamines, LSD, or peyote. An arrest will often result in the seizure of marijuana and LSD or marijuana and pep pills. Less frequently, however, is there an arrest where both marijuana and heroin are seized.

Cocaine is also defined in federal[25] and state[26] law as a narcotic drug. As the Commission points out, however, cocaine is a stimulant.[27] While it is undoubtedly more dangerous than marijuana, I believe that it should be categorized as a stimulant rather than as a narcotic. This would not necessarily mean that one would have to modify the penalties for cocaine violations; it simply means that a legislative body could provide special penalties for its illegal use while recognizing that it is a stimulant.

By utilizing this type of structure, penal law provisions dealing with the abuse of dangerous drugs would have both consistency and reasonableness —

21 *Id.* at 6.
22 N.Y. PEN. LAW § 220 (1967).
23 N.Y. PUBLIC HEALTH LAW § 3301 (1967).
24 This recognition is reflected in the high incidence of "bargain pleas" and suspended sentences.
25 INT. REV. CODE OF 1954, § 4731 (a).
26 UNIFORM NARCOTIC DRUG ACT § 14 (11).
27 *Id.* at 3.

factors often lacking when legislators view such emotionally charged matters.

Finally, it cannot be denied that sentencing for penal law violations is obviously a basic function of legislative bodies. However, few can quarrel with the Commission's recommendations that courts be given enough discretion to enable them to deal flexibly with violators of drug laws rather than being forced to impose mandatory terms of confinement.[28]

VI. Marijuana

The Commission made a point of commenting specially on marijuana. The selection of marijuana for special comment is amply justified by the current furor over its use on college campuses. Marijuana is fast becoming a focal point for student rebellion and protest against authority. It has created situations whereby college administrators are torn between their obligation to help students and their duty to cooperate with law enforcement officials; it has led to cries for legalization and liberalization and to cries for expulsion and the imposition of more stringent penal sanctions. The Commission's informative and unbiased analysis of the situation and its recommendation for more research are welcome, but again salient considerations are omitted.

The protagonists of marijuana have two basic contentions. First, marijuana, unlike heroin, does not produce physical dependence nor withdrawal, nor does it build up tolerance. The Commission recognizes this as true.[29] Secondly, the protagonists maintain that not only is marijuana not comparable to heroin but, even more important, it is less dangerous than alcohol which is a far greater threat to society. Often, those who oppose legalization of marijuana in any form fall into the trap of attempting to prove that marijuana is, indeed, a far greater menace than alcohol.

In view of the Commission's discussion on alcohol[30] and its enormous detrimental impact on the nation, this counter-argument is quite hollow. A more meaningful response would be to point out that merely because over a long period of time a tradition has been established whereby consumption of a toxic substance has been sanctioned in varying degrees on a mass level does not logically lead to the conclusion that society should release another toxic substance for mass consumption.

Then too, alcohol is, in fact, one of the most regulated drugs. There are laws dealing with the licensing of manufacturers, laws dealing with the age at which purchase is permissible, penal laws prohibiting public intoxication, and laws creating both penal and administrative penalties for driving under the influence of alcohol. The latter, of course, is a matter of extreme importance and an important factor in the death and injury tolls on our highways.

A person driving under the influence of marijuana is as dangerous as a

28 TFR ON NARCOTICS 12.
29 See *id.* at 13.
30 THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE; TASK FORCE REPORT ON DRUNKENNESS (1967).

person driving under the influence of alcohol.[31] How can society deter driving under the influence of marijuana? We can, of course, impose the same form of deterrent as we did with alcohol, that is, making it a criminal offense to drive under its influence. Theoretically, however, the law does not do vain and foolish things. Unenforceable statutes should not be passed. With respect to alcohol, it is relatively easy to prove that a person was driving under its influence. Smelling of alcohol on the breath, visual observation, blood alcohol tests or breath tests, make successful prosecutions possible. The same cannot be said for marijuana. Proof of driving while under the influence of marijuana would be a virtual impossibility. Accordingly it may properly be argued that a measured response is possible in connection with alcohol but if such a limited response is not possible with respect to marijuana at the present time, society has the right to ban its possession for all purposes.

VII. Law Enforcement

If there is one section of the report where it can be positively asserted that the Commission failed to come to grips in any meaningful fashion with a significant area, it is in the section on enforcement. If there is any one area of criminal law in which the recent court decisions relating to search and seizure, informers, wiretapping, eavesdropping and confessions[32] have particular importance, it is enforcement of narcotic and dangerous drug laws. Such vital areas as the problem of the proliferation of agencies which deal with this issue, the cooperation or lack of it among these agencies, the rivalries between and among these agencies, the need for coordination of criminal intelligence and problems of proof either were not mentioned at all or tangentially discussed. It is also a source of concern that the Report of the Arthur D. Little Company which surveyed the field of law enforcement was not included in the consultants' papers. This seems to me a grave omission. If one is to discuss law enforcement and the administration of justice and the area of narcotic and drug abuse, these issues cannot be avoided. They are not, obviously, easy of resolution. But problems do not disappear by refusing to acknowledge them. The failure to pose the questions and suggest alternatives casts a pall over the Commission's Report.

31 In this connection it is relevant to point out that there is, generally, no quarrel with the proposition that the physiological effects of marijuana include altered consciousness and disturbance of time and space perception. See GOODMAN & GILMAN, THE PHARMACOLOGICAL BASIS OF THERAPEUTICS 300 (1965).

32 *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967) (wiretapping and eavesdropping); Berger v. New York, 388 U.S. 41 (1967) (eavesdropping); Miranda v. Arizona, 384 U.S. 436 (1966) (interrogation of accused); Beek v. Ohio, 379 U.S. 89, (1964) (informers); Rugendorf v. United States, 376 U.S. 528 (1964) (informers); Ker v. California, 374 U.S. 23 (1963) (probable cause); Wong Sun v. United States, 371 U.S. 471 (1963) (search and seizure—interplay of 4th and 5th amendments); Mapp v. Ohio, 367 U.S. 643 (1961) (applicability of 4th amendment to states); Ross v. United States, 349 F.2d 210 (D.C. Cir. 1965) (police practice in narcotic sale cases); People v. Rivera, 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964) (stop and frisk).

VIII. Conclusion

The Presidential Commission's agonizing appraisal of the drug problem was based upon two fundamental assumptions. The first assumption was that there is a great deal of misinformation and emotionalism involved in the ideas of the average citizen about drug abuse. The second assumption was that new approaches have to be made in society's handling of the problem. With respect to the second assumption, the Commission was obviously unwilling or unable to analyze the drug problem in sufficient depth or to deal with its underlying philosophical issues.