Journal of Criminal Law and Criminology

Volume 52
Issue 3 *September-October*

Article 9

Fall 1961

The National District Attorneys' Association

Articles, Reports, and Notes
OF
THE NATIONAL DISTRICT ATTORNEYS' ASSOCIATION

[This section of the Journal has been added for the exclusive use of the National District Attorneys' Association. The selection and editing of the material contained herein is the sole responsibility of the Association's representative, Mr. Duane R. Nedrud, a former prosecuting attorney, and a member of the Association. However, neither Mr. Nedrud, the Association, nor the Journal assumes any responsibility for the views expressed by the authors of articles appearing in this section.]

Editor: Duane R. Nedrud, Associate Professor of Law, University of Kansas City, Kansas City, Missouri

THE EXPERT WITNESS IN CRIMINAL TRIALS

VICTOR H. BLANC

The author is a judge of the Court of Common Pleas in Philadelphia. He formerly served as District Attorney of Philadelphia.—EDITOR.

Among the earliest reported criminal cases in which expert testimony was used is *A Trial of Witches*.[1] It was reported that:

> "There was also Dr. Brown of Norwich, a person of great knowledge; who after this evidence given, and upon view of the three persons in court, was desired to give his opinion what he did conceive of them and he was clearly of opinion that the persons were bewitched."[2]

An expert witness today, like Dr. Brown of Norwich, must be a person of great knowledge. The purpose of the expert's testimony is to enlarge the vision and understanding of the triers of fact and to enable them to perform their function intelligently. The subject of inquiry must be one relating to some trade, profession, science, or art in which persons instructed therein, by study or experience, may be supposed to have more skill and knowledge than jurors of average intelligence are supposed to have. The use of expert evidence has increased until it was deemed an important and often controlling factor in an estimated sixty per cent of the most important litigation as early as 1937.[3] Obviously, expert evidence is being used with ever increasing frequency as scientific techniques develop. Happily, unlike Dr. Brown of Norwich, expert witnesses today rely not on the art of sorcery but are enlightened, intelligent, and scientific. Despite the more professional status of the witness, however, problems with the presentation of expert evidence still exist.

THE CALLING OF EXPERT WITNESSES

Under our adversary system of American jurisprudence, expert witnesses are called usually by either the defendant or the prosecution. They are called with relative infrequence by the court, even though the judge has inherent power to call such witnesses.[4] The inherent power to call witnesses, expert or otherwise, should be exercised in the interest of justice, where necessary to supplement or clarify evidence presented by either party. The court should exercise this power freely especially where unbiased expert witnesses are needed to clarify the confusion which is so often generated through the battle of the experts representing the respective litigants.

[1] Howell State Trials 687 (1665).

[2] *Id.* at 698.

[3] Commissioners' Prefatory Note to Model Expert Testimony Act, 9 UNIF. L. ANN. 351.

[4] In Matter of Peterson, 253 U.S. 300, 312 (1920), Mr. Justice Brandeis said: "Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties." See also Commonwealth v. Kosh, 305 Pa. 146, 157 Atl. 479 (1931), where the court ordered psychiatric examination of an important witness for the Commonwealth whose mental capacity had been challenged at trial; Kamabalo v. Coelho, 24 Hawaii 689 (1919) (handwriting expert called by judge); 9 WIGMORE, EVIDENCE §2484 (3d ed. 1940); Comment, *The Trial Judge's Use of His Power to Call Witnesses—An Aid to Adversary Presentation*, 51 NW. U. L. REV. 761 (1957).

In 1937, The National Conference of Commissioners on Uniform State Laws promulgated The Uniform Expert Testimony Act in recognition of this great need for eliminating or reducing partisanship in the selection of experts. Section 1 of the Act, which was redesignated a Model Act in 1943, provides in relevant part, that:

> "Wherever, in a civil or criminal proceeding, issues arise upon which the Court deems expert evidence is desirable, the Court, on its own motion, or on the request of either the state or the defendant in a criminal proceeding, . . . may appoint one or more experts, not exceeding three on each issue to testify at the trial."[5]

Several states have similar statutes, some of which antedate the Model Act.[6]

The Model Act provides that if the parties agree on an expert, the court shall appoint him. The expert, at the request of the court or of any party, may inspect and examine any person or subject matter committed to him, and the costs of the expert are costs of court and not of either party. One of the great incentives for bias and partisanship—the desire, consciously or unconsciously, to testify in favor of the employing party—is thus eliminated. Each party has the right to cross-examine the witness. The jury must be advised that the witness has been appointed by the court which doubtless will lend weight to his testimony. On the other hand, should either party deem it necessary to call expert witnesses of his own choosing, he may do so upon notice to the other.

The Model Act also provides that each expert may be required to file a report under oath, upon the subject he has inspected and examined, which report shall be subject to inspection. The court may require a conference of the experts so that all needless contradictions, diversions, and false issues can be eliminated before presentation to the jury.[7]

The inherent power of the trial court to call its own witnesses also rarely has been invoked in federal courts.[8] In recognition of that power, however, Rule 28 of the Federal Rules of the Criminal Procedure was adopted.[9]

The Hypothetical Question

In 1926, Judge Learned Hand, in one of his great lectures, said: "May I . . . hold up to you a prize of great value, the abolition of the hypothetical question—the most horrific and grotesque wen upon the fair face of Justice?"[10] When the expert has no first-hand knowledge of the situation about which his testimony is offered, must he first assume certain facts before giving his opinion on those assumptions? May the expert who has been in court during the taking of testimony be asked his opinion based on the truth of that testimony? Suppose the previous testimony has been conflicting, what facts should the expert assume? Should he be required to assume the facts as stated by one or of several witnesses and gives his opinion based on an assumption of truth

---

[5] 9A Unif. Laws Ann. 353.

[6] See collection of statutes in 2 Wigmore, Evidence §563 (3d ed. 1940). The purpose of these statutes, as expressed by the Supreme Court of Wisconsin, which state was one of the first to enact such legislation, was "to regulate the subject of expert evidence in criminal trials to the end that there may be some evidence in the case, not bought and paid for, coming from impartial witnesses who owe no duty or allegiance to either side of the controversy, and that the fact of their impartiality shall be made known to the jury." Jenner v. State, 202 Wis. 184, 193, 231 N.W. 634, 638 (1930).

[7] Williams, The Proof of Guilt 100-02 (1955), states that, in English jurisprudence, one of the serious problems confronting any lay jury is how to decide between conflicting expert evidence. The author suggests that, "A sensible recourse in some cases might be to adjourn the proceedings for the conflicting evidence to be considered by an expert or experts appointed by the court.

Under English practice, a judge at a criminal trial has the right to call a witness not called by either the prosecution or the defense, without the consent of either, if in his opinion that course is necessary in the interest of justice. The right, however, is subject to the proviso that a judge should not call a witness after the case for the defense is closed, "except in a case where a matter arose ex improviso, which no human ingenuity could foresee on the part of the prisoner." *Witness Called By Judge in a Criminal Trial*, 218 Law Times 3 (1954).

[8] Orfield, *Expert Witnesses in Federal Criminal Procedure*, 20 F.R.D. 317, 326 (1958); Sink, *The Unused Power of a Federal Judge to Call His Own Expert Witness*, 29 So. Calif. L. Rev. 195 (1956).

[9] "Rule 28. *Expert Witnesses.* The court may order the defendant or the government or both to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any, and may thereafter be called to testify by the court or by any party. He shall be subject to cross-examination by each party. The court may determine the reasonable compensation of such a witness and direct its payment out of such funds as may be provided by law. The parties also may call expert witnesses of their own selection."

[10] New York Bar Ass'n, Lectures on Legal Topics, 1921-22 (1926).

of each? In a situation where several experts have testified, can a succeeding expert be expected to form his opinion on the basis of the objective statements of the experts who preceded him rather than on inferences and conclusions drawn by them?

Wigmore has pointed out that the hypothetical question, "misused by the clumsy and abused by the clever, has in practice led to intolerable obstruction of truth." He has indicated that the question may be so built up and contrived by counsel as to represent only a partisan conclusion; that it has tended to mislead the jury as to the purport of actual expert opinion, and that it has tended to confuse the jury so that its employment becomes a mere waste of time and a futile obstruction. Wigmore suggested that a solution to the problem should encompass exempting the offering party from the requirement of using the hypothetical form, but according him the option of using it, both to be left to the trial court's discretion; and by permitting the opposing party, on cross-examination, to call for a hypothetical specification of the data which the witness has used as the basis of the opinion.[11] This was the scheme employed in Section 9 of the Model Act,[12] in Rule 58 of the Uniform Rules of Evidence,[13] and in Rule 409 of the Model Code of Evidence.[14]

In a California case,[15] the District Court of Appeals approved the action of a trial judge who permitted a physician to read the testimony of certain witnesses and letters written by the deceased which were introduced in evidence, and to answer the following question:

> "Not basing your opinion or founding your opinion upon the opinion of any witness in this case as to the mental capacity of Mr. V. but solely based upon the testimony which was given by [two witnesses] as to the conversations had with Mr. V., and the correspondence that you have examined, I will ask you if you have an opinion as to his mental capacity, and to give it."[16]

Objection was made that the opinions expressed were lacking in foundation and were incompetent. The objection was overruled. The doctor was cross-examined extensively and went into detail as to the precise evidence upon which his opinion was based.

In his opinion, Justice Fourth said:

> "Had the question been put in the usual form of a hypothetical question, nothing of importance would have been included therein which was not before the doctor in the transcript of the testimony of the witness in question and the exhibits examined. Further, had the question been put in the usual hypothetical manner, a great deal of extra time would have been consumed in asking the question, and surely, no one would argue that by so proceeding, the doctor would have been in a better position to have given an intelligent opinion."[17]

Judge Fourth said further:

> "It is our view that under the circumstances of this case, it was within the discretion of the court to admit the testimony in question. The trial judge was able to determine whether there was any conflict in what was said by the witnesses . . ., and whether the exhibits conflicted with any of the testimony of the witnesses and whether the transcript was too voluminous.
>
> "In any event, we cannot see whereby there could possibly have been the slightest prejudice worked against the appellants by reason of the form in which the question was put in this case."[18]

The court buttressed its opinion by citation of Rule 58 of the Uniform Rules, Rule 409 of the Model Code, *Wigmore on Evidence*, and the Model

[11] WIGMORE, EVIDENCE §686 (3d ed. 1940).

[12] "§9. *Examination of Experts.*—(1) An expert witness may be asked to state his inferences, whether these inferences are based on the witness' personal observation, or on evidence introduced at the trial and seen or heard by the witness, or on his technical knowledge of the subject, without first specifying hypothetically in the question the data on which these inferences are based. (2) An expert witness may be required, on direct or cross-examination, to specify the data on which his inferences are based."

[13] "Rule 58. *Hypothesis for Expert Opinion Not Necessary.* Questions calling for the opinion of an expert witness need not be hypothetical in form unless the judge in his discretion so requires, but the witness may state his opinion and reasons therefor without first specifying data on which it is based as an hypothesis or otherwise; but upon cross-examination he may be required to specify such data."

[14] "An expert witness may state his inference from relevant matters perceived by him or from evidence introduced at the trial and seen or heard by him or from his special knowledge, skill, experience or training, whether or not any such inference embraces an ultimate issue to be decided by the jury, and he may state his reason for such inferences and need not, unless the judge so orders, first specify, as any hypothesis or otherwise, the data from which he draws them; but he may thereafter during his examination or cross-examination be required to specify those data."

[15] Estate of Collins v. Ryan, 150 Cal. App. 2d 702, 310 P.2d 663 (1957).

[16] *Id.* at 713, 310 P.2d at 670.

[17] *Ibid.*

[18] *Id.* at 715, 310 P.2d at 672.

Act, the last of which would permit an opinion in all cases irrespective of conflict but providing for cross-examination for the enlightenment of the jury.

Invasion of Jury's Province and Form of Interrogatory

The most often voiced objection to expert testimony is that it invades the province of the jury. Whether a witness may give an opinion on the ultimate fact to be decided by the jury or whether he is limited only to opinions which are pertinent to the ultimate issue has been the subject of much confusion and quibbling. *Rogers on Expert Testimony*[19] quoted with approval a Texas case[20] to the effect that, "The proper test of the admissibility of the testimony of experts . . . is not whether or not the opinion of the expert would prove the very fact to be found by the jury. The object of all testimony is to prove the very fact to be found by the jury and it is not usurpation of the powers of the jury to prove that fact." Rogers stated emphatically that where the matter under inquiry is properly the subject of expert testimony the fact that the opinion elicited is on an issue or point to be decided by the jury does not render it inadmissible. The modern tendency seems to be in accord with this rule and does not require the exclusion of expert opinion testimony merely because it amounts to an opinion upon ultimate facts. "So long as proper guidance by a trial court leaves the jury free to exercise its untrammeled judgment upon the worth and weight of testimony and nothing is done to impair its freedom to bring in its verdict, we ought not be too finicky or fearful in allowing some discretion to trial judges in the conduct of a trial and in the appropriate submission of evidence within the general framework of familiar exclusionary rules."[21]

The leading case of *Grismore v. Consolidated Products*[22] presents an excellent discussion and contains an exhaustive collection of cases on this problem and on the form of the interrogatory. As to whether the expert witness may be asked his opinion as to the fact of a matter, or whether he may be asked his opinion only as to the possibility or probability of the matter, Justice Bliss said:

"There is no sound basis in law, reason or common sense for decisions that a witness may state his opinion as to what 'may', 'might', 'could', or 'probably did' cause something, but may not give an opinion as to what 'did', 'will', or 'would' cause it. The true rule is, and should be, that the witness may use such expression as voices his true state of mind on the matter, whether it be possibility, probability or actuality. To insist that a witness confine his testimony to an expression or possibility or probability, when his real judgment or conviction is actuality, or fact, is unfair to the witness and the jury and unjust to the party offering the testimony."[23]

Continuing, the court said:

"Many cases are decided because the jury accepted as true the direct testimony of a witness as to a particular item of fact. Why should it not be given the opportunity to decide a case, and the ultimate fact, upon the unequivocal opinion of an expert on a matter on which he is fully informed, and the jury have no information except his opinion? Since expert testimony is admitted to aid the jury, they are entitled to its full aid. If the witness is confident of his conclusion, let him say so. If it is but a possibility in his mind, let him say so. But do not compel him to say it is only a possibility when he believes it is an actuality. If the latter is the way he feels about it, the jury wish to know it and should know it. . . . We think there can no longer be any question of the soundness of the rule that if the matter before the tribunal for determination is one in which opinion testimony, either lay or expert, is necessary or proper, the witness may express his opinion either as to the possibility, probability, or actuality of the matter of fact about which he is interrogated and the answer will not be an invasion or usurpation of the jury even though it passes upon an ultimate fact which the jury must decide."[24]

The reasoning of the *Grismore* case is consistent with Wigmore,[25] and with Rule 409 of the Model Code.[26]

Conclusion

The legal profession must not, by restrictive procedure, deprive itself of the vast and ever

[19] Rogers on Expert Testimony §31 (3d. ed 1941).
[20] International and Great Northern R. R. Co. v. Mills, 34 Tex. Civ. App. 127, 78 S. W. 11, 12 (1903).
[21] Frankfurter, J., in U. S. v. Johnson, 319 U.S. 503, 519 (1943).
[22] 232 Ia. 328, 5 N.W.2d 646 (1942).
[23] *Id.* at 348, 5 N.W.2d at 657.
[24] *Ibid.*
[25] 7 Wigmore, Evidence §1920 (3d ed. 1940).
[26] *Supra*, note 12.

expanding body of expert evidence, scientific and otherwise. The less cumbersome and more flexible procedure espoused by Wigmore and set forth in the American Law Institute's Model Code of Evidence, in the Uniform Expert Testimony Act, in the Uniform Rules of Evidence, and in Rule 28 of the Federal Rules of Criminal Procedure should be followed.[27]

[27] An excellent collection of articles regarding expert testimony appears in 2 LAW & CONTEMP. PROB. 401–524 (1935), and includes the following: Rosenthal, *The Development of the Use of Expert Testimony* (403–18); Weihofen, *An Alternative to the Battle of Experts: Hospital Examination of Criminal Defendants Before Trial* (419–35); Overholser, *The History and Operation of the Briggs Law of Massachusetts* (436–47); Strauss, *The Qualifications of Psychiatrists as Experts in Legal Proceedings* (461–65); Osburn, *Reasons and Reasoning in Expert Testimony* (488–94); Inbau, *The Admissibility of Scientific Evidence in Criminal Cases* (495–503); Ploscowe, *The Expert Witness in Criminal Cases in France, Germany, and Italy* (504–09); and Bomar, *The Compensation of Expert Witnesses* (510–24).

A PROSECUTOR'S THOUGHTS CONCERNING ADDICTION

RICHARD H. KUH

The author is Administrative Assistant to the District Attorney of the County of New York.

Mr. Kuh's article is based upon a speech delivered at a Symposium on Narcotism held on May 12, 1961, in connection with the Annual Convention of the Medical Society of the State of New York.—EDITOR.

In 1960, the New York County District Attorney's office disposed of more than 5,000 narcotics cases.[1] The increase in our narcotics arrests, over the past five years, has averaged in the neighborhood of about five per cent, or 200 cases, annually.[2]

What New York City prosecutors have learned, as a result of this mandatory, expanding, never-ending cram-course in addiction, is the subject of this article.

WHAT IS THE NARCOTICS PROBLEM?

Certainly, it is not marijuana. Although our state laws ban marijuana[3] (classifying it as a narcotic despite its apparently non-addicting qualities),[4] only about eight per cent of our narcotics arrests are for its possession or sale.[5] If its use did not so often function as a prelude to heroin addiction,[6] we might not be so concerned about it.

Nor are opium or morphine the heart of our addiction problem. A rare and sensitive Samuel Taylor Coleridge, nourished by "the milk of Paradise,"[7] poured forth vibrantly expressive word pictures; but our addiction problem is not one compounded of any multiple of Coleridges. Some of you have seen patients who may have become addicted through medical use of morphine, administered initially to produce surcease from suffering. Most can be weaned away from such addictions. But morphine is not our problem either; if it were, we might consider weighing amendments to permit medically induced addic-

[1] The ANNUAL REPORT FOR THE YEAR 1960, COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK, Table II, reveals a total of 4,107 narcotics misdemeanor dispositions (possessing habit-forming drugs, and possessing hypodermic needles), of which 3,555 were convictions and 552 were acquittals, dismissals, and dismissals of criminal charges because defendents were treated as Youthful Offenders, etc. The records of the District Attorney's Office for New York County show an additional 949 narcotics felony charges that were disposed of in 1960.

[2] The records for the District Attorney's Office for New York County, from 1956 through 1960, reveal this case intake:

Year	Misdemeanors	Felonies	Total	Increase over Previous Year
1956	3,107	902	4,009	—
1957	3,366	1,113	4,479	470
1958	3,714	970	4,684	205
1959	3,876	928	4,804	120
1960	4,026	868	4,894	90

[3] N.Y. PUBLIC HEALTH LAW §3301(21) provides that " 'Narcotic Drugs' means . . . cannabis . . . ." Cannabis is the scientific name for marijuana.

[4] See MAYOR'S COMMITTEE ON MARIHUANA, THE MARIHUANA PROBLEM IN THE CITY OF NEW YORK 144–46 (1944).

[5] According to figures received from the New York City Police Department, 8.4% of the narcotics arrests made in the City during the year 1960 involved marijuana.

[6] TRUSSELL, SUMMARY OF REPORT PREPARED FOR THE INTERDEPARTMENTAL HEALTH RESOURCES BOARD OF NEW YORK STATE 5 (1959), notes that more than half of the heroin addicts studied had led up to their heroin addiction through the use of marijuana.

[7] COLERIDGE, KUBLA KHAN:

"For he on honey-dew hath fed,
And drunk the milk of Paradise."

tions to be medically sustained—with proper safeguards, as is done in England.[8]

The best estimates indicate that there are about 25,000 narcotics addicts in New York State, most of them located in the New York City area.[9] In New York City, about eighty-nine per cent of our current narcotics arrests involve heroin.[10] The heroin addict, then, is at the heart of "narcotism" in America.

Who Is the Addict?

The addict is generally male, he is generally young (from his late teens to his late twenties), and he is generally significantly maladjusted. Quite apart from his addiction, there is a likelihood that this maladjustment has found expression in a criminal record, or in conflicts with authority as a youthful offender, or as a juvenile deliquent. The heroin addict probably comes from one of our badly crowded urban areas. He has been unable to adjust to the tensions and responsibilities, to the economic privation, to the unsatisfactory family life that is all too common.[11]

Heroin is the elixir that provides his escape.

Certainly race and ethnic origin are not themselves factors tending to breed addiction or any other criminal conduct. But the frictions and insecurities present in the ghettoed areas of our great cities are likely to have their greatest impact upon those who are discriminated against for reasons beyond their control, and for whom race or language barriers interfere with early assimilation. The psychiatrists and sociologists can expound much more ably than can lawyers upon the forces that today generate crime among the negroes and the Puerto Rican migrants in our City far beyond their numerical proportions in our population; these same factors also drive these same minorities into a numerically dominant role among our heroin addicts.[12]

Heroin addiction, then, is a disease of high social contagion that not only may produce criminality because it is expensive to maintain, but also tends to attack those persons whose resistance to anti-social activity is, for a multitude of reasons, notoriously low.

The Penal Approach to "Narcotism"

In combatting heroin addiction in our largest cities, law enforcement has failed abysmally. It is no wonder, considering the procedures for dealing with addiction provided by our law. Indeed, Mr. Bumble's evaluation, "the law is a ass,"[13] is quite appropriate.

The arrested addict's case takes either of two courses. If bail is low enough for him to afford it, he is promptly released back into that community that spawned his addiction—possibly in time for a shot before the terrors of withdrawal begin. If he

[8] In England, of 350 known addicts in 1957, only fifty-two were addicted to heroin, and persons who have studied addiction in Britain have commented, ". . . it is our belief that there is little crime associated with narcotics in England and that the British narcotic problem in England is almost exclusively one of medical addiction. That is, addiction occurring in susceptible individuals exposed to narcotic drugs as a result of medical treatment." See Larimore & Brill, Report to Governor Rockefeller of an On the Site Study of the British Narcotic System 15, 17–18 (1959). England apparently has some slight *illicit* traffic, made up, according to one writer who favors the so-called "English system," of " 'joy poppers' and other experimenters who could not obtain drugs through medical channels, as well as some recently addicted persons who are afraid of contact with 'the law'." See Schur, *British Narcotics Policies*, 51 J. Crim. L., C. & P.S. 619, 622 (1961).

[9] The Report of the State of New York Joint Legislative Committee on Narcotic Study (1959) indicates, at p. 30, that as of September 1, 1958, 25,568 narcotic addicts had come to the attention of the New York City police. The Report of the Interdepartmental Committee on Narcotics to the President of the United States (1961) states, in appendix A, that as of December 31, 1959, there were 20,732 addicts in New York State, "predominately in the large metropolitan centers."

[10] According to figures received from the New York City Police Department, 89.9% of the narcotics arrests made in the City during the year 1960 involved heroin. Other reports indicating the major role of heroin in America's addiction problem include Report of the State of New York Joint Legislative Committee on Narcotics Study 30 (1959); New Jersey Commission on Narcotic Control, Sixth Report of Study and Recommendations 34–35 (1960); Council on Mental Health, *Report on Narcotic Addiction*, 165 A.M.A.J. 1707, 1712–13 (1957).

[11] For further descriptions of the heroin addict, see Report of the Interdepartmental Committee on Narcotics to the President of the United States 5, 14, and Appendix A (1961); Council on Mental Health, *Report on Drug Addiction*, 165 A.M.A.J. 1707, 1711–12, 1835, 1969–70 (1957); Report of the State of New York Joint Legislative Committee on Narcotic Study, 32–35 (1959); Narcotic Arrests in California, Bureau of Criminal Statistics, State Department of Justice (1960); New Jersey Commission on Narcotic Control, Sixth Report of Study and Recommendations 30–42 (1960); Bloomquist, *Let's Think Twice About "Free" Narcotics*, 21 G.P. 156, 157–59 (May 1960); Clausen, *Social and Psychological Factors in Narcotics Addiction*, 22 Law & Contemp. Prob. 34 (1957); Finestone, *Narcotics and Criminality*, 22 Law & Contemp. Prob. 69 (1957).

[12] See Report of the Interdepartmental Committee on Narcotics to the President of the United States 4–5, and Appendix A (1961); Council on Mental Health, *Report on Narcotic Addiction*, 165 A.M.A.J. 1707, 1711–12 (1957); *Hearings Before the Subcommittee on Appropriations of the House of Representatives*, 86th Cong., 2d Sess. at 144, 151, 175–76 (1960).

[13] Dickens, Oliver Twist c. 51.

cannot make bail, he remains in jail, for inhumane "cold turkey" detoxification. In neither event has our legal system taken any humane first step towards getting the addict away from drugs.

Then comes the addict's trial. A skillful defense attorney whose client is out on bail may succeed in delaying trial for as much as a year or longer—throughout which period the addicted defendant will, in all probability, continue catering to his addiction. Finally the time comes when the trial judge or trial jury must determine whether or not the defendant had violated the narcotics laws. But ordinarily this must be done in blissful and legally enforced ignorance of whether or not the defendant has had any prior medical or criminal drug record; it would be highly improper for the state to order a medical examination or to seek to introduce the evidence of its results.[14]

Verdict and sentence comes next.

Although New York County might boast of winning in the neighborhood of ninety per cent of its narcotics cases,[15] these are indeed Pyrrhic victories. Consider the less significant cases—the misdemeanors—that were "won" in 1960.[16] Of more than 3,500 defendants who were charged with and were convicted of narcotics misdemeanors in New York County that year, almost 1,000 were, by way of sentence, sent back into the streets. They received either a fine, or a suspended sentence, or were placed on nominal probation (but with extremely thin probationary supervision). About 750 additional convicted narcotics misdemeanants received sentences of not more than ninety days imprisonment. Thereafter, they too were sent back into the streets without meaningful supervision. The remaining half of the narcotic misdemeanants received reformatory or penitentiary sentences—sentences designed, theoretically, for the rehabilitation of criminals and executed in a penal environment, with little or no psychiatric aid.

Obviously, our penal system does not presently contain the weapons either for humane quarantine or for meaningful efforts at rehabilitation. To approach dealing with addicts more soundly, on occasion judges have taken somewhat extra-legal measures in cases in which defendants have pledged their cooperation. Courts have suspended sentences on condition that defendants report to narcotics hospitals. Such hospital facilities, however, are sparse. The federal hospital in Lexington, Kentucky, is some 600 miles from New York City. Moreover, the defendant who changes his mind after reaching Lexington—and after having had his sentence suspended—cannot be held against his will and compelled to undergo further treatment. Should the defendant agree to accept the grossly inadequate State and City narcotic addicts' hospital facilities that are now available—and should there be space in them for him—he will be held no longer than a couple of weeks, until he has been detoxified, and will then be released, ready to start the narcotics merry-go-round once more!

What Can Be Done To Lessen This Evil?

Maybe there should be a clamor for larger budgets for law enforcement, for employing additional personnel to prevent the smuggling of heroin into the United States. No heroin is produced here, and if all could be and were kept out, we would have no heroin problem. Although more enforcement agents could keep out more illicit drugs, a point of diminishing returns is reached. Anyone passing through customs could readily conceal from the most thorough search an ounce—a tiny packet—of contraband, in any of a hundred places. An ounce of relatively pure heroin today is valued at about $500; when broken down and adulterated for street use, it may ultimately bring upwards of $5,000. Clearly, even with the utmost vigilance, all heroin cannot be kept out.

The Clinical Approach

Another alternative is that we legalize the administration of narcotic drugs to addicts.[17]

[14] In a case in which, in order to test for intoxication, a blood sample was drawn from an unconscious driver of a car involved in an accident in which three persons were killed, and the driver was charged with involuntary manslaughter, the Supreme Court split, six to three. Breithaupt v. Abram, 352 U.S. 432 (1957). Contrast also People v. Duroncelay, 312 P.2d 690 (Calif. 1957) (taking blood from conscious and protesting defendant sustained) with State v. Kroenig, 79 N.W.2d 810 (Wis. 1956) (taking blood from semi-conscious defendant held to be improper). As the nalline test for narcotics addiction involves the use of intramuscular injections, and ordinarily a defendant would be conscious, and possibly objecting, and as the justification would be suspicion of addiction rather than involvement in the deaths of others, the likelihood of our criminal courts barring the use of such a test, and of testimony concerning it, appears to be considerable.

[15] See note 1 *supra*.

[16] See Annual Report for the Year 1960, Court of Special Sessions of the City of New York, Table VIII, for a detailed breakdown of the misdemeanor sentences imposed by that Court in New York County in the year 1960.

[17] See Berger, *Dealing with Drug Addiction, A Reply to Mr. Kuh*, 144 N.Y.L.J.4 (No. 41, Aug. 29, 1960).

This might be debated at some length. The best that can be done here, however, is to tick off a series of arguments against it:

1. Heroin is so pernicious that even the "legalization" people have not proposed that it be legalized. They suggest that addicts be given other opiates. Yet the heroin addict is not satisfied by lesser opiates, and so would continue to resort to the illegal heroin market.

2. Drug addicts find their tolerances are constantly increasing. Steady dosages may, at best, prevent withdrawal symptoms, but mounting dosages are required by the addict who is seeking "kicks." Clinical schemes do not contemplate mounting dosages. Hence such addicts would continue to resort to the illegal heroin market.

3. Heroin addicts are, for the most part, distorted personalities in rebellion against such regimentation as social living imposes. It is unlikely, therefore, that they will submit willingly to a system of registration and reporting daily—or more often—to clinics. As long as they avoid arrest, they will remain uninhibited by officialdom and red tape if they continue to resort to the illegal heroin market.

4. The State has an obligation to promote the betterment of public health. In good conscience, it ought not to engage in administering narcotic drugs to individuals for indefinite periods, when such drugs, ultimately, by destroying appetite and through other harmful side-effects, will impair health, and when, by lulling patients into euphoria, they will destroy ambition and industry.[18]

5. Experience has demonstrated that addiction increases proportionately to the availability of drugs. What greater incentive to becoming an addict could exist than the guarantee that the government will see to it that drugs are provided, at little or no cost, whenever needed? It is tragic that the medical profession has one of the highest rates of narcotism of any white collar group in the community; this would seem to be linked to the doctor's ready access to narcotic drugs.[19] There are other signs of the connection between rates of addiction and accessibility to drugs. During the 1920's, when America experimented with narcotics clinics, addiction rose markedly until the medical profession itself suggested that the dispensation of drugs at these "addict filling stations" be terminated.[20] As addiction increases with ready availability, and as it is generally conceded that addiction is pernicious, a moral government becomes morally obligated not to champion such availability.

Clearly the arguments pro and con for clinics will continue to rage, regardless of what is said. All, however, must recognize a bona fide difference of opinion among respected authorities on this question,[21] with one group of the belief that if clinics are to be recreated, the scourge of addiction will multiply at an accelerated rate. As long as an appreciable body of informed opinion is of this belief, no person with serious responsibilities for law enforcement—and that includes legislators as well as prosecutors—can, in good conscience, recommend the clinical distribution of narcotics.

The Hospitalization Plan

Until, in the spirit of the mid-twentieth century, research develops an Instant-Addict-Cure, our

[18] See *The Scourge of Narcotics*, Spring 3100 6, 7 (Dec. 1958), and discussion of statement therein contained concerning impact of narcotics addiction on health and character, appearing in Berger, *op. cit. supra* note 17, and Gamso, *Dealing with Drug Addiction, A Reply to Dr. Berger*, 144 N.Y.L.J. 4 (No. 42, Aug. 30, 1960).

[19] See Bloomquist, *The Problem of Doctor Addiction*, 1 Medicolegal Digest 11 (No. 4, Aug. 1960), which notes that one out of every one hundred physicians in the United States, either is, or has been, or will become a narcotic addict. At page 14, Dr. Bloomquist says:

"The doctor addict is a living example of the danger of easily obtained narcotics, an example of a man who has but to reach into his private stores of drugs to obtain his nemesis."

See also Quinn, *Narcotic Addiction in Physicians*, Bulletin of Los Angeles County Medical Association (April 3, 1958).

[20] See Council on Mental Health, *Report on Narcotic Addiction*, 165 A.M.A.J. 1707, 1709, 1969, 1972 (1957).

[21] Support for the ambulatory treatment of narcotic addicts is found in the INTERIM REPORT OF THE JOINT COMMITTEE OF THE AMERICAN BAR ASSOCIATION AND THE AMERICAN MEDICAL ASSOCIATION ON NARCOTIC DRUGS (1958); Berger, *op. cit. supra* note 17; Howe, *An Alternative Solution to the Narcotic Problem*, 22 LAW & CONTEMP. PROB. 132 (1957); Lindesmith, *The British System of Narcotics Control*, 22 LAW & CONTEMP. PROB. 138 (1957); Schur, *op. cit. supra* note 8.

Opposition to such ambulatory treatment is found in Council on Mental Health, *Report on Narcotic Addiction*, 165 A.M.A.J. 1707, 1834, 1968 (1957); Ausubel, *Controversial Issues in the Management of Drug Addiction: Legalization, Ambulatory Treatment and the British System* (paper read September 4, 1959, at the Convention of the American Psychological Association); Gilbert, *Why Dope Clinics Won't Work*, American Mercury 7 (May 1957); LARIMORE & BRILL, *op. cit. supra* note 8.

The REPORT OF THE INTERDEPARTMENTAL COMMITTEE ON NARCOTICS TO THE PRESIDENT OF THE UNITED STATES (1961) notes, at p. 10, that disapproval has also come from the Commission on Narcotic Drugs of the United Nations, the American Medical Association (1924), The Committee on Drug Addiction and Narcotics of the National Research Council (1954), and the United States Senate and House Subcommittees on Narcotics (1955).

goals in dealing with addiction are dual: on the one hand, the community must be protected from the contagion addicts spread and the devastation that they wreak, *and*, on the other, addicts must be treated in a humane fashion during that period of time when they are in quarantine for the community's protection.

A plan that might, ultimately, have achieved both of these goals was before the New York legislature during the 1961 Session, but was not enacted.[22] Aspects of that same plan are now before the Congress, under the prime sponsorship of New York's United States Senators, Jacob K. Javits and Kenneth B. Keating.[23] It is a plan that has attracted widespread support from persons both in and out of law enforcement.[24] It is simple, but it is expensive.

The plan calls for the hospitalization of narcotics addicts on a massive scale. By that I do not mean in a single Gargantuan institution; what I mean by "massive" is that it will embrace facilities for thousands, and possibly ultimately for even tens of thousands, of addicts. Some of these, the post-adolescent, for instance, might be in work camps; others might be on farms; still others would be in more conventional hospital atmosphere. Some of the hospitals would be newly constructed institutions; others—more immediately available—would be existing institutions, such as mental hospitals with beds that have been emptied through the miracle of tranquilizers and improved therapy,[25] or tuberculosis sanitariums vacated by the new wonder drugs. All such institutions would have two things in common, however; they would be closed—patients would not be permitted to leave at will—and they would be oriented along lines of cure. They would be staffed with vocational experts, social workers, psychologists, and psychiatrists. Their programs would stress useful work, occupational therapy, recreation, and psychotherapy. Closed they would be, but "Stone walls do not a prison make, nor iron bars a cage,"[26] —they would not exist for punishment and vengeance, but they would be dedicated to hope and to encouragement.

The idea of civil quarantine, as something quite distinct from correctional imprisonment, even although both restrict the subject's freedom, is nothing new. Almost 600 years ago, it was used to battle the bubonic plague in Venice and in Marseille.[27]

Humane quarantine, although still all but unknown for narcotics addicts, has been urged for ill persons by the medical profession for more than a century. In May, 1857, Dr. John W. Sterling, then of the Staten Island Marine Hospital, addressing the first congress ever convened on this continent to consider the question of quarantine, said:

> "... hospitals for the sequestration, care, and sanitary treatment of the sick ... instead of being regarded as nuisances, should be considered humane institutions for the relief of the suffering stranger, as well as for the protection of citizens against the introduction of contagious diseases."[28]

One hundred and four years later there is still a lack of humane institutions in the state of New York, on any significant scale, for the relief of the suffering narcotics addict!

The hospital plan would be expensive. But so is

[22] S.Int. 2170, S.Pr. 4422 (introduced by Senator Berkowitz), and A.Int. 3450, A.Pr. 5663 (introduced by Assemblyman Volker) were companion bills providing, with certain safeguards, an option for persons arrested on narcotic charges: in lieu of criminal proceedings, they might undergo civil hospitalization, to be followed by a period of supervised out-patient treatment. The Assembly bill passed during the closing days of New York's 1961 legislative session, but was permitted to die in committee in the Senate.

These bills and the companion federal proposals (see note 23 *infra*) articulate a program outlined by the writer in a statement made May 16, 1960 at hearings in New York City conducted by the President's Interdepartmental Committee on Narcotics. See Kuh, *Dealing with Narcotics Addiction*, 143 N.Y.L.J. 4 (Nos. 110–12, June 8–10, 1960).

[23] S.1693 and S.1694, 87th Cong., 1st Sess. (1961).

[24] In introducing the bills that would implement this program federally, Senators Javits and Keating noted the support of law enforcement agencies, including district attorneys and the Federal Commissioner of Narcotics for this particular program, and the support of the United States Attorney General and of the Secretary of Health, Education and Welfare for the hospitalizing of addicts. See 107 CONG. REC. 6029-43 (daily ed. Apr. 20, 1961). The writer is in receipt of letters and resolutions (copies of which were forwarded to the New York State legislative leaders) indicating support for this from these New York City officials: the Chief City Magistrate, the Commissioner of Correction, and the City Youth Board; also from leading civic groups and from the appropriate committees of county, city and state bar associations.

[25] The INTERIM ANNUAL REPORT, 1959–60, OF THE NEW YORK COMMISSIONER OF MENTAL HYGIENE (May 26, 1960) notes a decrease in resident mental patients from 93,559 in June, 1955, to 88,610 in March, 1960, an annual decrease of 1,000 patients. See N.Y. Times, May 27, 1960, p. 32, col. 1.

[26] LOVELACE, TO ALTHEA FROM PRISON.

[27] See *Quarantine*, 18 ENCYCLOPEDIA BRITANNICA 827 (1960).

[28] See MINUTES OF THE PROCEEDINGS OF THE QUARANTINE CONVENTION HELD AT PHILADELPHIA, MAY 13–15, 1857, pp. 49–50.

inaction. Hospitalization may cost the state and the federal governments twenty-five or fifty million dollars each, annually, for some years to come. Today, without such hospitalization, property loses in New York City alone, attributable to addiction, run in the neighborhood of $200,000,000 annually.[29] Police, courts and jails are not without additional expense.

Is it realistic to hope for facilities sufficient to accomodate thousands of addicts simultaneously? Yes, although New York City and New York State combined have, today, only a pitiable 325 hospital beds for narcotics addicts.[30] In kindred areas, large numbers have not proven discouraging to New Yorkers. There are about 18,000 prisoners in our state's correctional institutions;[31] New York City contains more than 70,000 hospital beds;[32] the state has had as many as 93,500 simultaneously institutionalized mental patients.[33] The hope for a few thousand hospital beds for narcotics addicts in this state within the forseeable future should not be marked down as the roseate dream of one who has spent too much time with drugs.

Were addict hospital facilities available, the hospitalization plan would lead drug users into them through two channels. One is already part of our law. In 1960, the New York legislature enacted a bill that permits an addict to commit himself to a curative institution through a civil proceeding brought in our state courts.[34] Should his resolution prove ephemeral, once committed he can be detained against his will for as much as a year.

Without, however, discounting the importance of wholly voluntary inner motivation, as long as we have tens of thousands of addicts who lack such drive, a procedure is needed to provide some leverage for motivating the great mass of heroin addicts to go to hospitals. Both the state and federal bills seek to provide such leverage by permitting arrested addicts—subject to certain safeguards—to choose civil hospital commitment in lieu of the criminal proceedings they would otherwise have to face.

Parole Supervision

Efforts at rehabilitation in closed institutions cannot, of course, provide our sole safeguard in dealing with the addict. Having isolated him completely from that community in which his addiction had been conceived, it would be the sheerest folly to dump him back abruptly into that same environment. An adequate program of after-care supervision, closely coordinated with the hospital's program of treatment, must be developed. In this connection, a pilot project conducted by the New York State Parole Board, that provided special parole supervision for previously addicted former State Prison inmates, demonstrated how important after-care can be. An estimated phenomonal thirty-five per cent of the ex-convicts studied remained away from drugs for the three year after-care period of supervision that the study lasted.[35] Moreover, a large scale program may be able to improve upon that statistic. If hospitalization is successful in removing large numbers of addicts from addict saturated communities for substantial periods of time, as every addict is—potentially—a drug pusher, there should be fewer street-corner pushers, and hence less drug availability when the former addict who has been released faces some emotional crisis that sends him scurrying about seeking euphoria.

[29] This estimate is suggested on the basis of the following calculations, premised on the proposition that New York City's addicts are, by and large, in such economic circumstances and of such defective personalities that they commit property crimes to support their habits; if the average heroin habit involves a drug cost of about $10 daily, it will take a minimum of $30 in larcenies to raise this sum; hence the addict will commit property crimes costing the community more than $200 weekly, or in excess of $10,000 annually to support this habit. As New York has, it is estimated, in excess of 20,000 heroin addicts, this will cost in the neighborhood of $200,000,000 annually.

[30] New York City operates these narcotic addict hospital facilities: 140 beds for youngsters and young adults at Riverside Hospital, 25 adult beds at Metropolitan Hospital, and 25 beds for youngsters at the same institution. New York State operates 55 beds at Manhattan State Hospital, and 80 beds at the Central Islip State Hospital. The State has announced plans for additional beds at the Utica State Hospital.

[31] This figure is from a statement made by State Commissioner of Correction Paul D. McGinnis, as moderator of a panel discussion on Release of Prisoners, sponsored by the District Attorney's Association of the State of New York, on January 29, 1960, in New York City.

[32] HOSPITALS AND RELATED FACILITIES IN NEW YORK CITY, 1960, a report published by the Hospital Council of Greater New York, reports these facilities in New York City as of January 1, 1960:

In voluntary hospitals	27,973 beds
In municipal hospitals	19,792 beds
In proprietary hospitals	5,000 beds
In federal hospitals	7,861 beds
In N.Y.S. hospitals	10,674 beds
Total	71,300 beds

[33] See note 25 *supra*.

[34] N.Y. MENTAL HYGIENE LAW §201-a, enacted as chapter 529 of the 1960 Session Laws.

[35] See AN EXPERIMENT IN THE SUPERVISION OF PAROLED OFFENDERS ADDICTED TO NARCOTIC DRUGS, FINAL REPORT OF THE SPECIAL NARCOTIC PROJECT, N.Y. STATE DIVISION OF PAROLE (1960).

Conclusion

The passage of the legislation now pending before the Congress would have the wholesome impact of putting state public officialdom directly on the spot. Talk would suffice no longer. Federal funds, funds running into multiple millions of dollars, would be dangled temptingly before those states—including New York—that have our nation's major narcotics problems.[36] This wealth would be available—to meet more than half of the expenses—but only if the states themselves developed action programs, programs premised on hospitals, on after-care, and on a changed emphasis from our present prehistoric penal approach.

Passage of the bills presently before the Congress should end present fragmentation of efforts in the area of addiction. Not only would federal, state, and local financial efforts be coordinated towards a common goal, but also this coordinated action would be forced to extend to other levels. There would have to be coordinated action between lawyers and doctors, if these funds were to be utilized. There would have to be planned coordination of an addict's in-patient rehabilitation and his out-patient supervision, for these funds to be made available. Most important there would have to be an over-all synthesis of efforts for the individual's health, and his rehabilitation, with efforts directed towards the physical and moral improvement of our narcotics-saturated communities.

[36] New York has about 45% of the nation's narcotic addicts; California about 14%; Illinois about 14%; Michigan about 5%. See Report of the Interdepartmental Committee on Narcotics to the President of the United States 5 (Jan. 1961). For some indication of the concern addiction has created in California, see Interim Report of the Special Study Commission on Narcotics, State of California (1960).