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H. H. A. Cooper

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THE NEW YORK EXPERIENCE

by H. H. A. COOPER*

I.

The first thing I would like to say is something about the general socio-historical aspect of the drug problem, an aspect touched upon by several of the speakers and touched upon in different ways. As an historian, I find one variable of this drug problem very striking. I was reminded of this particularly a couple of weeks ago when I was standing on the battlefield of Gettysburg. I was standing on Little Round Top and I realized at that moment how much the actions, the behavior and the thoughts of a very few men had changed the course of American history. If somebody had contemplated doing something differently, the whole setting in which we find ourselves today might well have been different. We are dealing, ladies and gentlemen, with human beings. We are very often dealing with human beings whose even casual utterances can have a much greater impact than would appear possible. Very often a peculiar idea that comes almost unwarranted out of a life experience, addressed to a particular problem at a particular time, can have an immense and lasting impact.

When we talk of historical events, we should be cognizant that those events were generated by human beings. For example, the Knapp Commission¹ was established largely in response

* LL.B. University of London, 1961; M.A. (Legal History) University of Liverpool, 1964; LL.M. (Criminal Justice) New York University, 1972. In 1973 appointed Deputy Director of the Center of Forensic Psychiatry of New York University.

1. The formal title of the Commission is *Commission to Investigate Allegations of Police Corruption and the City's Anti-Corruption Procedures*. This Commission was established in May, 1970 by executive order of Mayor John V. Lindsay. It was chaired by the Hon. Whitman Knapp, a distinguished United States District Court Judge. The Commission was established largely in response to an article appearing in the New York Times on April 25, 1970 charging widespread police corruption and official laxity in dealing with such corruption. The case of Frank Serpico in 1967 had raised these allegations of corruption.

It is particularly interesting, in the present connection, to see what the Commission said about narcotics:

The Commission believes that the police must continue to assume responsibility for enforcement of laws forbidding narcotics sale and possession as long as Society deems it necessary to invoke criminal sanctions in this area. However, increased study and attention should be given to ways other than criminal sanctions for dealing with the addict.

The laws against marijuana are particularly controversial because of their growing unenforceability and the conviction of many that they are undesirable. However, the Commission has not found

to information provided by one man, Frank Serpico, prodded along by David Durk and then blown into something very large by the *New York Times*. Also, the fact that so little time was devoted by Congress to marijuana, as Dr. Kittrie indicated to you yesterday, and the fact that this did have such momentous consequences was no accident, but was rather a product of the interactions between human beings. It was a product of our culture, a product of our way of thinking, a product really of our whole attitude toward the solution or non-solution of the drug problem. This, to me, is a very important lesson. I would like you to bear this very much in mind as my discussion progresses.

Furthermore, you heard Dr. Lindesmith speak about the stepping-stone theory. I think this theory had an immense impact upon our attitude toward the drug problem, just as the so-called domino theory had in our attitude toward the Cold War. Theories such as these constitute attractive words and present attractive ideas. The peculiarities of American society make them even more impressive. But here, too, we should be cognizant that theories are generated by human beings.

One of the difficulties in the resolution of the drug problem is that lawyers generally try to shy away from problems that are inconvenient by an appeal to the semantic difficulties in their resolution. We find extraordinary complexity in the word "obscenity"; we find that "negligence" is a word with which lawyers have played for many years, adding such categories as "crass negligence," "gross negligence," and so on, which did not help things very much but made for a great deal of additional litigation.

This playing with words, of course, is one of the lawyers' penchants. But you know, when you have had some training in this art, you come to realize that deep down everything is all very much the same, all dressed up in different garb. If you can strip it down, you can get to certain essentials.

I suggest to you, if you think very much about what we said yesterday and today, that if you substitute "gun control" for "drugs," we could have put all that we spoke about in exactly the same language. Are you in favor of licensing? Are you not in favor of licensing? Would greater suppression or greater law enforcement produce the type of results you want?

What I think we have to do is to look at some of these things

evidence that the marijuana laws are a distinct factor in police corruption.

G. BRAZILLER, *THE KNAPP COMMISSION REPORT ON POLICE CORRUPTION* (1973).

in a much more fundamental light. What exactly are we trying to do?

II.

I would like to give you a flavor of the New York legislation. In this respect, however, I think you should remember that New York City is only a part of New York State; that New York City is not the center of the world; that, to the contrary, New York City has intimate connections with the rest of the world. The "New York Experience," if you like, is the product of world experience. New York City happens to be the focal point of certain matters only because of its size, because of its urban complexities and because of the historic possibilities of it all happening there.

One of the things I think we should remember is that philosophy plays a very big part in the "New York Experience." New York City in particular has a motto: "Think big, but cheap." This notion permeates the city government. It permeates legislation. It permeates the solutions which are possible.

Successful legislation is the art of coping with the possible. However, there have been many attempts in New York to do by legislative means what really were impossible things. The point I would like to make is that one cannot understand legislation simply by looking at the mere words of the laws. This is not because the laws are difficult to understand in the terminology that is used, but because an understanding of the law as a complex demands a total knowledge of the problems with which the legislators are trying to grapple. One of the problems in understanding the laws is that the legislators themselves very often do not possess a total knowledge of the problems which their legislation addresses. Furthermore, I must ask you to consider another question: What is the will of the legislators?

Anybody who has been on a commission for the revision of laws or has engaged in legislation knows that very often in such a conference lasting, say 15 days, 11 days are spent discussing the first paragraph and very often the first sentence, and the positions of commas and semicolons. The 278 subsequent articles are promulgated in the next 4 days just before the final plenary session during which everybody wants to leave for the cocktail party.

Another of the problems with much of our legislation is that it is not made from an informed basis. Intelligence gathering is an essential part of decision making. A person who has not gathered the intelligence or, in academic terms, has not done

his research is not going to have the basis for making an informed decision.

One of the troubles that New York encounters that is peculiar to the state, and to New York City in particular, is the enormous body of people living in a relatively small area, subject in effect to a larger state organism, which often is in conflict with the local authorities who are interested in the more immediate government of the city and the population therein. You saw, for example, Mayor Lindsay at loggerheads with Governor Rockefeller. These are historical facts. They make themselves felt in terms of money available for programs, in terms of legislation, and in terms of what could be done about problems.

Furthermore, every public person, such as former Governor Rockefeller, gathers around himself a number of advisers, a number of young, ambitious people with ideas who wish to make their mark in public administration. Theirs are the ideas that become translated and manipulated into laws. When we talk about laws, what they are, what they do, these are ideas of individuals, which may or may not be right, which may or may not do what their authors feel should be done. You have to take all these things into consideration when you are considering the effectiveness of the New York legislation.

III.

One of the things that we see with the "New York Experience" is that it is essentially the product of very special factors. If you go back through the years you will see that these factors have a habit of repeating themselves: urban crises, corruption in local government, lack of confidence in the police, lack of confidence in the judiciary, ineffective law enforcement, increased crime.² Then the cycle changes and we get an individual taking charge, doing something about it. Recognition of this pattern is very important for an understanding of the "New York Experience."

When you look at the drug scene in New York, you cannot separate it from the general crises in the administration of justice. At the heart of it all is a belief that there is an association between drugs and crime.³ The question of the precise connection between drugs and crime, in my opinion, is far less important than the beliefs attaching to this. If Professor Lindesmith

2. See generally the excellent article by Quinn & McLaughlin, *The Evolution and Present Status of New York Drug Control Legislation*, 22 *BUFF. L. REV.* 705 (1973).

3. See N. KITTRIE, *THE RIGHT TO BE DIFFERENT* 233-35 (1971). See also Note, *Model Narcotic Drug Legislation*, 8 *CRIMINOLOGY* 156 at 157-58 (1970).

or I were able to prove to you that there is or is not a connection between drugs and crime, it would have, I hazard to say, no influence whatsoever upon your beliefs in this matter. From the point of view of the administration of justice, it is of no use to offer scientific palliatives to panicky people.

There is a great and pervasive fear of crime in New York City today. You can detect it in the way people walk, in the way people speak or do not speak, in the way crime on the streets has made its impact on the life of the community and in the way crime has caused the quality of life to deteriorate. Walk in some of the areas of Brooklyn, not at night, but during the day. Walk in some of the areas of Manhattan and the Bronx and you will understand what people think about this problem. There is an overwhelming preoccupation with street crime. In Forest Hills, which is an affluent neighborhood of Queens, there is an ineradicable belief that street crime and drug abuse are intimately connected, and much of City Hall policy is made over in Queens.

Professor Kittrie in his presentation yesterday referred to 1971-1973 as "the panic years." When you panic, you do not work well. Things are apt to go wrong. Look at the crises that we were passing through in New York at that time. September 13, 1971, is a very historic date—Attica. Attica came at a very inconvenient moment for New York, both as a state and a city. It came at a time when the urban crisis was perhaps pressing most heavily upon the population. It came also at a time when the economy was starting to turn against us. All of these factors were exacerbated by relatively small matters, such as police corruption.

The New York system is quite entrenched. There are five boroughs with five district attorneys, each endowed with immense legal resources at his disposal, each organizing his office differently from the rest, each entertaining his own ideas. Again, you have to look at the personalities. You have to know that Frank Hogan had been in the Manhattan office unopposed, a pillar of respectability, for over thirty years, but that in those years of panic and crises he was already suffering from cancer and was a dying man.

You have to know, quite honestly, that many judges were suspect. You have to know that organized crime is very powerful in New York. You have to know, too, that it is difficult in those circumstances to know whom to trust. It is difficult to trust even the most trustworthy when the climate of fear exists. Now, these are the facts of life of the "New York Experience."

IV.

At the heart of the crises facing New York City and many of the other parts of the State of New York, as indeed many parts of the United States in general, is the problem of plea bargaining. In this respect, you have to understand two things. One, that there are sentencing principles, and two, that plea bargaining is a very important thing in American law. Can you or can you not plea bargain? Is there or is there not discretion in the offense with which a client is charged? This is the important question today, and it is most material to the present subject.

Plea negotiations are essential to relieve court calendar congestion. It is a fact that if you were to try even a small percentage more of the persons by reference to what we always have understood to be the proper constitutional processes of trial, the system would break down, for it would be simply overloaded.

The concern about plea bargaining is widespread. The professional and lay literature reflect this concern. From time to time, ambitious calls are made for the abolition of plea bargaining and for a reversion to the understood trial practices for which plea bargaining is a substitute. Even the most cursory examination of court calendars in our large urban centers would indicate that these ideas are quite utopian and that plea bargaining in some form or other is decidedly here to stay.

Furthermore, plea bargaining serves the goals of law enforcement by permitting the exchange of leniency for information and serves the ends of justice by allowing the imposition of individualized sentences.⁴

Now, what did plea bargaining do in terms of criminal policy? Street crime was on the increase. People were afraid to live in the inner-city. They began to feel that they were no longer able to visit even the Metropolitan Museum with the price of admission in their pockets for fear of being mugged on the way. People were starting to panic. The legislature had to face this problem. Political pressure was exerted upon Governor Rockefeller. The Governor had a lot of the "New York Experience" on his back. Well, he decided with his advisers that he was going to use the strong policy of deterrence, the iron fist. Thus, the idea in New York was to provide for a mandatory death sentence for certain classes of offenses. Furthermore, sentencing was to be mandatory, swift and expeditious and was to address many of

4. In this connection it is worth examining the leading New York case of *People v. Selikoff*, 35 N.Y.2d 227, 360 N.Y.S.2d 623, 318 N.E.2d 784 (1974).

the problems that were besetting us. The legislature had struck, in effect, at what was considered to be the key to this problem, namely, judicial discretion and the discretion vested in the prosecutor. The new laws were aimed at producing stiff, mandatory sentences in the nature of a Draconian order.⁵

The deterrence concept, again, is another belief. You either believe in deterrence or you do not. Empirical study is not feasible. We can never know who has and who has not been deterred. We can only conjecture. Nevertheless, people hold very strong beliefs in this regard.⁶

However, there is one thing that is infallibly demonstrated when you speak of deterrence and that is that the only mobility is upward through escalation of punishment. You saw this demonstrated very neatly in the Viet Nam War with regard to the bombing.

Stalin had the most effective way of deterring people in the 1930's. When the *kolkhoz* farmers opposed him, he gave them a choice of collectivization or going underground, and he did not mean the sort of underground we mean. He put ten million people there. Afterward, he had very few dissidents. This is the price of a deterrence policy.

Is that what you want to do? What is the price you are willing to pay? You have to ask yourself in very simple terms at the start: "How far do I want to go?" Governor Rockefeller had to face this very question.

Now, neither the lawyers, who practice before the courts, nor the judges like the new laws.⁷ No one is impressed with

5. See Signorelli, *A Judicial Analysis and Critique of the New Drug and Sentencing Laws*, 46 N.Y. Sr. B.J. 9 (1974) for an excellent synopsis of the new law and all the areas affected by it.

See also on the question of plea bargaining *People v. Venable*, 46 App. Div. 2d 73, 361 N.Y.S.2d 398 at 407 (1974) where the court said:

It must be observed that as useful and valuable as the plea bargaining process is in administering the criminal process in a free society, there is nothing which would indicate that either a prosecutor or a defendant has any constitutional duty or right in regard to the existence of plea bargaining. and *People v. Gardner*, 78 Misc. 2d 1087, 359 N.Y.S.2d 192 at 201-02 (1974) where the court said:

The very drug crime classification and sentencing provisions which defendant so stridently objects to reflect no more than a legislative awareness that earlier and less stringent measures had failed to deter illicit drug traffic and the heinous crimes that it spawns.

6. See generally Cooper, *Crime Control and the Deterrence Perspective*, 11 CRIMINOLOGY 161 (1973).

7. Of particular interest in this regard is the case of *People v. Mosley*, 78 Misc. 2d 736, 358 N.Y.S.2d 1004 (1974), particularly the observation of the court at 1011:

There is one test the Court deems more important than the others: the conscience of the Court. It is a tribute to our system that the more fundamental a question becomes, the more human and less legalistic becomes the so[rt] of answer. The Court does not need

their efficacy. Yet, the profession allows it to be done. One of the things that strikes me is how very often we do not talk about what really bothers us, simply because it is inconvenient to do anything about it. There are many things that lawyers would not say in public about the New York drug laws, about the crises in the administration of justice, about the efficacy of removing judicial discretion, and about the removing, most importantly, of the possibility of plea bargaining.

V.

Currently, there are those in New York who seek to regulate the drug problem by taxing it out of existence.⁸ The American solution, quite frankly, is "if you cannot stop it, tax it." Remember this: We eliminated one of the greatest gangsters in the history of the United States in this very city by the use of a tax statute. We removed an inconvenient Vice President by the same means.

We can never divest ourselves of a bureaucracy, ladies and gentlemen. That is Parkinson's Law. Thus, we might as well get a bureaucracy that knows what it is doing and make use of it. If there is one thing bureaucracies do know, it is how to assess and levy taxes. They learned that from King William I's day onward, and it has been an invariable rule of government ever since.

I would like to suggest to you that if we are going to function in a conventional and constitutional framework, that this is all we can do. We must learn by experience accordingly. If we want to go the other route, of course, I would like to point out to you how efficiently that can be done. Those of you who saw the film *The Godfather* know how easy it would be for a person with the power and the means to eliminate somebody who is trafficking in drugs. If you have the power, you can do it. Just as Mussolini crushed the Mafia in Italy.

When faced with a desperate situation you strike at the top. When the Israelis were really bothered by terrorism and sent those raiders into Lebanon, they did not eliminate middle eche-

precedent to comprehend the effect upon a defendant of a life sentence. The Court must react as a man as well as a jurist. This life sentence provision is a statute without mercy. It is a statute without the possibility of mercy. It is without compassion. It is vindictiveness retribution. It offends the conscience of the Court and beyond reasonable doubt the principles inherent in our Constitution. The Court cannot and will not suffer the quality of mercy to be strained. It cannot permit the legislature to repeal compassion. Conscience must stand. The statute must fall.

8. For an example, see the background paper for the position favoring legalization and regulation of marijuana of January 23, 1975 by the Community Service Society of New York. This is in support of a bill by State Senator Leichter to this end.

lon people. The man they shot in bed was at the very top. It was very effective. We know who the major traffickers are, but we do not strike at them. We cannot do so in our constitutional system.

Now, let me put a point to you quite forcibly. What do we want to do about the so-called drug problem? Do we want to stop people from using or abusing drugs altogether? If we lived in a dictatorship, particularly with me as dictator, it would be very easy to do. Very easy. But we do not. We live in a country protected by the rule of law. Nevertheless, I am going to leave you with one unconstitutional thought. If you do not want to tinker and you really mean business, if you were going to close down the entire operations of the Chase Manhattan Bank, would you prosecute the manager of the branch at One Chase Plaza?