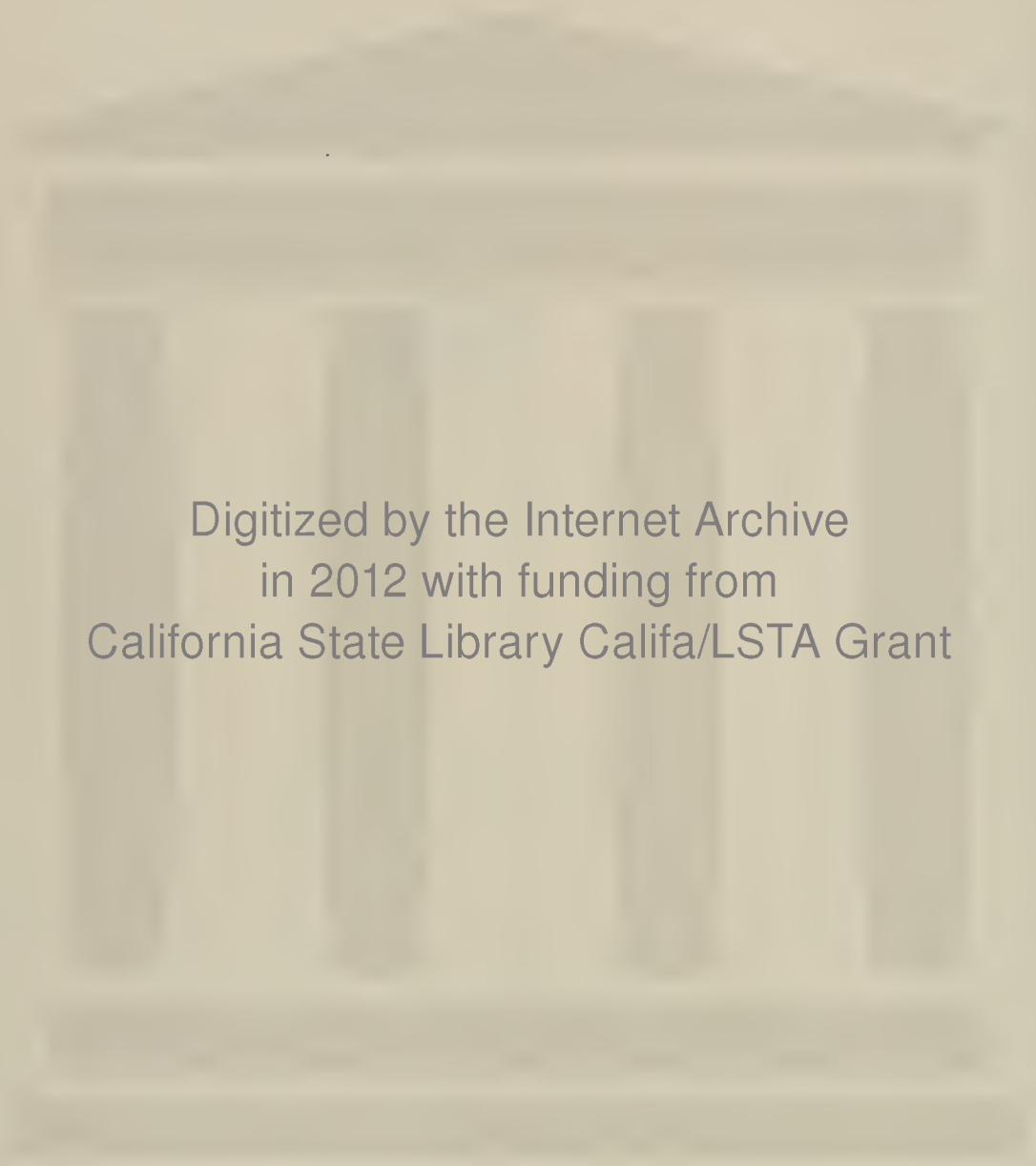

THE SAN FRANCISCO COMMITTEE ON CRIME

A REPORT ON NON-VICTIM CRIME IN SAN FRANCISCO

PART I

BASIC PRINCIPLES
PUBLIC DRUNKENNESS

PART II

SEXUAL CONDUCT
GAMBLING
PORNOGRAPHY

Moses Lasky, Co-Chairman
William H. Orrick, Jr., Co-Chairman
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June 1971

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THE SEVENTH REPORT OF THE COMMITTEE

June 1971

THE SAN FRANCISCO COMMITTEE ON CRIME

A REPORT ON NON-VICTIM CRIME IN SAN FRANCISCO

PART I
BASIC PRINCIPLES PUBLIC DRUNKENNESS

Moses Lasky, Co-Chairman
William H. Orrick, Jr., Co-Chairman
Irving F. Reichert, Jr., Executive Director
Richard M. Sims, III, Asst. Exec. Director

THE SIXTH REPORT OF THE COMMITTEE

April 26, 1971

This Report is being submitted to the Law Enforcement Assistance Administration of the United States Department of Justice in partial satisfaction of the conditions of O.L.E.A. Grant #374.

THE SAN FRANCISCO COMMITTEE ON CRIME

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Mr. William H. Orrick, Jr., Co-chairman

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EXECUTIVE DIRECTOR

April 26, 1971

Honorable Joseph L. Alioto,
Mayor of the City and County
of San Francisco,
City Hall,
San Francisco, California 94102.

My dear Mr. Mayor:

With this letter the San Francisco Committee on Crime submits to you Part I of its report on non-victim crime, a subject in which you have evinced much interest. As the report states at the outset, previous reports of the Committee have examined how laws are enforced and what improvement can be made in enforcement, but the report on non-victim crime asks the more basic questions of why certain laws should be enforced at all, and why they should even exist. The importance of the subject is also delineated by that portion of the report which speaks of the capacity of criminal law, and the crisis of costs.

Part I covers two subjects, basic principles and their application to drunkenness. So many vagrant and emotional attitudes toward non-victim crimes are encountered

that it seemed important to think out and articulate basic principles. Without immodesty, we think that Chapter 1 does this. Chapter 2 applies these principles to drunkenness; stated as briefly as possible, the conclusion of Chapter 2 is that, apart from drunken driving, drunkenness should be taken out of the criminal system entirely, whether or not it is possible to handle drunkenness as a medical problem. We are confident that the conclusion of Chapter 2 will in no distant future be followed throughout the United States. We hope that San Francisco will have both the courage and intelligence to be the first to do so.

There will be a Part II and possibly a Part III of the report, to be issued within the next two months. They will deal with other so-called non-victim crimes.

Respectfully,

Moses Lasky

William H. Orrick, Jr.

Co-Chairmen.

ML:MD

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IRVING F. REICHERT, JR.
EXECUTIVE DIRECTOR

April 26, 1971.

Honorable Dianne Feinstein,
President of the Board of Supervisors
of the City and County of San
Francisco,
City Hall,
San Francisco, California 94102.

Dear Mrs. Feinstein:

The San Francisco Committee on Crime submits to you with this letter Part I of its report on non-victim crime. Sufficient copies are enclosed for all members of the Board of Supervisors. We also enclose a copy of the letter by which we are concurrently submitting the report to the Mayor.

Respectfully,

Moses Lasky

William H. Orrick, Jr.

Co-Chairmen.

ML:MD
Encs.

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PREFACE

The San Francisco Committee on Crime has been entrusted with the duty of reporting and making recommendations for a more effective and economical system of criminal law. Previous reports of the Committee have examined how laws are currently enforced and what improvements can be made in enforcement. In addition to these questions, the present Report asks questions more basic. It asks why and how far certain laws should be enforced, why they should even exist. This Report will therefore tend to be philosophical -- but to the end of being highly practical. Well-qualified scholars of law and society have explored these questions, and we have had the benefit of their views. The Committee's own membership includes men whose experience qualifies them to offer answers, and its staff has spent many hours seeking statistical and other data on the subject.

Reliable statistics are hard to come by. When assembled, they are not exact. Statistics about the same thing but from different sources do not concur; statistics from the same source are not always internally consistent; categories overlap, and the effort necessary to eliminate overlap would not be warranted by the enlightenment it would bring. No one can tell with precision what it costs to arrest, process, and jail one drunk or to "roust" one prostitute. But the statistics serve their

purpose by illuminating the problem, by placing one in the general order of magnitudes involved. For that reason, we round off the statistics we use; to quote them to digits would be to give a spurious exactness.

This Report is the result of studies and reflections which have been going on since the Committee's creation, all made possible by a grant from the Law Enforcement Assistance Administration of the United States Department of Justice to study "non-victim" crime, by the grants from the Ford Foundation to study the systems of justice in San Francisco, and by the underlying appropriations of the City Government for the general support of the Committee. During the first year of the Committee's existence, it detailed a special sub-committee to the task. That sub-committee met some 22 times, with police, clinics, rehabilitation agencies, and with other agencies and numerous other persons, including pimps, prostitutes (male and female), drug addicts, alcoholics, and homosexuals. Whenever possible, it met its informants on their ground. Concurrently the Committee's staff was collecting statistics and the accumulated learning on the subject. Since then every phase of the matter has been the topic of numerous plenary meetings of the whole Committee.

I. BASIC PRINCIPLES

This Report endeavors to make those who quite properly press for law enforcement in San Francisco aware of the meaning of what they ask. They should know the enormous costs involved -- not only dollar costs to the burdened taxpayer, but intangible costs in the erosion of civic morality and respect for law when law tries to do what it is not well adapted to do or ought not to be trying to do at all or what other public effort can do better, when the innocent are swept up with the guilty, when sporadic enforcement based on deviant stereo-types undermines respect for enforcers, when police must constantly exercise the kind of superhuman discretion for which no training can prepare them.

The 1970-71 San Francisco budget for the police department is $31,428,713 and for all agencies of justice, mostly criminal, $47,253,182. The police made 59,100 arrests in 1969. Of this number 16,500 persons were arrested for drunkenness; 6,140 for drug offenses of whom about 4,900 were charged with nothing else; about 3,200 were arrested for prostitution (some under the guise of obstructing the sidewalks) and other non-violent sex offenses.[1] Forty-one percent (41%) of the inmates of the county jail at San Bruno are there as a result of drunk arrests. Yet, they and similar matters, consume roughly $3,000,000 or 7% of the

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[1] Not included in these figures are over 1,000,000 traffic citations.

budget for the administration of justice. In the same year the police reported 83,481 offenses of killings, forcible rapes, robbery, aggravated assaults, burglary, larcenies and auto thefts, and not 13% of these "cleared." In short, while unable to solve as much as 13% of the "crimes in the street," over 50% of the arrests and 54% of the jail occupancy went to non-violent "crimes."

These facts bring one up with a jolt. There is enormous slippage in the gears of the system. Law enforcement is costly. Not only does every arrest consume energies of the police; it may be the start of a train of processes and expenditures, as the case winds its way through the District Attorney's Office, possibly the Public Defender, the courts, the probation department, the jails, some cases peeling off and being dropped at stages on the way. More police, more prosecuting and defense attorneys, more judges, more courtrooms, more bailiffs and clerks, more equipment, more jails, more rehabilitation centers, more taxes -- but no less crime in the streets. This is the picture.

And so it becomes essential to inquire whether we, the public, are not asking the system of criminal law and justice to do too much. The inquiry goes to the very heart of what a governmental system should do; it involves citizens' liberties, citizens' protection and the taxpayer's dollar.

The subject of the present Report is, broadly speaking, what has come to be called "non-victim crime." This is a loose term. Read literally, it suggests that no one is a victim when two males copulate in private, or when a man chooses to lie with a prostitute or to destroy himself with the bottle, or to roll dice, or when a student chooses to smoke "grass." The term "non-victim crime" must therefore be re-read as "crimes without victims or with consenting victims." The terms further suggest that if no individual is a "victim," the public is not injured. It is, therefore, a question-begging term. But it is sufficiently suggestive to serve as an area of inquiry.

In approaching the problems dealt with by this Report, we believe that seven basic principles must be applied. We list them and explain why each is basic.

First principle: The law cannot successfully make criminal what the public does not want made criminal. The law cannot outrun the public conscience -- not simply the public conscience as professed from its pulpits and by its public figures, but the public conscience as demonstrated by how the public lives. At the risk of overstatement for the sake of emphasis, we state a paradox: Law can never be enforced when it becomes necessary to enforce it. We mean that unless the public, on the whole, is normally willing to obey the law without compulsion, the law cannot be enforced -- except in a police state. Hitler with a gestapo

might do so. But in a democratic society such as we treasure, a police force and courts seeking to apply even modest notions of civil rights and due process can enforce the law only if the vast bulk of the people quietly acquiesce and live in a law-abiding way. To take the simplest possible example: It is absurd for law to criminalize a church bingo game. Yet, as we shall see, laws like that are on the books, rarely enforced but lying at hand where they can be used as tools for harassment.

Second principle: Not all the ills or aberrancies of society are the concern of the government. Government is not the only human institution to handle the problems, hopes, fears or ambitions of people. There are still homes, families, churches, schools, unions, and the multitude of voluntary associations that characterize American life. If a breakdown in the system of law enforcement is to be avoided, it is necessary to stop loading upon the system of criminal law tasks that are unnecessary or for which it is not well fitted. And this second principle is the beginning of the answer to the question, "What is an unnecessary or unfitting task?"

Third principle: Every person should be free of the coercion of criminal law unless his conduct impinges on others and injures others, or if it damages society. Only in that event should the criminal law lay on its hand. Otherwise, a person should be left free to conduct his

life in his own way, to "go to hell in his own handbasket" or to heaven in his chariot, to act the fool as others see it. The proper sphere of Criminal Law is the relation of people to one another, not the relation of man to his conscience or to the conscience of others or to God. Stating the matter categorically, government should restrict only those actions of people that injure the community's peace, well-being, or dignity or contain a strong probability of doing so. No doubt it is often difficult to see where the line lies between what damages society and what does not. But failure to search for that line can only mean confusion and chaos. Our principle does not mean that society should refrain from trying to save people by persuasion or by education or that it ought not to offer them aid. It does not mean that society "write off the young" or any other group or person thought to be aberrant or self-destructive. It means only that government ought not to use coercion to prevent one from acting as he wishes so long as his conduct injures no one else or society itself. This leads to the next step in the chain of understanding.

Fourth principle: When government acts, it is not inevitably necessary that it do so by means of criminal processes. Even if conduct may be injurious to the rest of society, that is no necessary reason to make the conduct a crime, subject to prosecution and punishment. The methods of the criminal law may be ill suited, or there may be better

ways of achieving an end, better ways to deter or rehabilitate than to arrest, charge with crime, prosecute, convict and sentence. We must ask questions such as these: Why should a chronic drunk be scooped up, tried, sentenced and jailed in the filth of a county jail instead of being placed in a detoxification facility or even sobered up in a clean civic dormitory?

Fifth principle: Society has an obligation to protect the young, and it may be appropriate for government to intervene by imposing criminal controls on adult relations with the young although controls on similar relations between adults would not accord with our other principles.

Sixth principle: Criminal law cannot lag far behind a strong sense of public outrage. This is the other side of the coin from the first principle. Although criminal law cannot outrun the public conscience in condemning conduct, neither can it hold aloof entirely from a public sense of outrage. If the law suffers when it tries to do too much, it also suffers when it does not do what most people feel strongly that it ought to do. Because this sixth principle acts as a counterbalance to some of the others, it must be applied with great circumspection. Before applying it one must be certain that his personal sense of outrage -- his personal morals -- or that of his group is that of the public as a whole.

Broadly speaking, "non-victim" crime is a "morals" matter. It comprises those forms of aberrant behavior called "vice." The public

demand for "safe streets" is a demand for protection from violence. But the periodic demand that the police "clean up the streets" is something else; it is a demand to clean out vice. It is in response to this demand that the police round up the prostitutes, drunks, drug addicts, and others. It is well to review, briefly, what arguments are advanced to support denunciation of immoral behavior as criminal.

One reason assigned for making immoral conduct criminal is to avenge society. As no civilized man would publicly subscribe to that argument, regardless of what he might feel about a crime of brutal violence, it deserves no further comment.

Two other reasons often assigned for making immoral conduct criminal are to protect the deviant by imprisoning him and thereby keep him out of trouble and to deter further deviance by him or others. There may be a moral duty to protect the weak against temptation or from the consequences of his own sin, but except for the immature young this is not a task within the purview of the criminal law. Moreover, it is a task that criminal law performs badly. The consensus of those who have studied law enforcement is that imprisonment probably provides more education in criminality than in repentance. Prison is no threat to those who are there because a compulsive weakness has put them there, and the threat of prison appears to be little deterrent to those of the "now" generation who live in the present and will take any risk to "expand" their experiences now. Any kind of punishment may alienate the offender from society,

particularly if he thinks the law he has violated is unjust, unfair, or unnecessary or that punishment is a benighted way to go about curing the evil. Students of the subject say that the real deterrence offered by the criminal law to condemned conduct lies not in the severity of penalities but in (1) the quickness and certainty of imposition of any penalty and (2) the social condemnation flowing from accusation and conviction. Our system of courts and law enforcement is not conducive to speed and certainty, and social condemnation in a modern urban society grows increasingly attenuated.

While these first three reasons for making immoral conduct criminal have little, if any, merit, there are two others more deserving of careful consideration. The fourth reason given for making vice criminal is a prophylactic one. The argument runs that immoral behavior, although initially harmful only to the offender, will eventually breed true and serious crimes. Prostitutes may rob their clients or give them venereal disease. Homosexuals may corrupt minors or become victims of blackmail. Drunks are a public eyesore, and behind a wheel they may become murderers. Narcotics addicts may steal to obtain money for a "fix." Organized crime may organize a vice and gain political power. This argument cannot be swept aside out of hand. In part the answer is that the time to punish conduct as criminal is when it becomes criminal, not in anticipation. In part the answer may be that what makes it possible for organized

crime to organize the vice is the fact that the vice has been declared criminal. But these are serious questions, and we explore them in the later pages of this Report in the context of particular vices.

A fifth reason assigned for making vice criminal is to protect society from decadence and dissolution. It is argued that prevalence of deviation from the accepted norm tends to destroy the "moral fabric" of society and in this way leads to organized crime and the corruption of police and government officials. Unquestionably, the "moral fabric" of a community is essential to its health. If it could be shown that the use of marijuana threatens to reduce the next generation to a state of passive vegetation, devoid of the drive that made this nation the haven of all peoples, no stronger reason would be needed for seeking to eradicate the use of the weed by almost any means. But there are other ways to protect the moral fabric than by criminal law. Of all the institutions at hand, the system of criminal justice is, in our society, the one least capable of performing that task.

Moreover, <u>whose</u> morals make up the moral fabric of the community?

Our sixth principle tells us that if certain "morals" are indeed a sturdy part of the "moral fabric" of the whole community, law cannot ignore them. If the overwhelming bulk of the city is really outraged by prostitutes congesting the sidewalks and openly soliciting, criminal law must try to clean them out. By contrast, if substantial elements of

the community see nothing wrong with crap games, are we to try to stop them? Therefore: Whose morals make up the moral fabric? In a society of many roots such as the United States, and especially in a polyglot city like San Francisco, a city of so many different ethnic, religious and racial backgrounds, where a variety of sub-cultures exist and must continue to do so, where is the public consensus of what is immoral in the areas of conduct called "non-victim crime?" The population of this city is composed of Blacks, Mexican-Americans, all variety of Orientals, Italians, French, Indians, Catholics and Jews. Tourists and service men in large numbers visit us each year. There is, we trust, a consensus about crimes of violence -- rape, murder, robbery, and the like. We would be shocked to think that the consensus would not continue. It might not continue if efforts to enforce a missing consensus in other areas were to erode respect for law. But about drinking, gambling, prostitution, homosexuality, adultery, abortion, pornography, and the use of drugs, one may find various sub-cultures reacting differently, and each reaction further divided between young and old, rich and poor, educated and uneducated, those with strong religious convictions and those without. All the world loves San Francisco, but not because it is strait-laced. The concept of San Francisco as tolerant, free, with room for every taste, accustomed to the unusual pervades literature loved by tourists and is treasured by its citizens.

Seventh principle: Even where conduct may properly be condemned as criminal under the first six principles, it may be that the energies and resources of criminal law enforcement are better spent by concentrating

on more serious things. There is a matter of priorities. A community's resources are limited, and the demands on them grow fiercer. Not every violation of a criminal statute can be detected, not every offender punished, no matter how many resources are poured into the effort. More dangerous forms of behaviour should receive priority in law enforcement and have first call on available funds and manpower. It has been a habit in this country, whenever there is public dislike for a type of conduct, to "pass a law" and make the conduct a crime. Again, a simple example: Because sensible people believe that only a fool would ride a motorcycle without wearing a hard hat, the legislature makes it a crime to do so, although no one's head will be cracked but the fool's. In consequence, the statute books are bulky. We toss upon the police tasks that are not particularly adapted to what policemen should be trained to do. Look for example, at traffic control, more an engineering problem than a crime problem. And even where the police have learned how to do the task well, they should not be diverted from the tasks only they are trained to do to other tasks that others could do as well or better.

San Franciscans, whether white or colored, long-haired or short, rich or poor, must be able to walk on the streets and in the parks without fear, secure in knowledge, not necessarily that there are no prostitutes, addicts, drunks, or homosexuals, but that there will be no molestation or harassment by prostitutes, addicts, drunks, homosexuals

or anyone else. And San Franciscans should be able to walk the streets confident that there will be no molestation by police trying to protect us from ourselves.

The following chapters of this Report will propose the repeal of certain laws. Obviously, the City of San Francisco has no power to repeal State or Federal statutes. But until such time as Congress or the State Legislature sees eye to eye with San Francisco, this City can choose what it will enforce, for its coffers pay the bills. It can choose its priorities. If it should decide that it is poor policy to "bust" a small gambling game in the Fillmore, the police need not arrest and can preserve its manpower for more vital work. If an arrest is made, the District Attorney need not prosecute. However, lest there be misunderstanding, we emphasize two cautions. The first is that once a case reaches a court, no judge is free to ignore the law or make up his own rules. But matters need not reach the courts. Jurists have long recognized that a system of criminal law would break down were there no play in the hinges, points where the officers of justice can exercise discretion. Our second caution is that individual policemen cannot be let to decide what laws to enforce or when. What we say is that, pending repeal of legislation, all the agencies of justice, under strong central municipal leadership, can together lay down a policy to follow, open and above-board, and proudly declared to the State and Nation.

In the succeeding Parts of this Report, we apply our seven principles to several types of non-victim crime. Chapter II will discuss "Drunkenness." Other Parts of the Report to be released later will take up sexual conduct, gambling, pornography and drug abuse.

The statements in this first chapter are generalities, only dimly clarified by the simple examples already given. They must be brought down to earth by specific application to concrete situations. To do that is not an easy task. We have said that if conduct of a person is not "injurious" to society, law and government should leave it alone. But what is "injurious?" If use of certain drugs threatens to destroy a generation of youth, or any sizeable proportion, is that an injury to society? The answer would seem to be "yes." If sexual acts are performed in Union Square, the public's sense of decency is outraged. Is that an injury to the public? Everyone will answer "yes" to that. But if homosexuals overrun a city blatantly, engaging in no sexual acts publicly, but offending others by their presence and their mannerisms, is the public injured? In Iowa the answer might well be "yes." What about in San Francisco? The correct answers are not easy to reach, but the attempt to find them will be simplified by applying, at each step of the inquiry, our basic principles enumerated above. We seek answers that will strengthen law enforcement, increase respect for the law and the system of justice or stop the decrease of respect, and at the same time reduce or retard the mounting costs of maintaining law and order, while providing better methods of handling some of the ills of society.

We can anticipate that at this point some concerned readers may ask, "Is the Crime Committee going to legalize homosexuality, prostitution, drug use, drunkenness?" Once more it is necessary to insist on sharp, clear thinking, and to that end we indulge in some repetition. To talk about "legalizing" crime is to put matters backwards. The proper way to phrase the question is not whether we should "legalize" this or that but whether the law should continue to illegalize it, that is, to make it criminal. Not everything we disapprove should be a crime. To refrain from making a particular act a crime is not to approve or even condone it. The Old Testament, and the law of other ancient societies like the Incas and the Mongols, looked with horror and revulsion on sodomy. Most of the public may continue to do so; others may view it with pity and compassion. Most of the public may ostracize homosexuals in social relationships if they choose to do so. As to all this the Crime Committee refrains from expressing any views one way or the other, for our purview is to ask the totally different question whether a given conduct should be made a crime.

II. PUBLIC DRUNKENNESS

We shall consider "drunkenness" first because it is an object lesson. It illustrates an easy application of the seven principles enumerated above. And knowing opinion has generally come around to recognizing that drunkenness must not be handled as it traditionally has been, although the method of handling it is still in a state of transition. Many people would deal with it as a public health problem, and the Crime Committee approves that concept. But we emphasize that drunkenness <u>can</u> be handled short of that. Without the expense of attempts at complete medical rehabilitation and cure, "drunkenness" should be taken out of the criminal process entirely.

We do <u>not</u> include in our use of the term "drunkenness" the state of being drunk in an automobile or the act of driving while drunk. Those are conditions containing so strong a probability of injuring other people that they ought to be held criminal. On that score we have no doubt whatever.

A. <u>The Hazy Nature of the "Crime"</u>

By "drunkenness" we mean conduct violating Penal Code Section 647f. That section makes criminal two types of relevant conduct: (1) Being under the influence of intoxicating liquor in a public place in such a condition that the person cannot exercise care "for his own safety or the safety of others," and (2) by reason of being under the influence of intoxicating liquors, interfering with, obstructing or

preventing free use of a street, sidewalk or other public way. There are thus three categories. In the first a man is subject to punishment for not being able to take care of himself! That is monstrous. In the second, he is subject to punishment, not for injuring others, but for not being able to "care for their safety." This, too, is monstrous. As for the third, blocking a public way, the offense should consist of blocking the way, whether drunk or sober. Injecting the element of drunkenness is simply to create hypocrisy, for in practice the offense becomes simply one of being drunk in public.

Because drunkenness on the street is easily associated with a stereo-typed physical appearance and living habits, it is sometimes not clear whether an offender is arrested for violating 647f or for "looking like a drunk." Few, if any, of those arrested are given a test to determine sobriety; few are even given the chance to explain their presence on the street. Arrest reports are not normally made. Officers explained that they wrote reports only when they thought "the guy was going to make trouble." Common arrest criteria in South of Market arrests are, "he looked drunk," or "he smelled of booze," or "he was an old customer."

About half of all drunk arrests are in the South of Market Skid Row area, where most of the visible alcoholics live when not in jail. To handle them, at least four policemen and a patrol wagon run a "sweep," in which people are arrested <u>en masse</u> and taken in the wagon to city prison. South of Market there are four "sweeps" a day.

B. The Size of the Problem

The peak year for drunk arrests in San Francisco in the past 30 years was 1950. In that year there were 45,913 drunk arrests. In 1967, out of a total of 58,540 arrests by the San Francisco Police, almost 35% or 20,240 were drunk arrests.[1] In 1969 total arrests were 59,104, and drunk arrests had dropped to 16,112, possibly because the police have given drunkenness a lower priority, possibly because drug use, not alcohol, is the current preference of the young, possibly because redevelopment has demolished Skid Row hotels and the Salvation Army has increased its activity South of Market. The figures do not include instances where middle and upper income inebriates are escorted home by officers or sent home by taxi.

Of the total arrests in 1969, almost one-fourth (3,548) -- virtually all repeaters -- resulted in sentences to the county jail, about the same number as in 1967 (3,801). County jail is still the chief dumping ground for drunks in San Francisco. Somewhere around 40% of the inmates

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[1] In the same year 36% of the reported arrests in Washington, D.C., 66% in Boston, and 2½% in St. Louis were drunk arrests. Comparisons cannot be drawn from these figures. Arrest statistics depend on (1) police interpretation of city ordinances; (2) whether there is a detoxification center; (3) whether arrests for drunkenness are made under some other charge, such as vagrancy; and (4) whether it is police policy to make drunk arrests regularly. Boston's figures on total arrests are probably incomplete and unreliable. St. Louis had a detoxification center and gave drunk arrests a low priority.

at San Bruno County Jail are drunkenness offenders,[2] serving an average of 27.5 days each, the highest average sentence for drunkenness in Bay Area counties. The Sheriff's Department reports that one quarter of the capacity of the county jail is regularly given over to drunks.

It is a satisfaction to report that drunkenness is not associated with any one racial or ethnic group. So far as available arrest records indicate, arrests in San Francisco for drunkenness among whites, non-whites and ethnic groups are in proportion close to their percentage of the population.[3]

Drunk arrests fall into two classes, the one-time offender and the "revolving door" type.

Of the persons arrested in San Francisco in 1969, 68.4% were first offenders, and according to an experienced observer[4] three-quarters of these were transients -- farmers, seamen, suburbanites out on a spree. They spend the night in the drunk tank until sober, and usually

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[2]During 1969, there were 3,548 individual sentences to county jail from Drunk Court. This accounted for about 41% of the 8,665 sentences to county jail handed down by the San Francisco courts during that year.

[3]American Indians are a curious exception. Although Indians represent around 14/100ths of one percent of the population of San Francisco, Indian drunk arrests have ranged from nearly 6% to 8%. These figures are based on total arrests, not on individuals arrested.

[4]Officer John Larsen.

get off with a fine, suspended sentence, or some combination of the two. First offenders who are city residents are usually required to attend four sessions of "drunk school" as a condition of probation;[5] sometimes the arrest itself is considered a sufficient lesson.

About 8.2% of the persons arrested comprise a core of about 620 chronic recidivist drunks, the "street drunks;" about 93 have been arrested more than 15 times in one year. Yet this figure under-represents the amount of time that the police, courts and jails devote to this population. In 1967 recidivist drunks, although but a small proportion of all those arrested, accounted for nearly one half of the arrests. There may or may not have been some reduction of this percentage in 1969.[6]

Ninety-five percent (95%) of the arrests South of Market are of males, and seventy-two percent (72%) are persons over the age of 35. Typically, the older they are the more frequently they are arrested, according to experienced observation.

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[5] An article on this school by Judge Gerald S. Levin of the Federal District Court for the Northern District of California, published in the American Bar Association Journal of November 1967, cites a study of those processed through the school 1964-1967 which indicated that almost 70% of "those who attended the four sessions of the school during the time period covered by the study did not suffer a subsequent drunk arrest in that period."

[6] Statistics for 1967 classified as recidivist those arrested four or more times in one year; statistics for 1969 changed the classification to five or more arrests. This produces an apparent reduction from 1/2 to 1/3.

C. How the Drunk Is "Processed" Through the Criminal System

Each person arrested is searched, booked and allowed to make one phone call if he is coherent. If not coherent, he is taken to sober up in the "tank," a group of three cells, containing no bedding or furniture aside from a steel sink and toilet. When filled to capacity (about 80), tank cells are so crowded that all prisoners cannot even find room to sleep on the floor.

Medical examinations are given at San Francisco General Hospital to those who are picked up unconcious, but there is no routine inspection of drunks who are brought to the "tank" at city prison. Efforts of the Crime Committee resulted in setting up a medical steward plan to handle emergency medical problems in the city prison, but there is still no routine inspection of drunks. Although a doctor is on hand five mornings a week to attend to the 300 to 400 city prisoners, a drunk must request an examination, and in many cases his condition precludes his being able to ask.[7] One morning in April 1970 Crime Committee staff observed an epileptic, who had been separated from his medication the night before, try to explain his need to to the judge in a bad stutter. The eyes of another man in the same group were so badly swollen and infected that he had to be led in and out of the courtroom; he held a dirty rag to his face to keep his eyes from running.

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[7] The Police Department's Annual Report for 1969 indicates that 3,184 alcoholic prisoners were treated at city prison in 1969; alcoholics may have been part of 1807 prisoners sent to San Francisco General Hospital or part of 295 sent to emergency hospitals after arrival at city prison.

On weekday mornings, drunkenness offenders are arraigned in a department of the Municipal Court where they are brought from adjacent holding cells in groups of 25 to 50 at a session, like cattle to the dehorning chutes. Judges rotate in presiding at these sessions, and disposition of the accused often depends on who the judge is and what his mood is at the moment. Some judges are careful to explain to the accused their rights to counsel and the right to plead not guilty, all done en masse. Some judges tell them little or nothing. Whether told or not -- probably few understand -- they have no counsel. An experienced observer estimates that 96% to 97% plead guilty. Sitting next to the judge on the police bench is Officer John Larsen, court liaison officer for the Municipal Drunk Court. He has the defendants' records and advises the judge when he is asked. His job is a curious hybrid of prosecutor, defense counsel, and probation officer. He knows most of the repeaters, whom he calls rather affectionately "my drunks" or "my boys" -- which ones prey on others, which ones are candidates for rehabilitation.

Some judges may take some personal interest in each case. If the defendant's record is clear, he is given a suspended sentence. A repeater who pleaded "I haven't been here since August" was given "one more chance -- 30 days suspended." Another was cut short: "I gave you 30 days suspended yesterday, and here you are again -- 30 days." Some of the defendants asked to be sentenced ("I need some time to dry out, your Honor"). The judge, after consultation with Officer Larsen, then imposes sentence. Although there are normally no defense attorneys, public defenders, bail project personnel or district attorneys at these

hearings, Officer Larsen's role as advocate and prosecutor, while indefensible in theory, seemed effective in practice. Drunks who have money, friends or connections to raise $35 bail normally forfeit it and do not appear in Drunk Court.

Occasionally a judge, preoccupied with getting through the calendar, will rush through the explanation to the accused of his rights so that the befuddled prisoner can barely understand what is being said. On one such occasion members of the Crime Committee's staff observed an elderly man insisting that he be told what he was there for. The judge responded, "You know what you are here for." When the man said, "What do I do now?" the judge responded, "You have already done it." At that point the man seemed close to tears and said, "I want someone to help me." The judge responded, "We'll find someone to help you," and sentenced the man to county jail.

In most cases the defendant's past record and not the immediate arrest determines the judge's disposition of the case. Repeated offenders, especially those with multiple recent arrests, are commonly given a jail sentence, as if failure of prior imprisonment to accomplish any good for society or for the accused were a reason to continue the futility and -- in the hands of some judges -- the savagery.

The police seem compassionate enough; they claim and doubtless believe that a jail sentence is an act of kindness; -- it "keeps the drunks alive another 30 days" or whatever the term of the sentence may be.

For the period of his jailing, the drunk is at least fed, whereas on Skid Row he takes his calories in the form of alcohol and starves. And both police and social service workers say that street drunks are increasingly subject to savage beatings by roaming gangs of hoodlums in the streets, indeed by other drunks who are predators one day and prey the next, fighting over pennies or a few trifles of the world's goods.

Drunks are also beaten by their fellow prisoners in the county jail. As the Committee's Jail Report pointed out, there is no segregation in jail of prisoners by type. The helpless, physical wrecks from the Tenderloin provide the most convenient outlets for pent-up aggressions.

Judge Leo Friedman, formerly Presiding Judge of the Municipal Court, has described the present system:

> "All you're going to do is feed them and prolong their lives for a little while. I'm not hooked on sending drunks to jail but there is no other place for them."

That is an indictment of the system.

D. The Costs of Handling Drunkenness by Criminal Process

The futility and savagery of handling drunkenness through the criminal process is evident. The cost to the city of handling drunks in that way cannot be determined with exactness. Only approximation is possible. The Committee's staff has computed that in 1969 it cost

the city a minimum of $893,500.[8] The computation was that $267,196 was spent in making the arrests and processing the arrested person through sentence, and that roundly $626,300 was spent in keeping the drunks in county jail at San Bruno. And these figures do not include the costs to the city when a drunk is taken to San Francisco General Hospital from either the city prison or county jail. While our staff has concluded that it costs the city between $17 and $20 to process each drunk from arrest through sentencing, an estimate by a police officer assigned as liaison to the Drunk Court put the cost at $37 per man through the sentencing process. Thus, if anything, our cost estimates are low.

On a morning in the Drunk Court observed by one of the Co-Chairmen of the Crime Committee, 49 men were led into the courtroom for disposition of their cases. By this time, the city had spent at least $700 just to get them there. Twelve of the forty-nine men were given 30-day jail sentences without suspension, and it would cost the city at least another $1,800 to keep them at San Bruno. Thus, it cost the taxpayers about $2,500 to run one morning's "crop" of drunks through the criminal process. The split-second decision of a judge to dismiss, sentence or suspend, may cost the city anywhere from $125 to $150. If these expenditures achieved some social or public good, they should be gladly borne. But they do not.

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[8]See Appendix.

E. Necessity of Change

By no principle or criterion stated in Chapter I of this Report should drunkenness, unaccompanied by danger of violence, continue to be processed through the criminal system. If, while drunk, one commits some other crime, he can be prosecuted for that. As a drunk he hurts no one but himself. No enlightened social conscience is outraged. And the criminal system achieves nothing whatever by way of cure or deterrence. Only if a drunk is in an ugly mood where he may commit acts of violence should he be handled by the police. In simple truth, the police use the drunk statute, Penal Code Section 647f as a tool or excuse to achieve other ends, such as prettifying the streets or preventing other crime. That portion of Penal Code Section 647f which makes public alcoholic intoxication criminal should be repealed.

To test the validity of the conclusions of this Report on drunkenness a draft was submitted to a person of police background for criticism. His comment on rejecting the conclusion that the law prohibiting public drunkenness should be repealed is that Sec. 647f:

> "...is a useful police tool. Public drunk arrests are often made when a patrolman sees no other way to handle a dispute in which one or more persons have been drinking. As a result the disorder, disturbance, argument with the police, fight, etc. is broken up and yet no one involved has a charge more serious than plain drunk."

Example 1

Police are called to a disturbance in a Negro neighborhood. A crowd gathers. A drunk on the sidelines starts yelling insults at the police and agitating the crowd. Solution: Arrest the drunk for 647f P.C. before he gets the crowd angry. Result: Although the drunk was in fact inciting a riot he was arrested for drunk and will probably plead guilty to this charge. Alternative Solution: Arrest the drunk for inciting a riot (a felony). Result: He will most likely plead not guilty and an expensive trial and parade of witnesses will be required. Win or lose, the drunk ends up with a felony arrest on his record.

Example 2

Police are called to a fight in progress behind a "Western" bar on a Saturday night. A crowd of patrons are watching. Both participants are deadly serious and both are arrested for 415 P.C. (disturbing the peace). As police reinforcements arrive, friends of the two under arrest tell the police they aren't going anywhere with the prisoners. Solution: Either threaten to arrest or arrest the friends for drunk in public. Result: They either leave well enough alone or get arrested too. Most likely all concerned will plead guilty. Alternative Solution: Wait until they either make an overt move toward the prisoners or lay a hand on the officers then arrest them for obstructing an officer in his duties (misdemeanor), resisting an executive officer (felony), lynching (felony), or assault on a police officer (felony). Result: Those involved will have high bails set and will probably plead not guilty. Again higher court costs and the defendants, win or lose, will have more serious offenses on their records.

The police cannot avoid their responsibility for order maintenance. Unfortunately, much of the disorder in any city involves either drunks or people who have been drinking.

We have quoted these objections in full because they make the best case for not repealing those portions of Penal Code Section 647f which make public alcoholic intoxication criminal. And that case is not good enough. It confirms the conclusion expressed earlier in this Report that the drunk statute is used as a tool or excuse to achieve other ends, such as preventing other crime. The use of any statute as a tool to achieve

unexpressed purposes is hypocrisy. The use of statutes of vague contour as grants of discretion to police to arrest in order to prevent crime is intolerable and inconsistent with the fundamental American idea that people should be arrested for what they do, not because a police or other officer believes that they may commit a crime. It may be true that conduct containing a strong probability of injuring other people might well be prohibited as criminal, but it should be prohibited directly, not reached hypocritically. In Example 1 of the objection, the drunk on the sideline agitating the crowd is not being arrested because he is drunk. If not desirable to charge him with inciting a riot, he should be arrested for disturbing the peace (P.C. Sec. 415), a misdemeanor. If the facts warrant conviction on that charge, the accused will be convicted. If they do not, the police officer has made a mistake in judgment, and should not hide behind a "phony" drunk charge, to which the accused pleads guilty and places a stain on his record.

Our objector further criticized our proposal for repeal of parts of Penal Code Section 647f thus:

> As far as the skid row alcoholic goes, I suspect that repeal of 647f P.C. would only result in increased arrests for disturbing the peace, begging, trespassing, malicious mischief, indecent exposure, etc.
>
> The end result would be the same and although the drunk court would be eliminated the case load on other departments of the Municipal Court would increase, involve more prosecutors, and public defenders, require officers and witnesses to testify in court and otherwise increase expenses. Drunks in public, whether or not they are alcoholics, are individuals with lessened inhibitions. If you can see the need and necessity for arresting drunks in cars even though they have committed no violation because they represent a potential menace to society, then it would seem that it would also be clear that drunks that appear to be aggressive, or would appear likely to be the subject of

> a police report in the immediate future should also be taken into custody before they commit disorders, disturbances or violate other sections of the penal code. The police must be able to make the decision as to whether they represent a potential hazard to themselves or others. They shouldn't have to wait until potentially dangerous situations escalate.

If in fact repeal of 647f would result in increased arrests for other specific criminal acts, one or the other of two things will be true -- either those acts will have been committed, or they will not have been. If they have, it is better that people be honestly charged for what they do, not hypocritically under a catchall statute. If those acts have not been committed, the police will be guilty of harassment in making the arrests, but the abuse of process will not be cloaked and can more readily be reached.

The United States Supreme Court in Powell v. Texas, 392 U.S. 514 (1968) came close to holding it unconstitutional to treat chronic drunkenness as a crime. The court was deterred from doing so because five of the nine judges saw no clear promise, yet, of a better way of handling drunks. The Crime Committee thinks that a better way is at hand.

The "street drunks," the recurrent alcoholics, offer a more difficult problem than the one-time transient. But even they can be handled in a non-criminal manner either at less cost or not materially more, the treatment will be more humane, more efficient, and the police, prosecutors, defenders and courts will have their hands freed to attend to their true work. Government can also go even further to a public health or medical approach, but it need not do so to handle drunks better than they have been.

F. The Public Health or Medical Approach

Many have read the Supreme Court's decision in Powell v. Texas, supra, as a warning to cities and states. While the Court narrowly upheld the constitutionality of criminal statutes on public drunkenness, it did so on the ground that medical knowledge could not show a uniform consensus that alcoholism was a disease. However, most public health authorities have interpreted the decision as a time-biding device, a way to give local jurisdictions the chance to set up alternatives to the criminal justice system.

Over the past several years, many cities, including Atlanta, New York, Washington D.C., and St. Louis, have established various kinds of detoxification and treatment programs for handling skid-row alcoholics. A summary of many of these programs was prepared in August, 1969, by the staff of the Bay Area Social Planning Council,[9] and it would be pointless for us to duplicate their excellent work in this Report. These programs usually feature two components: a medical detoxification unit and varying kinds of follow-up rehabilitations techniques. While programs designed to rehabilitate the skid-row alcoholic are undoubtedly motivated by laudable and humane concerns for helping the skid-row alcoholic, these programs have uniformly suffered from two

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[9] Keldgord, Garrison & Wahl, Background Information on Chronic Drunkenness Offenders in Alameda County, B.A.S.P.C., (1969), Ch. V.

defects. First, even when one uses a broad and liberal test of success or failure, rehabilitation programs aimed at the skid-row population have not been able to demonstrate rehabilitative success with even 50% of their patients. Second, the costs of these kinds of rehabilitative programs have ranged generally from $38 to $100 per patient per day. In short, skid row rehabilitation costs a great deal and produces limited benefits. Some examples are:

(a) St. Louis[10]

A study of 200 male patients made through interviews conducted about four months after discharge from the St. Louis Detoxification and Diagnostic Evaluation Center revealed that:

(1) 19% of the study group had been abstinent from discharge for 120 days;

(2) 47% had shown "marked improvement" in drinking patterns;

(3) 49% had shown "marked improvement" in health;

(4) 15-18% had shown "significant improvement" in housing, income, and employment.

(b) New York Bowery Project[11]

The Bowery Project has not published any criteria of success. However, the Project's "First Annual Report" recommended as follows: "Finally there should be therapeutic programs whose goal is to help a

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[10]For a description of the St. Louis project, See the B.A.S.P.C. study (1969). The data quoted here is taken from St. Louis Detoxification and Diagnostic Evaluation Center, Addendum to the Final Project Report to the Law Enforcement Assistance Administration, United States Department of Justice (1969) p.3.

[11]See Manhattan Bowery Project, First Annual Report; April 1, 1969, p. 41.

a man re-enter society. A small proportion of the men treated at the Project seem amenable to such intensive rehabilitation efforts."

(c) Texas Involuntary Civil Commitment

Since 1958, Texas law has permitted involuntary civil commitment for persons suffering from seven categories of severe alcoholism. (See Tex. Rev. Civ. Stat. Ann. Art. 5561c, Sec. 9 (1958)). These patients are sent to Austin State Hospital. A note in the Texas Law Review reports that less than 30% of those treated at the hospital stay dry for more than six months following discharge. The author concluded: "With the present shortage of facilities in the Austin Rehabilitation Center, it is questionable whether the resources of the state are wisely expended on patients who offer such slight chances of success."[12]

(d) Boston Halfway House[13]

Peter Bent Brigham Hospital and the Harvard Medical School set up a halfway house rehabilitative program for skid row alcoholics, focusing on work skills. They defined "rehabilitation" as " ... a man who lives, for the most part, a sober life, works steadily and restores meaningful

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[12] Bannerot, Civil Commitment of Alcoholics in Texas, 48 Tex. L. Rev. 159, 197 (1969).

[13] Report on Alcoholism Clinic, Peter Bent Brigham Hospital, Boston, in Institute on Modern Trends in Handling the Chronic Alcoholic Offender, 19 So. Car. L. Rev. 303, 332 (1967).

family relations." Taking 106 follow-up cases, they reported:

22% successfully rehabilitated

24% partially rehabilitated

54% failures

Accurate cost figures are hard to come by. The Manhattan Bowery Project reports that it cost $38.20 per day per patient during 1968. The Committee staff has concluded that the St. Louis Project cost about $43 per patient per day during the same year.[14] The San Francisco Bureau of Alcoholism reports that it costs $80 - $110 per day to keep a patient in the acute detoxification ward at San Francisco General Hospital and from $36 to $38 per patient per day at the rehabilitation ward at Laguna Honda.

G. San Francisco Bureau of Alcoholism

These discouraging cost/benefit figures help explain why the San Francisco Bureau of Alcoholism has been reluctant to provide expensive resources for the rehabilitation of skid-row alcoholics. The medical profession would rather spend money and effort on more promising patients, i.e. working class or middle class alcoholics who outnumber street drunks in San Francisco by about 20 to 1. However, state funds for alcoholism

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[14] The St. Louis Project does not publish cost figures. Their reports to L.E.A.A. contain only estimates of police and court time saved by the Project, without any cost analysis. The staff cost figure is arrived at as follows:

(a) Total budget, 1968: $353,252.00
(b) Total admissions, 1968: 1,174
(c) Cost per admission: $300.00
(d) Since the St. Louis Project is based on a 7-day involuntary commitment, the cost per admission per day ($300/7) is roughly $43.00.

treatment were, until last year, directed toward attempts at rehabilitating the skid-row alcoholic. The McAteer Act of 1965 (Cal. Stat. 1965, Ch. 1431, replaced in 1969 by Chs. 8 and 9 of the Welfare and Institutions Code) entitles local county health departments to receive state money to set up programs for treatment and rehabilitation. In 1967-68, the California Assembly Interim Committee on Criminal Procedure, after hearings on chronic drunkenness, concluded that each county should be required to establish inebriate reception centers equipped and staffed to provide detoxification services, emergency medical care and diagnosis. It further recommended that the police take all persons in violation of the drunk statutes to this reception center where they could be detained for a limited period of time. Finally, it was proposed that each county be required to establish a comprehensive treatment and rehabilitation scheme, featuring a variety of services and facilities.

Following the 1965 McAteer Act, a Bureau of Alcoholism was established in the San Francisco Department of Public Health, but no comprehensive plan was developed. Dr. J. M. Stubblebine, Program Chief of Community Mental Health Services in the San Francisco Department of Public Health, has explained the inaction, both in writing and in testimony before the Health and Environment Committee of the Board of Supervisors, by stating that "There was not a clear, unambivalent charge for this program," that is, to create an alternative to jailing. Beginning with fiscal 1969-70, the San Francisco Board of Supervisors called for the creation of this alternative by approving a budget of $891,000 for the Bureau of Alcoholism. The Bureau designed a program for a 20-bed detoxification ward at San Francisco

General Hospital, a 45-bed convalescent hospital ward at Laguna Honda's Clarendon Hall, and one halfway house of unspecified capacity. Beginning July 1, 1969, additional state money became available to California counties on a ratio of 9 to 1 through passage of the Lanterman-Petris-Short Act (Welfare and Institutions Code, Section 5000, et seq.). One of the purposes of the legislation was to induce community mental health services to work on the problem of alcoholism, rather than continue to send chronic drinkers away to state hospital facilities, mainly at Mendocino.

Thus, since July of last year, the Bureau of Alcoholism has operated two facilities in San Francisco. One is an acute detoxification unit, located at San Francisco General Hospital. This is an intensive care unit which provides medical care and treatment for persons suffering from acute medical problems associated with alcoholism. Occasionally, the unit treats patients suffering from medical problems arising out of the use of drugs other than alcohol, but its emphasis is on the treatment of alcoholics who are seriously ill. It has 20 beds; the population fluctuates between 13 and 20. The average stay is 5 days, after which about two-thirds of all patients are referred to Laguna Honda for convalescence and attempts at rehabilitation. The per diem cost per patient in this unit varies from $80 to $110, depending on what kind of specialized services are provided. There is no liaison between the police, or the courts, and this unit at present. About 70% of the patients seen are derelict or "skid-row" alcoholics. The unit is concerned with emergency medical problems associated with detoxification and there are no attempts at rehabilitation.

Then, there is a convalescent and rehabilitative unit at Laguna Honda Hospital, with 45 beds, providing detoxification services for non-acute alcoholic withdrawal. The program first attempts to provide food and exercise for physical recovery, then encourages patients to join in a variety of rehabilitative techniques, ranging from encounter groups (including families) to direct psychiatric counseling. After an initial stay (7-30 days), patients are encouraged to return to the unit for out-patient counseling. The cost is $36 to $38 per day for in-patients, and about 70-80% of patients are derelict, skid-row alcoholics. This program is voluntary, and a patient may leave at any time. The Bureau has not released any data on their "success" rate.

Until very recently, there were only minimal connections between the Bureau's programs and the criminal justice system. In part, this could be explained by a reluctance on the part of those in the criminal justice system to cooperate with the Bureau. For example, in the past, the police refused to let Bureau doctors into City Prison, so that the doctors could simply make an evaluation of the medical needs of those in the drunk tank. Similarly, Bureau personnel have reported that among the judiciary, only Municipal Court Judge Charles Goff has been actively interested in cooperating with the Bureau. On the other hand, the Bureau has received a good deal of help from Officer John Larsen, the liaison officer in Drunk Court.

During the past couple of months, however, a sense of change has clearly emerged. After years of mutual aloofness, the police and public

health authorities have begun to meet regularly in order to design a workable alternative to the current methods of handling drunks in the criminal justice system. In part, this incentive for change has come from Bureau doctors, notably Dr. Richard Shore, the Bureau's Director, and Dr. Charles Becker, the Director of the Acute Detoxification Unit at San Francisco General. In part, the incentive has come from Chief of Police Nelder himself, from Judge Goff, and from this Committee. It is fair to say that a general agreement has been reached, that the police are not happy with the present system, and that changes along the lines suggested in this Report are likely to be forthcoming in the near future. The following small steps have already been taken:

(1) Since February, 1971, the police have been delivering one drunk arrestee per day directly to Laguna Honda.

(2) Every Wednesday, one of the Bureau's doctors goes to Drunk Court and picks up three men, convicted of drunkenness and screened by Officer Larsen. Their sentences are suspended on the condition that they go to the Single Men's Rehabilitation Center in Redwood City, administered by the San Francisco Department of Social Services.

Doctors in the Bureau of Alcoholism realize that present programs are not well suited for handling skid-row alcoholics. Physicians in charge of the acute detoxification ward at San Francisco General readily admit that the vast majority of skid-row drunks do not need the ward's extensive access to specialized medical services in order to "dry out" in a manner that is completely satisfactory by medical standards. For most

alcoholics, good food and oral medication is wholly adequate, and the doctors point out that nobody needs a hospital ward for this sort of treatment. Similarly, Bureau doctors who run the rehabilitation program at Laguna Honda know that their facilities and programs are largely wasted on hard-core skid-row alcoholics, even though the program concentrates over half of its resources on skid-row patients, possibly because they represent the most public (and therefore the most offensive) manifestations of alcoholism in the city.

This is not to say that the Bureau's programs are worthless, or even ill-advised. There is no doubt that the 20 beds in the detoxification unit are badly needed -- for emergency medical problems associated with alcoholic withdrawal and, possibly even more urgently, for emergency cases of drug overdose and withdrawal. And the Bureau knows that the vast majority of alcoholics in the City are not on skid row. The National Council on Alcoholism has estimated that, for every skid-row alcoholic there are fifteen to twenty working alcoholics, doing jobs as house painters, teamsters, secretaries, bankers and attorneys. The Bureau knows, too, that alcoholic rehabilitation stands a good chance with patients who have enough ties to family, church or work to want to make it back, and these patients are the ones that the Bureau would like to get at Laguna Honda. One Bureau doctor pointed out that, in all his professional practice, he had never encountered a case in which a skid-row alcoholic was arrested for drunk driving. "By far the most dangerous alcoholics are those who drive," he said, "yet criminal justice does no more to solve their problems than it does to solve the problems of the guy on the skids."

It would be wrong, also, to assume that the Bureau wants to give up on skid-row alcoholics, to pretend that Sixth Street doesn't exist. Rather, doctors in the Bureau are worried that the city, in its concern over the treatment of alcoholics by the criminal justice system, will simply transpose the handling of drunks from the courts to the Bureau's existing programs -- programs that are ill-designed for chronic drunkenness offenders. There is little purpose served in devoting the costly resources of current Bureau programs to skid-row alcoholics, especially when the effect of such a policy would be to deny those resources to patients who need them and can be helped by them. Thus, the Bureau, along with many other authorities in the treatment of alcoholism, has proposed a different approach, one that has already been tested in San Francisco.

H. An Alternative to the Criminal Justice System: Alcoholic Residential Centers

After a year and one-half of providing care and treatment for skid-row alcoholics, the staff of the Manhattan Bowery Project concluded that the most crucial priority in alcoholism treatment was as follows:[15]

> "First of all, congregate living facilities should be available to that proportion of homeless alcoholics who are probably incapable of re-entry into society as fully independent persons."

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[15] Manhattan Bowery Project, First Annual Report (1969) p. 40.

The Crime Committee has studied the possibilities for implementing such living facilities in San Francisco, is assured by workers in the field (including members of the staff of the Bureau of Alcoholism) of the practicality of such a plan and is convinced. Instead of elaborate detoxification arrays, or in addition to them, the community need simply furnish sparse municipal living quarters, a place for the drunk to dry out. They may be called "Alcoholic Residential Centers." But they would be clean, with medical attendants, and infinitely superior to a jail or prison. Surely there is no need for guards or bars, no need of a jail for the drunk, and no reason to toss him in with criminals. Instead of a police sweep and a wagon to take the drunk to the tank and thence to court, a small bus manned by a qualified attendant from the Department of Public Health and a civilian driver can tour the Skid Row area. They would pick up all drunks in need of care or shelter and take them to the Center. If a person is unwilling to go, the attendant from the Public Health Department will decide whether the drunk is in such condition that he should be involuntarily detained under Section 5170 of the Welfare and Institutions Code and taken to the Acute Detoxification Unit for 72 hours treatment or whether he can be safely left to wander the streets. When the drunk who is taken to the Alcoholic Residential Center sobers up, he can be offered further residence, payable out of his welfare check, and in some cases, rehabilitation. If he declines, he goes forth, uncoerced to stay. If he is picked up again, he sobers up again. There may still be a "revolving door," but it would be humane, it would be less expensive, it would give alcoholics a chance to regain self-respect.

In this connection the Crime Committee is much impressed with "New Start Center," located at Fourth and Howard Streets and its operation of nearby New Mars Hotel. New Start Center is sponsored and staffed by three agencies, the San Francisco Department of Public Health (not the Bureau of Alcoholism), the San Francisco Department of Social Services, and the San Francisco Redevelopment Agency. Over the past few years, New Start has seen more than 2,000 individuals, nearly all of whom suffer problems of excessive drinking. Mr. Earl Dombross, coordinator of the project, stated:

> "Frankly, we got tired of waiting for the Bureau of Alcoholism to get facilities set up where we could send patients for detoxification or custodial care, so we decided to go ahead and set up our own."

In October, 1969, the Center took over two floors of the Mars Hotel on Fourth Street, where five beds on the 5th floor were set aside for detoxification purposes and about 25 to 30 on the 6th floor were set aside for minimally supervised boarding. "We purposely avoided having any rehabilitation ambitions for the men we housed on the 6th floor," Dombross added. "All we wanted to do was give them a place to live and food to eat so that they would stay off the streets and out of jail. We've staffed the 6th floor with a couple of desk clerks, who are recovered alcoholics themselves, and kept the rules to a minimum -- drinking is allowed where it doesn't disturb the other boarders."

On the 5th floor, patients referred by the New Start Clinic physicians are detoxified for a period averaging about five days. For the most part, desk clerks are able to handle this drying-out process, giving milk, juice, medication and companionship. On the relatively few occasions when a

patient suffers convulsions or appears to exhibit serious symptoms of illness, the desk clerks call an ambulance from San Francisco General.

According to Mr. Dombross, New Start can run both the 5th floor and 6th floor operations, including salaries for desk clerks and food, but not rent or visits by physicians, for about $3.00 a day per person. The food is catered by Foster's because the Hotel does not have adequate cooking facilities.

The success of the 6th floor unit is perhaps best measured by the fact that its residents stay out of jail. Mr. Dombross reports that in the first seven months of operation, only two men out of the total of 140 who have lived in rooms on the 6th floor have been picked up on the streets for drinking, and the two were arrested and jailed only overnight. In other words, some of the city's worst recidivist alcoholics have been fed and sheltered in a workable, less expensive alternative to jail. A few have even gone on to more ambitious rehabilitation programs.

We do not believe that the Residential Centers would take drunks entirely out of the criminal system. For that, a center would need adequate security facilities, and trained security personnel, in order to handle a mean or fighting drunk. This would mean that the centers themselves would begin to resemble jails, and the costs of their operation would mount. Thus, where a drunk has been engaged in a fight, where he is still angry or dangerous, he should be taken to city prison and booked on the appropriate charge -- disturbing the peace, battery, or other applicable statutes. However, we think that the centers could accommodate

the vast majority of those now arrested for drunkenness in San Francisco -- the one-time transient offender and the "revolving door" drunk who is ordinarily discovered asleep on the sidewalk.

We think, too, that a person delivered to a center should be able to leave at will. Our first reason for proposing that a voluntary commitment be tried is that we think it unlikely that an involuntary commitment is necessary in order to keep skid-row men off the streets. The Mars Hotel project has demonstrated that most skid-row alcoholics will do their drinking indoors if permitted to do so. Indeed, it seems that one reason that "bottle groups" form on the streets, and that alcoholics end up asleep in doorways, is that drinking on the street provides a source of socialization and friendship (albeit transient) that cannot exist in many hotels that forbid drinking.

Furthermore, we think it unfair (and probably unconstitutional) that any person could be detained against his will in any facility -- whether it is called a "jail" or a "residential center" -- without a hearing in a court of law. Nor do we believe that such an involuntary commitment to a Residential Center is authorized by existing law. Although the Lanterman-Petris-Short Act[16] permits inebriates to be detained for 72 hours without a hearing, such an involuntary detention must be in a facility "... approved by the State Department of Mental Hygiene," for

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[16] Sec. 5170 et seq. W. & I. Code.

medical care and treatment.[17] We think it likely that the purpose of the Act was to provide for involuntary commitment to intensive medical facilities, such as the Acute Detoxification Unit, and we think it very doubtful that the Act could be used to justify involuntary commitments to sparse residential facilities.

We can anticipate various objections to this proposal. Certainly very few residents of San Francisco want chronic alcoholics in their neighborhoods, and there is likely to be a good deal of public resistance no matter where the centers are located. This problem of location will undoubtedly become more acute as redevelopment projects transform areas of the city which have traditionally harbored homeless alcoholics. Yet changes in the physical make-up of the city do not get rid of skid-row drunks; rather, the population is re-located and dispersed. Even now, one can see more visible alcoholics in the Mission than there were only a year ago, and many of these have emigrated from the South-of-Market renewal area. Thus, citizens of San Francisco must realize that they face some hard choices. The people of skid row will not disappear. They can be arrested and jailed, time and again, at great expense. They can simply be left alone, to sleep on the streets of the city as beggars do in cities of the Far East. Or they can be provided with sparse and spare and frugal accommodations, and an <u>opportunity</u> to improve their condition and to become more self-sufficient. If the citizens of the city choose

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[17] See Secs. 5172 and 5250 W. & I. Code, allowing a 14-day commitment where a person is "danger to others, or to himself, or gravely disabled as a result of mental disorder ..."

the latter alternative, as we have done, then the city, and we ourselves, must make room for residential centers.

If indeed, public opposition to the location of these centers in residential districts is enormous, the city should consider the conversion of smaller warehouses in essentially industrial districts. This suggestion may provoke some to say that we are in favor of "warehousing " drunks. We are not. Many artists in San Francisco (and in other cities) have proved that a warehouse can be transformed into a stylish residential facility at little cost. While we do not recommend that alcoholic residential centers become "stylish," we do think that smaller warehouses could, with imagination, be transformed into decent, humane and practical residential facilities, probably at less expense to the city than the cost of jailing our drunks for even a month or two.[18]

Another argument to be recognized and met is this: "By recommending that residential facilities be provided for drunks, aren't you guaranteeing a <u>better</u> source of essentially public housing than exists for some poor people in San Francisco who are <u>not</u> drunks?" We are prepared to grant the truth of this argument, so far as it goes, i.e. that alcoholics living in residential centers, no matter how sparsely furnished, would get better housing than some poor people in the city who have no alcoholic problems. Yet we find the establishment of residential centers still justified.

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[18]Our estimates indicate that the city spends about $66,500 per month in costs at city prison and county jail for drunks.

First, we should realize that the city now pays for housing many alcoholics, because they receive welfare assistance in one form or another or they are housed at the county jail. Thus, to some large extent, the city now provides alcoholics with housing, which, in some cases, may be better than housing provided for poor but sober citizens.

Second, we believe that the establishment of Alcoholic Residential Centers may possibly save the city money. No assurance can be given of this because the Bureau has not yet estimated the costs of setting up, staffing and operating them. But it is clear that the manpower and money presently being spent by the police, the courts and the Sheriff's Department to process drunks within the criminal justice system can be spent much more effectively in handling criminal cases of greater community concern. Also, we must consider that skid-row alcoholics suffering from exposure, malnutrition, hepatitis and related diseases constitute a substantial proportion of the patients now seen and treated at San Francisco General Hospital. By providing shelter, nutrition and early preventive medical care, the Centers should help to reduce hospital costs and enable the staff to give better service to other patients. Finally, funding for Residential Centers (and for expanded programs for those convicted of drunk driving) is available from various state and federal sources. The police and the Bureau of Alcoholism are aware of these funds and will probably be developing grant proposals.

Some will say that we want to reward drunks for becoming drunks. However, we have difficulty conceiving of anyone voluntarily choosing the road of alcoholism with the aim of ultimately residing in an Alcoholic Residential Center.

We believe that we are proposing the least expensive form of humane and quasi-medical treatment as a solution to a problem that is both medical and social in nature.

III. RECOMMENDATIONS

1. The Committee urges that alternatives to both jail and rehabilitation be adopted for the accommodation of those chronic alcoholics who by virtue of age, health, mental incapacity, or unwillingness to cooperate are truly beyond reclamation.

2. Inexpensive Alcoholic Residential Centers, modeled on the Mars Hotel project, should be established in lieu of jail for those inebriated persons who are found in a public place, unable to care for themselves. These Centers should provide minimal detoxification services, and essential bedding and food. They should serve both as detoxification centers for transient or "one-time" public drunks and as permanent residential facilities for derelict alcoholics. Public drunks should be recruited from the streets and taken to a Center by civilian teams (preferably ex-alcoholics) employed by the Department of Public Health. Continued residency in a Center should be voluntary.

Recommendations: (Cont'd)

3. Emergency medical cases should be taken to the Acute Detoxification Unit at San Francisco General Hospital.

4. The State Legislature should repeal those portions of Section 647f of the Penal Code which make public alcoholic intoxication criminal. The police should be called to handle only dangerous, unruly, or fighting drunks, and these drunks should be arrested and charged under appropriate penal code statutes such as disturbing the peace or battery.

5. The Courts and the Bureau of Alcoholism should co-operate and initiate a policy whereby defendants convicted of drunk driving should be required, as a condition of probation, to submit to an oral examination by Bureau staff, so that the defendant's possible alcoholism can be diagnosed. Where the Bureau so recommends, the defendant should be required to enter and participate in the Bureau's Clarendon Hall rehabilitation program at Laguna Honda Hospital as a condition of probation. This should be required even though the court, in its discretion, may also impose a jail sentence or fine.

6. Until such time as drunks can be taken out of the criminal justice system, those sent to county jail should be separated and segregated from other inmates.

APPENDIX

CRIMINAL JUSTICE COSTS OF PUBLIC DRUNKENNESS ARRESTS, SAN FRANCISCO, 1969

COST ANALYSIS: DRUNKENNESS ARRESTS AND PROCESSING, 1969

This analysis attempts to arrive at an estimate of the costs of processing through the criminal justice system those persons arrested for public drunkenness during 1969. Since our focus is on the cost of the routine "Drunk Court" operation, we have not included in this analysis the costs of processing persons who were arrested primarily for an offense other than public drunkenness but who were charged with drunkenness as an additional and secondary offense.

There is an inherent difficulty in computing the costs of criminal justice in San Francisco. The Police Department issues its Annual Report on a calendar-year basis, in this case calendar year 1969. All other agencies of criminal justice, however, issue reports on a fiscal year basis, and the city's budget is also compiled that way. Thus, in this analysis, all arrest and sentencing statistics are derived from the Police Department's Annual Report for calendar 1969. Police salaries are also taken from that Report. However, the salaries and costs of other agencies of criminal justice are taken from the City Budget for fiscal 1968-1969. Since most costs and salaries increased during fiscal 1969-1970 (a period which includes the latter half of calendar year 1969), it should be apparent that this cost analysis is somewhat low in estimating the costs of processing persons arrested for drunkenness during calendar year 1969.

I. Police Costs/Time:

Arrests for violations of 647f of the California Penal Code, drunk and disorderly, are most commonly made by the Patrol Division of the San Francisco Police Department. In order to determine the amount of time required for detention and arrest on drunkenness charges, an average arrest time was formulated.

Most arrests made by the Patrol Division of the San Francisco Police Department are made by the wagon crews, assigned to specific areas of downtown San Francisco.

Through a process of observation and analysis, we have estimated that the average time to effect an arrest for public drunkenness is approximately 15 minutes. This is from the time the officer's attention is focused upon an individual because of his behavior pattern until the individual is placed in a police patrol vehicle or police wagon to be transported to the Hall of Justice. There is no report writing required of the offense, merely a booking slip made at the scene. The total number of individuals detained by the Patrol Division of the San Francisco Police Department during the period under inquiry was 16,112.

A. 16,112 arrests X 15 minutes = 241,680 minutes or 4,028 hrs.

B. 4,028 hours X $5.67 per hour ('69 patrolman's hourly wage = $22,839.00

TOTAL $22,839.00

II. Transportation Costs:

Transportation to a district station or to the Hall of Justice for individuals who have been detained or arrested may be by either of two means. The defendant may be transported by the arresting officers in a police vehicle, or else the defendant may be transported to a district station or to the Hall of Justice by the police patrol wagon. Because of the potential danger involved, and the condition of most drunks, it is an infrequent situation in which the officer will transport the individual himself. Elapsed times, from the point at which the officer summons the patrol wagon to the arrival of the wagon, differ greatly, as to the time of the day, the day of the week and the availability of the wagon. Also, in large numbers of drunk arrests, the arrests themselves are made by patrol wagon personnel.

In most situations we have observed the average time to be 35 minutes from the time the officer summons the wagon until the wagon delivers the defendant to the booking area of city prison. Each patrol wagon has two uniformed officers assigned to it. There is an average of 6 men transported per trip.

A. 2685 trips X 35 minutes X 2 patrolmen = 187,970 minutes or 3116 hours

B. 3116 hours X $5.67 per hour X 2 patrolmen = $35,356.00

TOTAL $35,356.00

III. Other Police Personnel:

There are at present (and were during 1969) 2 patrolmen assigned as liaison with the court in the handling of 647f violations. These men are also responsible for the "drunk school" which is conducted by the court. This is their sole function within the police department.

A. Salary, 2 patrolmen (1969 avg.) @ $958 mo. = $22,992.00

TOTAL $22,992.00

IV. City Prison Costs:

The police department does not publish segregated cost figures for city prison. However, the department reports that the following personnel were assigned to the prison during 1969:

	Cost/year
1 Captain @ $1533/mo	$18,396.00
6 Sergeants @ $1116/mo	80,352.00
36 Patrolmen @ $958/mo (avg.)	413,856.00
5 Jail Matrons @ $760/mo (avg.) (full-time)	45,600.00
Total Personnel Salaries	$ 558,204.00

A. Total prisoners booked in City Prison, 1969 — 59,086

B. Prisoners booked in City Prison, 1969, for drunk — 16,660

Thus, 28% of all bookings were for drunk.

C. Personnel cost attributable to drunks ($558,204 X .28) $156,297.00

D. Estimated cost of food per day: $.95

E. Cost of food per day ($.95) X 16,660 (assuming avg. one day incarceration) $ 15,827.00

Costs of City Prison (Personnel and Food, not including costs of medical care or transportation to San Francisco General Hospital) attributable to drunks, 1969: $ 172,124.00

TOTAL $172,124.00

V. Records Index

Another clerk in the Criminal Records Division is responsible for indexing defendant and his disposition in the courts criminal records index. There is an average of at least 1.2 indices per arrest, including continuances, and each index requires approximately 2 minutes to record.

A. 16,112 arrests X 2 minutes X 1.2 indices = 38,670 minutes or 645 hours.

B. 645 hours X $4.10 (avg. hrly. clerk wage) = $2644.00

TOTAL $2,644.00

VI. Preparation of the Court Calendar:

A. 15,930 charged defendants + 25 lines on the court calendar per page = 637 calendar pages

B. 637 calendar pages X 1.2 average appearances = 764 calendar pages

C. 764 calendar pages X 15 minutes (avg. time to type a page) = 191 hours

D. 191 hours X $4.10 per hr. = $781.00

TOTAL $781.00

VII. Court Time/Costs (Drunk Court):

Costs of operation of Municipal Court Department No. 13g

A.	Salary, Municipal Court Judge	$12.00 hr.
B.	Salary, 2 Bailiffs	9.30 hr.
C.	Salary, Courtroom Clerk	5.90 hr.

TOTAL $ 27.20 per hour

Drunk Court holds session on the average of one hour per day every week of the year.

$27.20 X 5 days X 52 weeks = $7,072.00

TOTAL $7,072.00

VIII. Additional Costs/Court Trials:

Approximately 4% of those charged subsequently requested trials by a judge. The average length of such an appearance was approximately 7 minutes.

A. 637 defendants X 7 minutes = 74 hours

B. 74 hours X $44.00 (Municipal Court Costs)* = $3,388.00

TOTAL $3,388.00

IX. Jury Trials:

The District Attorney's Office reports that there are very few, if any, jury trials arising out of ordinary drunkenness charges (i.e. defendants initially processed in Drunk Court). A drunkenness charge may be at issue in a jury trial when that charge is joined with others, such as battery, assault on a police officer, or resisting arrest. For our purposes, however, it is safe to say that ordinary drunkenness offenders account for a negligible portion of those tried by juries in San Francisco.

*Where a court trial or a jury trial is held, both a Deputy District Attorney and a court reporter are present. Often, a Public Defender will be appointed.

X. TOTAL COSTS: ARREST THROUGH SENTENCING

Police Costs/ arrests	$ 22,839.00
Police Costs/ transportation	35,356.00
Police Costs/ Court liaison	22,992.00
Police Costs/ City Prison	172,124.00
Records Index	2,644.00
Calendar preparation	781.00
Court Costs/ Drunk Court	7,072.00
Court Costs/ Court trials	3,388.00
TOTAL	$ 267,196.00

XI. County Jail Costs

Although persons charged with 647f P.C. (drunk) accounted for about 41% of the sentences to County Jail by the San Francisco Courts during 1969 (3,548 out of 8,665), this does not provide an accurate basis for cost analysis, since it is likely that most sentences for other offenses, including felonies, exceed the average of 27.5 days for drunkenness offenders.

Thus, we base our analysis on the Sheriff Department's estimate that approximately 1/4 of all physical facilities at San Bruno have been devoted to drunkenness offenders over the past several years.

The budget for fiscal 1968-1969 for County Jails Nos. 2 and 4 (San Bruno) is as follows:

Salaries	$2,253,516.00
Admin. Costs	8,970.00
Equip./supplies etc.	53,685.00
Food/livestock	189,000.00
	$ 2,505,171.00

25% of $2,505,171.00 = $626,293.00

TOTAL	$626,293.00

TOTAL CRIMINAL JUSTICE COSTS

A. Costs:	Arrest Through Sentencing	$267,196.00
B. Costs:	County Jail	626,293.00
	TOTAL CRIMINAL JUSTICE COSTS	$893,489.00

THE SAN FRANCISCO COMMITTEE ON CRIME

A REPORT ON NON-VICTIM CRIME IN SAN FRANCISCO

PART I

BASIC PRINCIPLES
PUBLIC DRUNKENNESS

PART II

SEXUAL CONDUCT
GAMBLING
PORNOGRAPHY

Moses Lasky, Co-Chairman
William H. Orrick, Jr., Co-Chairman
Irving F. Reichert, Jr., Executive Director
Richard M. Sims, III, Asst. Exec. Director

THE SEVENTH REPORT OF THE COMMITTEE

June 1971

THE SAN FRANCISCO COMMITTEE ON CRIME

A REPORT ON NON-VICTIM CRIME IN SAN FRANCISCO

PART II

SEXUAL CONDUCT

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THE SEVENTH REPORT OF THE COMMITTEE

June 3, 1971

This Report is being submitted to the Law Enforcement Assistance Administration of the United States Department of Justice in partial satisfaction of the conditions of O.L.E.A. Grant #374.

THE SAN FRANCISCO COMMITTEE ON CRIME

MEMBERS:

Mr. Moses Lasky, Co-chairman
Mr. William H. Orrick, Jr., Co-chairman

Mr. Alessandro Baccari
Mr. Clarence W. Bryant
Mrs. Ruth Chance
Mr. William K. Coblentz
Mr. Gene N. Connell
Dr. Victor Eisner
Dr. Leon J. Epstein
Mr. Welton H. Flynn
Mr. Frederick Furth
Dr. Donald Garrity
Dr. David Hamburg
Mr. Warren T. Jenkins
Rev. Albert R. Jonsen, S.J.
Mr. Samuel Ladar
Mr. Lawrence R. Lawson
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Lt. William Osterloh
Mr. Michael Parker
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Mr. Louis S. Simon
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Mr. Edison Uno
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405 MONTGOMERY STREET
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IRVING F. REICHERT, JR.
EXECUTIVE DIRECTOR

June 3, 1971

Honorable Joseph L. Alioto,
Mayor of the City and County
of San Francisco
City Hall
San Francisco, California 94102

My dear Mr. Mayor:

On April 26, 1971, the San Francisco Committee on Crime submitted to you Part I of its Report on Non-Victim Crime. We now submit to you Part II, which discusses gambling, sexual conduct (including homosexuality and prostitution), and pornography.

These are all manifestations of the human species that have been with mankind from time immemorial. Nothing ever done about them has been completely satisfactory, and doubtless nothing ever devised in the future will be so either. We think, however, that our recommendations are a step forward, promise improvement, and merit adoption.

If time permits before the Committee's existence ceases on June 30, 1971, there may be a Part III to the Non-Victim Crime Report.

Respectfully,

Moses Lasky

William H. Orrick, Jr.

Co-Chairmen

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EXECUTIVE DIRECTOR

June 3, 1971

Honorable Dianne Feinstein,
President of the Board of Supervisors
of the City and County of San Francisco
City Hall
San Francisco, California 94102

Dear Mrs. Feinstein:

The San Francisco Committee on Crime submits to you with this letter Part II of its report on non-victim crime. Sufficient copies are enclosed for all members of the Board of Supervisors. We also enclose a copy of the letter by which we are concurrently submitting the report to the Mayor.

Respectfully,

Moses Lasky

William H. Orrick, Jr.

Co-Chairmen

ML/nh
Enclosures

I. INTRODUCTION

This is the second in a series of reports by the Committee on so-called "non-victim crime" in San Francisco. In Part I of our Report on this subject, issued April 26, 1971,[1] we said that the term "non-victim crime" is a "loose term," useful only to suggest an area of inquiry. With this Report, we define our concerns with more precision, by examining the enforcement of laws dealing with sexual conduct, gambling and pornography.

Our task is to inquire whether we, the public, are not asking the system of criminal law and justice to do too much. We have found that, during 1969, the police were unable to solve more than 13% of the killings, forcible rapes, robberies, aggravated assaults, burglaries, larcenies, and auto thefts reported in San Francisco. During the same year, over 50% of all arrests in the city were for non-victim offenses.

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[1] San Francisco Committee on Crime, A Report on Non-Victim Crime in San Francisco, Part I. Copies of this report are available at the Committee's offices, 300 Montgomery St., Suite 709.

Thus, if we really want to cut down serious crime in San Francisco, either we must be willing to devote considerably more money to the criminal justice system -- to police, prosecutors, judges, public defenders, probation services, jails and prisons -- or we must re-examine our priorities in law enforcement. This latter task requires that we take a new look at old laws. In doing so, we are guided by a number of "basic principles." Our reasons for arriving at these principles were set out in some detail in Part I of this Report, and it would be cumbersome to repeat our arguments here. However, we list our principles again, with the hope that readers interested in the origins of these guidelines will return to Part I of this Report. Our principles are:

1. The law cannot successfully make criminal what the public does not want made criminal.

2. Not all the ills or aberrancies of society are the concern of the government. Government is not the only human institution to handle the problems, hopes, fears or ambitions of people.

3. Every person should be left free of the coercion of criminal law unless his conduct impinges on others and injures others, or if it damages society.

4. When government acts, it is not inevitably necessary that it do so by means of criminal processes.

5. Society has an obligation to protect the young.

6. Criminal law cannot lag far behind a strong sense of public outrage.

7. Even where conduct may properly be condemned as criminal under the first six principles, it may be that the energies and resources of criminal law enforcement are better spent by concentrating on more serious things. This is a matter of priorities.

II. SEXUAL CONDUCT

It is in matters of sex that criminal law has made its baldest efforts to legislate morals. And it is in these matters that its efforts are little defensible under the basic principles stated in Chapter I. There is no justification for making criminal sexual conduct between adults, both consenting, carried on in private, whether the participating adults be of one sex or two, both male, both female, or one male and one female. This is so obvious as respects adult non-commercial male and female relations that laws against fornication and adultery are rarely enforced. The lack of justification exists, moreover, in areas of sexual conduct, where shreds and tatters of "public outrage" linger on from an earlier age.

A. Homosexuality

In California homosexuals can be arrested for violating any one or a combination of sections of the Penal Code. There are four types of misdemeanor disorderly conduct: Section 647a, engaging in a lewd act in a public place or soliciting anyone to engage in a lewd act; Section 647b, engaging in prostitution where lewd acts are solicited for money or services; Section 647d, loitering about a toilet for purposes of engaging in a lewd act; and Section 647c, wilfully and maliciously obstructing a public way. Section 650 ½ makes it illegal to impersonate one of the opposite sex for purposes of committing a lewd act.

Section 286 makes sodomy, even between husband and wife, a felony, and Section 288a makes the act of oral copulation a felony.

Unlike drunkenness, homosexuality does not consume a large portion of San Francisco's budget for criminal justice. Although any deflection of the energies of law enforcement from controlling violent crime to matters of morals is a waste of limited resources, the case for change of the law relative to homosexuality is not one of dollars and cents.

The police of San Francisco are generally confining their efforts in the area of homosexuality to controlling street solicitation and lewd acts in public. There has been a tacit, if grudging, acceptance of the principle the Committee presents in this Report -- that the criminal justice system should not intervene in matters of purely private sexual conduct. This enlightened attitude has not always prevailed in San Francisco. Police and homosexuals concur that the turning point was a raid in 1965 on a "gay" dance, a raid to which there was a strong adverse community reaction. The desire for a more lenient attitude was communicated to the working policeman by the higher authorities in the police department. The new attitude may be based, in part, upon the fact that there are, perhaps, 90,000 homosexuals in San Francisco. At anything close to that figure, they constitute a substantial proportion of the population, and an even larger percentage of potential voters. Candidates for supervisor in the last election recognized this fact and addressed meetings of homophile organizations.

Thus, since 1965, the police have concentrated on the enforcement of law against public homosexual activity, usually involving some form of solicitation. For example, during 1969 the police arrested and charged 286 males with soliciting and engaging in an act of prostitution.[1] During the same year, the police made 57 male arrests for impersonating a female for a lewd purpose, and an unknown number of these were also charged with prostitution (therefore included in the above 286 arrested males). Forty-three (43) males were charged with committing lewd or indecent acts in a public place. During the same time, only eight (8) defendants (6 males and 2 females) were charged with sex perversion, while two (2) males were charged with sodomy. These charges of homosexual offenses accounted for a miniscule portion of the costs of criminal justice in the city during 1969. Indeed, arrests for all sex offenses (excluding prostitution and rape) accounted for less than 1/2 of one percent of all arrests during 1969.[2] The same pattern holds true for the state generally. Arrests for all sex crimes except rape accounted for less than two percent (2%) of felony arrests in the state during 1969.[3]

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[1] S.F.P.D., Annual Report, 1969, pp. 108, 130.

[2] Id. at p. 48. There were 282 persons arrested for sex offenses (excluding rape and prostitution) out of a total of 59,104 persons arrested during 1969.

[3] 3,352 arrests for sex offenses out of 198,157 felony arrests. California Bureau of Criminal Statistics, Reference Tables: Crimes and Arrests, 1969, p. 5.

Further relaxation of law or law enforcement against homosexuality is therfore not a matter of saving resources. It is based on the sound principles stated in Chapter I.

Other police departments in the Bay Area do actively employ police officers as "decoys" in public restrooms, bars and other homosexual hangouts. But the San Francisco Police Department has not been using this degrading procedure in recent years. By and large, the San Francisco Police Department now leaves "gay" bars and clubs alone. An active homosexual social life goes on in these places, but, as the police concede, there is little overt sexual activity.

Arrests for male prostitution routinely occur through the use of two procedures. Most often, a pair of uniformed or plainclothes patrolmen observe a female impersonator make contact with a potential customer. When it appears that "she" and the man are going to do business, the officers approach the couple, identify themselves and attempt to learn the details of the contact. One officer questions the "victim" trying to determine who initiated the conversation, what was said, the price agreed upon, and whether the "victim" believed the impersonator was female. (Invariably, the "victim" insists that he did.) The impersonator is then arrested, and the "victim" is released. Once released, he is very hard to find. The result here, as with female prostitution, is that many of the cases based on such arrests are dismissed for lack of evidence.

The second method of arrest parallels that employed to arrest females on prostitution charges;[4] an officer walks through an area frequented by prostitutes and waits to be solicited. If he is solicited, and a deal is made between him and the prostitute, an arrest results.

The plea-bargaining process described at length in earlier reports of the Crime Committee is used extensively in prostitution cases. One reason is that the arrests made on "observation" of a solicitation are difficult cases to try since the potential customer is hard to find when needed as a witness. Another reason is that judges are reluctant to send homosexuals to jail. There is a wide belief among the judges that jailing encourages homosexual activity. In this setting, the District Attorney usually drops one of the two charges[5] with the promise that a guilty plea on the other will bring no jail sentence. The court normally honors this bargain, except where there has been violence in the offense or the defendant has been before the court on other occasions.

To the extent that all this activity of police, prosecutors, and courts relates to <u>public</u> activity, there is a legitimate place for

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[4] To be described in the next Chapter of this Report.

[5] See above, p. 6. The combination charge Section 647b and 650 ½ -- male prostitution/female impersonation -- is the most frequently filed charge.

the criminal law. Society also has legitimate concern to protect the young. Penal Code Section 272 (contributing to the delinquency of a minor) and Section 288 (lewd and lascivious acts upon children) should continue to prohibit adults from engaging in sexual conduct with minors.

But beyond this the criminal law ought not to go.

Much of the teaching about homosexuality in Western societies stems from religious doctrine binding sexual relationships to procreation. Translated into legal phraseology, these teachings made homosexuality a "crime against nature," since the homosexual relationship produced no offspring. Homosexuality may continue to be instinctively repugnant to most people and it is not the purpose of this Report to argue away that repugnance or even to try to do so. This Report advocates nothing whatever on whether social, moral, or religious stigma should remain or be removed from homosexuality. It confines itself to the question of the proper use of criminal law, and the conclusion it has reached is the same as the Wolfenden Report in England,[6] the Report of the Task Force on Homosexuality of the National Institute of

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[6] Report of the Departmental Committee on Homosexual Offenses and Prostitution, Great Britain, The Wolfenden Report, (Stein & Day Pub. 1963).

Mental Health,[7] and the Report of the Roman Catholic Advisory Committee on Homosexual Offenses.[8]

Before leaving the subject, we must ask whether any facts are present which support continued criminalization of private, consensual homosexual conduct among adults upon the principles of Chapter I. Some members of the police department say that there are. They urge that there is a connection between homosexuality and violent crime. They claim that the number of homicides by one homosexual partner of the other is increasing. This may be true, for homicide is largely a crime of passion, occurring mostly among intimates and acquaintances. For example, the National Commission on the Causes and Prevention of Violence discovered that homicides and assaults occurred between relatives, friends, or acquaintances in about 3/4 of all reported cases.[9] These crimes may occur in homosexual relationships as well as in relationships between fathers and sons, wives and husbands, or boy-friends and girlfriends. But there is no evidence showing that assaults and homicides occur at a higher rate in homosexual relationships.

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[7] National Institute of Mental Health, Report of the Task Force on Homosexuality, (1969).

[8] Report of the Roman Catholic Advisory Committee on Homosexual Offenses, in Dublin Review, Vol. CCXXX (Summer 1956) p. 57 et seq.

[9] National Commission on the Causes and Prevention of Violence, TO ESTABLISH JUSTICE, TO INSURE DOMESTIC TRANQUILITY, Award Books (1969), p. 27.

It has also been argued that prohibition of homosexuality is a measure to control venereal disease. Prevention of venereal disease is a legitimate matter of public concern, but nothing in present criminal law or enforcement policy holds any potential for mitigating venereal disease in male prostitution.

Other arguments against revising the laws to decriminalize private homosexual conduct were considered and found wanting by the Wolfenden Committee, with which we agree. We quote from that Report in Appendix A.

Frequently the argument about homosexuality and the law becomes entangled with the findings of Kinsey and others. Some argue that homosexuality is a sickness, others that it is merely the individual's location on a scale from total heterosexuality to total homosexuality; that there are far more covert than overt homosexuals, and that homosexuality cuts widely across the population. Arguments like these seek to remove the stigma from homosexuality, just as assertions about sinfulness seek to impose it. These arguments, at both ends of the stigma spectrum, miss the point. For the present purpose, it is enough that private consensual conduct of adult homosexuals (whoever and for whatever causes) threatens no harm to society at large so as to justify the use of the criminal sanction.[10]

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[10] See generally: Comment, Sexual Freedom for Consenting Adults--Why Not?, 2 Pac. L. J. 206 (1971).

B. "Unlawful Sexual Intercourse" (Statutory Rape)

Rape by force or fraud are not "non-victim crime" and are outside the scope of this Report. But Penal Code Section 261.5 makes it criminal for a male to have sexual relations with a female under the age of 18 however much she consented or was even the aggressor, or even when the male is a minor.[11]

We can find no justification at all for this kind of law to apply when both participants are minors. When one of the participants is a minor (under 18), and the other an adult, the same law should apply to the adult, whether the adult be male or female.[12] And if the minor be close to the age of majority and the adult only a little older, the concern of the law to protect minors from adults does not fit the situation either. "Statutory rape" is a ripe implement for shakedowns. It is so susceptible of creating injustice that the Supreme Court of California 7 years ago created an escape hatch by holding that the male could not be held guilty if he "reasonably"

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[11] The crime is "Unlawful Sexual Intercourse." Punishment for conviction, as set out in Penal Code Section 264, can be by commitment to either county jail or state prison, in the discretion of the jury or the judge where a guilty plea is entered.

[12] Females may now be convicted for Contributing to the Delinquency of a Minor. See Penal Code Section 272, People v. Aadland, 193 C.A. 2d 584, 14 Cal. Rptr. 462 (1961).

supposed the female to be of age.[13] A female of age 18 is probably as adult sexually as a male of 21 or 22. It has been suggested that the adult not be guilty of statutory rape unless the adult is at least three years older.[14] We agree with that view.

C. Prostitution

Prostitution is essentially a business transaction between a willing buyer and a willing seller. As long as there is a demand for prostitutes, they will exist. Prostitution has been made criminal because of a wide and historical feeling that it is immoral and sinful. And that is no proper basis for invoking criminal law. So far as prostitution consists of sexual conduct in private between two willing adults, the principles for removing the illegalization apply as much as they do to homosexuality, even more so as the moral repugnance to most people is less. Justification for using criminal law must look further, and this Report will examine the justifications advanced. But first we turn to the costs and show the futilities of trying to enforce our present laws on the subject.

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[13] People v. Hernandez, 71 C. 2d 529, 39 Cal. Rptr. 361, 393 P. 2d 673 (1964).

[14] California Joint Legislative Committee for Revision of the Penal Code, Tent. Draft No. 1, (Sept. 1967), p. 63.

Clamor and Law Enforcement

Law enforcement policy nowhere appears more susceptible to political pressure and whim than in the area of prostitution. Arrest figures jump one year and plummet the next.[15] Rousting prostitutes has long been the most flamboyant of police "streetcleaning" operations. There is no arrest pattern more ritualized and superficial, nor any more apparently ineffectual. On a given night, police may bear off to the Hall of Justice as many as sixty girls, most of whom are back on the street the next night. In an election year political pressures drive the whole operation into high gear: "Wait and see," said one cynical member of the Black community, "the closer to November, the harder the police and politicians will stress cleaning up on the streets." Newspapers and political candidates have focused attention on the problem in the last couple of years,[16] and police have responded to pressure to clean up the street by making more arrests for prostitution (see Chart A, p. 15).

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[15] Chart A, showing the number of prostitution arrests for the years 1936-1969 also reflects historical developments and events in San Francisco which had an effect upon the number of prostitutes presumably present in the city. But in some of the years ('48-'52), ('60-'65), and ('65-'66) the fluctuations are far too great to be explainable on the basis of a proportionate reduction in the number of prostitutes "working" in the city.

[16] Numerous studies and exposes have been produced in the past two years on prostitution. Particularly in August, September, November and December 1968 when a new Vice Detail head was appointed.

CHART A

PROSTITUTION ARRESTS, SAN FRANCISCO
1936 - 1969

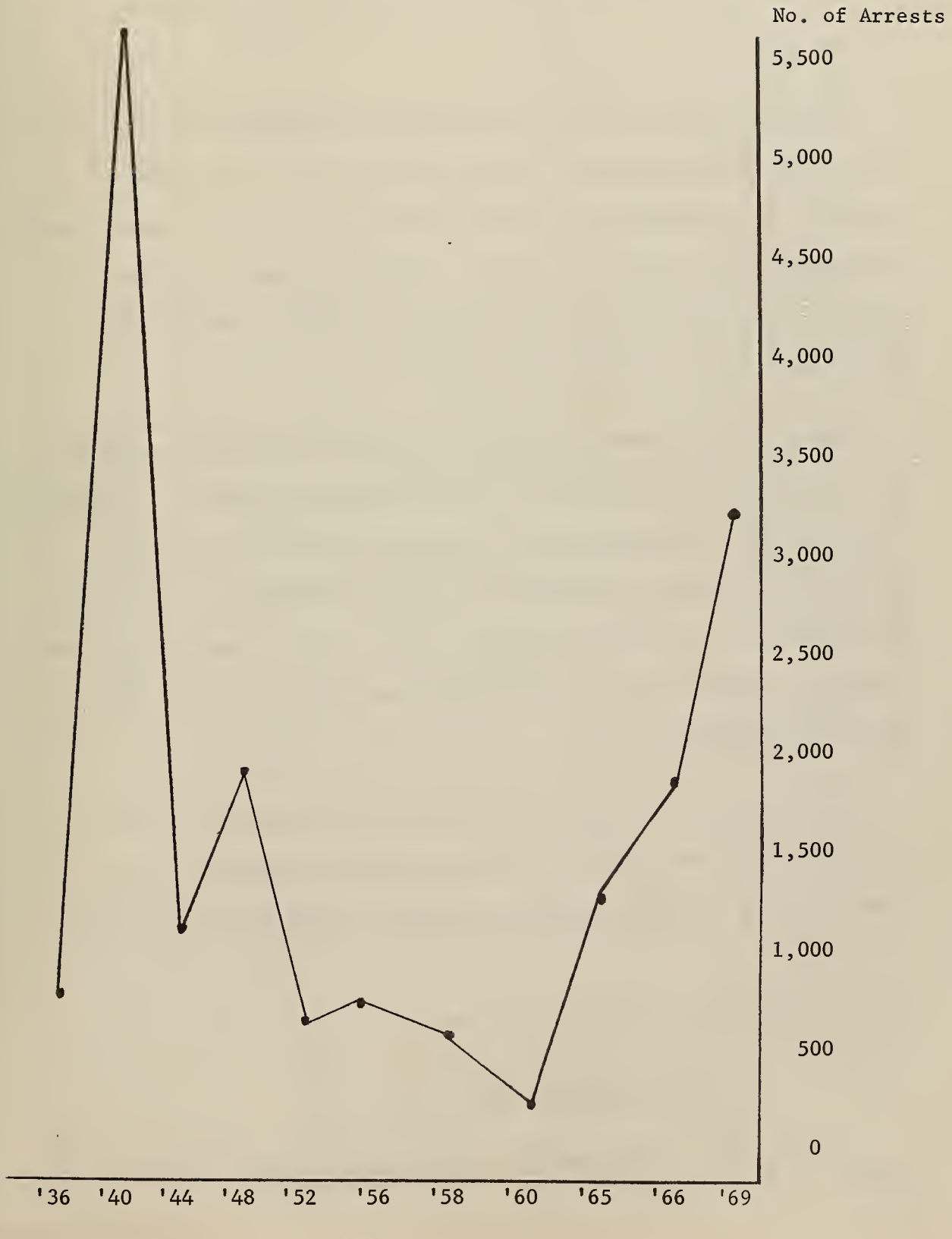

Table I, on page 17 shows that ten times as many girls went to jail in San Francisco in 1967 than in other comparable jurisdictions. Yet police admit that prostitution, particularly streetwalking, is on the increase.

Less than ten years ago police made only 330 arrests in the city for prostitution (Chart A). During 1969, the figure had risen to 3,221.[17] It does not follow, however, that there are ten times as many prostitutes now as there were then. Prostitution arrest figures for any period may reflect political pressure and fail to be any index of the prostitute population at any given time.

No person conversant with reality believes that prostitution can be "eliminated," certainly not in a city like San Francisco -- with its port, tourists, conventions, etc. It is no doubt true that some American cities have controlled visible streetwalking prostitutes by the application of criminal sanctions, and the Crime Committee believes that to be a legitimate use of criminal law. But the prostitution continues clandestinely.[18]

In the late 30's through 1950, more than 130 houses of prostitution were closed down in a clean-up campaign inspired by the State Attorney General's Report (The Atherton Report) on vice in San

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[17] S.F.P.D., Annual Report, 1969, p. 150.

[18] See George, Legal, Medical and Psychiatric Considerations in the Control of Prostitution, 60 Mich. L. Rev. 717 (1962).

TABLE I

DISPOSITION OF PROSTITUTION ARRESTS*
SELECTED CITIES, 1967

	ARRESTED	CHARGED	DISMISSED	JAIL	SUSP. SENT.	FINE	OTHER	PENDING
SAN FRANCISCO	2,116	1,335	621	389	249	84	12	400
BOSTON	502	502	39	1	0	288	0	174
WASH., D.C.	225	225	58	39	0	0	43	85
ST. LOUIS**	2,046						176	

*Sources: San Francisco Police Department, Annual Report, 1967, pp. 124-168; San Francisco Municipal Court Docket, Vols. 130-132 (A-Z); Boston Police Department, unpublished figures, Records and Planning Unit, 1967; Washington, D.C. Police Department, unpublished figures, Research and Planning Unit, 1967; St. Louis Police Department, unpublished figures, Research and Planning Unit, 1967.

**St. Louis reports only 176 individuals arrested were guilty of charge.

Francisco. Before then police were heavily involved in pay-offs, and prostitution flourished under their protection. When the city became a port of embarcation before the war, girls came here from other cities to practice their trade. Venereal disease became a serious social problem, and police made over 5,600 arrests in 1940 in an attempt to check it.

After the war and through the 50's prostitution arrests dropped off in the absence of any serious public concern over the issue. Streetwalkers were discreet and generally cautious.

In the late 60's, as street violence rose, politicians and police pledged efforts to control it. Since prostitution is a highly visible kind of street "crime" police concentrated manpower on making those arrests, in an effort to satisfy the more general public demand that they "do something about crime."

Most of those who seek prostitutes in San Francisco are returning servicemen or merchant seamen, conventioneers and other visitors looking for the "fun" San Francisco has a reputation for providing. The middle class tourist works through a cab driver, hotel clerk or bellhop who will put him in touch with the $100-a-night call girl. She is generally not a native of San Francisco, and she does not stay long enough to get caught; she is shrewd, versatile, and usually white. Affluent "swingers" may also find sexual partners at some massage parlors and "breakfast clubs," the latter a euphemism for sleasy early-

morning catch-alls of vice-prone buyers. Less affluent visitors pick up bar girls or streetwalkers, the latter considered by other prostitutes to be of the lowest caste.

The range of prostitution in this city is fantastic. Practitioners may be male or female; black, white, or oriental. They may be 14-year olds hustling as part of a junior high school "syndicate" operation; they may be hippies supporting the habits of their "old man" (or their own habits); they may be moonlighting secretaries who sell their favors on a selective basis through legitimate dating services. Places of assignation range from run-down hotels to luxurious hilltop apartments. A few "houses" still exist (under elaborate covers) in spite of the red-light abatement laws.

Streetwalkers -- because they are so flagrantly visible -- have provided the greatest source of public outcry and consequent political pressure. As competition increases, there is strong rivalry for "territory" and approaches to the customer become more aggressive. Hotel owners in the downtown area complain that respectable tourists are shocked by the aggressive tactics of streetwalkers in the heart of town.

The Cost and Futility of Enforcement

Based on their investigations,[19] members of the Committee's staff

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[19] Summaries of the staff analysis appear in Appendix B.

concluded that it cost the city more than $270,000 to arrest, process, and prosecute 2,116 prostitution arrests to the point of sentencing during 1967, plus probable county jail costs in excess of $100,000 for those convicted of a prostitution offense. The total: more than $375,000, or an estimated per arrest cost in excess of $175. These costs were undoubtedly even higher during 1969.[20]

What do San Francisco taxpayers buy for $175 every time a prostitute is swept up off the street? They buy essentially nothing of a positive nature, and agreat deal that is negative. Without really affecting the problems associated with prostitution, they are supporting a futile operation and one of the most cynical conducted by any level of government.

During 1969 the police arrested 1,566 adults (including 286 males) for either soliciting or engaging in an act of prostitution. In 683 cases the charges were dismissed. In 706 cases charges were still "pending" at the end of the year. During the year only 246 defendants went to jail for soliciting or engaging in an act of prostitution, and most of them were sentenced to less than four months. Another 1,938 adults were arrested for "obstructing the sidewalk," the usual charge in a street-sweep operation where no attempt is made to prove solicitation. 198 of these were dismissed, 983 defendants

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[20] The San Francisco Police Department reported 3,221 prostitution arrests during 1969. S.F.P.D. Annual Report, 1969, p. 44. In addition the 1967 cost figures were calculated according to costs for that year.

received suspended sentences, and 599 cases were pending at the end of the year. Only 334 went to jail, usually for less than thirty days.[21] Assuming that most arrests for "obstructing the sidewalk" are substitutes for prostitution arrests, we can conclude that, during 1969, only about 15% of all persons arrested on prostitution charges in San Francisco ended up going to jail, almost invariably for a period of time between one and four months. The police say that even prostitutes who are sent to jail are not deterred from future prostitution; they write off a short jail sentence as the cost of doing business.

The reason that current enforcement practices have not worked is that the statutes are unenforceable and the courts congested. The appearance of efforts at enforcement goes on because it offers the public the appearance of "controlling" prostitution. The whole process resembles a game.

The game starts on the streest, where the police are supposed to arrest prostitutes for soliciting or for engaging in an act of prostitution. Yet the soliciting prostitute is a very difficult rabbit to catch. Any citizen can report a solicitation to the police. But

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[21] For the foregoing figures see, San Francisco Police Department Annual Report, 1969, pp. 130, 150, 176, 178.

citizens are ordinarily not so offended that they are willing to call the police, fill out a report, and spend time on the witness stand in the Municipal Court. Customers do not wish to get involved with a prostitution arrest. When a police officer apprehends a prostitute and customer on the street, the customer is likely to give the officer a false name and address, thereby foreclosing attempts to locate him when the case comes up for trial. Even if the customer gives his correct name, the chances are slim that he will be willing to go to court. One Municipal Court judge in 1970 set all cases (where the customer was expected to testify) for trial on the same day, because he knew that only one in a hundred would ever go to trial and others would "fold up." This practice became widely known around the Hall of Justice as "trick day."

Since the police know that they cannot rely on a customer's testimony, they have turned to the use of plainclothes officers who pose as customers, walking through an area or sitting in a bar, waiting to be approached. He may or may not be "wired up" to record the conversation. But he must maneuver the girl to make the approach and set the price -- any overt move on his part would be considered entrapment. The girl, unless she is a novice, is likely to be wary of any man who seems to be playing coy; she knows he is probably a police officer. The kind of verbal skirmishing that occurs in this situation consumes much police time and often accomplishes little. Street grapevine is able to identify a plainclothes officer in almost no time.

The police themselves know that this sort of plainclothes stalking produces few arrests for the time and effort invested. Most often they settle for street-sweeps, with arrests for "wilfully and maliciously obstructing the sidewalk."[22] The sweep is merely a way of removing the girls from the street temporarily (until three or four o'clock the next afternoon), getting publicity, and swelling arrest statistics. Neither the district attorney's office nor the judges take this kind of arrest seriously unless there is a previous conviction of some kind. A girl who makes no fuss knows that she will soon be back at work. She is eligible for bail and has a right to an attorney. Her pimp will get her bailed out and will usually retain one of several lawyers who specialize in prostitution cases. Since a native-born prostitute (and particularly one with prior arrests) is a better-than-average risk to a bondsman, there is seldom any problem in getting a bond. The pimp, too, has an interest in having his girl make her court appearances, since he must maintain a good working relationship with the bondsmen in order to keep his girls on the street. Thus, within forty-eight hours of her arrest, the girl is back on the street, further indebted to her pimp.

The girl's case is now formally in the Municipal Court. Her lawyer demands a jury trial, knowing that it is impossible for the

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[22] Sec. 647c P.C.

courts to provide jury trials for even a fraction of those arrested for prostitution, let alone for the multitude of other misdemeanor offenses that the courts must process. The District Attorney reports that during 1968-69, 23% of all jury trial demands in Municipal Court were in prostitution cases.[23] Municipal Court judges who have presided over the criminal trial departments have estimated that 30-35% of all jury trial demands during 1970 were made in prostitution cases.

The girl's attorney knows that, if the case depends on the testimony of the customer, chances for a dismissal are excellent, even though the case may remain in court until the day of trial. If it appears that the case involves an irate customer who wants to testify, or that a plainclothes officer is a witness, the lawyer's tactic is to ask for repeated continuances of the case until the customer stops coming to court or until the prosecution offers a better plea bargain. The large number of continuances granted in prostitution cases is demonstrated by the fact that 706 of those cases were pending at the end of 1969. In one case one girl arrested four times within a two month period was given twenty-one continuances over the following 13 months! Continuances also give the lawyer and his client a chance to "judge shop" as the case is transferred from court to court until it finally reaches a judge known to "go easy" on prostitution offenses.

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[23] Office of the District Attorney for the City and County of San Francisco, Annual Report, 1968-1969, p. 8.

Judges say that if they did not grant continuances, lawyers would ask for a jury trial and the court calendars would become more hopelessly clogged than ever.

In consequence of all this, most prostitution cases are dismissed or short sentences are given on plea bargains. It is obvious that nothing is gained by the State Legislature's attempt in 1969 to make sentences in prostitution cases more severe by requiring a 45-day sentence for a convicted prostitute with one prior prostitution conviction and a 90-day sentence for a defendant with two or more priors.[24] The legislature may have thought that stiffer sentences would increase the "cost of doing business" and thereby discourage prostitution. But if mandatory penalties increase, there are more jury trial demands, more continuances, and, following conviction, more appeals. If the legislature had really wanted stiffer prostitution sentences, it would have had to provide the judicial resources -- from courts to prosecutors to bailiffs and clerks (not to mention jail facilities) -- to enable the whole system to handle a vastly increased load of contested cases.

The criminal process not only fails to be significant deterrent for prostitution, it does nothing to help the prostitute. It reinforces

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[24]Sec. 647b P.C., as amended.

the pimp's role in the prostitution complex. Nor does a jail sentence -- whether short or long -- help a girl who wants to get out of the business. She is not given protection from her pimp when she is released from jail. She has not been given any education or training or skills which might enable her to survive economically without prostitution, and if she has a drug habit when she goes into the county jail, she will have it when she gets out.

Studies have shown that most prostitutes do not like their work.[25] While there is much debate among medical authorities over the causes of prostitution, there is wide agreement that many, if not most, girls who become prostitutes are suffering from psychological illness of one kind or another.[26] It is not for us to determine which medical theory of prostitution is correct; it is enough that we recognize that prostitution is connected with psychiatric illness.

Thus there are a number of losers in the "prostitution game" as it is now played. The taxpayers are losers, because they do not get

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[25] See Khalaf, Prostitution in a Changing Society, Khayats Pub., Lebanon (1965), p. 81. Report of the Departmental Committee on Homosexual Offenses and Prostitution, Home Department, Great Britain, The Wolfenden Report, Stein & Day Pub. (1963).

[26] Thompson, Psychiatric Aspects of Prostitution Control, 101 Am. J. Psychiatry, 677 (1945), Agoston, Some Psychological Aspects of Prostitution: The Pseudo-Personality, 26 Int'l. J. of Psychoanalysis, 62 (1945), Wengraf, Fragment of an Analysis of a Prostitute, 5 J. Crim. Psychopath, 247 (1943), Lichtenstein, Identity and Sexuality, 9 J. Am. Psychoanalytic A. 179 (1961).

what they think their money pays for. The police and the courts are losers. But the pimps continue to exercise their dominion from the sidelines.

The Arguments Encountered for Continuing Present Law about Prostitution: Public Decency, Associated Crimes, Venereal Disease, Protection of Minors and Girls of Racial Minorities

The real root of laws criminalizing prostitution is moral repugnance,[27] but other considerations are advanced to support these laws. It is said that these laws and their enforcement (1) prevent offense to decency when prostitutes become a visible and public nuisance; (2) prevent robbery, extortion, sales of dangerous drugs, and the development of organized vice rings feeding on prostitution; (3) prevent the spread of venereal disease; and (4) prevent exploitation of juveniles and racial minorities. We must discuss these claims to see what merit they possess.

We think it clear that prostitution on the public streets in a highly visible form is no longer a "non-victim" crime. The offense to public decency and public sensibilities, the obstruction of

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[27] A medical historian has written that "It was the fear of venereal disease more than a change in the moral fabric of society which led to an increase of degrading punishments meted out to prostitutes * * *;" Bullough, The History of Prostitution, pp. 134-135 (University Books, 1964). But the root of making prostitution a crime is undoubtedly moral feeling of its sinfulness.

passageway, the irritation of the passerby, all constitute an offense to society which does warrant prohibition and the use of criminal process, if the use of that process can be successful. The tentative conclusion that would seem to follow is this: (1) Remove criminal prohibitions from prostitution carried on privately and discreetly off the street, but (2) continue the prohibition against streetwalking. We explore the question each raises to see whether the tentative conclusion is the correct one.

According to the Chief of Special Services of the police department, between 20-30 robberies are reported each week in connection with prostitution. During 1967, there were 596 robberies or thefts reported to the police in connection with prostitution, amounting to a loss of victims of over $145,000.[28] Though it cannot be measured, the police claim that the amount of theft associated with prostitution is many times that reported to the department.

No doubt, some prostitutes do rob or "roll" their clients by the use of force or the threat of force. (One pimp has told us that it is necessary to protect the girls from being robbed or beaten by the customer.) More frequently, however, prostitutes rely on their customer's naivete or stupidity. Bar girls, for example, may sit with a man until he has drunk enough to be insensible, and then slip

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[28] San Francisco Police Department Prostitution Theft Detail figures, 1967.

some money out of his wallet without ever engaging in an act of prostitution. Another frequent ploy is the "paddy hustle," where the customer leaves his wallet or other valuables with a friendly and trustworthy third party (who may or may not be a pimp), only to find his possessions gone when he returns.

Confidence games like these are as old as civilization. They will continue so long as there are "gulls" who will be "gulled." In prostitution there is a high degree of "assumption of the risk" on the part of the customer. Bearing in mind the financial limits on public resources available to combat crime, this is a poor area to apply "consumer protection" against the consumer's own gulibility. The answer to prostitution-connected force, violence or theft is that it is chargeable and punishable as a separate crime, independent of any act or solicitation of prostitution.

Moreover, it is more likely that a crime of force or violence, "connected with prostitution," will be committed by a male pimp than by a female prostitute. The commoner practice is for the prostitute to lure the customer to a hotel room, car, or apartment, where he becomes the easy target for strong-arm pimps. In short, society's effort to prevent crimes of violence associated with prostitution would be more effective by concentrating law enforcement efforts on the pimps, rather than on the girls, on the "associated crimes" rather than prostitution.

During 1967, the police arrested 140 "known prostitutes" for possession of narcotics and dangerous drugs,[29] a wholly insignificant part of the city's 4,278 total arrests for drugs and narcotics during the same year.[30] However, these bare statistics tell us little. Interviews have revealed a close connection between prostitution and drug abuse, but we must examine the connection closely, to see what it really signifies.

Pimps sometimes induce girls into taking habit-forming drugs, as a calculated way of gaining power and control. The girl performs for the pimp, who in turn supplied her with drugs for her habit. Moreover, many women and men become prostitutes because they are suffering from any one of a host of psychiatric illnesses, and it is likely that the psychiatric problems which lead persons to prostitution also lead those persons into the drug sub-culture.

While we cannot measure the relationship between drug sales and prostitution, we know that many pimps are also drug dealers. There is little evidence of independent drug-dealing by prostitutes themselves.

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[29] San Francisco Police Department Prostitution Theft Detail Records, 1967.

[30] San Francisco Police Department, Annual Report, 1967, p. 45.

Where prostitutes are selling drugs or narcotics, they are usually doing so because a pimp has given them no alternative.

In short, if we want to reduce the dissemination of dangerous drugs and narcotics associated with prostitution we should focus attention on the pimp, not the prostitute.

It is sometimes suggested that there may be a connection between prostitution and organized crime. The Committee on Crime is not a Grand Jury and has no power of subpoena. It has therefore been unable to investigate whether there is organized crime in San Francisco. We know, however, that the President's Crime Commission reported in 1967 that prostitution plays "...a small and declining role in organized crime's operations."[31] On the other hand, we have been informed by reliable law enforcement authorities that pimps are in control of virtually all street-walking prostitution in the city, and that the pimps themselves are organized. We presume that in the near future we will know much more about organized crime in the Bay Area, since a special task force of the United States Department of Justice, headquartered in San Francisco, is currently investigating that area.

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[31] President's Commission on Law Enforcement and Administration of Justice, THE CHALLENGE OF CRIME IN A FREE SOCIETY, 189 (1967).

No doubt organized crime could not gain a foothold in prostitution if there were no prostitution. It is also probable that if prostitution were not a crime, it would not be organized. In any event, a law enforcement policy of sweeping prostitutes off the streets and into our courts is no way to keep organized crime out of prostitution. The prostitute is the last link in any chain or "organization," whether the organization is limited to a pimp and his stable or whether it extends beyond. By and large, in this context, the prostitute is a victim -- obviously a victim of pimps, possibly of poverty and racism, and probably a victim of psychiatric abnormality.[32]

One of the most fearsome problems associated with prostitution is the spread of venereal disease. This has been true since at least the fifteenth century, when the "bad pox" appeared, apparently for the first time in Europe.

Medical studies show that a high percentage of prostitutes are carriers of venereal disease.[33] While Public Health officials agree

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[32]See p. 26, infra.

[33]Mc Ginnis & Packer, Prostitution Abatement in a V.D. Control Program, 27 J. Social Hygiene, 355, 357 (1941); Willcox, Prostitution and Venereal Disease, 13 Int'l. Rev. of Crim. Policy 67 (U.N. Pub. No. 58 IV. 4, 1958).

that changing sexual patterns among adolescents and young adults is the major cause of the increase in the disease among the young, there can be no doubt that prostitution, with its high commerce in partners, plays a significant role. No scheme of medical inspection can be effective in checking venereal disease among prostitutes.[34] Not only are female cultures simply not accurate tests of venereal disease, but a prostitute can acquire V.D. immediately after inspection and infect fifty to seventy men before she is inspected again. In any event, the present method of handling prostitution is ineffective to controlling V.D. When police make a large "sweep," the girls are ordinarily given a shot of penicillin and asked to return, but few do. Nor can they be located, since they give false addresses to the police. They very criminality of prostitution serves to discourage many girls from seeking cures. Since, we have concluded, prostitution cannot be stamped out by the increased use of law enforcement resources, the most effective remedies for the problem of venereal disease must be found in efforts that will (a) educate both prostitutes and customers to the risks and dangers of venereal disease; (b) encourage, rather than discourage, prostitutes in seeking medical inspection and help; and (c) encourage medical research to develop preventive medical approaches to venereal disease.

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[34] See: George, supra, note 4, at pp. 738-739.

There is still another factor to consider: the exploitation of minors and racial minorities. Young girls, particularly young Black girls, are being enticed into the profession by enterprising pimps. The police report that during 1969 about 60% of all women arrested for prostitution were Black, and the perecentage of Black women arrested for "obstructing the sidewalk" (a frequent street-sweeping charge) was even higher.[35] Over 20% of all women arrested for prostitution during the same year were between 18 and 20 years old,[36] and, in addition, 36 juveniles were taken to the Youth Guidance Center for "delinquency" associated with prostitution.[37] Prostitution rings have been uncovered in San Francisco high schools, and knowledgeable streetworkers in the Western Addition and Tenderloin swear that the police department's juvenile arrest figures vastly under-represent the proportion of young girls arrested for prostitution, because the girls lie about their age.

The pimp has a number of means of power and influence at his command. One, already discussed, is drugs. Another is his

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[35] San Francisco Police Department, Annual Report, 1969, p. 150.

[36] Id. at p. 128.

[37] Id. at p. 82.

affluence and glitter in the midst of poverty. No employment agency can match the offer that the pimp holds out to the poor, young, uneducated girl. Then too, the pimp offers many girls a promise of caring. Once a girl is in the pimp's stable, his tactics may change considerably. The girl discovers that her promised cut shrinks to only a modest share. And she discovers that it is, after all, a very tough game. The penalty for holding back on the pimp's cut is likely to be a beating or a cutting, and the same may be true if she wants to leave the stable. It is no accident that law enforcement officials have enormous problems in getting convictions for pimps. The girls are afraid they will be killed.

The pimps also have a large amount of economic leverage, and most of this is supplied by the criminal justice system itself. The pimp allows his girls enough money so that they can keep themselves looking good but not enough so that they can keep themselves out of jail. The girls need the pimp to pay bail and to hire a lawyer. Thus a direct consequence of our current law enforcement practices is that they provide the pimp with economic power over his girls.

There are stringent laws against the activities of pimps. Pimping, "pandering" and conspiring to commit prostitution are all felonies, punishable by from one to ten years in state prison.[38] But in 1969

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[38] See Secs. 182, 266h, 266i P.C.

the San Francisco police arrested only one adult for pimping, and the charges were dismissed.[39] In that year there were no arrests for pandering,[40] and only nine adults were arrested on criminal conspiracy charges,[41] an unknown number of these involving activities not connected with prostitution. Indeed, during 1969, only 25 defendants in the entire State of California were convicted of either pimping or pandering, and, of these, only four defendants were sentenced to state prison.[42]

In large part, the failure of law enforcement against the operations of pimps has been a failure of proof; girls won't talk. While the problems involved in prosecuting pimps are enormous, it seems to us that they are not insurmountable. Difficult problems of proof have existed wherever rackets have taken hold and have been broken. Law enforcement officials should ask for help from other jurisdictions in the state, and from the state itself, since pimps are an increasing problem in the state generally. This may mean, for example, that girls who are willing to testify may be sent to other jurisdictions and protected there by other law enforcement agencies. It may mean, too,

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[39] San Francisco Police Department, Annual Report, 1969, p. 176.

[40] Id.

[41] Id. at p. 170.

[42] California Department of Justice, Bureau of Criminal Statistics, Superior Court Prosecutions, 1969, Table 25, p. 33.

that there can be an exchange of ideas and techniques in law enforcement against pimps. San Francisco can ask for the cooperation of the federal government. For example, tax evasion has been used successfully as a tool in efforts to stamp out organized crime in other parts of the country, and we suspect that it would be a useful device for cleansing our city of pimps.

We believe, further, that removing the illegalization of private, non-visible prostitution would itself contribute to lessening the grip of the pimp, for it would open an area of activity to the girls where the pimp's protection would be less needed. Possibly the most important step to be taken in reaching the pimp is for the authorities to seek the help and cooperation of the minority communities. There is some sentiment in those communities that present enforcement practices against prostitutes are discriminatory and unfair, but there are also overwhelming distaste and revulsion for the pimps who prey upon those communities. Our own interviews and investigations have convinced us that there is substantial supply of information about the activities of pimps which could be tapped by law enforcement, if the minority communities could be convinced that the pimps -- and not the girls -- were the target of the criminal law and of enforcement policies.

One thing is clear. Present law enforcement practices have not worked, and we can do little worse by trying something different.

We are thus impelled to the conclusion that continued criminalization of private, non-visible prostitution cannot be warranted by fear of associated crime, drug abuse, venereal disease, or protection of minors. Our tentative conclusion to to this effect becomes fixed.

We turn back to the tentative conclusion that criminal law should continue to prohibit open solicitation on the streets.

Prevention of Open Solicitation

We have observed the aggressive tactics of large groups of prostitutes in the Western Addition and in the Tenderloin and have seen them flag down cars and grab at the coattails of pedestrians. There are undoubtedly many elderly persons and merchants in the Tenderloin, families in the Western Addition, and tourists in the North Beach area who feel offended, even imperilled, by the open solicitations that take place before their eyes. Few respectable citizens care to look upon the exposed face of vice, and they should not have to.

But it is argued that, since efforts to enforce the law against visible prostitution have been so costly and so futile as we have described, it makes no sense to continue the prohibition and the enforcement. It is argued, too, that strict enforcement of criminal sanctions against street solicitation make the pimp's role as a

procurer even more necessary, since streetwalking is currently the prostitute's way of advertising her wares. The arguments are persuasive, but not persuasive enough. If non-visible, private prostitution, conducted discreetly off-the-street, were no longer criminal, there would be a place for the girls to go, lawfully, and that very fact may join hands with continued enforcement of the law against street operations to diminish the street evil to an acceptable level. Yet if that hope proves wrong, and if the courts continue to be deluged with street prostitution cases, there are other measures that can be taken. The large number of jury trial demands in solicitation cases clog the courts. The Municipal Court judges can announce collectively that they will not impose more than a 15-day sentence on any defendant, charged with solicitation, who agrees to waive a jury trial and is tried by the court and found guilty. A similar promise of leniency by the courts -- say a promise to impose no more than 60 days upon conviction -- could be made in return for a defendant's willingness to be tried by a six-man jury.[43]

It is said that such a waiver of a right to jury trial is unconstitutional, because a defendant would face a longer possible sentence, if convicted, by insisting on a jury of twelve. Thus, it

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[43] Art. I, Sec. 7 of the California Constitution now permits misdemeanor cases to be tried with a jury of less than twelve, where both prosecution and defense stipulate to the smaller jury.

is argued that the courts cannot make it "costly" for a defendant to insist on his right to a full jury trial.[44] We, however, think that a voluntary and knowledgeable waiver of jury trial, in exchange for a promise of leniency by the courts if the defendant is convicted, is closely analagous to plea bargaining, where the defendant enters a plea of guilty based upon a promise of a reduced sentence by the courts. This process is clearly permissible if the plea is entered knowingly and voluntarily and if the state keeps its bargain with the defendant.[45]

If waivers of full juries in this fashion are declared unconstitutional, it may be necessary to amend the State Constitution to create a new class of "petty" misdemeanors, in which solicitation for prostitution would be included. These petty offenses might be tried without juries, so long as the defendant faced a minimal sentence.[46]

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[44] Cf. Spevack v. Klein, 385 U.S. 511 (1967), Garrity v. New Jersey, 385 U.S. 493 (1967).

[45] People v. West, 3 C. 3d 595 (1970), People v. Delles, 69 C. 2d 906 (1968).

[46] A defendant charged with a serious crime has a right to a trial by jury in state court under the Sixth Amendment to the Federal Constitution. Duncan v. New York, 391 U.S. 145 (1968). However, there is no Sixth Amendment right to a jury trial where the possible punishment does not exceed six months imprisonment. Baldwin v. New York, 399 U.S. 66 (1970), Cheff v. Schnackenberg, 384 U.S. 373 (1966), District of Columbia v. Clawans, 300 U.S. 617 (1937). We believe, however, that where a defendant has no right to jury trial, and is tried by a judge, his possible sentence upon conviction should not exceed 15 days.

We should at least experiment before entirely abandoning efforts to preserve public decency. The fact is that society has struggled with the problem of prostitution since time immemorial, and no solution has seemed to work satisfactorially.

The Final Conclusions and Recommendations

Any realistic appraisal must start with recognition of the fact that "the world's oldest profession" is going to be with us forever, and the real question is how the city should go about developing a means of dealing with prostitution that limits its visibility and keeps its associated problems to the barest possible minimum.

Any system of control of prostitution should attempt to:

(1) Prevent street solicitation;

(2) Eliminate the pimp or panderer;

(3) Prevent the enticement of minors into prostitution;

(4) Prevent the use of force or violence, or the sale of dangerous drugs in connection with prostitution;

(5) Provide education, treatment, or counseling for prostitutes who wish to leave the business;

(6) Retard as much as possible, the spread of venereal disease.[47]

We have been presented with forceful arguments that all these objectives can best be served by a system of licensing prostitution, by which government admits the necessary existence of prostitution and licenses its conduct. Forceful as these arguments are, we are unpersuaded by them. The history of prostitution is, in a sense, a history of pendulum swings between licensing and repression. The licensing of prostitutes in London was proposed as early as 1724, on grounds that it would cut down on many evils, including venereal disease. During the eighteenth and nineteenth centuries, prostitution was licensed in both Paris and Berlin. Attempts at regulation by licensing narrowly failed in the nineteenth century in New York, Chicago, Cincinnati and Washington, D.C. When these measures died, the police turned to informal "segregation" -- the toleration of known, but unlicensed, "red-light" districts where prostitutes were often required to register with the police, though no law required the practice.[48]

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[47] This objective comes last because in the present state of medical techniques no system of control, either within or without the criminal justice system, can have an appreciable effect on this problem.

[48] For the foregoing history, see BULLOUGH, supra, note 27, pp. 165-168.

The establishment of these districts provoked the passage of "Red Light Abatement" laws in most states, and, since World War II, there has been nearly-uniform policy of police repression throughout the country.[49]

What most repels us from the licensing of prostitution is that it puts organized society into the position of condoning and approving. Yet the basic principles stated in Chapter I of this Report draw a sharp distinction between approving and condoning immoral conduct, on the one hand, and merely removing from it the hand of criminal process. Yet the proponents for licensing are driven by their logic to proposing that the city own or lease hotels in which to establish brothels, have them administered by the city, and rent the rooms to prostitutes by the day (or night), week or month!

The Wolfenden Committee, which studied and reported on the laws concerning prositution in Great Britain, recommended against licensed brothels.[50] It said,

> "...prostitution can be eradicated only through measures directed to a better understanding of the nature and obligations of sex relationships and to a raising of the social and moral outlook of society as a whole. The licensing and toleration of brothels by the State would make nonsense of such measures, for it would imply that the State recognized prostitution as a social necessity."

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[49] George, supra, note 18, at 734. Prostitution in Nevada is not subject to control by state law. Thus, the regulation of prostitution is left to the counties. While Washoe County (Reno) and Clark County (Las Vegas) have laws making prostitution illegal, other counties have permitted brothels to exist.

[50] The Wolfenden Report, supra, note 6

It will be seen that the Wolfenden Report speaks, not only of licensing brothels, but of "tolerating" them. It argues that the existence of the "tolerated" brothel would encourage recruitment of women. Wolfenden may here be speaking of the "tolerated brothel" as one that has been "licensed." If so, we agree. If, however, Wolfenden attaches disapproval to unlicensed but non-illegalized off-the-street prostitution, we are unable to follow the Wolfenden Report to that extent, just as we are unable to follow those who would license prostitution. We share Wolfenden's conclusion that prostitution should be kept off the streets. Keeping prostitutes off the streets may be aided by tolerating them off the streets, and we find it difficult to imagine that tolerating them off the streets would recruit more women than pimps are doing now.[51]

Our final conclusion is that:

(1) The laws against on-the-street activity should be continued and enforced;

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[51] Wolfenden also reported that:

> "All but two European countries have now abolished them (tolerated brothels) and there are at the present time only 19 countries with tolerated brothels as against 119 'abolistionist' countries."

But the experience of other countries, while important to consider and study, cannot be controlling.

(2) The laws against pimps should be continued and enforcement stepped up, because the activity of pimps is not "non-victim crime;"

(3) Discreet, private, off-the-street prostitution should cease to be criminal.

The repeal of Penal Code Section 647b would enable counties and cities and counties to regulate the act of prostitution as they see fit.

If it is too sanguine to suppose that the state legislature will make this change in the near future, nevertheless, our Report may induce others in California to take a fresh look at prostitution and criminal justice, as we have done. We can hope that they will reach conclusions similar to ours. But meanwhile the criminal justice system in San Francisco can ill afford to wait out the time that may elapse before such a change takes place. What should it do in the meanwhile?

What it must do is to come as close to the desired system as it can by a policy of selective enforcement, adopted in the manner advocated in Part I of this Report,[52] that is, by the collective determination

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[52] A Report on Non-Victim Crime in San Francisco, Part I: Basic Principles; Public Drunkenness, issued April 26, 1971.

of all the agencies of criminal justice, and the municipal health authorities under central municipal leadership.

By recommending selective enforcement of the prostitution laws, we recognize an unfortunate fact of life and seek to direct enforcement into more rational and less costly efforts. San Francisco urgently needs its police resources, and the resources of its courts and jails, for handling crimes that are far more serious.

III. GAMBLING

Gambling is an activity of humans that occurs on two levels. One is typified by Sky Masterson in "Guys and Dolls," betting on which of two raindrops on a window pane will reach the bottom first: two "guys" getting pleasure or excitement out of chance. The other consists of commercialized operations, in which hard-eyed men organize machinery to profit from the blandishment that chance has for the frailty of humans. The first seems as old as mankind and is doubtless incurable. The second is as old as the rapacity of some men to profit from the weakness of others. If crime is involved in the first, it is non-victim crime. But crime in the second is not non-victim crime at all, for it does involve injury to society.

The weakness of the law's approach to gambling is, first, its failure to perceive that gambling does take place on these two levels and that these are wholly different in character, and, second, its erratic and capricious treatment of gambling on each level. Much, but not all, non-victim gambling is made criminal, and some victim gambling is treated as perfectly lawful. Thus, betting on horses in California has been lawful since 1933 on the spurious justification that racing encouraged "agriculture and the breeding of horses," as if society had any interest in "the breed" except as a tool for gambling.[1]

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[1] Pari-mutual betting on horses was permitted by the addition of Art. IV, Sec. 25a to the California Constitution in 1933. In the same year, the Legislature enacted the "Horse Racing Act," the purpose of which was "...the encouragement of agriculture and the breeding of horses in the State of California." Cal. Stats. 1933, Ch. 769, Sec. 4, p. 2048. See: In re Goddard, 24 C.A. 2d 132, 137 (1937).

Various forms of gambling, ranging from stud poker to slot machines, are made illegal by state law.[2] Yet the state has not made all forms of gambling "illegal." For example, while "banking or percentage" card games, including stud poker, are illegal, draw poker[3] and bridge[4] have been held by the courts to be predominantly games of skill, not prohibited by state law.[5] Moreover, San Francisco and other cities have legislated against gambling in areas not covered by state statutes.[6] Thus Section 260 of the San Francisco Municipal Police Code prohibits "any game of chance of any kind whatever in a public place open to public view." And Section 288 of the Police Code makes it a misdemeanor to visit or maintain a place where "gambling" is carried on or conducted. It is this latter statute -- Section 288 -- that is charged in most of the gambling cases in San Francisco.[7]

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[2] Secs. 330-337.5 P.C.

[3] In re Hubbard, 62 C. 2d 119, 41 Cal. Rptr. 393, 396 P. 2d 809 (1964).

[4] In re Allen, 59 C. 2d 1, 377 P. 2d 280 (1962).

[5] Ordinary pin-ball games have also been classified as "games of skill." Knowles v. O'Connor, 266 C.A. 2d 31, 71 Cal. Rptr. 879 (1968).

[6] See In re Hubbard, supra.

[7] In 1969, charges for "keeping" or "visiting" a place of gambling accounted for 419 out of 425 formal charges filed by the police. S.F.P.D. Annual Report, 1969, p. 166.

Just as the law is erratic in what gambling it declares to be illegal, law enforcement is erratic about when and against whom it will enforce the law. These laws are applied with some energy against the poor and the minority communities, while gambling in more affluent communities goes virtually untouched. This difference in treatment is even written into the law itself in Section 277 of the Municipal Police Code. Although that section prohibits "any game of chance of any kind whatever in a public place," it then allows dice to be "...thrown for merchandise within a place of business where such merchandise is ordinarily sold." This broad language is designed to allow an exception in the law for the favorite pastime of rolling dice for drinks, lunch or dinner. It cannot be explained to men from the Black communities like the Western Addition who are arrested on a Friday afternoon for rolling dice in a garage. The distinction cannot be based on differences in chance or in value, since the cost of drinks and dinner at a good San Francisco restaurant is far more than the stakes at any backyard crap-shoot. The difference is one of cultural values, carved into the law to protect a cultural pastime of the majority.

Section 277 writes a discrimination into the law. More pervasive is the inequality in the way that all gambling laws are enforced. During 1969, the police charged 593 persons with gambling offenses in San Francisco. Of these, 396, or sixty-seven percent (67%) were Black. Eighty-six percent (86%) of those charged were minority citizens, while only fourteen percent (14%) were white.[8] Yet everyone knows that

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[8] S.F.P.D., Annual Report, 1969, pp. 146-147.

gambling in San Francisco is not confined to minority communities, and much goes on in even the most respectable areas of white society, including private clubs, church functions and charitable affairs. Some judges who hear gambling cases have been outspoken in their criticism of the unequal enforcement of gambling laws. On July 10, 1969, for example, Municipal Judge Albert Axelrod, presiding over a case involving the arrest of 49 persons for gambling in the Western Addition, commented that he believed that the police were singling out the Fillmore District for enforcement of gambling laws, leaving gambling in private clubs untouched. On November 4, 1969, the late Judge Fitzgerald Ames stated from the bench, "I'm sick and tired of seeing only Black defendants here on gambling charges. You can't tell me that white people in this city don't do any gambling."

The enforcement of anti-gambling laws in San Francisco has been largely along racial lines. Yet there is no process of rational inquiry which can justify that kind of enforcement. If the unspoken rationale of this discrimination is that anti-gambling laws are necessary in order to protect the poor from their own weaknesses, it takes little reflection to see that the rationale has no justification. Any law that expressly legalized gambling for the rich and outlawed it for the poor would amount to denial of the equal protection of the laws in violation of the Fourteenth Amendment. Government should not and constitutionally cannot engage in enforcement practices that would be illegal if these practices were codified by law.

It must be conceded that the financial burden of enforcing laws against gambling has not been great. The arrests by San Francisco police in 1969 for gambling accounted for only slightly more than one percent of the 59,104 total arrests made that year. Gambling arrests accounted for less that 5% of the arrests made during 1969 by the Bureau of Special Services, known more familiarly as the "Vice Squad."[9] Only 36 persons were sentenced to county jail for gambling offenses.[10] The old Chinatown Detail, which consisted of six plainclothes officers who made regular and ineffectual checks on Chinese gambling parlors, has been disbanded.

But the measurable dollar cost of enforcement is only part of the costs. There are often other and unmeasurable costs suffered by society when laws against non-victim crime are enforced. One of these costs is the lack of respect, the bitterness that is engendered when the law is enforced unequally among classes of citizens. When the law bears down on the conduct of the poor and of racial minorities, leaving identical conduct by the more affluent untouched, then the poor and

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[9] Id. at p. 48.

[10] Id. at p. 167.

minority citizens rightfully feel that the law is simply for the rich and against them. If in fact the law is hypocritical in seemingly small matters, it is hard for the law to hold out a convincing honesty in matters more important.

Another unmeasurable cost is that the police are left with a huge measure of discretion in the enforcement of gambling statutes.[11] In effect, the police must become a buffer between hypocritical laws and realistic law enforcement. This is a truly monumental task, and it is little wonder that the police are often caught between the letter of the law and community sentiment. Consider for example, what happened during the last football season when the police gambling detail made an arrest involving a "runner" (card collector) for an organized football betting pool.[12] The "runner" was arrested on a Saturday night; on the following Monday, the police, for whatever reasons, issued a public statement explaining that the arrest was not the precursor of a crackdown on football pools.[13] The head of the anti-gambling squad explained that most people regarded the football pools as perfectly proper, so that the police could not get the kind of information they needed to make arrests.[14]

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[11] See: SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY, John Wiley & Sons Pub., 1967.

[12] "There's No Football Pool Crackdown," S.F. Chronicle, Oct. 5, 1970, p. 36.

[13] Id.

Another unmeasurable cost is the loss of respect for law when it tries to illegalize what the people largely desire. Certainly much of the reason why gambling laws are not enforced against church bingo games, football pools and private clubs is that most people in the community do not want the laws enforced against these activities. It is not simply a matter of whether the police could get evidence. Rather, by refusing to enforce broadly-drawn laws to the letter, the police save themselves -- and the rest of the legal system -- from public ridicule. Anti-gambling laws still try to prohibit all people from engaging in any activity that many people want to pursue. And this has been true since at least Biblical times. There are as many ways to gamble as there are chances in the world. There is no way for the law to prevent gambling or to prevent people from losing money at it.

Furthermore, the selective enforcement of gambling laws in San Francisco has little effect, if any, on whether poor people will lose more money than they can afford. Any poor person who wants to gamble legally can do so very easily right now. Two Bay Area racetracks, open six months of the year, are easily accessible by local bus from San Francisco. A San Francisco bettor has access to Golden Gate fields for $1.10 round-trip A.C. transit fare and the price of admission. Anyone with $9.30 can buy a round-trip ticket to South Shore Tahoe any weekday and obtain a refund of $8.00 in cash, plus a drink, when the bus reaches the Lake.

It must be self-evident, under the principles stated in Chapter 1 of the San Francisco Crime Committee's Report on Non-Victim Crime, that criminal laws against gambling on the first level simply cannot be justified at all. That is to say, laws making gambling criminal cannot be justified on any purpose to prevent gambling. They cannot be justified as an attempt to legislate morals or to protect people against themselves. Criminal laws against gambling on the second level are justified. When gambling becomes a large-scale commercial operation it may cease to be a matter of "non-victim crime" because the public may become a victim, and organized large gambling operators may be a corrupting influence. Society might be warranted in concluding that to be true. We need not be more conclusive, because the State Attorney General, Mr. Evelle J. Younger, has recently formed a state-wide task force to study and report on the effects of various forms of legalized gambling in New York, New Hampshire and Nevada,[15] and we can await the results of that study.

However, until there is reliable evidence that large-scale gambling is not injurious to society, laws on gambling should be tailored to prevent the operation of gambling apparatus from being organized and large. There are a number of possibilities. Corporations, partnerships,

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[15]"Big Study of Legalized Gambling," S.F. Chronicle, Feb. 11, 1971, p. 10.

and syndicates could be denied the right to run gambling establishments or operations. Or conduct of more than one establishment by the same party could be prohibited. Or the number of people participating in or visiting a game or games of chance at the same structure, building, house, or club could be limited to a small figure, say, twenty. Certainly the public advertisement of gambling or public solicitation of participation in "gambling" could be prohibited. We are aware that the Joint Legislative Committee for the Revision of the Penal Code is currently drafting proposals for change in the state's gambling laws, and we hope that they will find our suggestions helpful.

What the Committee on Crime does recommend at this time is this:

(1) Section 288 of the Police Code should be amended at least to confine it to prohibiting the maintenance of a place where gambling is carried on or conducted and to delete its prohibition of "visiting" such a place;

(2) So long as the anti-gambling laws remain on the books, they should be applied equally to all segments of our society. The city's enforcement policies on gambling should be brought into balance. Since private clubs, church games and the like should remain free from arrests for gambling, so also should the private games in garages, in the Western Addition, in Hunter's Point, and in the Mission or in Chinatown. The police should confine their efforts to the control of large games, organization, the enticement of minors, and solicitation.

IV. PORNOGRAPHY

Approximately 30 bookstores in San Francisco now specialize in the sale to adults of hard-core pornographic reading material. While the police have made several arrests for "reading materials" over the past year, these arrests have focused on publications emphasizing pornographic photographs with little text.

Most of the law enforcement relative to pornography has been aimed at pornographic films. Two police officers are currently assigned full-time to investigation and arrest of the operators of theaters showing sexually explicit films. At present there are between 20 and 25 theaters in the city regularly showing these kinds of movies. Since the Spring of 1970, the police and the District Attorney's Office have seized 33 films in connection with arrests for obscenity. These arrests resulted in 10 trials, which, in turn, produced only 3 convictions and 7 hung juries.

The convictions involved films depicting heterosexual masturbation and sexual intercourse, and lesbian oral copulation, and one cartoon found to be obscene contained depictions of bestiality. Sentences in these cases ranged from a fine of $1,000 to a six-month jail sentence with a $1,000 fine. All sentences have been stayed pending appeal.

In short, little has been accomplished by the effort to put down pornography by means of the criminal law.

A. What is Pornography? What is Illegal?

On the threshold, what to do about pornography is elusive because no one quite "knows" what "pornography" is. The word carries with it a load of condemnation and revulsion. But what is it that is revolting? We all know what pornography means, until we try to define it in words. And we are not helped much by definitions borrowed from the law, for the law on "obscenity" has been in constant flux.[1] Many people think that the law has banned either too little or too much.

One inherent difficulty in most definitions of "obscenity" or "pornography" is that they are subjective. For example, one literary critic has defined pornography as "...the representation of directly or indirectly erotic acts with an intrusive vividness which offends decency without aesthetic justification."[2] California's basic

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[1] See: Magrath, The Obscenity Cases: Grapes of Roth, 1966 Sup. Ct. Rev. 7; also United States v. Reidel (U.S. Supreme Court, May 3, 1971), 39 L.W. 4523.

[2] George P. Elliott, "Against Pornography," in Perspectives on Pornography, Hughes ed. (St. Martin's Press, 1970), pp. 74-75.

obscenity statute, Section 311 of the Penal Code, is as subjective as other definitions.[3] It was drafted to conform with decisions of the United States Supreme Court[4] and defines "obscene matter" as:

> ...matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance.

The President's Commission on Obscenity and Pornography refused to use the term "pornography" because "... it appears to have no legal significance and because it most often denotes subjective disapproval of certain materials, rather than their content or effect." Accordingly, the Commission addressed itself to "... a wide range of explicit sexual depictions in pictorial and textual media."[5] We, however, choose to narrow this concern somewhat. Our focus has been on books, movies and live stage shows commercially available in San Francisco.

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[3] Penal Code Sec. 311 is reproduced in full in Appendix C to this Report.

[4] Notably Roth v. United States, 354 U.S. 476 (1957), A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413 (1966). See: "Legal Considerations Relating to Erotica," in Commission on Obscenity, supra, p. 295.

[5] The Report of the Commission on Obscenity and Pornography, p. 3, n. 4 (1970).

Whether the distribution of books, newspapers, photographs or movies (and other forms of media) is illegal under present law must be tested by the definition of Penal Code Section 311. And the test applies to "obscene live conduct" as well. A somewhat different standard applies to the distribution of "harmful matter" to minors.[6]

B. How is Something Found to be "Obscene?"

Nearly all convictions for the sale or distribution of obscene matter are appealed to higher courts, and in the past they reviewed obscenity convictions on a case-by-case basis.[7] Recent efforts have attempted to set down more precise standards for lower courts to follow. Yet this process of formulating legal standards has not been easy. As one Justice of the California Supreme Court wrote recently,[8]

> It is no novel revelation that the passage of years since the United States Supreme Court first attempted a constitutional definition of obscenity * * * has produced * * * a multiplicity of standards. Throughout this period, courts have struggled to find an accomodation between the constitutionally protected interest in free speech and the legitimate public interest in controlling activities which fall under the broad category of obscenity.

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[6] Penal Code Sec. 313, et seq. See Appendix C.

[7] See, e.g., United States v. One Book Entitled "Ulysses," 72 F. 2d 705 (2 Cir. 1934).

[8] Tobriner, J., dissenting in People v. Luros, ____ C. 3d ____ (1971).

As this quotation shows, the public desire to ban matter felt to be offensive to decency has conflicted with interpretation of the freedom of speech protected by the First Amendment to the Constitution of the United States. One of the roots of the First Amendment is the conviction that society profits by free transmission of ideas. The attempt to apply this to "pornography" requires some determination of where lies the border between transmission of ideas and titillation for profit or depravity. That border has been difficult to find. The Supreme Court has recently reiterated that "obscenity is not within the area of constitutionally protected speech or press,"[9] but the limits of the one cannot be found without marking the limits of the other.

Of recent judicial decisions, by far the most influential have been those in the following areas: (a) private possession of obscene materials; (b) procedures to be followed in the issuance of search warrants in obscenity cases; and (c) requirements of proof of "contemporary community standards" in obscenity trials.

In Stanley v. Georgia, 394 U.S. 557, 568 (1969), the United States Supreme Court held that "...the First and Fourteenth Amendments

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[9] U.S. v. Reidel, 39 L.W. 4523 (1971).

prohibit making mere private possession of obscene material a crime." This rule is reflected in the California obscenity statutes, which make distribution, but not mere possession, of obscene materials criminal. But the Constitution does not preclude making a crime of the distribution of obscene materials to willing recipients.

Before 1969, the San Francisco police made arrests for showing allegedly pornographic films in the following manner: (a) Police officers would attend a film showing and would then prepare detailed affidavits describing what they saw; (b) the affidavits were then reviewed by a Municipal Court judge and a Deputy District Attorney; (c) if the judge found that there was reasonable cause to believe the film illegal, he would issue warrants authorizing the police to seize the film and to arrest the owner or disbributor. That procedure was upheld by the California Appellate Courts so long as the police seized an amount of film that was "... no more, and no less, than would be necessary to establish obscenity at a later adversary proceeding."[10] Moreover, the police were not required to present evidence to the judge as to whether the content of the film violated "contemporary community standards" of candor and decency.[11] In

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[10] People v. De Renzy, 275 C.A. 2d 380, 387, 79 Cal. Rptr. 777 (1969).

[11] People v. De Renzy, supra; Aday v. Superior Court, 55 C.2d 789, 13 Cal. Rptr. 415, 362 P. 2d 47 (1961).

September 1969 the United States District Court for the Northern District of California held that the Municipal Court could no longer issue search warrants for the seizure of allegedly obscene films unless that court first held an adversary hearing on the issue of the film's obscenity.[12] The decision was reversed by the United States Supreme Court in April, 1971.[13]

Although the California State Courts have not required the prosecution to show that "obscene matter" violates contemporary community standards at the time a search warrant is issued, they do require proof at trial that allegedly obscene material "goes substantially beyond" contemporary standards of candor and decency. In holding that the prosecution should put on "expert testimony" of community standards, the California Supreme Court said in 1968:

> We cannot assume that jurors in themselves necessarily express or reflect community standards; we must achieve so far as possible the application of

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[12] Natali v. Municipal Court, 309 F. Supp. 192 (N.D. Cal. 1969).

[13] Demich, Inc. v. Ferdon, _____ U.S. _____(1971).

> an objective, rather than a subjective, determination of community standards.[14]

The Court also defined the relevant "community" as the entire State of California, so that, in theory, the prosecution must put on expert testimony to the effect that any given book, photograph, or film violated statewide standards of candor and decency.

If there is a common theme to these decisions, it is that the courts do not much trust anyone to censor what adults may choose to see or read. First of all, the courts do not trust themselves. Nor do the courts place an abiding faith in juries. The attempt of the California Supreme Court to find an "objective" standard for obscenity reflect an apprehension that juries, without evidence of community standards, would simply apply their own moral notions to allegedly obscene matter. In part, the statewide test was obviously designed to avoid the anomaly of having a book or movie banned in Oakland and distributed legally in San Francisco. In the long run, this search

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[14] In re Giannini, 69 C. 2d 563, 574-575, 72 Cal. Rptr. 655, 446 P. 2d 535 (1968). In 1969, the legislature added Penal Code Sec. 312.1, specifying that "neither the prosecution nor the defense shall be required to introduce expert witness testimony..." This statute has not been tested by the courts. Someone may argue that expert testimony is constitutionally required. In San Francisco, the two police officers regularly assigned to pornography prosecutions have travelled extensively throughout the state and have been qualified as "experts" on statewide standards.

for an objective standard will fail. "Pornography" and "obscenity" are what offend. The test is of necessity subjective, and it is subjective to the community.[15]

We cannot believe that "statewide community standards" means very much in fact. Is the jury bound by the most permissive standard in the state, or by the mean average? If breasts are covered in Red Bluff and bare in San Francisco, can Stockton require covered breasts, or must they permit something to show?

The courts have not succeeded very well in drafting strict standards or in aiming at "objective" tests for obscenity and pornography. The truth of the matter is that there can be no objective test for ascertaining what is pornography. Words such as "prurient interest," "contemporary standards," "customary limits of candor," and "redeeming social importance" -- the words which attempt to define "obscenity" -- are no more than linguistic codifications of highly personal moral feelings.

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[15]A profitable analogy may be found in the history of the standard of "negligence" in personal injury cases. About 75 years ago the great Justice Oliver Wendell Holmes, then on the Supreme Judicial Court of Massachusetts, insisted that the standard of "due care" was for judges, not juries, to decide (I Holmes-Pollock Letters 85, Harvard Press, 1941). Sixty years later the United States Supreme Court was holding that courts can place almost no bridle on juries Rogers v. Missouri Pacific Co., 352 U.S. 500 (1957).

C. What "Pornography" Should Be Brought Under Criminal Law.

In short, no guide can be found in judicial decisions or supposed Constitutional standards as to what "pornography" shall be criminally condemned. On May 3, 1971, the United States Supreme Court observed (U.S. v. Reidel, 39 L.W. 4523):

> It is urged that there is developing sentiment that adults should have complete freedom to produce, deal in, possess, and consume whatever communicative materials may appeal to them and that the law's involvement with obscenity should be limited to those situations where children are involved or where it is necessary to prevent imposition of unwilling recipients of whatever age. The concepts involved are said to be so elusive and the laws so inherently unenforceable without extravagant expenditures of time and effort by enforcement officers and the courts that basic reassessment is not only wise but essential. This may prove to be the desirable and eventual legislative course. But if it is, the task of restructuring the obscenity laws lies with those who pass, repeal, and amend statutes and ordinances.

In order to determine what laws should be passed, repealed or amended, it is necessary to get back to the basic principles by which to test what conduct should be made criminal as a matter of sound public policy.[16]

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[16] See Chapter I for the 7 principles.

We state now the conclusions we reach by the application of those principles. There should be no prohibition of:

(1) What adults choose to read, see, or do in private.

(2) The discreet sale of pornography by one adult to another.

(3) The display of pornography in the flesh, film, or stage to adults in an off-the-street reticent surrounding; that is to say, in such a way as to come to the attention only of those who seek it out.

(4) Discreet commercial advertising that merely informs the public about the availability of sexual materials and is not vulgar, salacious, or lewd on its face.

There <u>should</u> be prohibition of:

(5) Sale or display to minors.

(6) Public display or exhibition whereby the pornography is thrown before or called to the attention of the general public, the passerby.

(7) Commercial advertising or solicitation that is offensive, vulgar, lewd or obscene.

If some of these proposals offend some of the public as too liberal, others may be objected to as violating constitutional rights. But if the Constitution as interpreted by the courts should be found to stand in the way, confrontation with sound policy carefully thought out may lead to reinterpretation of the Constitution. And, if the courts remain doctrinaire and unmovable, the Constitution can be amended.

The remainder of this Chapter tells how we have reached the conclusions enumerated above.

D. Pornography and "Harm": Why Is the Distribution of Pornography Made Criminal?

Our Third Principle of the proper application of the criminal law specifies that: "Every person should be free of coercion of criminal law unless his conduct impinges on others and injures others, or if it damages society." It is often argued that pornography is of itself "harmful," that in and of itself it causes injury to society. Among the kinds of harm said to result from the distribution of pornography are the following:

(a) That pornography causes crime;

(b) That it is offensive to most people; and

(c) That it leads to a decline in civilization.

(a) The Contention that Pornography Causes Crime

According to the President's Commission, 49% of the American public in 1969 believed that viewing explicit sexual materials led people to commit rape.[17] But the Commission concluded, in 1970, that there was no "substantial basis" for belief that erotic materials are a "significant determinative factor" in causing crime and delinquency.[18] On the other hand, it found the data so insufficient that it did not "absolutely * * * disprove such a connection."

> * * it is obviously not possible, and never would be possible, to state that never on any occasion, under any conditions, did any erotic material ever contribute in any way to the likelihood of any individual committing a sex crime. Indeed, no such statement could be made about any kind of nonerotic material. On the basis of the available data, however, it is not possible to conclude that erotic material is a significant cause of sex crime.

Given the increasingly widespread distribution of pornography in San Francisco over the past year, one would expect to find a corresponding increase in forcible rapes reported to the police if a

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[17] Commission on Obscenity, p. 158.

[18] Id. at pp. 242-243.

a causal relationship existed between pornography and rape. Yet over the past ten months,[19] forcible rapes reported to San Francisco police, with ups and downs, have shown a decreasing trend.[20]

In short, we have found no reliable evidence demonstrating a causal relationship between pornography and victim crime. The mere undemonstrated possibility of a connection is not enough to support the prohibitions of criminal law. "A million possibilities do not make a probability."[21] Justification for making conduct relative to pornography a crime must be found elsewhere, and it can be found for some prohibitions.

(b) The Contention that Exposure to Pornography Is Offensive to Most People

Most people do not want to be exposed to erotic sexual materials without exercising some choice in the matter.[22] When erotica is

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[19] June, 1970 through March, 1971.

[20] San Francisco Police Department, Bureau of Criminal Information, "Preliminary Crime Summary Reports" for months indicated. There were 488 cases of forcible rape reported to the police during the months indicated, a decrease from 580 forcible rapes reported during the same months of the previous year.

[21] Judge Alfred C. Arraj, United States District Judge, District of Colorado.

[22] Commission on Obscenity, pp. 155-158.

displayed publicly, when it is sent through the mails without express request, most people respond antagonistically, from annoyance to outrage. For some, erotica itself strikes at deeply-held religious convictions about sex. For others, exposure to erotic materials is more a matter of aesthetic preference: They prefer not to have materials that they consider ugly thrust upon them.

Annoyance, revulsion, or disgust are all very real kinds of "harm." Moreover, most citizens are probably outraged by the distribution or display of explicit sexual materials in public. Our Sixth Principle, set out in the Introduction to this Report, stated that "The Criminal Law cannot lag far behind a strong sense of public outrage." We believe that the criminal law acts properly in prohibiting both the public display of pornography and the dissemination of unsolicited sexual materials.

(c) The Contention that Distribution of Pornography Leads to a Decline in Civilization

Some authors have postulated a connection between sexual permissiveness and the "cultural decline" of civilization.[23] It is said that sexual freedom inhibits rationality, philosophical speculation and "advanced civilization."[24] The argument

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[23] Among them are J.D. Unwin, Pitirim Sorokin, Arnold Toynbee, and Bruno Bettelheim. See: Christenson, "Censorship of Pornography? Yes.," in The Progressive, Sept. 1970, pp. 24-25.

[24] Id.

has two parts: (a) that exposure to erotica causes sexual permissiveness, and (b) that sexual permissiveness impedes "progress." The argument merits careful consideration. It may not be lightly brushed aside. While it does not seem to bear up well on purely intellectual analysis, history is marshalled in its support.

In opposition to this argument for placing criminal sanctions on pornography, there is a laissez faire attitude that says that in a democracy "progress" is no more and no less than what most people say it is, that our most basic notions of the meaning of "progress," including notions of proper sexual conduct, are undergoing serious examination by many people, particularly the young, and that it is not for society to say whether ideas about sexual permissiveness will, or should, win out. According to this point of view, the state has no business applying criminal sanctions to depictions of sexual conduct viewed voluntarily by adults, in order to preserve something as tenuous as "progress."

We do not agree with this argument. A society has a right to preserve its notion of progress. But it is unnecessary to resolve that argument at this juncture, for the simple reason that there is no convincing connection between erotica and permissiveness. The President's Commission concluded:

> The findings of available research cast considerable doubt on the thesis that erotica is a determinant of either the extent or nature of individuals' habitual sexual behavior.[25]

Young people clearly constitute the most sexually permissive segment of our society. Yet they are rarely the purchasers of pornography in San Francisco. The average buyer of erotica in this city is a middle-aged male. It seems likely, therefore, that pornography is more a substitute for sexual permissiveness than a cause of it.

(d) Minors Should Not Be Exposed to Pornography

In Part I of this Report,[26] we set out, as a principle to be applied to our study of non-victim crime, the proposition that "society has an obligation to protect the young." In the area of pornography, protection of minors is a justifiable goal for the criminal law. The President's Commission found no evidence to suggest that exposure to explicit sexual materials leads juveniles to commit delinquent acts.[27] But that misses the point entirely. In our society, education and upbringing about sexual conduct have been entrusted to the family. Whether they should also be entrusted to

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[25] Commission on Obscenity, p. 194.

[26] Issued April 26, 1971.

[27] Commission on Obscenity, p. 225.

the schools is another question. But it is appropriate to preserve them from commercial intrusion. Laws prohibiting the distribution of sexual materials to juveniles without parental consent are justified not because they prevent "crime" or "delinquency" but rather because they protect the privacy of moral education.

But how far should the law go in its aim of protecting juveniles from pornography? It should be obvious, for example, that the state could achieve an absolute prohibition on the distribution of erotica to juveniles only if the state were to ban erotica completely. This the state cannot do, since the effect of such a prohibition would "reduce the adult population ... to reading only what is fit for children."[28] On the other hand, it is clear that the state can legislate directly against the distribution or dissemination of explicit sexual materials to juveniles,[29] and California has done just that. In 1969, the legislature enacted a statutory scheme prohibiting the distribution of "harmful matter" to persons under 18 years of age.[30] The law allows parents to give their children whatever books

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[28] Butler v. Michigan, 352 U.S. 380, 383 (1957) (Opinion by Justice Frankfurter).

[29] Stanley v. Georgia, supra; Jacobellis v. Ohio, 378 U.S. 184 (1964); People v. Luros, supra (Tobriner, J. dissenting).

[30] Penal Code Sec. 313, et seq. See Appendix C.

the parents wish and to take their children to movies as they see fit, thereby permitting parents to decide what their children should or should not see or read.[31] We believe that the current statutory scheme prohibiting the distribution of "harmful matter" to juveniles makes sense as it stands.

(f) Some Conclusions on "Harm"

Our study of "pornography" has not disclosed sufficient harm to society to justify the application of criminal sanctions to erotica read or viewed in a private place by adults. However, we do find that criminal sanctions are proper in order to prohibit:

(1) The sale or display of explicit sexual materials to minors; and

(2) Offensive or salacious public displays of sexual themes or materials.

In the first instance, the "harm" is done to our sense of the privacy of the family and home. In the second, the "harm" is one of affront, embarrassment, or disgust of the public at large.

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[31] Penal Code Sec. 313.2.

On the other hand, there are measurable harms in prohibiting the distribution of "obscenity" to adults who want it. The first, and most important of these, is that there is no way for the law, depending as it must on language as a tool for defining its rules, to arrive at precise or objective standards for obscenity. This necessary vagueness, in turn, has two consequences. One is that, throughout history, artistic works have been swept up by obscenity laws, often finding vindication only in our highest courts.[32] Joyce's Ulysses and D. H. Lawrence's Lady Chatterly's Lover were both banned by obscenity statutes.[33] Not many years ago, North Beach book-sellers stood trial in San Francisco for selling poetry that later found its way into major anthologies.

Another consequence of the necessary precision of obscenity statutes is that the interpretation of those laws makes the courts look erratic. The public at large comes to think that justice is uncertain, and it is. This measure of arbitrariness is not, however, rightfully attributed to any misfeasance by the courts. Rather,

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[32]For a history of obscenity prosecutions, see Ernst & Schwartz, Censorship: The Search for the Obscene, (MacMillan Co., 1964).

[33]Id. at p. 127, et seq.

conflicting interpretations are what we must expect when we ask the courts to become the final arbiters of what is "obscenity."

Some people point to a second kind of identifiable "harm" that comes from the enforcement of obscenity laws. For example, Justice Mathew O. Tobriner of the California Supreme Court wrote recently:[34]

> In our highly complex and increasingly interdependent society the need to preserve the individual's freedom of thought has become crucial. The individual has been confronted with the rise of tremendous power in government and in the so-called technostructure that tends to compel conformity and standardization. The central issue of our time must be to preserve the identity of the individual in the face of a dangerous depersonalization and dehumanization.

We think this a gross exaggeration of fear as applied to pornography and obscenity. But there is enough in it to work against applying obscenity laws to sexual materials viewed voluntarily by adults.

Finally, there is a curious kind of harm that has resulted from the arrest and prosecution of the owners of movie theaters

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[34] People v. Luros, supra, (Tobriner, J. dissenting).

showing pornographic films in San Francisco. The one recognizable consequence of these prosecutions is that they have made the city's pornography more important than it should be. Notorious prosecutions have created an aura of intrigue and mystery, and citizens of San Francisco have naturally responded by going to see what the fuss is all about. Just as commercial book-sellers have never greeted being "banned in Boston" with great dismay, so too, some commercial theater owners in the city have been able to depend on a constant supply of headlines manufactured by obscenity prosecutions.

A number of members of the Committee have viewed "pornographic" films at a theater suggested by the police. Apart from remarking that we found the films extremely bad, we see no need of adding additional comments, since to do so would simply add to these films an unwarranted dimension of importance.

D. Public Display and Commercial Advertisement

We have said that we believe the criminal law acts properly by prohibiting the distribution of sexual materials to minors, and we have affirmed our approval of the California statutes (dealing with "harmful matter") which do so.

We believe that the criminal law acts properly in prohibiting public display, that is, display to those who do not seek it out.

The public display of erotica, whether on posters, marquees or magazine stands, or whether it appears in newspaper advertisements, obviously reaches minors. But even were it to reach adults alone, and although adults ought to be able to see or read if and what they choose, we see no need to have the citizens of San Francisco bombarded with bad taste. To be specific, we think that the obscene neon signs and the salacious suggestions of the doorway barkers in North Beach should be prohibited.

On these conclusions it seems obvious that obscene advertising should be prohibited. Obscene public advertising is objectionable whether the motion picture, stage performance or book it advertises is obscene or not. Indeed, if what is advertised is not obscene, the advertisement is no more than degraded huckstering that possesses no conceivable social virtue. While there are important values at stake in letting adults see or read whatever they choose, there are no similar values in allowing theater owners or book-sellers to advertise in whatever manner they choose. It is nearly certain that criminal statutes aimed directly at vulgar, salacious or obscene public advertising would pass constitutional muster.[35] Indeed, a

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[35] See: "Legal Considerations Relating to Erotica," in Commission on Obscenity, supra, p. 295 et seq.; People v. Luros, supra, (Tobriner, J., dissenting).

model statute aimed at offensive public display was proposed by the President's Commission.[36] Some may say that the problems of drafting statutory standards for offensive public display will be identical to the problems inherent in drafting standards to apply to books or movies themselves, so that the courts will be just as busy trying to figure out what is prohibited. However, we think it likely that the courts will properly feel that they can trust juries to decide what is vulgar or salacious public display. The constitutional right of free speech, we observe again, exists to protect ideas and their dissemination. To that end courts tend to be sensitive to encroachments. No such extreme sensitivity is to be expected in the protection of the pursuit of dirty money. Prohibitions on vulgar public display, such as offensive commercial advertising, simply do not involve the risk that the community at large will be deprived of its chance to see or read what it wants. Juries, and not courts, ought to determine the public aesthetic tenor of their communities.

What, then, about discreet, non-obscene advertisement of obscene material? The purpose of advertising should be to inform the public about the availability of commerical wares, and it is entirely possible for advertsing to let adults know the availability of sexual materials without resort to vulgarity.

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[36] Commission on Obscenity, supra, at p. 67.

For example, theaters can advertise films as "Adult Entertainment" or as "Sexually Explicit." Erotic books or magazines need not have erotic covers, or, if they do, they can be kept in rooms not accessible to minors. It is therefore argued that this kind of neutral, sedate advertising should not be prohibited. And there is logic in the argument that if the discreet, private viewing of obscene material by adults should not be prohibited, the non-offensive advertisement of what itself should not be criminal ought not to be prohibited. To that argument it is answered that society does have some rights to protect its own standards of civilization, so long as it does not encroach on freedom of thought, freedom of non-victim action, and of communication of ideas, and therefore society has a right to prohibit the enticement of the public to offensive material, when the enticement is motivated by nothing nobler than acquisition of money. The public enticement to salaciousness of those who would otherwise not view it is not non-victim crime at all; the public is the victim. So the answer runs.

To enforce laws against in-offensive advertisement of obscene material would require someone to determine whether the material is obscene. This must be a jury. This brings one back to all the difficulties now encountered in determining whether a book, stage performance, or motion picture is obscene. Those who favor prohibition of advertising of pornography argue that the result of passing

judgment on the obscenity of the material will not be to prohibit the material but only to prohibit the commercial enticement of people to view or read it, and that the great social values that courts have sought to protect by their search for some objective standard of obscenity are not at stake. They argue that, while judgments of juries are subjective and often capricious, they represent a cross-section of public consciousness; if juries can judge whether a motorist has "negligently" injured another or whether a businessman has "unreasonably restrained trade," they can with equal propriety be entrusted with the task of determining whether material is so "obscene" as not to be publicly and commercially advertised.

The pros and cons make the choice difficult. Our final conclusion is that discreet, non-obscene advertisement should not be prohibited. This conclusion is produced by consideration of the fourth and seventh of the basic principles set forth in Chapter I of Part I of this Report on Non-Victim Crime:

"Fourth Principle: When government acts, it is not inevitably necessary that it do so by means of criminal processes."

"Seventh Principle: Even where conduct may properly be condemned as criminal under the first six principles, it may be that

the energies and resources of criminal law enforcement are better spent by concentrating on more serious things. There is a matter of priorities."

On the one hand, the attempt to enforce criminal prohibitions of non-salacious advertising of books or private performances is likely to be an expensive and futile use of law enforcement resources. On the other hand, it would be better to spend that kind of money on efforts for education for decency Pornography for profit is highly reprehensible, but in the end it is also boring.

Our recommendation against prohibiting sedate announcements of private obscenity may prove, in practice, to be mistaken. There will be time enough to change it if that turns out to be the fact. Meanwhile, the effort of the criminal law should concentrate on protecting minors, on putting down public display, and on prohibiting unsolicited distribution.

APPENDIX A

Excerpts from the Report of the Committee on Homosexual Offenses and Prostitution, Great Britain (The Wolfenden Report) (1963)

Para. 52. We have indicated (in Chapter II above) our opinion as to the province of the law and its sanctions, and how far it properly applies to the sexual behaviour of the individual citizen. On the basis of the considerations there advanced we have reached the conclusion that legislation which covers acts in the third category (private acts) we have mentioned goes beyond the proper sphere of the law's concern. We do not think that it is proper for the law to concern itself with what a man does in private unless it can be shown to be so contrary to the public good that the law ought to intervene in its function as the guardian of that public good.

Para. 53. In considering whether homosexual acts between consenting adults in private should cease to be criminal offenses we have examined the more serious arguments in favor of retaining them as such. We now set out these arguments and our reasons for disagreement with them. In favor of retaining the present law, it has been contended that homosexual behaviour between adult males, in private no less than in public, is contrary to the public good on the grounds that --

(i) it menaces the health of society;
(ii) it has damaging effects on family life;
(iii) a man who indulges in these practices with another man may turn his attention to boys.

Para. 54. As regards the first of these arguments, it is held that conduct of this kind is a cause of the demoralization and decay of civilizations, and that therefore, unless we wish to see our nation degenerate and decay, such conduct must be stopped, by every possible means. We have found no evidence to support this view, and we cannot feel it right to frame the laws which should govern this country in the present age by reference to hypothetical explanations of the history of other peoples in ages distant in time and different in circumstances from our own. In so far as the basis of this argument can be precisely formulated, it is often no more than the expression of revulsion against what is regarded as unnatural, sinful or disgusting. Many people feel this revulsion, for one or more of these reasons. But moral conviction of instinctive feeling, however strong, is not a valid basis for overriding the individual's privacy and for bringing within the ambit of the criminal law private sexual behaviour of this kind. It is held also that if such men are employed in certain professions or certain branches of the public service their

private habits may render them liable to threats of blackmail or to other pressures which may make them "bad security risks." If this is true, it is true also of some other categories of person: for example, drunkards, gamblers and those who become involved in compromising situations of a heterosexual kind; and while it may be a valid ground for excluding from certain forms of employment men who indulge in homosexual behaviour, it does not, in our view, constitute a sufficient reason for making their private sexual behaviour an offense in itself.

Para. 55. The second contention, that homosexual behaviour between males has a damaging effect on family life, may well be true. Indeed, we have had evidence that it often is; cases in which homosexual behaviour on the part of the husband has broken up a marriage are by no means rare, and there are also cases in which a man in whom the homosexual component is relatively weak nevertheless derives such satisfaction from homosexual outlets that he does not enter upon a marriage which might have been successfully and happily consummated. We deplore this damage to what we regard as the basic unit of society; but cases are also frequently encountered in which a marriage has been broken up by homosexual behaviour on the part of the wife, and no doubt some women, too, derive sufficient satisfaction from homosexual outlets to prevent their marrying. We have had no reasons shown to us which would lead us to believe that homosexual behaviour between males inflicts any greater damage on family life than adultery, fornication or lesbian behaviour. These practices are all reprehensible from the point of view of harm to the family, but it is difficult to see why on this ground male homosexual behaviour alone among them should be a criminal offense. This argument is not to be taken as saying that society should condone or approve male homosexual behaviour. But where adultery, fornication and lesbian behaviour are not criminal offenses there seems to us to be no valid ground, on the basis of damage to the family, for so regarding homosexual behaviour between men. Moreover, it has to be recognized that the mere existence of the condition of homosexuality in one of the partners can result in an unsatisfactory marriage, so that for a homosexual to marry simply for the sake of conformity with the accepted structure of society or in the hope of curing his condition may result in disaster.

Para. 56. We have given anxious consideration to the third argument, that an adult male who has sought as his partner another another adult male may turn from such a relationship and seek as his partner a boy or succession of boys. We should certainly not wish to countenance any proposal which might tend to increase offenses against minors. Indeed, if we thought that any recommendation for a change in the law would increase the danger to minors we should not make it. But in this matter we have been much influenced by our expert witnesses. They are in no doubt that whatever may be the origins of the homosexual condition, there are two recognizably different categories among adult male homosexuals. There are those who seek as partners other adult males, and there are paedophiliacs, that is to say men who seek as partners boys who have not reached puberty.(*)

Para. 57. We are authoritatively informed that a man who has homosexual relations with an adult partner seldom turns to boys, and vice versa, though it is apparent from the police reports we have seen and from other evidence submitted to us that such cases do happen. A survey of 155 prisoners diagnosed as being homosexuals on reception into Brixton prison during the period 1st January, 1954, to 31st May, 1955, indicated that 107 (69 percent) were attracted to adults, 43 (27.7 percent) were attracted to boys, and 5 (3.3 percent) were attracted to both boys and adults. This last figure of 3.3 percent is strikingly confirmed by another investigation of 200 patients outside prison. But paedophiliacs, together with the comparatively few who are indiscriminate, will continue to be liable to the sanctions of criminal law, exactly as they are now. And the others would be very unlikely to change their practices and turn to boys simply because their present practices were made legal. It would be paradoxical if the making legal of an act at present illegal were to turn men towards another kind of act which is, and would remain, contrary to the law. Indeed, it has been put to us that to remove homosexual behaviour between adults males from the listed crimes may serve to protect minors; with the law as it is there may be some men who would prefer an adult partner but who at present turn their attention to boys because they consider that this course

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(*) There are reasons for supposing that paedophilia differs from other manifestations of homosexuality. For example, it would seem that in some cases the propensity is for partners of a particular age rather than for partners of a particular sex. An examination of the records of the offenses covered by the Cambridge survey reveals that 8 percent of the men convicted of sexual offenses against children had previous convictions for both heterosexual and homosexual offenses.

is less likely to lay them open to prosecution or to blackmail than if they sought other adults as their partners. If the law were changed in the way we suggest, it is at least possible that such men would prefer to seek relations with older persons which would not render them liable to prosecution. In this connection, information we have received from the police authorities in the Netherlands suggests that practicing homosexuals in that country are to some extent turning from those practices which are punishable under the criminal law to other practices which are not. Our evidence, in short, indicates that the fear that the legalization of homosexual acts between adults will lead to similar acts with boys has not enough substance to justify the treatment of adult homosexual behaviour in private as a criminal offense, and suggest that it would be more likely that such a change in the law would protect boys rather than endanger them.

Para. 58. In addition, an argument of a more general character in favor of retaining the present law has been put to us by some of our witnesses. It is that to change the law in such a way that homosexual acts between consenting adults in private ceased to be criminal offenses must suggest to the average citizen a degree of toleration by the Legislature of homosexual behaviour, and that such a change would "open the floodgates" and result in unbridled license. It is true that a change of this sort would amount to a limited degree of such toleration, but we do not share the fears of our witnesses that the change would have the effect they expect. This expectation seems to us to exaggerate the effect of the law on human behaviour. It may well be true that the present law deters from homosexual acts some who would otherwise commit them, and to that extent an increase in homosexual behaviour can be expected. But it is no less true that if the amount of homosexual behaviour has, in fact, increased in recent years, then the law has failed to act as an effective deterrent. It seems to us that the law itself probably makes little difference to the amount of homosexual behaviour which actually occurs; whatever the law may be there will always be strong social forces opposed to homosexual behaviour. It is highly improbable that the man to whom homosexual behaviour is repugnant would find it any less repugnant because the law permitted it in certain circumstances; so that even if, as has been suggested to us, homosexuals tend to proselytize, there is no valid reason for supposing that any considerable number of conversions would follow the change in the law.

Para. 59. As will be observed from Appendix III, in only very few European countries does the criminal law now take cognizance of homosexual behaviour between consenting parties in private. It is not possible to make any useful statistical comparison between the situation in countries where the law tolerates such behaviour and that in countries where all male homosexuals acts are punishable, if only because in the former the acts do not reflect themselves in criminal statistics. We have, however, caused inquiry to be made in Sweden, where homosexual acts between consenting adults in private ceased to be criminal offenses in consequence of an amendment of the law in 1944. We asked particularly whether the amendment of the law had had any discernible effect on the prevalence of homosexual practices, and on this point the authorities were able to say no more than that very little was known about the prevalence of such practices either before or after the change in the law. We think it reasonable to assume that if the change in the law had produced any appreciable increase in homosexual behaviour or any large-scale proselytizing, these would have become apparent to the authorities.

Para. 60. We recognize that a proposal to change a law which has operated for many years so as to make legally permissible acts which were formerly unlawful, is open to criticisms which might not be made in relation to a proposal to omit, from a code of laws being formulated de novo, any provision making these acts illegal. To reverse a long-standing tradition is a serious matter and not to be suggested lightly. But the task entrusted to us, as we conceive it, is to state what we regard as just and equitable law. We therefore do not think it appropriate that consideration of this question should be unduly influenced by a regard for the present law, much of which derives from traditions whose origins are obscure.

Para. 61. Further, we feel bound to say this. We have outlined the arguments against a change in the law, and we recognize their weight. We believe, however, that they have been met by the counter-arguments we have already advanced. There remains one additional counter-argument which we believe to be decisive, namely, the importance which society and the law ought to give to individual freedom of choice and action in matters of private morality. Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business. To say this is not

to condone or encourage private immorality. On the contrary, to emphasize the personal and private responsibility which a mature agent can properly be expected to carry for himself without the threat of punishment from the law.

Para. 62. We accordingly recommend that homosexual behaviour between consenting adults in private should no longer be a criminal offense.

APPENDIX B

CRIMINAL JUSTICE COSTS: PROSTITUTION ARRESTS, SAN FRANCISCO, 1967

Prepared by
William B. Smith

COST ANALYSIS

PROSTITUTION ARRESTS AND PROCESSING:

I. Police Costs/Time:

Detention and arrests for female prostitution offenses are made by the Bureau of Special Services, the Patrol Division of the San Francisco Police Department and other special units of the Department, such as the Tactical Squad, and the "S Squad." In order to determine the amount of time required for detention and arrest on prostitution charges, an average time was formulated.

The detention and arrest process was considered to be that time between the period at which the officers' attention is first drawn to a particular individual and the time when the officer either completes a written police report as to the offenses of the individual, or he releases the individual if she has been detained.

From the point at which the officer's attention is drawn to a particular individual by her actions, behavior or dress, until the time the officer accosts the individuals, a minimum average time of 13 minutes elapses. From this point of original contact, until the time the officer places the responsible in physical custody, an average minimum time of 17 minutes elapses.

There is an additional waiting time for the police patrol vehicle to arrive at the arrest location or a transportation time by the arresting officers of the individual to some central holding or

booking facility. This average time is approximately 17 minutes. Further, there is an average of 5 minutes required to complete the police report.

The average time required to complete a detention exclusive of an arrest of an individual is 47 minutes.

The average time then, to affect an arrest of prostitution by the Patrol Division personnel is approximately 52 minutes.

During the period under question, there were 1,744 individuals detained by the Patrol Division and special squads of the San Francisco Police Department.

A. 1,744 detentions X 47 minutes X 2 patrolmen = 163,936 minutes or 2,732.2 hours.

B. 1,053 arrests X 5 minutes report writing = 5,265 minutes or 87.7 hours.

C. 2,732.2 detention hours + 87.7 additional arrest hours = 2,819.9 hours.

D. 2,819.9 hours X $5.35 per hr. ('67 patrolman's wage) = $15,086.46.

TOTAL $15,086.46

II. Transportation Costs:

Transportation to a district station or to the Hall of Justice for individuals who have been detained or arrested may be by either of two means. The defendant may be transported to a district station or the Hall of Justice by the arresting officer in a police vehicle, or by the police patrol wagon and the officers manning it.

If the individual has been transported by the officers who have made the arrest in a police car then the 17 minutes already considered in Paragraph I will suffice for transportation time. However, in approximately 70% of the cases, transportation was made by the police patrol wagon. In presenting figures on transportation we will be concerned not only with the individuals detained by the Patrol Division of the San Francisco Police Department, but also 372 individuals who were detained by the Bureau of Special Services. Total number of individuals detained was 2,116.

A. 2,116 detentions X 70% (average number transported by the patrol vehicle) = 1,481 transported individuals.

B. 1,481 transported individuals X 35 minutes X 2 patrolmen = 103,670 min. or 1,727.7 hours.

C. 1,727.7 hours X $5.35 per hr. ('67 patrolman's wage) = $9,243,19.

TOTAL $9,243.19

III. Personnel in the Bureau of Special Services Assigned to Prostitution:

A. Salary, Director of Bureau of Special Services (50% of the time)	$ 7,374.50
B. Salary, Sergeant of Police	$ 12,622.56
C. Salary, 12 patrolmen	$133,317.52
D. Salary, 1 Clerk typist (50% of time)	3,000.00
TOTAL	$156,811.58

IV. Booking Defendant/City Prison:

There is an average of 25 minutes spent from the time the defendant is brought to city prison to be booked, and the time she enters her cell.

A. 1,425 arrests X 25 minutes = 35,625 minutes or 593.7 hours.

B. 593.7 hours X $5.35 per hour = $3,176.29

TOTAL	$3,176.29

V. Bail Receipts:

There is an average of 5 minutes expended for the preparation of each bail receipt issued by the clerk in the Criminal Records Division. Assuming that all 647b defendants were able to post bail, then;

A. 1,425 arrested X 5 minutes = 7,125 minutes or 118.7 hours.

B. 118.7 hours X $4.56 = $541.27

TOTAL $541.27

VI. Indexing Defendants:

Another clerk in the Criminal Records Division is responsible for indexing the defendant and her disposition in the courts criminal records index. There is an average of at least 5 indicies for an arrest, including continuances and each index requires approximately 2 minutes to record.

A. 1,355 charged X 2 minutes X 5 indicies = 13,550 minutes or 225.8 hours.

B. 225.8 hours X $4.10 per hour = $925.78

TOTAL $925.78

VII. Quarantine Time for Defendants:

Those arrested for 647b of the Penal Code are arrested normally between the hours of 10 p.m. and 2 a.m. They must remain quarantined until 3 p.m. in the afternoon following the arrest. Fourteen (14) hours then, is an average time spent by the defendants in city prison before being released on bail.

A. 1,425 arrested X 14 hours = 19,950 hours.

B. 19,950 hours X $0.48.5 cents per hours = $9,675.75

TOTAL $9,675.75

VIII. Venereal Disease Examination in the City Prison:

Each individual arrested on a charge of 647b receives an examination for venereal disease. The City Public Health Department provides 1 physician specialist and 1 registered nurse to conduct such an examination. The physician specialist spends an average of 9 hours per week conducting such examinations and the registered nurse spends an average of 14 hours per week assisting in such examinations and in the analysis of subsequent tests.

A. Physician: 9 hours a week X 52 weeks of the year = 468 hours

B. 468 hours X $8.68 per hour = $4,062.24

C. Nurse: 14 hours per week X 52 weeks = 728 hours

D. 728 hours X $4.19 per hour = $3,050.32

E. Additional medication costs: 1,425 defendants X $0.50 per medication unit = $712.50

TOTAL $7,825.06

IX. Preparation of the Court Calendar:

A. 1,355 charged defendants ÷ 25 lines of the court calendar per page = 54.2 calendar pages.

B. 54.2 calendar pages X 5 average appearances = 271 calendar pages

C. 271 calendar pages X 15 minutes = 4.065 minutes or 67.7 hours

D. 67.7 hours X $4.10 per hour = $277.57

TOTAL $277.57

X. Court Time/Costs:

Costs of operation of the Municipal Court departments which handle violations of 647b of the Penal Code.

A. Salary, Municipal Court Judge = $ 11.97 hr.

B. Salary, Bailiff = $ 4.64 hr.

C. Salary, Courtroom Clerk = $ 5.89 hr.

D. Salary, Court Reporter = $ 6.95 hr.

E. Salary, District Attorney = $ 9.58 hr.

F. Salary, Probation Officer = $ 4.99 hr.

TOTAL $ 44.02 per hour

There is a minimum average of 5 appearances per arrest, including the initial appearances. Each appearance requires on the average of 4 minutes.

G. 4 minutes X 5 appearances X 1,355 defendants = 27,100 minutes or 451.6 hours

H. 451.6 hours X $44.02 per hour = $19,879.43

TOTAL $ 19,879.43

XI. Additional Court Costs/Court Trials:

There were a total of 76 court trials held before a judge. Each court trial required 31 minutes to complete.

A. 76 court trials X 31 minutes = 2,356 minutes or 30.9 hours

B. 30.9 hours per trial X $44.02 per court hour = $1,360.21

TOTAL $1,360.21

XII. Additional Costs/Jury Trials:

There were 55 jury trials for violation of 647b of the Penal Code during the period under inquiry. There is an average of three additional court appearances once the defendant is in the jury department. Each of these additional appearances require approximately 4 minutes each.

A. 3 appearances X 4 minutes X 55 trials = 660 minutes or 11 hours

B. 11 hours X $44.02 per hour = $484.22

Each of the 55 jury cases required an average of 6 hours, including jury selection.

C. 55 cases X 6 hours = 330 hours

D. 330 hours X $44.02 per hour = $14,526.60

E. $484.22 additional appearance costs + $14,526.60 additional court costs = $15,010.82

TOTAL $15,010.82

XIII. Jury Fees:

Each trial before a jury, required an average of 2 days to complete. The current rate for jurors during this period was $6.00 per day.

A. 2 days X $6.00 per juror per day X 12 jurors = $144 per trial

B. $144 per trial X 55 trials = $7,920.00

Although only 12 jurors were chosen for each trial, a total of 40 prospective jurors were summoned. Of the 40 jurors summoned approximately 30 would appear. Jury is normally seated in 1 day on prostitution cases.

As only 12 jurors are selected for the trial this leaves a total of 18 rejected jurors who nevertheless receive $6.00 per trial each.

C. 18 jurors rejected X $6.00 per day = $108.00

D. $108 X 55 trials = $5,940.00

E. $7,920.00 trial costs + $5,940.00 additional jury costs = $14,860.00

TOTAL $14,860.00

XIV. Public Defender Costs for Prostitution Cases:

The Public Defenders Office represented 1,007 defendants charged with violation of 647b of the Penal Code during this period. An average of 4 appearances were made in behalf of each of the defendants. Each appearance required 4 minutes, which excludes trial time in behalf of these defendants. Additionally the Public Defender expended 6,206 minutes in court and jury trial defense time.

A. 1,007 defendants X 4 appearances = 4,028 appearances

B. 4,028 appearances X 4 minutes = 16,112 minutes

C. 16,112 minutes + 6,206 minutes trial time = 22,318 min. or 371.8 hours

D. 371.8 hours X $7.91 per hour = $2,940.93

TOTAL $2,940.93

XV. Police Overtime for Court Appearances:

There are no figures available to us to indicate how much overtime was expended by the police department for court appearances in prostitution cases. We can only surmise the following.

Approximately 45% or 621 cases of those charged with prostitution in San Francisco were dismissed on the motion of the District Attorney. Therefore, one may assume that the decisions for dismissal were made prior to a court trial. In these 621 cases then it would be reasonable to expect that police officers would not be present. This leaves a remainder of approximately 734 cases in which there is a probability that police officers were subpoenaed as witnesses.

The average number of appearances by an officer would be approximately one (1). For each appearance the officer would receive 2 hours of compensation.

A. 1 appearance X 2 hours X 734 cases = 1,468 hours

B. 1,468 hours X $5.35 per hour X 2 police officers = $15,557.60

Further, as there were 55 jury trials the following additional expenses would be incurred.

C. 55 jury trials X 1 appearance X 2 officers = 110 appearances

D. 110 appearances X 2 hours overtime X $5.35 = $1,117.00

TOTAL $16,734.60

XVI. Total Costs for Criminal Justice Processing: Arrest Through Sentence:

TOTAL $272,348.94

XVII. County Jail Costs:

The Sheriff's Department has reported that the average daily cost of maintaining a prisoner in a county jail during this period was $4.29 per day. There were 389 county jail sentences handed down during this period of time on charges of prostitution. The average length of the sentence handed down was 64 days.

A. 389 sentences X 64 days = 24,896 days

B. 24,896 days X $4.29 per day = $106,803.84

TOTAL $106,803.84

XVIII. Total Criminal Justice Costs:

TOTAL $379,153.00

APPENDIX C

BASIC CALIFORNIA OBSCENITY STATUTES

ALL SECTIONS REFER TO CALIFORNIA

PENAL CODE

Sec. 311. (Indecent exposures, exhibitions, etc.: Grade of Offense: Application of subd 6.)

As used in this chapter:

(a) " Obscene matter means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex or exeretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters;

and is matter which taken as a whole is utterly without redeeming social importance.

(1) The predominant appeal to prurient interest of the matter is judged with reference to average adults unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

(b) "Matter" means any book, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statute or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(c) "Person" means any individual, partnership, firm, association, corporation or other legal entity.

(d) "Distribute" means to transfer possession of, whether with or without consideration.

(e) "Knowingly" means being aware of the character of the matter or live conduct.

(f) "Exhibit" means to show.

(g) "Obscene live conduct" means any physical human body activity, whether performed or engaged in alone or with other persons, including but not limited to singing, speaking, dancing, acting,

simulating, or pantomiming, where, taken as a whole, the predominant appeal of such conduct to the average person, applying contemporary standards is to prurient interest, i.c., a shameful or morbid interest in nudity, sex, or excretion; and is conduct which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is conduct which taken as a whole is utterly without redeeming social importance.

(1) The predominant appeal to prurient interest of the conduct is judged with reference to average adults unless it appears from the nature of the conduct or the circumstances of its production, presentation or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the conduct shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation advertising, or exhibition indicate that live conduct is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the conduct and can justify the conclusion that the conduct is utterly without redeeming social importance.

Sec. 311.2. (Sale or distribution, etc., of obscene matter: Penalty: Motion picture machine operator.)

(a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor.

(b) The provisions of this section with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to a motion picture operator or projectionist who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such operator or projectionist has no financial interest in the place wherein he is so employed.

Sec. 311.4. (Hiring, employing, etc., minor to engage in acts described in Sec. 311.2: Penalty.) Every person who, with knowledge that a person is a minor, or who, while in possession of such facts that he should reasonably know that such person is a minor, hires, employs, or uses such minor to do or assist in doing any of the acts described in Section 311.2, is guilty of a misdemeanor.

Sec. 311.5. (Advertisement, promotion of sale, etc., of matter represented to be obscene: Penalty.)

Every person who writes, creates, or solicits the publication or distribution of advertising or other promotional material, or who in any manner promotes, the sale, distribution, or exhibition of matter represented or held out by him to be obscene, is guilty of a misdemeanor.

Sec. 311.6. (Participating in, etc. obscene live conduct: Penalty.) Every person who knowingly engages or participates in, manages, produces, sponsors, presents or exhibits obscene live conduct to or before an assembly or audience consisting of at least one person or spectator in any public place or in any place exposed to public view, or in any place open to the public or to a segment thereof, whether or not an admission fee is charged, or whether or not attendance is conditioned upon the presentation of a membership card or other taken, is guilty of a misdemeanor.

Sec. 311.7. (Requiring purchaser or consignee to receive obscene matter as condition to sale, etc.: Penalty.) Every person who, knowingly, as a condition to a sale, allocation, consignment, or delivery for resale of any paper, magazine, book, periodical, publication or other merchandise, requires that the purchaser or consignee receive any obscene matter or who denies or threatens to deny a franchise, revokes or threatens to revoke, or imposes any penalty, financial or otherwise, by reason of the failure of any person to accept obscene matter, or by reason of the return of such obscene matter, is guilty of a misdemeanor.

Sec. 311.8. (Defense.) It shall be a defense in any prosecution for a violation of this chapter that the act charged was committed in aid of legitimate scientific or educational purposes.

Sec. 311.9. (Punishment for violation of Secs. 311.2, 311.3, 311.4, 311.7, 313.1.)

(a) Every person who violates Section 311.2 or 311.5 is punishable by fine of not more than one thousand dollars ($1,000) plus five dollars ($5) for each additional unit of material coming within the provisions of this chapter, which is involved in the offense, not to exceed ten thousand dollars ($10,000), or by imprisonment in the county jail for not more than six months plus one day for each additional unit of material coming within the provisions of this chapter, and which is involved in the offense, such basic maximum and additional days not to exceed 360 days in the county jail, or by both such fine and imprisonment. If such person has previously been convicted of any offense in this chapter, or of a violation of Section 313.1, a violation of Section 311 2 or 311.5 is punishable as a felony.

(b) Every person who violates Section 311.4 is punishable by fine of not more than two thousand dollars ($2,000) or by imprisonment in the county jail for not more than one year, or by both such fine and such imprisonment. If such person has been previously convicted of a violation of former Section 311.3 or 311.4, he is punishable by imprisonment in the state prison not exceeding five years.

(c) Every person who violates Section 311.7 is punishable by fine of not more than one thousand dollars ($1,000) or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment. For a second and subsequent offense he shall be punished by a fine of not more than two thousand dollars ($2,000), or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment. If such person has been twice convicted of a violation of this chapter, a violation of Section 311.7 is punishable as a felony.

Sec. 312.1 (Evidence in prosecution: Nonrequirement as to expert testimony concerning obscene or harmful character: Admissibility of evidence tending to establish contemporary community standards.)

In any prosecution for a violation of the provisions of this chapter or of Chapter 7.6 (commencing with Section 313), neither the prosecution nor the defense shall be required to introduce expert witness testimony concerning the obscene or harmful character of the matter or live conduct which is the subject of any such prosecution. Any evidence which tends to establish contemporary community standards of appeal to prurient interest or of customary limits of candor in the description or representation of nudity, sex or excretion, or which bears upon the question of redeeming social importance, shall, subject to the provisions of the Evidence Code, be admissible when offered by either the prosecution or by the defense.

Sec. 313. (Definitions) As used in this chapter:

(a) "Harmful matter" means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is prurient interst, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance for minors.

(1) When it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition that it is designed for clearly defined deviant sexual groups, the predominant appeal of the matter shall be judged with reference to its intended recipient group.

(2) In the prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance for minors.

(b) "Matter" means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription, or mechanical, chemical, or electrical reproduction or any other articles, equipment, machines, or materials.

(c) "Persons" means any individual, partnership, firm, association, corporation, or other legal entity.

(d) "Distribute" means to transfer possession of, whether with or without consideration.

(e) "Knowingly" means being aware of the character of the matter.

(f) "Exhibit" means to show.

(g) "Minor" means any natural person under 18 years of age.

Sec. 313.1 (Distribution or exhibition of harmful matter to minor as misdemeanor.)

(a) Every person who, with knowledge that a person is a minor, or who fails to exercise reasonable care in ascertaining the true age of a minor, knowingly distributes, sends, causes to be sent, exhibits, or offers to distribute or exhibit any harmful matter to the minor is guilty of a misdemeanor.

(b) Every person who misrepresents himself to be the parent or guardian of a minor and thereby causes the minor to be admitted to an exhibition of any harmful matter is guilty of a misdemeanor.

Sec. 313.2 (Absence of prohibition against parent's distribution to his child.)

(a) Nothing is this chapter shall prohibit any parent or guardian from distributing any harmful matter to his child or ward or permitting his child or ward to attend an exhibition of any harmful matter if the child or ward is accompanied by him.

(b) Nothing in this chapter shall prohibit any person from exhibiting any harmful matter to any of the following:

(1) A minor who is accompanied by his parent or guardian.

(2) A minor who is accompanied by an adult who represents himself to be the parent or guardian of the minor and whom the person, by the exercise or reasonable care, does not have reason to know is not the parent or guardian of the minor.

Sec. 313.3 (Scientific or educational purposes as defense.)

It shall be a defense in any prosecution for a violation of this chapter that the act charged was committed in aid of legitimate scientific or educational purposes.

Sec. 313.4 (Punishment.)

Every person who violates Section 313.1 is punishable by fine of not more than two thousand dollars ($2,000) or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment. If such person has been previously convicted of a violation of Section 313.1 or any section of Chapter 7.5 (commencing with Section 311) of Title 9 of Part 1 of this code, he is punishable by imprisonment in the state prison for not exceeding five years.

Sec. 313.5 (Statutory severability and partial validity.)

If any phrase, clause, sentence, section or provision of this chapter or application thereof to any person or circumstance is held invalid, such invalidity shall not affect any other phrase, clause, sentence, section, provision or application of this chapter, which can be given effect without the invalid phrase, clause, sentence, section, provision or application and to this end the provisions of this chapter are declared to be severable.

THE SAN FRANCISCO COMMITTEE ON CRIME

A REPORT ON NON-VICTIM CRIME IN SAN FRANCISCO

PART III

DANGEROUS DRUGS AND NARCOTICS

Moses Lasky, Co-Chairman
William H. Orrick, Jr., Co-Chairman
Irving F. Reichert, Jr., Executive Director
Richard M. Sims, III, Asst. Exec. Director

THE ELEVENTH REPORT OF THE COMMITTEE

July 19, 1971

THE SAN FRANCISCO COMMITTEE ON CRIME

A REPORT ON NON-VICTIM CRIME IN SAN FRANCISCO

PART III

DANGEROUS DRUGS AND NARCOTICS

ERRATA

Mr. William Coblentz who is listed as "not participating" should be listed as voting "for" both sections of the Report.

Page 25; the sentence commencing on the third line from the bottom of the page should read:
"Repealing prohibition of marijuana use might result in an increase of use for awhile by some people."

Page 35; the last word on the fourth line should read "perameter."

Moses Lasky, Co-Chairman
William H. Orrick, Jr., Co-Chairman
Irving F. Reichert, Jr., Executive Director
Richard M. Sims, III, Asst. Exec. Director

THE ELEVENTH REPORT OF THE COMMITTEE

July 19, 1971

This Report is being submitted to the Law Enforcement Assistance Administration of the United States Department of Justice in partial satisfaction of the conditions of O.L.E.A. Grant #374.

THE SAN FRANCISCO COMMITTEE ON CRIME

Members:

Mr. Moses Lasky, Co-chairman
Mr. William H. Orrick, Jr., Co-chairman

Mr. Alessandro Baccari
Mr. Clarence W. Bryant
Mrs. Ruth Chance
Mr. William K. Coblentz
Mr. Gene N. Connell
Dr. Victor Eisner
Dr. Leon J. Epstein
Mr. Welton H. Flynn
Mr. Frederick Furth
Dr. Donald Garrity
Dr. David Hamburg
Rev. Albert R. Jonsen, S.J.
Mr. Samuel Ladar
Mr. Lawrence R. Lawson
Mr. Orville Luster
Lt. William Osterloh
Mr. Michael Parker
Mr. Stuart Pollak
Mr. William K. Popham
Mr. Lee D. Rashall
Mrs. Becky Schettler
Mr. Louis S. Simon
Mr. Garfield Steward
Mr. Edison Uno
Mr. Zeppelin W. Wong

Professional Staff Participating in the Preparation of this Report:

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Mr. Richard M. Sims, III, Assistant Executive Director
Mrs. Carolyn French, Consultant
Miss Kathleen Thomas, Consultant

Secretarial Staff:

Miss Karen Hagewood
Mrs. Nancy Henshall
Mrs. Maria T. Strong

THE VOTE OF THE MEMBERS ON THIS REPORT

I. On the Marijuana Section:

FOR	AGAINST	NOT PARTICIPATING
1. Mr. Bryant	1. Mr. Baccari	1. Mr. Coblentz
2. Mrs. Chance	2. Mr. Connell	2. Dr. Hamburg
3. Dr. Eisner	3. Dr. Epstein	
4. Mr. Flynn	4. Father Jonsen	
5. Mr. Furth	5. Mr. Ladar	
6. Dr. Garrity	6. Mr. Lawson	
7. Mr. Lasky	7. Mr. Osterloh	
8. Mr. Luster	8. Mrs. Schettler	
9. Mr. Orrick	9. Mr. Wong	
10. Mr. Parker		
11. Mr. Pollak		
12. Mr. Popham		
13. Mr. Rashall		
14. Mr. Steward		
15. Mr. Simon		
16. Mr. Uno		

II. On the Heroin Section:

FOR	AGAINST	NOT PARTICIPATING
1. Mr. Baccari	1. Mr. Ladar	1. Mr. Coblentz
2. Mrs. Bryant		2. Dr. Hamburg
3. Mrs. Chance		3. Father Jonsen
4. Mr. Connell		4. Mr. Luster
5. Dr. Eisner		5. Mr. Steward
6. Dr. Epstein		
7. Mr. Flynn		
8. Mr. Furth		
9. Dr. Garrity		
10. Mr. Lasky		
11. Mr. Lawson		
12. Mr. Orrick		
13. Mr. Parker		
14. Mr. Popham		
15. Mr. Pollak		
16. Mr. Rashall		
17. Mrs. Schettler		
18. Mr. Simon		
19. Mr. Uno		
20. Mr. Wong		

SAN FRANCISCO COMMITTEE ON CRIME
300 MONTGOMERY STREET ROOM 709
SAN FRANCISCO, CALIFORNIA, 94104
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VILLIAM H. ORRICK, JR.
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July 19,1971

Honorable Joseph L. Alioto,
Mayor of the City and County
of San Francisco,
City Hall,
San Francisco, California 94102.

Dear Mr. Mayor:

On behalf of the San Francisco Committee on Crime, we submit to you, as the Committee's Eleventh Report, a report on Dangerous Drugs and Narcotics. The Committee's term of existence, under the resolutions of the Board of Supervisors creating it, came to an end at the close of June 30, 1971, but this Eleventh Report was adopted before June 30th. The Committee's principal funding came from the Ford Foundation, and,as we informed you in our Tenth Report, Ford Foundation extended the period of its grant to July 31, 1971, to permit an orderly winding up and the publication and distribution of the Committee's reports. Because this Eleventh Report, although adopted before June 30th, has been released after that date, only funds received from Ford Foundation have been used for its publication and distribution; no funds from the City

have been used for that purpose.

All the previous reports of the Committee have been unanimous or virtually so. This is not true of the Eleventh Report. That report consists of two sections, in addition to a preliminary discussion, one on marijuana and the other on heroin. The section on heroin has been adopted by the virtually unanimous action of all members of the Committee participating. The section on marijuana has been adopted by a vote of not quite 2/3 of the participants. A 2/3 vote on any of the important and difficult subjects with which this Committee has dealt would be a notable achievement; it is particularly notable with respect to a subject so charged with emotion and fears as dangerous drugs and narcotics.

Yet, in a very real sense, there is unanimity,- unanimity that the present marijuana laws are too rigorous and repressive. Attached to the report are two minority reports which speak for themselves. One minority report states that "it is not necessarily in agreement with the existing laws and procedures which may be too punitive with respect to adults who use or possess small amounts of marijuana"; the other minority report believes that the present laws are "unreasonable" as respects the

"severity of punishment for such offenses as the possession of small amounts". And these suggestions for amelioration come on top of the fact that California law was amended to ameliorate the penalties in 1969.

The minority reports were received as the Committee Report was about to go to the printer, and therefore the Report itself does not respond. Some brief comment, however, is in order.

The present restrictive criminal laws on marijuana were adopted in the 1930's. It was then believed that marijuana made its users into dangerous criminals. No one who has looked into that subject even slightly any longer believes that. The present fears about marijuana are, largely, of two kinds: (1) That its use leads to the use of "harder" drugs, and (2) that it makes its users "amotivational", that is, that it reduces its users to a state of passive vegetation. The Report fully discusses these two questions. The consensus at the present time is that the deleteriousness of marijuana, or its extent, remains largely unestablished. Those who oppose change in the law do not appear to contend that if those laws were not already in effect it would now be appropriate to enact them in the present state of knowledge. The view of one minority

report is that, as the laws are on the books, they should stay there in view of the uncertainty of knowledge. The majority of the Committee believes that laws that would not have been adopted on the basis of present knowledge ought not be retained.

The further statement in one minority report, that the Committee has not gathered enough data on the subject, is completely unwarranted, and it is rejected out-of-hand by the Chairmen, the staff, and the majority of the Committee. The present literature is abundant and fairly uniform in its conclusions, which, as the Report states, add up to a Scotch verdict. As late as Friday, July 2, 1971, at the Commonwealth Club, Dr. Leo Hollister of the Veterans Administration Hospital at Palo Alto reported the state of present knowledge about the pharmalogical aspects of marijuana quite in accord with the majority report.

Another reason for dissent expressed in the minority reports is the belief that the repeal of present laws on marijuana may be regarded in some areas as an approval of the use of the drug and might lead to the spread of its use. The majority of the Committee does not dismiss that objection lightly; the Report discusses

it with care and gives it the weight it deserves. One minority report speaks of the Committee report as recommending "legalization" of marijuana as respects adults; the recommendation, of course, is for regulating the sale, possession and use relative to adults by a system adapted from the control of alcoholic beverages.

We realize that previous portions of our report on non-victim crime, such as those dealing with prostitution and pornography, have been carelessly read by portions of the public, including those who should know better. The Committee thoroughly deplores prostitution and has the utmost detestation for pornography. Yet our reports have been carelessly interpreted as an endorsement of these vices. We resign ourselves to a like misinterpretation that the Committee approves the use of marijuana, despite our reiteration that we disapprove the use of marijuana and encourage all non-criminal processes to prevent it.

In the last analysis, the basic question is exactly the same as this Committee emphasized with respect to every type of non-victim crime. That question is simply this: Is the criminal process the correct and effective way by which society should seek to meet a problem; are the resources of society best spent on the

criminal process? We have said that the law cannot successfully make criminal what a substantial portion of the public does not want made criminal, and we know that a vast number of the citizenry--perhaps an overwhelming number of the younger generation--cannot understand and will not accept the marijuana laws. We have said that not all the ills or aberrancies of society are the concern of government; that when the government acts, it is not inevitably necessary that it do so by means of criminal processes; that every person should be free of the coercion of criminal law unless his conduct injures others or damages society; that when criminal law seeks to express a sense of public outrage, it should be sure that its sense of outrage is that of substantially the public as a whole. We have said that there is a matter of priorities in the expenditures of the energies and resources of criminal law enforcement. If we are correct in all these statements--and we are convinced that we are--, then we are convinced that the conclusions expressed in the majority report are also correct, and that only formless fears deter the minority members from following to its rational end their own belief that the present law needs some change.

Inasmuch as the reports and recommendations of this Committee on matters entirely within the hands of this City have yet to be put into effect, the Committee is not so sanguine as to believe that its recommendations on marijuana, the control of which lies in the State and National sphere, will be speedily adopted. We submit the Committee Report and the minority reports in the hope that they will, at least, encourage and focus thoughtful consideration.

The control of heroin lies even more largely in federal hands, and our report on that subject is confined to an analysis and delineation of the difficulties and to pointing out the matters to which serious attention should be given.

With this Eleventh Report, the work of the San Francisco Committee on Crime comes to an end.

Respectfully,

Moses Lasky

William H. Orrick, Jr.

Co-Chairmen.

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SAN FRANCISCO

July 19, 1971

Honorable Dianne Feinstein,
President of the Board of Supervisors
of the City and County of San Francisco,
City Hall,
San Francisco, California 94102.

Dear Mrs. Feinstein:

The San Francisco Committee on Crime submits to you with this letter Part III of its report on non-victim crime. Sufficient copies are enclosed for all members of the Board of Supervisors. We also enclose a copy of the letter by which we are concurrently submitting the report to the Mayor.

With this Eleventh Report, the work of the San Francisco Committee on Crime comes to an end.

Respectfully,

Moses Lasky

William H. Orrick, Jr.

Co-Chairmen.

ML/nh
Enclosures

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INTRODUCTION

This is the third in a series of reports by the Committee on "non-victim crimes" in San Francisco. The first report on this subject dealt with basic principles and public drunkenness. The second report discussed gambling, sexual conduct and pornography. This report covers "drugs and narcotics," concentrating on laws concerning marijuana and heroin.

Throughout our examination of laws dealing with "non-victim crime," we have been guided by the seven "basic principles" set out and discussed in some detail in Part I of this Report. We list those principles again, for they are referred to in this Report. Readers interested in the origins of these guidelines can return to Part I of this Report, which is available in local bookstores and through the Public Library. Our principles are:

1. The law cannot successfully make criminal what the public does not want made criminal.

2. Not all the ills or aberrancies of society are the concern of the government. Government is not the only human institution to handle the problems, hopes, fears or ambitions of people.

3. Every person should be left free of coercion of criminal law unless his conduct impinges on others and injures others, or if it damages society.

4. When government acts, it is not inevitably necessary that it do so by means of criminal processes.

5. Society has an obligation to protect the young.

6. Criminal law cannot lag far behind a strong sense of public outrage.

7. Even where conduct may properly be condemned as criminal under the first six principles, it may be that the energies and resources of criminal law enforcement are better spent by concentrating on more serious things. This is a matter of priorities.

The only aspect of drug and narcotic use that comes within the assigned task of this Committee or within the area of its competence is to determine the part to be played by criminal law. We cannot pass on morals.

In 1960 in California, 4,245 adults were arrested for violating laws on marijuana; in 1969 there were 38,670, an increase of over 800%. In 1960 there were 910 arrests of juveniles under the same laws; in 1969 there were about 16,000, an increase of more than 1650%. For dangerous drugs the increase was even greater, both for adults and juveniles.[1]

Other available data are equally startling. In January of this year, the Federal Department of Health, Education and Welfare (H.E.W.) reported that 31% of American college students had used marijuana by 1970, and that in that year, 42% of the students in the San Mateo County High School system asserted that they had used marijuana. H.E.W. summarized a study showing that 40% of college-age residents of San Francisco who were not in school had tried marijuana by 1969.[2]

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[1] California Bureau of Criminal Statistics, Drug Arrests and Dispositions, 1969, p. 1.

[2] United States Department of Health, Education and Welfare, a Report to Congress: Marihuana and Health, Jan. 31, 1971, pp. 35-38.

Professor John Kaplan of the Stanford Law School has estimated that in 1968 state and local government agencies in California spent $72 million enforcing the marijuana laws.[3]

In 1969, 14% of all felony arrests in San Francisco were for violating the marijuana laws,[4] but 38% of all so arrested were released without prosecution,[5] doubtless because the District Attorney's Office believed that it had insufficient legally admissible evidence. Since 1969, State Law has permitted District Attorneys to charge either a felony or a misdemeanor for possession of marijuana.[6] In San Francisco, a defendant is ordinarily charged

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[3] John Kaplan, Marijuana, The New Prohibition, World Publishing Co., 1970, p. 29.

[4] California Bureau of Criminal Statistics, Crime and Arrests, Reference Tables, 1969, Table II, p. 22; Drug Arrests and Disposition In California, Reference Tables 1969, Table IV, p. 9.

[5] This figure was computed by Mr. Bruce Johnson, a sociologist at the University of California at Berkeley, in connection with a study of felony release rates prepared for the Crime Committee in December, 1970. Mr. Johnson's source data consisted of Monthly Adult Felony Arrest Reports submitted by the San Francisco Police Department to the California Bureau of Criminal Statistics.

[6] See Sec. 17 Penal Code, as amended, Sec. 11530 H. & S. Code.

with a misdemeanor if he has no prior record of drug or narcotic convictions and he has been arrested for possessing not more than a "lid" (about one ounce) of marijuana. About 15% of all Municipal Court cases in San Francisco[7] involve either possession of marijuana or "visiting a place" where marijuana is being used.

Someone has said that statistics are used the same way a drunk uses a light standard, for support and not for illumination. Advocates for the repeal of criminal laws on marijuana and other drugs point to statistics like the foregoing as demonstrating that criminal law does not deter the use of these drugs. Another explanation would be that the social and economic conditions of the 1960's produced an upsurge of use that might have been even greater but for criminal laws All that is speculation. We cite the statistics for the neutral purpose of showing the gravity of the problem, the enormous drain on law enforcement money and manpower, and the lack of satisfactory effect of all this effort.

Clearing the Underbrush

This subject of drugs and narcotics is the most difficult to analyze and resolve of all those discussed in our Report on "Non-Victim Crime." A major difficulty is that the discussion in

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[7] Based on all cases filed in Municipal Court Departments 9 and 10, January 1, 1971 - May 1, 1971.

the literature is bedeviled with hyperbole, emotion, irrational argument and pedantic quibble.

On the threshold, we note that to categorize the subject as non-victim crime is itself to vault to a conclusion over thorny obstacles. "Drugs and narcotics" are placed in that category because the user acts voluntarily But whatever may be said about using drugs, the act of selling is not non-victim conduct in the case of a drug like heroin which addicts the user; one deprived of either physiological or mental power to resist is no longer a "voluntary" participant. Thus whether the act of selling can be categorized as non-victim conduct depends upon the nature and effect of a particular drug. Nor is it all crystal clear that the act of use is non-victim conduct; society can be the victim in several ways. For example, we said in Part I of this Report on Non-Victim Crime that:

> If it could be shown that the use of marijuana threatens to reduce the next generation to a state of passive vegetation, devoid of the drive that made this nation the haven of all peoples, no stronger reason would be needed for seeking to eradicate the use of the weed by almost any means.

This states a possibility. No evidence yet discovered by us shows it to be a probability, but the reported use of heroin among the troops in Vietnam could pose a worse threat to the future of the

country. The use of drugs and narcotics could also be an injury to society in ways less sweeping than that of the destruction of a generation of youth. For example, it would be so if its use were frequently to induce violent or aggressive behavior toward others. It would also be so if drug use were to make ordinary and gainful employment by the user difficult or impossible, for society would then have loaded upon its back the costs of support and medical care.

Discussion is also handicapped by the extreme positions taken by partisans on the one side or the other. At the one extreme, users are assailed as immoral or indecent, as "freaks" or misfits or as a disgrace to society. This kind of reaction gets one nowhere; the law would have no business whatever trying to prohibit adults from using drugs to get "high" or to alter their perceptions unless injury to society were also present. At the other extreme, society is itself assailed as the very cause of the abuse of drugs. It is argued that, while people resort to drug abuse for a variety of reasons, psychological or psychotic illness, or to find new experiences, or to do what their peers do, the unifying explanation is that drug abuse represents an attempt to reconcile serious contradictions between self and society. It is no accident, we are told, that until recently heroin was a problem confined to the ghettos of this country, and that, when young people are asked why they turn to drugs, their reply is almost uniformly that modern urban mass society is becoming increasingly inhuman. The blame is laid on

pollution, racism, poverty, "loss of identity," and so on and on. When so many young people are unable to "integrate with society," when they turn to drugs as only one of a number of means of escape, it is time to look hard at society: so the assertions go.

All this may be true, or it may be only the fashion of the moment to say so. Perhaps the causes are in the very structure of contemporary civilization. And if society could find the causes and root them out, it should do so. But that truism gets us nowhere in finding an answer to the only aspect of drug and narcotic use that comes within the assigned task of this Committee or within its area of competence, which, as already observed is to determine the part, if any, to be played by criminal law.

In the previous paragraphs we have sometimes spoken of "drug abuse" rather than "use," and of "dangerous" drugs instead of merely "drugs." We have done so to avoid the pedantry of being told that coffee, tea, nicotine and alcohol are drugs or narcotics, that there are legitimate drugs and legitimate uses for even dangerous drugs and narcotics, that "dangerous" drugs and narcotics can be administered and controlled in small doses without harm, and that even drugs like aspirin can be harmful if abused. All that is true; even LSD might have a legitimate use in the hands of expert researchers; marijuana was once prescribed by physicians for some

purposes. But observations like these simply enmesh rational analyses in irrelevant distinctions. Suffice it to say, once and for all, that when this Report speaks of drugs, it means "dangerous drugs" within the meaning of current law, and when its speaks of use it means "abuse."

Another red herring frequently drawn across the path of rational consideration is the assertion that alcohol is far more injurious to the user and society than any other drug whether legal or illegal. The late Louis S. Goodman, Chief Judge of the United States District Court in San Francisco, used to comment impatiently on the habit of attorneys to defend a charge of wrongdoing with the riposte that someone else or some other conduct was equally as bad or worse. The use of alcohol is as old as mankind and is to be found in every civilization and culture; in a sense it is symbiotic with man himself. Whole ways of living and coping with it have arisen, and mankind evidently must endure it while enjoying it. Efforts to eradicate its use have failed. The fact that alcohol is abused to the injury of society is no reason whatever for permitting the introduction and spread of other abuses not yet so ingrained in our social structure, even though they may not be so harmful, providing it is <u>reasonably</u> possible to prevent them. Nor should the effort to prevent them be deterred by cries from the young that their elders are guilty of "hypocrisy." The history

of the use of alcohol can, however, teach us one valuable lesson. The failure of the Volstead Act and the 18th Amendment does warn us that criminal sanctions do not work when a large segment of society is opposed to them and that, on the contrary, severe prohibition can produce evils such as organized crime. If, in what we have said above, we have expressed some impatience with certain arguments for change in drug laws, we have equal impatience with opponents of change when they speak of "legalizing (or illegalizing) marijuana or heroin." Any drug is a mere physical object. It can be neither legal nor illegal. All that can be made illegal is human conduct. The appropriate question, therefore, is: What human conduct with respect to a given drug or narcotic should be illegal? With the question thus properly stated, one can begin to distinguish between types of conduct instead of making lump judgments.

Each type of drug or drug abuse must be examined on its own and handled on its own. To that end we now review the subjects of marijuana and of heroin. We shall not touch on other substances in this Report. We refrain from doing so for lack of time and study.

A. Marijuana[8]

This Committee does not condone or endorse the use of marijuana or any drug that may be mind-altering. On the contrary, we deplore that use and encourage searching for proper and successful ways to discourage it. But the assigned area of concern of this Committee is to determine what part criminal law should play in discouraging that use.

The starting point of that consideration ought to be a determination of what deleterious effects marijuana produces. No member of this Committee is persuaded that marijuana is not really injurious to the user or only mildly so. Rather, we simply find the whole voluminous literature unsatisfactory. Partisans on both sides are intemperate, untrustworthy and unreliable; the conclusions drawn by more temperate and sober writers from their data are unpersuasive.

On the one hand we know that the active ingredient in marijuana is the same as produces hashish, and that historically hashish has been considered an evil in the Oriental countries of its use. Despite the fact that defenders of marijuana often cite the findings of the Indian Hemp Commission of 1894, India today prohibits hashish. On the other hand, medical studies are cited, from the

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8 Because of correct pronunciation of this Mexican word, its spelling is sometimes anglicized as "marihuana," as in the Report of the U. S. Department of Health, Education and Welfare.

La Guardia Report of 1944 to a recent report of the United States Department of Health, Education and Welfare[9] and a more recent one by Dr. Lester Grinspoon.[10] The various reports become involved in quibbles about what constitutes "addiction;" the defenders of marijuana claim that it is not addictive because there are no physical withdrawal symptoms, their antagonists retorting that its use creates psychic dependence. One group asserts that the use of marijuana causes users to abandon motiviation and to become socially indifferent; the rejoinder is that "present evidence does not permit the establishment of a causal relationship between marihuana and the amotivational syndrome."[11]

The antagonists of marijuana argue that its use leads to the use of harder drugs. The soberest reply is that it does not "necessarily" do so "directly," and that the fact that a high percentage of heroin addicts have used marijuana is a coincidence stemming from the character of the users.[12] While the evidence is that a large percentage of heroin users have used marijuana, the evidence does not show that a large percentage of marijuana users

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9 U. S. Department of Health, Education and Welfare, Marihuana and Health, a Report from the Secretary to Congress, January 31, 1971.

10 Lester Grinspoon, M D., Marijuana Reconsidered (Harvard University Press, 1971).

11 H.E.W. Report, p. 10.

12 Id. at p. 16.

have turned to heroin. Advocates of change in the marijuana laws sometimes do concede that denizens of the drug sub-culture use a variety of drugs and, starting with marijuana, move on to others. But they argue, quite persuasively, that what throws the marijuana user into the drug sub-culture is the fact that its sale and use are made illegal, forcing the user to procure it from drug pushers and to use it in drug-oriented surroundings.

Neutral observations concede that psychotic episodes have followed use in high dosages and even use at levels of social usage "in particularly susceptible individuals."[13] Dr. Grinspoon has written:[14]

> While there can be no question that the use of psychoactive drugs may be harmful to the social fabric, the harm resulting from the use of marihuana is of a far lower order of magnitude than the harm caused by abuse of narcotics, alcohol, and other drugs. Marihuana itself is not criminogenic; it does not lead to sexual debauchery; it is not addicting; there is no evidence that it leads to the use of narcotics. It does not, under ordinary circumstances, lead to psychoses, and there is no convincing evidence that it causes personality deterioration. Even with respect to automobile driving, although the use of any psychoactive drug must perforce be detrimental to this skill, there exists evidence that marihuana is less so than alcohol. Marihuana use, even over a considerable period of time, does not lead to malnutrition or to any known organic illness. There is no evidence that mortality rates are any higher among users than nonusers; in fact, relative to other psychoactive drugs, it is remarkably safe.

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13 Id. at p. 11.

14 Grinspoon, pp. 25, 26.

This hardly exonerates marijuana; comparison of marijuana with alcohol or other drugs is, as we have suggested, an irrelevance. But, on the other hand, Dr. Grinspoon's statement adds up to no severe condemnation.

The Crime Committee concludes that it cannot return a verdict about marijuana of either "guilty" or "not guilty." We return a "Scotch verdict" on the present evidence; that is, the evils of marijuana use are not proved. With that verdict, what is the question to be answered? It is not whether marijuana should be used. Every member of the Crime Committee opposes its use. The question is something entirely different. The critical question is this: How far is the criminal law justified in imposing its criminal sanctions on a not proved verdict?

Bearing in mind that the physical object -- marijuana -- can be neither legal nor illegal and that only human conduct can be, the question must be separately asked relative (1) to minors and (2) to adults. And as respects adults, it must be separately asked of (a) use, (b) possession, (c) sale, and (d) commercial exploitation.

1. Sale of Marijuana to Minors and Possession by Minors

The fifth principle stated in Chapter I of Part I of this Report on Non-Victim Crime is this:

> Fifth principle: Society has an obligation to protect the young, and it may be appropriate for government to intervene by imposing criminal controls on adult relations with the young although controls on similar relations between adults would not accord with our other principles.

The doubts about the effect of marijuana compel us to recommend continued prohibition of sale to minors. An adult may be left free to take chances on his own condition, to play Russian roulette if he will with his own mind and character. By definition, a minor is not yet mature enough to reach sound judgments for himself, and doubt should be resolved for the minor's protection. With the trend toward reducing the age of majority to 18, the young will soon enough reach the age of choosing their own route. The law prohibits sale of alcoholic beverages to minors, although alcohol has long been with us; marijuana, a relative upstart, should fare no better. The prohibitions on use of marijuana by minors should parallel those with respect to alcohol.

2. Use of Marijuana by Adults

The case as to adults is different. And it is different for several reasons.

First, as we have seen, the verdict on marijuana is a "Scotch verdict" -- not proved. Certainly, on a not proved verdict, criminal law cannot impose its criminal sanctions on the user who is more a victim than he is a perpetrator of evil.

Opponents of change in the law argue that if the evidence is uncertain, the status quo should be maintained by leaving the law as it is. But those laws originated when legislators assumed that the dangers of marijuana were far worse than a dispassionate examination of the evidence now available warrants. If that evidence would not warrant enactment, now, of the highly restrictive laws presently on the books, it cannot justify their retention. In a free society there ought always to be a presumption against illegalizing conduct until evidence is produced to warrant criminalization.

In the second place, educators tell us that by casting the whole marijuana scene into a criminal underworld, minors are estranged from sound counselling. It is said that minors can more readily be deflected from use of marijuana if it is regulated and controlled as alcohol is.

Finally, our conclusions are fortified by the socially injurious consequences flowing from attempts to enforce the present statutes. We find, in the literature on the subject the following, which we are persuaded do exist.[15]

(1) Users of marijuana, mainly the young, perceive no rational distinction between the dangers of alcohol and cigarettes and those of marijuana. Consequently, "massive numbers of young people today

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[15] John Kaplan, "Marijuana" supra, note 3, contains a convenient portrayal of these consequences. While we do not agree with all of Professor Kaplan's book, there is much useful material in it.

regard the marijuana laws as one of the clearest examples of their elder's hypocrisy." And since numerous young persons have used marijuana, widespread disrespect for law and for law-making institutions has arisen. (The invalidity of the charge of hypocrisy would not alter the fact that young people believe it.)

(2) By exaggerating the dangers believed by the young to be possessed by marijuana, the law degrades its educational effect with more dangerous drugs.

(3) Because the enforcement of marijuana laws requires the police to conduct searches of persons, homes and cars for small quantities, feelings of hostility toward the police are created.

(4) Possession of marijuana has come to be associated with several identifiable segments of society -- those with long hair, juveniles and ethnic minorities. Enforcement "...contributes to the hostility of three groups that one might most wish to bring into the mainstream of our society: the alienated middle-class drug-user, the high school youth, and the inhabitants of our urban Negro and Spanish-American ghettos." [15a]

To this list may be added the fact that use of marijuana has made its way to some extent into the San Francisco middle-class business and professional communities. As was said in Part I

[15a] Kaplan, supra, p. 42.

of this Report:

> The law cannot outrun the public conscience -- not simply the public conscience as professed from its pulpits and by its public figures, but the public conscience as demonstrated by how the public lives.

The soundness of our recommendation that the law cease criminalizing the use of marijuana or a visit to a place where it is used is fortified by the fact that the courts by and large have come to look with distaste on enforcing these laws. A defendant who pleads guilty in San Francisco to a misdemeanor charge for one of these violations is likely to receive a suspended sentence with a year's probation; and some judges will impose a $50 fine. In 1969 the courts disposed of the cases of 328 defendants who were originally charged with felony possession but whose charges were reduced to the misdemeanor "visiting."[16] Consequently, of the 702 felony cases pending in Superior Court in San Francisco on May 1, 1971, only 43 involved isolated charges of possession or sale of marijuana.[17] During the same year only one person convicted of a marijuana offense in San Francisco was sent to state prison, and

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[16] San Francisco Police Department, Annual Report, 1969, p. 173. The common practice of reducing a charge of felony possession to "visiting a place," a misdemeanor, has since become infrequent, because state law was amended in 1969 to permit charging possession of marijuana as a misdemeanor. See Sec. 17 P.C.

[17] Source: List of Cases Pending, prepared by the San Francisco District Attorney's Office. In addition, there were 56 pending cases in which a marijuana charge was joined with other felonies.

over 75% were given straight probation.[18] In the entire state during 1969 only 1.7% of those convicted of felony possession of marijuana were sent to prison, and 56% were placed on straight probation without any jail time at all.[19]

One of the principles stated in Part I of this Report was that even where conduct may properly be condemned as criminal under other principles, "it may be that the energies and resources of criminal law enforcement are better spent by concentrating on more serious things. There is a matter of priorities." That principle is particularly applicable to marijuana where it is dubious that use should be made criminal under any principle. Because possession of marijuana is still a crime, the police spend considerable time and energy on the matter. Then each case is handled by a Deputy District Attorney, and many cases are handled by the Public Defender's Office. As already noted, 15% of all cases in the Municipal Court deal with marijuana, and they consume the time of a judge, a court reporter and two bailiffs. Yet, in the end, most of those convicted are treated with more leniency than common drunks. The judicial system is recognizing that it has more important things to do than to spend time and resources on processing most defendants arrested for possessing marijuana.

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[18] California Bureau of Criminal Statistics, Felony Arrest Dispositions in San Francisco, 1969, Table 2.

[19] California Bureau of Criminal Statistics, Drug Arrests and Dispositions in California: Reference Tables, 1969, Table 33, p. 33.

Another perversion of priorities worked by the marijuana law is with respect to the work of the San Francisco Police Crime Laboratory. That agency is responsible for conducting various scientific tests - for the police and the District Attorney - ranging from blood types to tool mark identifications. Currently it employs a criminologist and three assistants.[20] According to charts prepared by the laboratory, each criminologist handled slightly more than 200 narcotic cases in 1960, but in 1969 this peaked at 1000 (nearly five times as many), declining slightly to about 900 in 1970. The total number of narcotic cases in the laboratory in 1960 was about 400; in 1970 it was over 3,900, an increase by a multiple of about 10. During the same period the number of criminologists increased from only two to four, and the laboratory estimates that 38% of its staff time is now devoted exclusively to marijuana analysis alone.

The number of many other scientific tests, normally associated with serious offenses, has decreased. A summary of crime laboratory cases for the years 1960, 1969 and 1970 is found in Appendix A to this Report, but we note the following here.

In 1960 the laborabory processed 106 casts (either plaster, moulage or silicone) but only eight casts in 1970. It performed

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[20] Between 9 and 11 police officers are also assigned to the laboratory's "mobile units," which travel to the scene of crimes and collect evidence.

182 blood analyses in 1960 but only 85 in 1970. It made 170 tests for semen in 1960 and only 64 in 1970. It performed 19 microscopic examinations on hair and fibres in 1960 and only 5 in 1970.

The statistics for 1970 may be imprecise; an unknown number of tests may not be tabulated in the official report. Moreover, more criminal cases were disposed of on a plea bargain in 1970 than in 1960, and where a case is disposed of by a negotiated plea rather than trial, the crime laboratory may not have to perform tests. Nonetheless, the fact remains that the number of laboratory tests associated with serious offenses has declined during a period when offenses of the identical type reported to the police have more than doubled.[21] Criminologist Williams estimates that his staff would have to be doubled to do all that it should be doing. During the same period the "clearance rate" for serious crimes -- murder, manslaughter, forcible rape, robbery, burglary, aggravated assault, larceny and auto theft -- has declined by nearly a third to about 13% of all reported cases.[22]

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[21] From 30,919 actual Part I offenses in 1960 to 83,481 in 1970. San Francisco Police Department, Annual Report, for years indicated.

[22] Id. A case is "cleared" when the police believe that it is "solved," either by arrest, by the death of a known suspect, by a discovery that the reported crime did not, in fact, take place, etc.

The conclusion of the Crime Committee is that the demonstrable harm associated with marijuana does not justify the voracious demands on the resources of criminal justice made by the marijuana laws. The police, court system, and correctional resources are desperately needed to handle matters demonstrating greater harm to society. Add to these "economic" costs the social costs of the marijuana laws, and we have no doubt that the use of marijuana should be handled outside the criminal justice system.

Consequently, the Crime Committee recommends:

> Repeal the laws prohibiting the use by adults of marijuana and prohibiting adults from visiting a place where marijuana is used as now provided in the California Health & Safety Code Section 11556.

If and when medical evidence is developed that shifts the verdict from non-proved to guilty, this recommendation can be reconsidered.

3. Possession of Marijuana by Adults

Thus far we have been speaking of use of marijuana and of visiting a place where it is used. We still must answer the question, what should be recommended about possession and sale.

The answer about possession is relatively easy. Possession of a "small" amount is probably for personal use and should be treated the same way as use, that is, it should not be made criminal. Possession of a "large" amount should be treated the same way as

sale, since there is a reasonable inference that one who possessed a "large" amount will either sell it or give it away. A "large" amount is an amount more than sufficient for one person's use for several days, and, when and if it should be necessary to make the distinction, it may be left to testimony before a legislative committee to determine the dividing line.

4. Sale of Marijuana to Adults

Curiously, writers who almost feverishly oppose the marijuana laws become uncertain of their ground when they turn to consider sale to adults. We encounter proposals for a system of government monopoly of sale or government licensing of a limited number of vendors. We are not impressed by the proposal. The sale of marijuana to adults can be regulated by laws on the general order of those regulating alcoholic beverages. We recommend simply that sale of marijuana to adults, within that kind of regulation, should not be subjected to criminal sanction unless and until medical evidence, by moving the verdict from "not proved" to "guilty," requires reconsideration.

We are impelled to this conclusion by two sets of considerations:

1. Government monopoly presupposes that the traffic is evil and therefore not to be left in private industry. But if the

traffic be evil, organized society should not indulge in it.[23] Moreover, any system of licensing that is more selective or restrictive than our present system of alcoholic beverage control is fruitful for bribery and corruption.

2. The fourth principle set forth in Part I of this Report was:

> When government acts, it is not inevitably necessary that it do so by means of criminal process. * * * The methods of the criminal law may be ill suited, or there may be better ways of achieving an end, better ways to deter or rehabilitate than to arrest, charge with crime, prosecute, convict and sentence.

By criminalizing manufacture or sale of various drugs and narcotics, what the law hopes to accomplish is: (1) To deter the manufacture, or (2) to deter those who might use or experiment with the drugs or narcotics by stamping them with a stigma of dangerousness, or (3) to rehabilitate the offender.

Criminal law has not been spectacularly successful in achieving any of these goals. Where the evil is great, even modest success will justify the effort. Where the evil is dubious, that is no longer true. The lack of success in achieving its goals as respects marijuana seems inherent in the nature of the thing sought to be regulated. If the threat of criminal sanctions is to have

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[23] Addictive narcotic drugs pose a unique problem. Whether society should engage in the traffic of that peculiar evil is discussed later in this Report.

any effect, there must be a real fear of arrest. But usable quantities of virtually every illegal drug or narcotic can be carried or secreted in a coat pocket, glove compartment, drawer or other hiding place, and ordinarily in a private residence. Police detection of the "crime" is extraordinarily difficult. The contrast with robbery, burglary, assault, rape, homicide or auto theft is striking, for in these offenses the offender must intrude upon others or accomplish his crime in a public place, with greater chances of identification, detection and arrest.

Of course, the deterrent effect of making conduct criminal depends only partly on the fear of arrest. Perhaps in greater degree it rests on the stigma of social disapproval or social warning of danger. By making the possession of certain drugs illegal, the law announces that their use will result in harm to the user. But this warning of dangerousness has not been taken seriously. To the extent that criminal laws declare that certain drugs are dangerous or harmful, they are widely disbelieved by a sizable segment of young people simply because these laws are handed down by the "establishment." Moreover, young people in their twenties and even into their thirties are the largest users of marijuana. Having used marijuana, innumerable young persons believe that they have discovered for themselves that the harms from the drug are not nearly so great as the law had

claimed. Whether their judgment in this respect is sound is irrelevant. The relevant fact is that they believe it. Some even carry this belief into distrust of warnings about the harms resulting from hard drugs.

If the sale of marijuana were no longer criminal, the cost of acquiring it would decline, for it can grow almost anywhere. There would then be no incentive for purveyors to push it, unless it can be merchandised and exploited on a large scale just as cigarette manufacturers have exploited cigarettes and brewers have exploited beer with suggestions that the use of cigarettes or beer creates virility and allure.

5. Commercial Exploitation

Advertising of marijuana should be prohibited. The very doubts which call for legalizing use call for prohibiting mass enticement to use. While no longer criminalizing use, society should continue efforts to educate against use; and those efforts would be out-matched by multimillion-dollar advertising budgets spent by the equivalent of the large cigarette companies. Were advertising permitted, any change toward prohibiting marijuana, if and when new evidence developed, would encounter the entrenchment of vested interests. Nicotine and alcohol have become vested. There is no reason to permit this to happen with marijuana.

The sale of marijuana should not become "merchandising " To that end interstate and foreign commerce in marijuana should also be prohibited, as a way of keeping the sale of the drug from becoming a large-scale operation. On the other hand, if importation into the state is prohibited, it seems evident that production of marijuana within the state must be permitted to avoid restoring the business to black market operation. Production for sale should be subjected to regulations paralleling those governing production of alcoholic beverages. Included in this type of regulation could be provisions fixing standards of potency, particularly maximal limits. Also included in this type of regulation could be stiff taxation, as in the case of alcoholic beverages. The tax should not be so stiff, as in the case of "hard" narcotics, as to drive the business underground into the hands of pushers and racketeers, but stiff enough to dampen demand and discourage idle experimentation.

More on Whether Criminalization Should Be Retained as a Deterrent

Some people who follow the chain of reasoning that has led us to our conclusions, admitting the truth of every link in the chain, balk at the end at the conclusion. They do so out of an uneasiness or tormenting fear that if criminalization is abandoned, many people will take to marijuana who do not use it now. Nobody knows the certain answer. Repealing prohibition of marijuana use might result in an inverse of use of awhile by some people. Probably most of those who would turn to the weed would try it only once or twice as an

experience but would soon drop it or use it only occasionally. A few might go on to frequent use. But, in order to appraise what injury to society would follow, we must consider once more the physiological aspects of marijuana use. Unlike heroin, use of marijuana is easily ended. The hard narcotics produce an irresistible "craving;" lack of the drug produces the tortures of "withdrawal;" continued use produces increasing "tolerance," so that more and more is needed to obtain the desired effect. One thing about marijuana that seems clear is that its use does none of these things. There are no withdrawal symptoms; there is no increasing tolerance; craving is psychological, as with cigarettes, not physiological. In short, if some spread of use should follow repeal of prohibitions, it is likely to be a transitory phenomenon, subject to reversal by education without the counterproductive effect of the policeman's billy club and the filthy jail.

Moreover, the fear that repeal will lead to a spread of use is, we think, more a subconscious reaction than a rationally held belief. Many who oppose repeal favor reduction of the penalties. Indeed, California has already moved in that direction and if California fails to move even further, it may well be left behind the march of events throughout the nation. If continued criminalization is justified as a deterrent, reduction of penalties will diminish the deterre

and leave the laws largely dead letter, resting in the books for use by police or prosecutor whenever it suits their purposes.

If one favors reduction of penalties, if he believes that smoking a half "joint" is no basis for being imprisoned, then he does not really think that the use of marijuana is a serious injury to society. Continued prohibition of use then becomes nothing more than an expression of moral condemnation. And moral condemnation is no basis for criminal law.

Among the seven basic principles enumerated in Chapter I of Part I of our Report on Non-Victim Crime was this:

> Sixth principle: Criminal law cannot lag far behind a strong sense of public outrage. This is the other side of the coin from the first principle. Although criminal law cannot outrun the public conscience in condemning conduct, neither can it hold aloof entirely from a public sense of outrage. If the law suffers when it tries to do too much, it also suffers when it does not do what most people feel strongly that it ought to do. Because the sixth principle acts as a counterbalance to some of the others, it must be applied with great circumspection. Before applying it one must be certain that his personal sense of outrage -- his personal morals -- or that of his group is that of the public as a whole.

It appears to us that the opposition to change of the marijuana laws expressed by many responsible people is explicable only under a variation of this sixth principle. It is not so much a sense of

outrage but a fear or terror of something unknown. The majority of the Committee is unable to see in the evidence any valid basis for that fear; the majority does not believe that unsupported fear is enough basis for keeping and trying to enforce laws that divide the generations so sharply.

Recapitulation

The sum of our recommendations concerning marijuana is as follows:

1. Repeal the laws prohibiting the use by adults of marijuana or forbidding adults from visiting a place where marijuana is used.

2. Repeal the laws prohibiting possession by adults.

3. Repeal the laws prohibiting sale of marijuana to adults and regulate sale to them by laws on the general order of those regulating alcoholic beverages.

4. Continue to prohibit sale to minors and possession by minors.

5. Prohibit any advertising of marijuana.

6. Prohibit the importation of marijuana into California (probably would require federal action).

7. Regulate the production of marijuana in California for sale by laws similar to those regulating the commercial production of alcoholic beverages.

8. Devise and expand a vigorous educational campaign about marijuana.

We do not propose that society discontinue efforts to deter people from using marijuana. Its use is probably not as deleterious as its most earnest detractors say, but certainly people would be better off without it. In an age when human wits are most needed, they should not be subjected to manipulation or alteration by drugs. We simply conclude that the criminal process is not the way to go about achieving the goal given the present state of evidence. Indeed, removing the stigma of criminality may remove the attraction of the illicit and eliminate the impetus to use that comes from bravado.

Criminalization has failed; we suggest that society now try non-criminalization.

We have one more recommendation: Until such time as the laws on marijuana are changed, what should the authorities in San Francisco do about enforcing them? In the Chapter on basic principles we said:

> The following chapters of this Report will propose the repeal of certain laws. Obviously, the City of San Francisco has no power to repeal State or Federal statutes. But until such time as Congress or the State Legislature sees eye to eye with San Francisco, this City can choose what it will enforce, for its coffers pay the bills. It can choose its priorities. If it should decide that it is poor policy to 'bust' a small gambling game in the Fillmore, the police need

> not arrest and can preserve its manpower for more vital work. If an arrest is made, the District Attorney need not prosecute. However, lest there be misunderstanding, we emphasize two cautions. The first is that once a case reaches a court, no judge is free to ignore the law or make up his own rules. But matters need not reach the courts. Jurists have long recognized that a system of criminal law would break down were there no play in the hinges, points where the officers of justice can exercise discretion. Our second caution is that individual policemen cannot be let to decide what laws to enforce or when. What we say is that, pending repeal of legislation, all the agencies of justice, under strong central municipal leadership, can together lay down a policy to follow, open and above-board, and proudly declared to the State and Nation.

We recommend that course with respect to marijuana to the end of laying out a policy of action as close as is possible to what it would be under the kind of law we recommend.

At the risk of repetition but so that a hasty reader may not be misled, we conclude by saying: No responsible reader of this Report should take the Crime Committee's recommendations regarding marijuana to mean an endorsement of marijuana's use. On the contrary, we oppose its use by anyone, but we believe that our present criminal laws on the subject do more harm than good in forwarding that opposition.

B. Heroin

When one turns from marijuana to the "hard" drug heroin, a wholly different set of considerations is apparent.

The use of heroin is unmitigatably bad. It is destructive to the user, and it is destructive to society. No one is more contemptible than the vendor or pusher who "hooks" another into use for the sake of profit. If society is ever justified in punishing anyone for the sake of revenge and detestation rather than for determent or rehabilitation, it would be justified in doing so to the vendor of heroin. And as already said, the sale of heroin simply is not properly in the category of non-victim conduct.

The problem with putting down the use of heroin is simply one of efficacy. What method will really work? Once again the question must be divided into user and supplier. And the first question is what to do with the supplier.

1. Possession and Sale of Heroin

We recommend that present laws making the sale of heroin criminal be kept in effect and enforced. Possession by an addict of a "small" amount is probably for personal use and should be treated

the same way as use, a subject discussed below. Possession by an addict of an amount greater than one's personal needs for several days should be prohibited as being possession for sale. Possession of any amount by a non-addict (other than a physician or researcher) should be treated as possession for sale.

But this is not enough. Little is accomplished by catching and punishing the local pusher who is himself likely to be an addict and in any event, as a retailer, is a relatively minor cog in the distribution machinery.

The addict pusher needs treatment. The non-addict pusher belongs in prison. But the local pusher is "small potatoes" in the problem.

Heroin is an opium derivative. Either it or the materials from which it is made come entirely from abroad. The major effort must be that of the federal government to stop importation, or, if possible, to cut off the source by inducing foreign countries to discontinue cultivation. What local police can do is minor. This Committee is primarily concerned with recommendations that can be carried out by the City Administration or by state law, and it is not for us to make recommendations to the federal government in the area of international relations on how more effectively to prevent the cultivation of the opium poppy or the importation of heroin.

The unvarnished fact is that the present system of illegalizing sale contributes to making the problem infinitely worse, unless something more is done. It makes the price of heroin enormously high. Thereby it makes the profits of the illicit business attractive, it becomes profitable to "hook" an innocent and convert him into a permanent customer. It drives the customer to crime to support a habit that levies a crime tax on society of $100 per day per addict. An average habit costs the user conservatively $20 per day,[24] and it is estimated that in order to fence enough to support an average habit costing $20, an addict must obtain in some manner $100 worth of property each day. Estimates of the number of addicts in the City vary, but the lowest estimate given the Committee in a survey of drug-treatment facilities in the City[25] puts the figure at 5,000 addicts. This means that if only one-half of San Francisco's minimal addict population steals only one-half of what they need to support their habits (getting the rest by pushing, pimping, hustling, or working at an honest job)

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[24] A study of 435 patients at the Haight-Ashbury Free Clinic, surveyed between November, 1969, and May, 1970, revealed that 47% had a habit costing less than $50 per day, while 38.2% had habits costing between $50 and $100 per day. About 15% of these patients had habits in excess of $100. See: Gay, Bathurst, Matzger, and Smith, Short Term Heroin Detoxification on an Outpatient Basis, Haight-Ashbury Free Clinic, 1970.

[25] Conducted during May, 1971.

addicts are responsible for more than $45 million dollars worth of property crimes in San Francisco each year. That amount of property loss exceeds the annual budget of the Police Department.

The circle is vicious, so vicious and so serious as to justify some bold experimentation. That experimentation cannot be done at the local level because the field is controlled by the federal government with its prohibitions, although changes of federal law can be supplemented by local activity.

Experimentation should start by examining what other countries are doing to ascertain their successes and failures. In England, the control of narcotic drugs by physicians was first defined by the Dangerous Drugs Act of 1920.[26] In the several years following passage of this law, there was considerable confusion as to the circumstances under which the law allowed physicians to prescribe heroin and morphine to addicts.[27] Consequently, a committee of the Ministry of Health - the Rolleston Committee - was appointed to bring more certainty to the interpretation of the law, and in 1926 this committee issued a report recommending that physicians be allowed to prescribe narcotics to patients who, after serious

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[26] 10 and 11 Geo. 5, c. 46 (1920).

[27] This history is found in Lindesmith, "The British System of Narcotics Control," 22 Law and Contemporary Problems, 140 (1957).

attempts at rehabilitation, were unable to abstain from drugs.[28] Physicians were given wide discretion as to dosage and patients were not required to register as addicts with any public authority. These guidelines of the Rolleston Committee defined the perametors of narcotic control in the United Kingdom until 1968.

For awhile this method of treating the problem seemed exemplary. The number of British addicts was small -- in the hundreds -- as opposed to the thousands of addicts in New York City alone. They were mostly middle aged, employed, and not involved in crime. Like the 19th century addicts in the United States, most British addicts had become addicts through the administration of narcotic drugs by doctors in connection with medical treatment for disease.

In the late 1950's, health officials became alarmed at the rapid increase in the United Kingdom of non-therapeutic, non-middle aged, unemployed addicts. A new committee was appointed in 1958, the Brain Committee. In a second report in 1965 it found that there had been a disturbing rise in heroin addiction, especially among young people, and attributed the main source of supply

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[28]Report of the Departmental Committee on Morphine and Heroin Addiction, Ministry of Health, United Kingdom, (1926).

to over-prescribing of these drugs by a small number of doctors.[29] Upon the recommendation of the Brain Committee, Parliament in 1968 removed dispensing of narcotic drugs from the hands of private physicians. Special treatment centers were established, particularly in the London area, where any addict who registered could receive drugs. Only doctors on the staff of the centers were allowed to prescribe heroin.

During 1968, the first year in which addicts were required to register, the number of narcotic addicts known to the Home Office rose to 2,783 from 1,729 the year before, and from 753 in 1964.[30] The most striking increase was in the number using heroin -- 2,240 in 1968, as compared with 1,299 in the previous year. The number of known addicts under age 20, nearly all heroin users, increased between 1967 and 1968 by 93%. Seventy-nine percent of all heroin addicts were under 25 years old.

If these figures represent the number of addicts who began using narcotics during the period covered, they would throw grave doubt on the English system in effect before 1968 and raise question whether the change in 1968 was sufficient. However, it is likely that until 1968, when addicts were first required to register in

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[29] Second Report on the Interdepartmental Committee, Ministry of Health, United Kingdom, "Drug Addiction in the United Kingdom," in Bulletin on Narcotics, Vol. XVIII, April-June, 1966, p. 27.

[30] See: "Drug Addicts," in Lancet, Aug. 9, 1969, p. 332.

order to obtain their narcotics, statistics were inadequate and grossly understated the facts.[31] And not all the addition to the ranks of addicts are British subjects. Many addicts have migrated to England in order to escape the sanctions of their own countries and to obtain narcotics easily.[32]

Even so, it is likely that addiction in the United Kingdom, as in the United States, has rapidly increased among the young. During the 1960's the "drug culture" among the young which originated in the United States has spread to many other nations. England, which had never before experienced widespread delinquency, dislike for the police, and violent crimes has begun to be "Americanized" in this respect. During this period it experienced an increase in use, not only of narcotics, but of all categories of drugs among the young, including LSD. No one can tell what increase in drug addiction would have occurred in the United Kingdom if the drugs had been outlawed as in the United States. Whereas the number of addicts in the United Kingdom still remains under 3,000, there are over 5,000 addicts in San Francisco alone. Moreover, there is no

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[31] See: "Drug Addicts," in Lancet, Dec. 28, 1968, p. 1398.

[32] One-fourth of all addicts recorded for the first time in Britain between 1960 and 1964 were not British citizens. See: Bewley, T., "Recent Changes in the Pattern of Drug Abuse in the United Kingdom," in Bulletin on Narcotics, Oct.-Dec., 1966, p. 4.

way to tell how much organized criminal activity has been prevented in England by the legal distribution of narcotics to addicts. We do know, however, that in 1970, the Home Office and the Ministry of Health were convinced that there was no evidence of criminally-organized control of narcotics distribution in the United Kingdom.[33]

It is impossible, as yet, to assess the success of the new English method of narcotics clinics. Addicts can no longer visit several doctors or grossly overstate their needs and thereby acquire narcotics for distribution. Each addict is registered at a clinic and may be observed and "tested" by clinic personnel before being given a narcotic.

To transplant the English system to the United States would require amendment of federal law so that the federal government, with the aid of state and local governments, would supply heroin free or inexpensively to all addicts. Were this to be done, we think that the system should be more rigorously applied than in England; the heroin should be administered to the addict at the clinic by government employed medical personnel and not allowed to be taken away on prescription.

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[33] Lieberman & Blain, "The British System of Drug Control," in Drug Dependence, March, 1970, p. 12.

The arguments in favor of this system run as follows:

No profit would be available to the private vendor, for it is inconceivable that anyone would buy or pay a high price when he could get his heroin free. With the profit gone, the whole vicious business would collapse. The government clinics would not supply heroin to non-addicts. The non-addict would not be able to obtain it privately because there would be no incentive to pushers to hook him or to risk the penalties of violating criminal law against importation and sale for the simple reason that, once a person became hooked, he would be eligible to obtain his heroin free from a clinic and would immediately cease to be a customer of any private vendor. The petty profit still available to private vendors from an occasional sale would no longer warrant the risk of violating the criminal laws. Furthermore, as all addicts would be placing themselves in trained medical hands, efforts at rehabilitation could be stepped up.

In response to the fear that supplying heroin would create crime, two facts are stated as fundamental:

1. Although heroin is a destructive drug to the addict, it is also a tranquilizer or depressant. Contrary to popular opinion, there is no evidence that heroin itself induces violent or aggressive behavior or that heroin increases sex drive. Indeed, the opposite is true. While under the influence, an addict is ordinarily extremely passive.

2. The numerous crimes perpetrated by addicts are almost all perpetrated in order to get money to obtain the drug. With the narcotic supplied free or cheaply, that drive to crime would vanish.

Such a system of government dispensing of heroin would have to be accomplished on a nation-wide level, first, because federal law pre-empts the field, and, second, because any state that attempted it alone would soon become a haven for the nation's addicts.

Objections to the English system, even as more rigorously applied, come readily to mind. There is something obnoxious about the government supplying dangerous drugs to its citizens. The use of heroin produces a "high," a kind of orgasm, and the user demands his dose four or five or six times a day. We have been told that heroin cannot be handled safely even by doctors.

Even so, if the choice lay solely between the present American system of rigorous criminalization and the modified English system, the balance might tip in favor of the latter. Fortunately, the choice may not lie solely between these two. The use of methadone may be a better solution. Methadone is a synthetic narcotic chemically related to heroin. It is addictive, discontinuance produces withdrawal symptoms, its use must be continuous. But its advocates say that it produces little "high;" it ousts the craving for heroin. Its effect lasts for 36 hours, so that infrequent dosing is necessary. Above all, while the methadone user is addicted to it, his behavior is so different from that of the heroin user

that he can live as a normal productive person in society. Since the methadone is inexpensive, it is claimed that administration of that drug has reduced crime enormously, for those who receive it no longer turn to crime to support the habit. It is claimed that in San Francisco it has worked a "cure" of 95% of the heroin addicts to whom it has been administered by converting them to methadone addiction. This is contrasted with other forms of treatment which have a cure rate of possibly 5%. Only about 395 people are under methadone treatment in San Francisco.[34]

The San Francisco Committee on Crime cannot assume to evaluate methadone. We are aware that there have always been fads and fashions in medicine and that the wonder chemicals of one decade often become the villains of another. The merits of methadone are for medical men to say. The problem of the law is not to prescribe treatment but to devise a legal system that makes it possible for medicine to bring its talents and expertise to bear.

Our recommendation: Our recommendation is simply to emphasize that the time has come for the federal government to make a thorough

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[34]The City runs four methadone clinics, serving about 260 patients. Another clinic is sponsored by Fort Help, a private organization. The Fort Help methadone program currently serves about 135 patients.

and objective analysis of the benefits and harms of a system of government controlled clinics that dispense, free or at nominal cost, methadone, heroin, or whatever other drug or treatment experts should conclude is even better. We have been told that most addicts of heroin are wearied of being tied down to the heroin rack, would welcome being taken from it, and would choose methadone were it readily available.

On the other hand, we have been told that many addicts, particularly those who have not been hooked for a substantial period of time, will not voluntarily choose methadone over heroin. Moreover, we do not know whether heroin could be dispensed successfully in conjunction with other drugs like methadone. For example, if clinic physicians were able to dispense heroin in some cases, would that in itself diminish an addict's incentive to go on methadone? These questions we cannot answer. We need immediate study by the federal government, and we then need the courage and willingness to experiment.

We are mightily persuaded that one's chances of cure or rehabilitation are better as a frequenter of the clinics than as a denizen of the drug sub-culture where the influences brought to bear are those of the pusher.

2. Use

Thus far we have been speaking of the sale and supply of heroin. We have recommended no change in the prohibitions on private

sale and supply, but we have said that something more must be added because the present system is not effective.

What, then, about our laws making use of heroin a crime?

The user is more a victim than a wrongdoer. Certainly he is a victim once he has become an addict. The United States Supreme Court has held that the condition of being an addict cannot be punished as a crime.[35] Making use of heroin a crime is a singularly ineffective procedure. One cannot tell how many people have been deterred from use by the fact that use is criminal, but we do know that alarmingly large numbers have not been deterred. We suspect that most of those who do not use heroin are deterred by intelligence, knowledge and fear of the consequences other than criminal punishment.

If some system of dispensing narcotics at government clinics should be established, then the use of the narcotic outside the clinics should be made criminal, as a measure to force the addict to the clinic. But if there are no clinics, we are troubled by the use of criminal process to prevent a man from doing what the addiction deprives him of the power to resist.

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[35] Robinson v. California, 370 U.S. 660 (1962).

Moreover, making use a crime seems in the current jargon, "counter-productive" to rehabilitation. Just as one can never know how many people have been deterred from experimenting with drugs because of the threat of criminal law, one cannot know how many drug users have been deterred from seeking treatment because of fear of arrest. The Committee's staff has surveyed many of the drug-treatment facilities in San Francisco and has found a uniform consensus that fear of arrest has been a major obstacle to successful drug treatment.

There are no rehabilitative or treatment resources for people sentenced to San Francisco's County Jail for drug abuse. For state prison, the Department of Corrections provides some psychiatric and psychological counseling (including encounter groups), but the Department's main drug treatment resource is the California Rehabilitation Center at Corona, commonly called "C.R.C."[36] Most commitments to C.R.C. occur after a defendant, in a criminal proceeding, has been convicted of a crime, often by entering a guilty plea.[37]

Unfortunately, most addicts who are sent to the California Rehabilitation Center for "treatment" have relapsed into drug use

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[36]For an analysis of the C.R.C. commitment, see Appendix B.

[37]See Secs. 3050, 3051 W. & I. Code.

after leaving this institution, according to Dr. John Kramer, formerly Research Director at C.R.C., and Richard A. Bass:[38] "By spring 1968, 6½ years after the program's inception, between 8,000 and 9,000 individuals had been committed, and about 5,200 of them were still in the program. Of the 5,200 about 2,600 (50%) were in the institution, about 1,800 (35%) were on active parole, called OPS, and about 800 (15%) were on inactive OPS, that is, at large or in jail." Out of the nearly 9,000 individuals who had been committed to the program since its inception in 1961, only 300 had been discharged for having successfully completed the outpatient program by 1968. In a follow-up of the 1,209 people placed on OPS for the first time between June 1962 and June 1964, Dr. Kramer found that two-thirds returned to the institution at least once during the first three years of their release.

The heroin user should not be punished for use; he should be treated. The utilization of criminal process as a machinery for treatment and rehabilitation has not been successful. On superficial

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38 See Kramer and Bass, Institutionalization Patterns Among Civilly Committed Addicts, 208 Jour. Am. Med. Assoc. 2297, 2300 (July 1969).

consideration, one might therefore slip into a recommendation that unless and until some system of clinics to dispense narcotics is established, the laws making use of heroin a crime should be repealed, and that the addict should be handled through a method of civil detention.

But a study of alternatives fails to unearth anything materially better than handling use through the criminal system or anything essentially different except in terminology.

Treatment and Rehabilitation of the User

To do more for the addict than keep him addicted, society must be willing to make a very large investment in facilities and personnel to provide the "treatment" everyone agrees is required -- medical treatment, job counselling, education -- a full range of costly services over a very long period of time. So far, there has been nothing like what would be required to have meaningful treatment programs on a scale to match the problem, and nothing indicates society is willing to devote a substantial portion of its resources to costly long term rehabilitation of drug addicts. To the extent that facilities and personnel are made available, clear priority should be given to addicts enrolled in voluntary programs in view of the history of failures in the involuntary programs.

That kind of program can be enormously costly, but in the end, if it conquers the drug problem by taking the addict off drugs, it will have conquered a substantial portion of the crime problem in the United States, and it will have cost society vastly less than the tax levied by the drug addicted criminal We have estimated that heroin addicts cost San Francisco alone, by property crimes, a loss of at least $45 million per year. Multiply this figure for one city by the "crime tariff" in New York City and throughout the nation, and we can see that the public is being saddled with vast losses. Devoting even a portion of that amount to methods of cure and rehabilitation simply makes sound sense even without regard to dictates of humanity and concern for the future of the make-up of the Republic.

It must be emphasized, and it cannot be emphasized too much, that <u>any person who voluntarily places himself in the way of cure and treatment should have complete immunity from prosecution or conviction.</u>

What, then, is to be done for those who will not voluntarily place themselves in the way of cure if and when really adequate facilities are available.

If a system of government dispensing of narcotics to addicts should be adopted, then care and treatment of addicts could be handled largely on a voluntary basis. But until such a system can

be adopted, the situation continues that addicts must pay high prices for illegal narcotics and must, therefore, resort to crime, including hooking others to obtain money for their habits. The addict is therefore a constant threat to the peace and safety of society. The danger and threat are so serious that society is justified in pushing to the very limits of the Constitution in seeking ways of prevention. Prevention means detention. Detention should be coupled with efforts at cure and rehabilitation. Those efforts to date, at least until the advent of methadone, have not been singularly successful. Thus efforts at cure and rehabilitation became largely prolonged detention.

The problem is how the law can go about making it possible for the physicians, psychiatrists, and behavioral scientists to perform their task if abusers of dangerous drugs or narcotics do not voluntarily choose care or treatment.

It would be easy simply to change labels, continue to use the compulsory instruments of criminal law, and pretend that the various functions and agencies of criminal justice are now agencies of a medical model. For example, certain officials, called "Drug Abuse Diagnosticians" instead of police, would pick up possessors of dangerous drugs or narcotics, instead of "arresting" them, and hold them for review before a "Drug Abuse Civil Commitment Agency" instead of trying them before a court. Then if this agency should find that a person should be "committed" to an institution for

"care and treatment" instead of convicting him, it could so commit him instead of "sentencing him to prison." This would be an easy course, but it would also be quackery. In the end, any system of civil detention for rehabilitation or cure against the will of the detained person is essentially the use of criminal process. We might as well call it what it is, thereby retaining constitutional protections, and concurrently shape the detention toward cure and rehabilitation and away from punishment.

During the past year, the San Francisco Committee on Crime compiled a Directory of Drug Treatment Facilities in San Francisco. This Directory, the only one of its kind in the city, has gone through two printings, and more than 10,000 copies have been distributed to schools, churches, youth groups, hospitals, etc. In the course of compiling that Directory, we encountered numerous different theories and models of drug abuse treatment. While we neither endorse nor disapprove any of the drug treatment schemes operating in the City, it is likely that each abuser of drugs or narcotics is an individual with peculiar problems and needs and goals. We believe that drug abuse treatment stands the best chance for success when medical, psychiatric and behavioral experts are permitted by law to prescribe and require care and treatment in their absolute discretion.

Conclusion on Heroin

At the outset of this section of our Non-Victim Crime Report on Dangerous Drugs and Narcotics, we said that it was the most difficult subject with which we had to deal. We can now sum up some of the difficulties and dilemmas presented by heroin.

We have adverted to a system of detention for purposes of cure and rehabilitation without conviction first of crime. But to detain a man against his will in order to cure or rehabilitate him, when he has violated no criminal statute, raises feelings of discomfort, to say the least, in a free society, if not severe constitutional doubts. And, yet, an addict free of detention is likely to commit crimes of burglary and the like to obtain funds to serve his addiction. To prevent the commission of such crimes, society can arrest and incarcerate him for preventive detention. But, a free society cannot feel confortable with arrest as a means of preventive detention.[39] Of course, if the use and possession of heroin remain prohibited by criminal statute, the addict can be convicted and incarcerated constitutionally as punishment for a "crime." But to make a man a criminal and to punish him as such for committing acts

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[39] We call attention to our discussion of this subject in the Fifth Report of this Committee on "Bail and O.R. Release."

which the use of drugs has made him incapable of avoiding is also repulsive. All these difficulties can be escaped by the proposed government administration to the addict of methadone and, if necessary, heroin. But that proposal is abhorrent to some people and uncomfortable to many more. No choice is a pleasant one. Society must grapple with the difficulties and select the one that combines the best promise of success with the least abhorrence.

As an aid to making the right choice, we enumerate a number of facts:

(1) Heroin is unquestionably destructive both to the user and to society.

(2) Efforts to date by criminal law to check heroin traffic have been singularly unsuccessful. Major arrests are few and do not visibly decrease the traffic.

(3) Long-range solutions to the heroin problem must be found in efforts by the federal government to stop opium cultivation, heroin refining, and importation, and in massive educational programs aimed at the drug.

(4) The cure rate of heroin addicts by conventional involuntary treatment is very low.

(5) Heroin addicts are desperate and will get the drug one way or another. They will steal, and if necessary kill, to obtain heroin.

(6) Under the present laws, the only way they can obtain heroin is by purchasing it from the underworld.

(7) Heroin users rarely commit major crimes while under the influence of the drug. They do commit crimes in order to obtain money to buy their next fix or to keep themselves supplied.

(8) A conservative estimate of the amount of property stolen by heroin addicts in San Francisco each year is 45 million dollars. (This sum exceeds the annual budget of the Police Department.)

(9) If we cannot effectively reduce the harm that an addict does to himself, we can substantially reduce the harm the addict inflicts on society. At this time, there appear to be only two ways of having a substantial effect on the heroin crime cycle. The first alternative is to place addicts permanently in institutions. This is punishment for illness. The second alternative is to establish government controlled medical clinics where, if nothing else succeeds, heroin could be administered, not handed out, to confirmed heroin addicts on the educated, experienced judgment of physicians. This would substantially reduce crime, the role of the commercial peddler, and the likelihood of peddlers attempting to hook our youth.

CONCLUSION

The reader will perceive that we make no cut-and-dried recommendation. We have pointed up the problem and delineated the choices. We have done all we can if this Report opens up thoughtful debate.

MINORITY REPORT

We do not agree with the Report or recommendations of the Committee majority on DANGEROUS DRUGS AND NARCOTICS. We regret that the Committee issued an opinion and recommendations on this subject - a subject we believe deserving of more careful study and evaluation than the Committee gave to it. Our brief comments concerning the recommendations on marihuana illustrate our disagreement. We deem fallacious the Committee's argument that because there is a conflict of opinion as to whether the use and possession of a "small" amount of marihuana by adults and the sale of it to them is harmful to society, therefore the existing laws should be repealed and such use, possession and sale should be legalized.

To the contrary, we believe that just because there is such a sharp conflict of opinions on such a serious subject, the total reversal of the present laws without further study would be misleading and do disservice to the community. Based upon the small amount of evidence presented to the Committee, it appeared that there were two completely conflicting views. One view was that marihuana is not one of the causes of crime and violence nor does it lead to the use of addicting drugs, particularly heroin. The other point of view was exactly to the contrary. The proponents of neither point of view could point to any evidence by way of scientific study, research, available statistics or opinion

of so-called experts in the field which could in any way be deemed to be substantially in support of their particular point of view. We, the minority of the Committee, are not necessarily in agreement with the existing laws and procedures which may be too punitive with respect to adults who use or possess small amounts of marihuana. However, we cannot accept the principle that because present laws may be too harsh they should be repealed in their entirety as to the class of adults affected by the majority recommendation.

Such repeal at this time would suggest, despite any disclaimers, that the Committee after careful study recommends that society sanction the use of marihuana as medically and socially acceptable. We would then be making a positive educational statement about marihuana use which our study does not warrant. The minority believes that the entire problem deserves much more careful and considerable consideration than this Committee has given to the issues and that until more substantial evidence has been presented supporting the view that legalized use and possession of marihuana by adults will be relatively harmless, the recommendations of the Committee majority are misleading and should not be adopted.

That the conflict of views results in what the majority term a "Scotch (inconclusive) Verdict" does not necessarily justify the jump to the conclusion that existing laws should be repealed

and use and possession by adults should be legalized. Legalization should only follow the positive verdict of the scientific community that the bases upon which the laws are founded are proven to be wrong. Short of that proof, consideration should be given to moderation of the laws and changes in the procedures of handling drug abuse victims so that those laws will be helpful rather than punitive with respect to users. All of the laws relating to DANGEROUS DRUGS AND NARCOTICS are presently under intensive study in many places.

The following members of the Committee concur with the above:

* Alessandro Baccari
* Gene N. Connell
* Dr. Leon J. Epstein
** Reverend Albert R. Jonsen, S. J.
Samuel Ladar
* Lawrence R. Lawson
* William Osterloh
* Mrs. Becky Schettler
* Zeppelin W. Wong

* Dissenting only on marijuana section of Report.
** Not participating on heroin section of Report.

SUPPLEMENTAL MINORITY REPORT

In addition to my agreement with the minority report concerning marijuana, I should like to add the following supplementary comments:

For most persons, for most varieties of the substance generally used in this country, and for most situations, the occasional use of marijuana has not proven injurious. One simply cannot deny the fact, however, that for certain people, in certain situations, and in certain dosages, marijuana is indeed a harmful substance. There are ample data which demonstrate that there can be behavioral toxicity with marijuana which may include impaired thinking and judgment, slowed motor responses, and with potent material, psychotic reactions. As with LSD, opiates, amphetamines, and cocaine, the important and meaningful hazards are in the area of behavioral, rather than tissue, toxicity.

Although the recommendation for legalization of marijuana is certainly not an endorsement of its use, and this was clearly not the intention of those who have endorsed the majority report, many would at least interpret this as an endorsement. In the current complex society, where individual citizens do not possess the technical information or the machinery to reach an informed opinion about the hazards, risks and dangers relative to the toxicity of chemical agents, they increasingly look to their government for protection, whether in canned tuna, sugar substitutes, or other

substances. We must, therefore, beware of misleading many of the great majority of Americans who have not experimented with marijuana because they believe it to be unsafe in the light of current restrictions.

It is of importance, also, for one to be aware that experience in this country with marijuana is rather limited to about a five year period of its wide usage, and to relatively low dosages of weak material. We must not dismiss reports and studies from other countries because they are not consistent with our own data. More conclusive data should be obtained before recommending the changes suggested in the majority report, data which may need several more years to accumulate. This is important because should deleterious chronic effects appear after marijuana is legalized, it will be exceedingly difficult to reverse either the trend of wider usage or government policy. This would surely suggest caution in recommending the legalization of marijuana. Also suggestive of caution is the fact that there are data which suggest that the current extensive use of marijuana may be a fad which will ultimately go the way of other transient fads and premature legalization may interfere with this natural process.

There is frequently expressed conviction that marijuana restrictions tend to criminalize youth. It is a fact, however, that certain other laws such as parking, speeding, and other traffic laws, are very often violated and often both inconsistently and irrationally enforced. These traffic laws nevertheless serve a

very useful social purpose. Marijuana restrictions probably act as a deterrant much as do the traffic laws, and both may well have desirable effects on the behavior of many individuals.

Certain aspects of the present marijuana laws do, however, appear unreasonable. This is particularly true for the severity of punishment for such offenses as the possession of small amounts of the substance. Among other questionable issues is that of the selective enforcement of laws concerning marijuana which results in far greater arrest frequency within certain age and socio economic groups. The net effect of such issues in the light of our present knowledge is not, however, sufficient at this time to recommend its legalization, as recommended in the majority report.

Submitted by: Leon J. Epstein, M. D.

APPENDIX "A"

SAN FRANCISCO CRIME LABORATORY SERVICES PERFORMED:

A COMPARISON OF YEARS 1960, 1969 and 1970

SAN FRANCISCO CRIME LABORATORY SERVICES PERFORMED:

A COMPARISON OF YEARS 1960, 1969 AND 1970

TYPE OF LABORATORY SERVICE	1960	1969	Change from 1960	1970	Change from 1960
1. CASTS (Moulage, silicone or plaster)	106	14	-92	8	-98
2. CHEMICAL AND PHYSICAL PROPERTIES					
A. Blood	182	72	-112	85	-97
B. Fibers	5	1	-4	2	-3
C. Glass	10	6	-4	1	-9
D. Miscellaneous	53	83	+30	5951 **	+5898
E. Paint	9	15	+6	17	+8
F. Powder residue	19	3	-16	6	-13
G. Stains	10	1	-9	--	--
H. Semen	170	95	-75	64	-106
I. Poisons & Narcotics	866	6103 *	+5237	6545*	+5679
3. DOCUMENTS					
A. Handwriting	320	39	-281	24	-296
B. Restoration	21	4	-17	6	-15
C. Typewriting	17	3	-14	--	--
D. Printing	10	9	-1	--	--
4. FINGERPRINTS					
A. Development					
(Powder)	2366	6933	+4567	7593	+5227
(Chemical)	241	96	-145	131	-110
(Photographic)	19	3	-16	1	-18
5. PALM OR SOLE					
A. Development	372	294	-78	61	-311
B. Comparison	90	122	+32	37	-53
6. FIREARMS					
A. Bullet or Case Exam.	32	97	+65	87	+55
B. Bullet comparison	61	99	+38	66	+5
C. Case comparison	26	46	+20	33	+7
D. Test patterns	1	1	--	4	+3
E. Test bullets fired	71	122	+51	88	+17
F. Weapon exam.	12	16	+4	32	+20

SAN FRANCISCO CRIME LABORATORY SERVICES PERFORMED:

A COMPARISON OF YEARS 1960, 1969 AND 1970, CONT.

TYPE OF LABORATORY SERVICE	1960	1969	Change from 1960	1970	Change from 1960
7. FLUORESCENT EXAMINATION	84	5	-79	--	--
8. MICROSCOPIC EXAMINATION					
A. Hair and fibers	19	14	-5	5	-14
B. Paints	16	4	-12	3	-13
C. Powder residue	26	1	-25	--	--
D. Stains (Blood & Semen)	389	130	-259	174	-215
E. Miscellaneous	12	2145	+2133	2746	+2734
F. Microcrystalline examination	715	2441	+1726	3427	+2712
9. PHOTOGRAPHY					
A. Special	216	162	-54	159	-57
B. Crime scene	326	404	+78	204	-122
10. SEROLOGICAL					
A. Precipitin	147	57	-90	85	-62
B. Blood group	110	32	-78	65	-45
11. SPECTROGRAPHIC	1	--		3	+2
12. SPECTROPHOTOMETRIC	81	338	+257	410	+329
13. TOOL MARK COMPARISONS	28	4	-24	7	-21
14. PHYSICAL MATCH	11	3	-8	5	-6

* Narcotics cases only.

** During 1970, physical examinations of narcotics were included for the first time.

APPENDIX "B"

AN ANALYSIS OF THE EXISTING CALIFORNIA SYSTEM OF INVOLUNTARY COMMITMENT OF NARCOTICS ADDICTS

"Is C.R.C. a Prison?"

"It is not a prison. Although it has the physical aspects of a prison for security, to prevent escapes and to keep illegal narcotics and drugs OUT of the institution, it is a '..... detention, treatment and rehabilitation facility' within the Department or Corrections."

"A person who escapes from CRC is charged with the felony of Escape, which carries a prison term of seven years."

California Department of
Corrections
"Orientation to California's
Civil Addict Program"

1. The Commitment*

In accordance with the emerging medical consensus that addiction is a "disease" and should be treated as such by the law, the California Legislature enacted in 1961 a program for the commitment of addicts who either volunteered for such treatment or were involuntarily committed for treatment by the courts. Part of this program consists of the California Rehabilitation Center in Corona, California, which is under the supervision of the Department of Corrections. This institution is commonly called "C.R.C."

The purpose of this program was stated in Section 3000 of the Welfare and Institution Code: "It is the intent of the Legislature that persons addicted to narcotics, or who by reason of repeated use of narcotics are in imminent danger of becoming addicted, shall be

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*A comprehensive, and readable, analysis of the C.R.C. commitment procedure has been prepared by the Los Angeles Public Defender's Office. See Fischer, Narcotic Addiction Commitment: From In to Out, Office of the Public Defender for the County of Los Angeles, Room 402, Hall of Justice, Los Angeles, California, 90012. This analysis is cited below as "Narcotic Addiction Treatment."

treated for such condition and its underlying causes, and that such treatment shall be carried out for non-punitive purposes not only for the protection of the addict, or person in imminent danger of addiction, against himself, but also for the prevention of contamination of others and the protection of the public . . ." The Legislature obviously had the intent not merely to attempt to rehabilitate addicts, but also to detain those addicts who could not be "rehabilitated" so that they would not "contaminate" the rest of society.

There are two ways by which a narcotics addict can be sent to C.R.C. First, the law allows a commitment even though an arrest has not occurred. Thus, "anyone who believes that a person is addicted to the use of narcotics or by reason of repeated use of narcotics is in imminent danger of becoming addicted to their use or any person who believes himself to be addicted or about to become addicted" can go to the District Attorney and petition for a commitment.[1] Also, any peace officer or health officer who has reasonable cause to believe that a person is addicted to narcotics or is in danger of becoming addicted can take the suspected addict directly to a hospital, where commitment proceedings are begun nearly immediately.[2] After an examination by a physician,[3] and a full judicial

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[1] Sec. 3100.6 W. & I. Code.

[2] Sec. 3103.5 W. & I. Code.

[3] Secs. 3105, 3108 W. & I. Code.

hearing, which may include a jury trial,[4] the person may be committed to C.R.C.[5] This commitment procedure, which is undertaken without the arrest of a suspected addict, is used very rarely in San Francisco. Chief Assistant District Attorney, Walter H. Giubbini has explained,[6] "Our office very rarely gets requests for this kind of commitment procedure. Most of the time, we get parents who investigate the possibility of having a son or daughter committed, but, when we explain the procedure to them, they decide not to go ahead with legal proceedings and find another way to deal with the problem."

Thus, most commitments to C.R.C. occur after a defendant, in a criminal proceeding, has been convicted of a crime, often by entering a guilty plea.[7] Both misdemeanor[8] and felony defendants[9] may be committed after conviction, if they are eligible for the C.R.C. program.[10] In either case, "if it appears to the judge that the defendant may be addicted or by reason of repeated use of narcotics may be in imminent danger of becoming addicted to narcotics, he shall adjourn the

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[4] Sec. 3106.5 W. & I. Code.

[5] Sec. 3106.5 W. & I. Code.

[6] Telephone interview with Walter H. Giubbini, August 30, 1970.

[7] See, generally, Narcotic Addiction Treatment, supra, note 1, pp.26-49.

[8] Sec. 3050 W. & I. Code.

[9] Sec. 3051 W. & I. Code.

[10] Sec. 3052 W. & I. Code.

the proceedings or suspend the imposition of the sentence and order the district attorney to file a petition for commitment . . ."[11] After two physicians, appointed by the Court, have examined the defendant, there is a hearing before a judge.[12] If the judge orders the defendant committed to C.R.C., and if the defendant is dissatisfied with the commitment, he may file a written demand for a jury trial, and he must be given a full jury trial, on the issues of his addiction, within 30 days.

How, then, does the Court determine whether a defendant is "addicted" or is "in imminent danger of becoming addicted to narcotics?" The legal test was further defined by the California Supreme Court in People v. Victor, 62 C. 2d 280, 292, 42 Cal. Rptr. 199 (1965):[13]

> In creating a distinct category of persons who "by reasons of repeated use" of narcotics are in imminent danger of "becoming addicted" the legislature has in effect recognized the fundamental medical fact that narcotic addiction is not so much an event as as process... Certainly mere sampling or experimentation does not make an addict; but it could be a step in the process. Among the identifiable stages in this process may be listed the following: (1) introduction to and initial experimentation with the drug; (2) "joy popping" or occasional use to satisfy personal gratification or social pressures; (3) increasingly frequent

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[11] Sec. 3051 W. & I. Code

[12] Secs. 3050, 3051, 3108 W. & I. Code

[13] Although this language is dictum, the Court, following Victor, reached a square holding in People v. O'Neil, 62 C. 2d 748, 44 Cal. Rprt. 320 (1965).

use coincident with development of a growing degree of emotional dependence on the drug; (4) bodily reaction to such use by development of increasing physical tolerance; (5) temporary cessation (whether voluntary or not) of use of the drug, resulting in manifestation of physical dependence in the form of withdrawal symptoms; (6) realization by the user of the fact that it was his failure to maintain his intake of the drug that caused the withdrawal distress; (7) continuing use of the drug thereafter for the conscious and primary purpose of forestalling or alleviating withdrawal distress; and (8) concomitant side-effects, such as the tendency towards lowering of the user's anxiety threshold so that normal (non-addict) instances of nervousness or discomfort become misinterpreted as signs of an impending withdrawal experience and hence increase even further the user's recourse to and dependence on the drug.

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To recognize that addiction is more a process than an event is also to clarify the scope of the challenged category of persons "who by reason of repeated use of narcotics are in imminent danger of becoming addicted." On the one hand, and individual may not escape an inquiry into his addictive status merely by showing that he is not yet "hooked" in the strict sense of the word. On the other, to be brought within this category it is not enough that the individual be "addiction prone" or associate with addicts, or even have begun to experiment with drugs; he must have subjected himself to "repeated use of narcotics." (The) argument that "repeated use" can theoretically mean as few as twice is unreasonable when the phrase is seen in the context of the whole addiction process; for "At least several weeks of experience with a drug are usually necessary for the development of an addiction." (Citations omitted). Nor is it enough that the individual has thus "repeatedly used" narcotics, or even be "accustomed or habituated to their use, unless such repeated use or habituation has reached the point that he is in imminent danger -- in the common-sense meaning of that phrase discussed above -- of becoming emotionally or physically dependent on their use.

If a defendant has been declared an addict, or is in imminent danger of becoming an addict, he is then committed to C.R.C. for institutional treatment.[14] During 1967, the median period of commitment for men was 14 months before release.[15]

Inside the dormitory like buildings at Corona reside approximately 2,000 men. Another 800 or so male "patients" reside in a wing of the state prison at Tehachapi. An additional 300 or so women patients occupy the C.R.C. branch in Patton. 13% of these patients are from the San Francisco area; northern California patients for the most part are institutionalized at Tehachapi. Together, these three branches constitute the entire state-run narcotics rehabilitation center; capacity: nearly 3,700 "patients."

Within the walls of these institutions, patients are normally separated into 60-man units, each with its own counselling staff. Large group meetings are held daily, five days per week, and include all dormitory residents plus their staff. However, the basic therapy sessions and work details are based upon those 60-man living units.

Each day the patients are subjected to "encounter group" styled therapy sessions, work details, educational and job training, and

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[14] Secs. 3050, 3051 W. & I. Code. Until 1970, the patient was required to spend at least six months in the institution.

[15] Narcotic Addiction Treatment, supra, note 3, p. 64.

psychiatric counseling; all calculated to enable the patients to overcome their desire for narcotic like substances and to prepare them to lead useful lives outside the institution.

However, workers from within the institution admit that some of these programs are ineffective. One gave his synopsis of the job training programs. He characterized the vocational training which patients receive as "nothing which would develop into a first class job." Each patient receives a few hours per week of instruction in such fields as upholstery, drafting, baking, dry cleaning, landscape gardening, small appliance repair, hotel maintenance and secretarial work, among others; however, the Center makes no attempt to determine what types of jobs will be in demand in California in the next few years, and shape its vocational program accordingly. Therefore many persons find themselves "trained" for jobs in which there are no openings. Also, the worker offered reasons which have prevented the Center from offering vocational rehabilitation of a more skilled and perhaps more demanded variety: first, the patients do not remain at the Center for a long enough period of time to be able to train them adequately in more complex fields; second, patients frequently do not have the educational background with which to be able to cope with more advanced programs; thirdly, the Center does not have adequate funds. For whatever reason, patients who are released from the California Rehabilitation Center are rarely much better prepared to accept employment than when they entered.

Perhaps for this reason, the Center does not have any formalized job placement program, although there are a few "contacts" in the meatpacking industry and shipyards which sometimes employ qualified ex-addicts. If the patient has had prior welding or mechanics training it is often not difficult to place him in a job; however, most patients are left to find a job on their own after leaving the institution.

The job training problem would not be as acute if it were not for the fact that a majority of addicts are school "drop-outs" and often do not possess even the rudimentary qualifications for most employment, although C.R.C. staff categorize them as often having average or above average intelligence. Although many employers will not hire persons who do not have at least a high-school degree, a majority of the patients at the California Rehabilitation Center have dropped out of school prior to receiving this degree. The Center offers high-school courses to such patients, but often a patient is released before he can qualify for a degree.

2. Release on Outpatient Status

After an initial unspecified period of treatment and observation, C.R.C. may ask that the defendant be released on an out-patient basis if the defendant "has recovered from his addiction or imminent danger of addiction to such an extent" as to warrant release.[16] This request

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[16]Sec.3151 W. & I. Code. A defendant gets an automatic yearly review of his status at C.R.C. by parole authorities.

is made to the Narcotic Addict Evaluation Authority, which is analogous to a parole board.[17] The N.A.E.A. then supervises the defendant on an outpatient basis, receiving reports from special supervisors employed by the Department of Corrections.[18] The defendant must be closely supervised, and he is subjected to surprise testing for narcotics use while on outpatient status.[19] There are about 220 C.R.C. outpatients in San Francisco.

If the defendant makes it through two consecutive years of outpatient status, then the Director of Corrections (in practice, the C.R.C. authorities) may certify the defendant's success to the N.A.E.A.[20] Then, if that Authority agrees with the Director, the Authority can file a request with the Court for discharge from the C.R.C. program.[21] The Court has to discharge the defendant from the C.R.C. program, but the defendant is then sent back to the criminal court where he was originally convicted. There, the defendant may have his original charges dismissed,[22] or he may be put on

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[17]Sec. 3150 W. & I. Code. The N.A.E.A. replaced the Adult Authority, which supervised addicts until 1963.

[18]In San Francisco, these supervisors are employed by the Parole and Community Services Division of the Department of Corrections, 71-11th Street, San Francisco.

[19]Sec. 3152 W. & I. Code.

[20]This discharge procedure is governed by Sec. 3200 W. & I. Code. In 1970, the requisite period of successful out-patient status was reduced from three years to two years.

[21]Id.

[22]Pursuant to Sec. 1203.4 P.C.

probation, or he may be sentenced to jail or prison, with credit for time served while at C.R.C.[23] As a practical matter in San Francisco, defendants who have successfully made it through the C.R.C. program (including the 2-year outpatient requirement) may be put on probation, but they will not receive jail time.

If the defendant begins to use narcotics at any time that he is on outpatient status, or if he refuses to submit to nalline testing for addiction, the defendant may be sent back to C.R.C. by the Authority, for further institutional treatment.[24] In addition, "if at any time following receipt at the facility of a person committed pursuant to this article, the Director of Corrections concludes that the person, because of excessive criminality or for other relevant reasons, is not a fit subject for confinement or treatment ... he shall return the person to the court in which the case originated for such further proceedings on the criminal charges as that court may deem warranted."[25] It is simply not clear whether the court must give the defendant credit for time served at C.R.C. where the defendant has been sent back to the court as "unfit

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[23]Sec. 3200 W. & I. Code.

[24]Sec. 3151 W. & I. Code. In re Marks, 71 A.C. 33, 77 Cal. Rptr. 1 (1969).

[25]Sec. 3053 W. & I. Code.

for treatment."[26] The Committee staff has witnessed a number of cases in which a defendant, rejected from the C.R.C. program, was sentenced by the San Francisco Courts without credit for the time served.

Staff members at the Center consistently proclaim that the most important crisis an addict will face in his struggle to refrain from narcotics is within the few weeks immmediately after he is released from in-patient status. The patient finds himself released from the cloistered atmosphere of the institution and thrust into his "old environment" where he must again struggle to support himself and to ignore the drugs which are within easy access. Most rehabilitation personnel emphasize that it is at this juncture that the need for community support for such patients becomes acute; yet, it is at this very juncture that the California Rehabilitation Program's support is seriously deficient. After the State spends at least $3,300 per patient for institutional care at Corona, the State then gives the patient $46.55 at the gate and tells him to go home. The patient must buy his clothes and his transportation home out of the $46.55. What happens when a patient gets to San Francisco is described by Mr. Walter China, Assistant

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[26] Compare: People v. Reynoso, 64 C. 2d 432, 50 Cal. Rptr. 468 (1968), holding no right to time served, with People v. McCuiston, 246 C.A. 2d 799, 55 Cal. Rptr. 482 (1966) (distinguishing Reynoso).

Supervisor of the Parole and Community Services Division of the Department of Correction in San Francisco:[27]

> If a guy has a family and a job waiting for him here, then there is a good chance that he'll make it. But take a guy who has no family and has no job waiting for him. We call these cases "cold turkey" releases. By the time he gets to the city, his gate allowance is almost gone. We try to do whatever we can for him -- contact welfare, the Department of Human Resources. And in most cases, we can give him enough money to live for a couple of weeks. But his budget is so low that he invariably ends up in a cheap hotel, usually South-of-Market. They are not good hotels, and there is a lot of drug use in the area. Some guys manage to make it -- somehow. But most guys get discouraged pretty fast. Also, they know that they can get a good bed, without roaches, and good food at C.R.C. So they can solve all their problems by shooting up, because they will go back to C.R.C. and it is a better place than they have.

Mr. China estimates that not more than 20% of all San Francisco out-patients make it through the out-patient requirement (recently changed from 3 to 2 years) to discharge. It is fairly obvious that the State, by giving a C.R.C. out-patient $46.55 at the gate, is jeopardizing an investment in excess of $3,300.00 per year and the ultimate success of its rehabilitation program.

The success of the out-patient program is not merely jeopardized by the inadequate funds given to addicts upon release from the institution. Perhaps the more important short-coming of the program lies in its disregard for the emotional problems occasioned by a person's "re-entry" into society from an institution. The problems of re-entry from prisons has been amply described by ex-cons in recent literature;

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[27] Interview with Walter China, Assistant Supervisor, Parole and Community Services Division, Department of Corrections, San Francisco, May 4th, 1971

the problems of re-entry from the California Rehabilitation Center are no different. Recent experiments with so-called "Halfway-Houses" where persons can learn to re-adapt to their environment in the presence of others who are going through the same process have shown that they may alleviate some of the stresses of re-adjustment. Privately-funded drug treatment facilities in the Bay Area, such as San Francisco's Walden House and Synanon, have long recognized the importance of community living -- where people can share their problems and where people force other people to be honest -- in their schemes of drug treatment. Ironically, the law has permitted the Department of Corrections to set up experimental half-way houses for C.R.C. patients since 1965. Section 3153 of the Welfare and Institutions Code as follows:

> The Director of Corrections is authorized to establish one or more half-way houses in large metropolitan areas as pilot projects in order to determine the effectiveness of such control on the addict's rehabilitation, particularly upon his release from the narcotic detention and treatment facility. Rules and regulations governing the operation of such half-way houses shall be established by the Director of Corrections and shall provide for control of the earnings of persons assigned to such half-way houses during their residence there, from which shall be deducted such charges for maintenance as the Director of Corrections may prescribe.

The California Rehabilitation Program utilizes two half-way houses in Los Angeles and one in San Diego; however, although there is a critical need for one in the San Francisco area, one has yet to be established here by the state.

3. Release from the Program

If a patient completes two full years of living in the community without having used drugs or having engaged in anti-social activities, he may be released permanently from the program.[28] If he resumes or seems in danger of resuming his narcotics habit, or engages in anti-social activity (unless it is serious enough to warrant his release from the program and his incarceration in prison), he will be returned to in-patient status for another series of months until, again, he seems qualified to release.[29] This revolving door procedure may continue up to the entire term of his commitment -- 7 years for one involuntarily committed, or 14 years if he is recommitted, or 10 years if the director of the program petitions the court for a three year extension of the original commitment.[30]

4. The Limitations of the C.R.C. Program

Why doesn't the C.R.C. program do even an adequate job for defendants in San Francisco who use addictive or dangerous drugs? There are a number or reasons:

(a) Limitation to Addictive Drugs

The C.R.C. program is limited by statute to defendants who are "addicted" or who are "in imminent danger" of addiction.[31] Consequently,

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[28]Sec. 3200 W. & I. Code

[29]Sec. 3151 W. & I. Code

[30]Sec. 3201 W. & I. Code

[31]Secs. 3050, 3051 W. & I. Code

the program does not provide treatment for defendants who are habitual users of dangerous non-addictive drugs -- mainly amphetamines and barbituates. Although some habitual users of these drugs may get treatment at either Napa or Atascadero, if they have been committed to these facilities for treatment of mental illness under either Sec. 1370 or Sec. 1026 of the Penal Code,[32] there are undeniably significant numbers of defendant in the city who are habitual users of these drugs and who end up in the county jail without treatment.

(b) Statutory Limitations[33]

Not all defendants who are addicts are eligible for the C.R.C. program. Indeed, Section 3052 of the Welfare and Institutions Code specifically excludes defendants who have been convicted (a) in the present offense, or (b) previously of certain offenses, many of which might be logically connected with drug use. For example, the statute excludes defendants convicted of robbery, first-degree burglary, pimping, pandering, and "any felonies involving bodily harm or attempt to inflict bodily harm."[34] However, "in unusual cases, wherein the interest of justice would best be served, the judge may, with the

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[32]Penal Code Section 1370 provides for commitment for treatment where a defendant is not capable of standing trial. Penal Code Section 1026 provides for treatment where a defendant has been found "not guilty by reason of insanity."

[33]Generally, see: Note, Statutory Ineligibility for Commitment of Narcotics Addicts, 19 Hast. L. J. 637 (1968).

[34]The statute also excludes defendants convicted of numerous violations of the Health and Safety Code. See Sec. 3052 W. & I. Code.

concurrence of the district attorney and defendant, order commitment notwithstanding Section 3052."[35] Although some of San Francisco's judges have exercised this discretion and have sent defendants to C.R.C. in spite of the defendant's ineligibility under Section 3052, they have seen most of these defendants sent back. The judges also know that C.R.C. has sole discretion whether to send a defendant back to court,[36] and C.R.C. itself has declared that it will not accept defendants who have:[37]

(a) a history of large volume narcotics or other drug sale beyond that necessary to support own addiction;

(b) a pattern of aggressive and violent behavior;

(c) a long and continuous history of criminal behavior, usually preceding addiction history, and particularly older men who have served several prison terms before; and

(d) a pattern of overt and provocative homosexuality.

One San Francisco Superior Court Judge said:

> There is no doubt that C.R.C.'s standards are quite restrictive. I can't blame them too much. It's a relatively new program, and they want to prove themselves. They know that they can't take too many risks. But it makes it tough on the Courts, because there is

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[35] Sec. 3051 W. & I. Code.

[36] Sec. 3053 W. & I. Code.

[37] C.R.C. Memorandum re: "Exclusionary Criteria, June 3, 1969," in Narcotic Addiction Treatment, supra, note 3, at p. 55.

> just no place to send a lot of people for decent treatment. I know that a defendant will be very lucky if he gets any treatment in state prison, but that is where the worst addicts -- the 30-year addicts -- go. And what about a homosexual? I simply can't send a homosexual any place where he will get institutional care for his drug problems.

(c) The "Imminent Danger" Test

The test for C.R.C. commitment, as announced by the California Supreme Court in People v. Victor, supra, indicates that "repeated use" of narcotics is not, in itself, sufficient to constitute addiction. Rather there must be an "imminent danger" of physical or emotional dependence. Most people who are concerned with so-called "drug-treatment" -- from doctors to social workers to streetworkers -- have come to realize that "treatment" for drug abuse is far from merely a medical problem. In most cases, medical care for heroin withdrawal, for bad trips, can be provided in a rather routine way. Thus, drug treatment workers know that their real problem is in figuring out ways to deal with why people take, and become dependent on, dangerous drugs. The problem with drug abuse rests in people's heads, not in their bodies.

It should not be surprising that "treatment" for drug use -- which ordinarily includes a variety of psychological techniques, ranging from individual psychiatric counseling to in-house community living, -- is far more successful where a drug user is still experimenting.[38] Yet

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[38] Interview with Josea Bly and Walter Littrell, Walden House, William Bathurst, Haight-Ashbury Drug Treatment Center.

this is precisely the stage of drug use which is, by Court rule, excluded from C.R.C. treatment. It is easy enough to understand why the Court ruled as it did. Given limited resources at C.R.C., it makes sense to limit C.R.C. services to those who really need intense institutional care. In addition, the Court was undoubtedly influenced by the fact that C.R.C. is an institution. Defendants cannot walk out. Thus, before a defendant is committed, and removed from society for a substantial period of time, there must be adequate evidence that his use of drugs is likely to pose a danger to society. Consequently, the problem is not with the Court-made standard for commitment; rather, the problem is that institutional confinement is not a good way of treating drug abuse at its earlier stages.

(d) Deficiencies in the Outpatient Program

The C.R.C. program relies heavily on its outpatient program, whereby defendants are released from C.R.C. to return to their places of residence.

Yet, as we have shown, this outpatient component of the C.R.C. program is ridiculously weak. The frugal release dole of $46.55 would cause problems enough in a society with full employment, for it is not easy for an ex-addict to get a job even when jobs are available. In these times of high unemployment, when even trained engineers and college graduates cannot find jobs, what chances are there for the ex-addict? One thing is clear: an ex-addict needs income to support

himself, if not a renewed habit. If he is ineligible for unemployment, for welfare, or for other state income, and if he cannot find a job, it is very likely that he will turn to a familiar and certain (albeit risky) source of income: pushing heroin.

5. The Failure of C.R.C. Rehabilitation

Dr. John Kramer, formerly Research Director at C.R.C., and Richard A. Bass who studied the performance of 121 addicts after the addicts left C.R.C., reported that "...while some people successfully complete three years of outpatient status (OPS),...most of the remainder do not and it appeared that they would spend about half of their rather long commitments within the institution."[39] These researchers tabulated that for every addict who successfully completes a three year outpatient period, four do not. Out of the nearly 9,000 individuals who had been committed to the program since its inception in 1961, only 300 had been discharged for having successfully completed the outpatient program by 1968.

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39 Kramer & Bass, Institutionalization Patterns Among Civilly Committed Addicts, 208 Jour. Am. Med. Assoc. 2297, 2300 (July, 1969).