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REPRESENTING HEROIN USERS: SENTENCING AND OTHER ISSUES

by THOMAS D. DECKER*

INTRODUCTION

In light of the increasing number of heroin addicts entering the criminal justice system,¹ a long overdue need for dialogue about drugs, and punishment for their use, has become pressing. For one thing, the heated emotionalism and bad information surrounding all aspects of drug use, treatment efforts, prosecutions, and sentences upon conviction require the re-examination of many basic assumptions. Second, regardless of the nature of the offense of which any type of drug user is convicted, the newness of effective sentencing approaches and treatment programs is such that educative efforts are all but required of defense counsel. Third, the impact of law enforcement on drug use seems to have been negligible, and perhaps even counterproductive, despite massive increases in funding. The suggested vehicle for advancing some of these considerations in the context of a criminal case is a post-conviction memorandum on the defendant's behalf in support of the recommended sentence. Such considerations also bear on both pre-trial and trial strategy.

Representation of a heroin user is not limited to drug cases, of course. Users are charged routinely with a variety of crimes, typically of a non-violent sort, usually having to do with their need for funds. For reasons that will appear below, the attorney should be aware that the client's involvement with a drug treatment program will be helpful in preparation for trial as well as at sentencing if things should come to that. It is suggested, however, that the client must express a sincere interest in par-

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1. As with any aspects of what is known as the drug problem, reliable statistics are hard to come by. The trend is quite visible to some practicing lawyers, however, as a likely outgrowth of the growing demand in law enforcement circles for informers and large increases in prosecutive efforts and budgets in the past few years. And there seems no reason to question the continuing accuracy of the finding over a decade ago that more than forty per cent of arrestees in federal drug prosecutions were addicts. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE—THE CHALLENGE OF CRIME IN A FREE SOCIETY 219 (1967) [hereinafter cited as 1967 COMMISSION]. A much greater number of local arrests, of course, involve drug users. See note 9 *infra*.

ticipating in a program; a casual involvement, followed by relapse, could work to his or her ultimate disadvantage.

Counsel should be acquainted with local drug programs before involvement with the case. Not only is the accused apt to be unfamiliar with the possibilities, but it may also be necessary to convince the judge of the merits of an out-patient program, or of the relative security provided by a residential program, before the client's release on bond can be obtained. That is, the defendant's agreement to participate in a drug treatment program may be sufficient to obtain his release on a recognizance bond; without such an agreement a secured bond may be set that is beyond his financial means.

Once the client appears to be participating satisfactorily in a program, consultation with the prosecutor may be appropriate. The case may be such that prosecution will be declined or deferred in light of the defendant's progress. At the least, a request should be considered for a delay in presentation of the case to the grand jury until the defendant has had the time to compile a meaningful record of freedom from heroin use.²

The New War on Drugs

In the past few years we have seen a massive escalation in the venerable war on illicit drug use and the declaration of a number of new engagements. A few basic, though incomplete, statistics are sufficient to point out the trend and are also instructive of the shifting priorities that have emerged:

	Approximate Marijuana Arrests Nationally ³	Federal Drug Indictments ⁴ Marijuana	Other	Federal DEA and BNDD Budgets (millions) ⁵	Federal Funds for Enforce- ment of of Drug Laws (millions) ⁶
1964		365	1,399		
1965	19,000	562	1,632		
1966		689	1,388	\$5	

2. A slow pace after indictment may also be desirable. As discussed in the textual section on *The Success and Desirability of Court-Ordered Treatment and Probation, infra*, there is a correlation between the length of involvement in a drug program and the likelihood that the defendant will continue to abstain from drug use.

3. U.S. NEWS & WORLD REPORT, Apr. 28, 1975, at 37.

4. These figures are derived from the annual publication ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR, Table D.2.

5. See Pub. L. No. 93-481 (Oct. 26, 1974), 16 CRIM. L. RPTR. 3048 (Feb. 5, 1975); NATIONAL COMM. ON MARIJUANA AND DRUG ABUSE, DRUG USE IN AMERICA: PROBLEM IN PERSPECTIVE 277 (2d Rep. 1973) [hereinafter cited as DRUG AMERICA]; ABA SPECIAL COMM. ON CRIME PREVENTION AND CONTROL: NEW PERSPECTIVES ON URBAN CRIME 37 (1972) [hereinafter cited as NEW PERSPECTIVES]. While the 1975-77 budgetary figures in the text are spending authorizations only, they reflect generally what has and what will be expended for DEA operations.

6. FEDERAL STRATEGY FOR DRUG ABUSE AND DRUG TRAFFIC PREVENTION 1974, at 17 (Report to the President of the Strategy Council on Drug Abuse) [hereinafter cited as 1974 STRATEGY]; DRUG AMERICA, *supra* note

1967		989	1,349		
1968	80,000	1,502	1,358		
1969		1,936	1,522	16.8	\$20.5
1970		2,010	1,501	25.8	41.4
1971	225,000	2,530	2,477	41.3	81.6
1972		3,002	3,756	59.7	155.3
1973	421,000	3,519	5,298	71.2	226.1
1974		2,868	4,506		254.7
1975				105.0	294.5
1976				175.0	
1977				200.0	

*The Significance of Treatment Programs
in Representing Drug Dependent Persons*

The recent escalation of the law enforcement approach has been accompanied by a slowdown in drug treatment efforts. In fiscal year 1975 the federal funds allotted to treatment programs dropped approximately \$50 million,⁷ while the law enforcement budget rose by a like amount.⁸ Another by-product of the law enforcement effort has been the entry into the criminal justice system of heroin users in unprecedented numbers. While, just as a decade ago, most of these persons are perhaps charged with theft or other crimes not directly relating to drugs, a dramatically increased number of heroin addicts are also being charged with possession or sale of small amounts of drugs.⁹ During this same time span in many locales, federally-funded drug abuse programs were established, passed through experimental periods, and now report encouraging results with alternatives to the use of illegal narcotics and other drugs.¹⁰ The ways in which these diverse approaches (prosecution and treatment) relate are of immediate importance to attorneys who must understand and

5, at 280, showing a budgetary increase between fiscal years 1969 and 1973 of more than one thousand percent. The federal agency charged with drug law enforcement, the Drug Enforcement Administration (DEA), was formed by the President in 1973, replacing the Bureau of Narcotics and Dangerous Drugs (BNDD), the Office of Drug Abuse Law Enforcement (ODALE), and the Office of National Narcotics Intelligence (ONNI). GOVERNMENTAL RESPONSE TO DRUGS: FISCAL AND ORGANIZATIONAL 12 (1974) [hereinafter cited as GOVERNMENTAL RESPONSE].

7. GOVERNMENTAL RESPONSE at 2-11.

8. *Id.* at 2-3. It is suggested, however, that existing programs have not been utilized to capacity. *Id.* at 14. But Illinois officials claim that the facilities of the Illinois Drug Abuse Program have operated at close to capacity, and estimate that budget increases in the neighborhood of 150% would be necessary to serve the needs of drug dependent persons in the Chicago area who would likely seek treatment if it was available. Interview with Edward C. Senay, M.D., Director, Illinois Drug Abuse Program, in Chicago, Illinois, June 7, 1975; interview with Jeffrey C. Doane, Director of Legal Services, Illinois Drug Abuse Program, in Chicago, Illinois, June 6, 1975. And treatment programs in New York City were estimated in 1972 to reach only about ten percent of the city's addicts. NEW PERSPECTIVES, *supra* note 5, at 44.

9. DRUG AMERICA, *supra* note 5, at 254, reports that 80% of the half-million annual drug arrests at the local level are for possessory offenses. Most arrests of addicts, though, are for non-drug offenses. *Id.* at 175.

10. See generally NEW PERSPECTIVES, *supra* note 5, at 50-64; DRUG AMERICA, *supra* note 5, at 314-46.

urge at the sentencing stage the need for continued treatment. These same considerations also support the rejection of commonplace attitudes, particularly that progress with a heroin problem should have no bearing on sentences imposed for such crimes as theft or small sales, or that imprisonment ought to be required for any drug offense though the defendant is no longer drug dependent.

Sentencing the Former Addict: A Brief Look

While different aspects of drug cases are considered herein, the focus is on cases involving persons who commit non-violent offenses while addicted to heroin, later enter drug programs (typically under the pressure of pending charges, often as a condition of release on bail), and at sentencing are known not to have used heroin for an appreciable period of time.¹¹ The thesis of this article is that the interests of both society and the offender ordinarily are parallel in this setting; the sentence should be one of probation, conditioned, if appropriate, upon continued participation in a drug program. In federal cases, at least, if a probationary sentence is imposed and the defendant has a history of drug use, a routine condition of the sentence is continued forbearance from the use of illicit drugs, whether or not the defendant participates in a program.

The efficacy and rightness of probationary sentences for former addicts arise from a number of factors. A prime reason that incarceration holds little promise is its ineffectiveness as a means of altering a person's susceptibility to drug abuse.¹² Temporary removal from the community seems to not only whet the addict's need for heroin, but also to expose other inmates to the lifestyle of the user.¹³ Incarceration, many believe, also reinforces the tendency towards drug dependency, for the prisoner inevitably acquires further knowledge of the means by which to raise funds illegally and is exposed to the frustration and bitterness of that setting—outlooks that may have prompted

11. The shorthand expression "former addicts" sometimes will be used in referring to such persons. Such simplistic tags are of little value in understanding patterns of drug use and abuse, as the National Commission on Marijuana and Drug Abuse found. See text accompanying notes 60-66 *infra*. Nonetheless, in the context of a criminal case, if a connection is established between drug abuse and the offense, counsel's strategy is not apt to be affected by the wide individual variations among clients.

12. See, e.g., NEW PERSPECTIVES, *supra* note 5, at 39-43; Seaberg, *The Drug Abuse Problems and Some Proposals*, 58 J. CRIM. L.C. & P.S. 349, 362-63 (1967) [hereinafter cited as SEABERG]; text accompanying notes 120-38 *infra*.

13. Many observers feel that a precondition of heroin use is association or friendship with a user. See note 140 *infra* and accompanying text.

drug use in the first place.¹⁴ Strong corroboration for this supposition is provided by the recent experience of fifteen undercover agents planted in a New York jail to check conditions.¹⁵ They reported later the onset of paranoid feelings and guilt concerning the fictitious crimes that led to their "imprisonment." They felt a camaraderie with their fellow inmates and one agent, after repeated talks with a motorcycle thief, began to daydream about stealing motorcycles and, finally, automobiles. While the report concluded that the jail was a very good one on the whole, the agents began to consider themselves capable of violent crimes, viewed themselves as "criminal beasts," and felt their lives would "never be the same."¹⁶

Naturally, society's interest in the punishment of offenders is a factor, but the real question is the weight it should be assigned when the price is the foregoing. On the other hand, if such means as probation are available to offer some assurance that the former addict will continue without the use of heroin, if these means are predictably effective, and if lapses are uncovered easily, a considerable benefit accrues to society because of the likelihood that the probationer will also abstain from crime and perhaps become a contributing member of the community. Thus, unless the need to punish is an imperative, which it clearly is not,¹⁷ justification for incarceration is commonly absent.

Mandatory incarceration, however, may be required, depending upon the jurisdiction. While such sentences were rejected by Congress in the latest federal legislation,¹⁸ some states require incarceration of offenders in drug cases, and New York's recent legislative effort to deal with drug usage¹⁹ may encourage such efforts. Many, if not most, former addicts, though,

14. See, e.g., *DRUG AMERICA*, *supra* note 5, at 110-11; Cohen, *A Commentary on 'The Ethics of Addiction'*, 128 *AM. J. PSYCHIATRY* 547 (1971).

15. Cahn, *Report on the Nassau County Jail*, 19 *CRIME & DELINQ.* 1 (1973).

16. *Id.* at 5-10. For a discussion of the proposition that persons respond in the manner in which they are regarded by others, see Payne, *Negative Labels: Passageways and Prisons*, 19 *CRIME & DELINQ.* 33 (1973).

17. Consider the treatment made available to alcoholics, even though their actions may have been destructive of others' rights.

18. See 21 U.S.C. § 841 (1970), replacing the Narcotics Control Act of 1956, *INT. REV. CODE OF 1954*, §§ 7237-38.

19. For a commentary on that legislation, see Bayer, *Repression, Reform and Drug Abuse: An Analysis of the Response to the Rockefeller Drug Proposals of 1973*, 6 *J. PSYCHEDELIC DRUGS* 299 (1974). In his recent message to Congress on crime, the President spoke of coupling pretrial diversion programs "with a mandatory term of imprisonment for violent offenders . . ." 17 *CRIM. L. RPTR.* 3089, 3090 (1975). The offenses for which mandatory incarceration is proposed are those in which dangerous weapons were used, those committed by repeat offenders, and "such extraordinarily serious crimes as aircraft hijacking, kidnapping, and trafficking in hard drugs . . ." *Id.*

will be convicted of such crimes as theft or drug possession, which probably will not require incarceration. The principal obstacle to probation for the former addict will most likely be the ingrained attitude of the court that incarceration is the appropriate disposition for drug users and dealers.

In their leanings toward incarceration in narcotics cases, judges reflect prevailing national views, which have hardened in the past few years.²⁰ Because these views have been forged by publication over decades of the most imprecise claims about the effects of drugs and because predictions are common that the war on drugs can be won if only this step or that is taken,²¹ a brief historical discussion is warranted. Whether or not the interests of a client are served in a sentencing memorandum by reference to such considerations, and how it is best to present them, are matters for careful consideration by counsel.

THE DEVELOPMENT OF NATIONAL ATTITUDES

The Flawed Input

A cursory look at the nation's history of drug regulation, and at the roles played in its development by the groups most responsible—law enforcement officials, judges, lawyers and physicians—yields a disturbing impression. By any measure the law enforcement community has been heard almost solely through the voices of federal law enforcement officials.²² With a few recent exceptions, local police agencies have been content to opt for the legislation that has been current at the federal level and to follow the policy line of the federal government.²³ The other interested groups have either been silent or have supported the policies espoused by various federal drug agencies.

Thus, one looks in vain for guidelines of any sort that judges

20. See *DRUG AMERICA*, *supra* note 5, at 154.

21. See, e.g., Ingersoll, *The Role of Law Enforcement in Dealing with Drug Abuse*, *DRUG DEPENDENCE AND ABUSE RESOURCE BOOK 3* (P. Healy & J. Manak eds. 1971). At the time of this address in 1970 to the Second National Institute on Narcotics and Dangerous Drugs, Mr. Ingersoll was the Director of the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice. He identified the 3,978 arrestees in fiscal year 1969 as "the cream of the crop" of drug traffickers, referred to a plan "to prevent these drugs from being manufactured or to interdict and seize them before they are smuggled out of the country of origin and directed toward the United States," *id.* at 4, and said that "law enforcement does or can have the means for significantly diminishing the supplies and availability of abused drugs. . . ." *Id.* at 5.

22. See the discussion in A. LINDESMITH, *THE ADDICT AND THE LAW* ch. 9 (1965) [hereinafter cited as *LINDESMITH*].

23. With the exception of isolated political responses such as New York's, see note 19 *supra*, the states have generally enacted the uniform statutes that are patterned after the federal model. Uniform Controlled Substance Act, 9 U.L.A. 145 (1973), supplanting the Uniform Narcotic Drug Act, *id.* at 523. 1967 COMMISSION, *supra* note 1, at 213.

may employ when sentencing former addicts.²⁴ About the only expressions of opinion are appellate reviews of sentences that recount the sentencing judge's views as to the dangers of certain drugs. Even then, the sentencing judge typically expresses only indignation as to the activities of the defendant, rather than explaining how his attitude was translated into a concrete sentence.²⁵

With a few notable exceptions,²⁶ and despite the number of drug cases appearing before the courts, lawyers have failed to express opinions about national policies toward drug control, about the role that law enforcement agencies should play, or about the representation of drug users.

The medical profession, on the other hand, has been heard over the years on these subjects. Unfortunately, its collective waffling and blind support of the ever-changing law enforcement points of view have placed the profession's credibility on drug abuse in question. A classic recent example is reported by Professor Kaplan. The President-elect of the American Medical Association was widely quoted to the effect that the Association had evidence demonstrating that the use of marijuana caused impotence and birth defects. Admitting later that he knew of no such evidence, he said under questioning: "I'm tired of these phrases about credibility gap and such. We're talking about the morality of our country and the loss of respect of law and order and authority and decency."²⁷

Cocaine has fared no better with segments of the medical profession. Last year a medical expert filed an affidavit defending Congress' classification of cocaine as a "narcotic drug" in the Comprehensive Drug Abuse Prevention and Control Act of 1970.²⁸ Although he stated that the Committee on Drug Dependence and Alcoholism of the American Medical Association

24. See notes 102-09 *infra* and accompanying text.

25. *E.g.*, *United States v. Foss*, 501 F.2d 522, 524-25 (1st Cir. 1974) ("hard narcotics [cocaine] . . . demand hard sentences"); *United States v. Hartford*, 489 F.2d 652, 656-59 (5th Cir. 1974) (first-time offender sentenced to maximum term of imprisonment for hashish distribution, the court noting his admitted personal involvement with cocaine, "one of the most dangerous substances the world has ever known").

26. *E.g.*, NEW PERSPECTIVES, *supra* note 5; as to practice in narcotics cases, see D. BERNHEIM, DEFENSE OF NARCOTICS CASES (1972); Shellow, *The Expert Witness in Narcotics Cases*, 2 CONTEMP. DRUG PROBS. 81 (1973).

27. Kaplan, *The Role of the Law in Drug Control*, 1971 DUKE L.J. 1065, 1097-98. See generally LINDESMITH, *supra* note 22; T. SZASZ, CEREMONIAL CHEMISTRY: THE RITUAL PERSECUTION OF DRUGS, ADDICTS, AND PUSHERS (1974) [hereinafter cited as SZASZ].

28. See 21 U.S.C. § 802(16) (1970). The affidavit was one of many filed in *United States v. Brookins*, 383 F. Supp. 1212 (D.N.J. 1974). The same arguments and materials were before the court in *United States v. Castro*, 16 CRIM. L. RPT. 2511 (N.D. Ill. 1975), which followed *Brookins* in rejecting the defendant's constitutional arguments.

brought to Congress' attention the fact that cocaine was not pharmacologically a narcotic substance, Congress decided to retain cocaine in that classification, he said, because of the drug's established dangerous capacity and its long association with heroin in the illicit market.²⁹ Responding, an A.M.A. representative then denied by affidavit that the organization had ever taken a position on cocaine or had an input regarding the drug at the congressional hearings.³⁰ Nor, in the thousands of pages of testimony and other submissions that preceded the adoption of the Act, does there seem to be a recognition by anyone else of the fact that cocaine is not a narcotic substance, but for law enforcement purposes is classified as such,³¹ thus tripling the maximum possible sentence. The litigation in which the issue arose also illustrates the failure of our institutions to consider systematically the basic questions involving drug use. Thus, while cocaine experiments with animals have given rise to scores of papers and articles,³² until the past few years no one has paid attention to the drug's effect on humans or to isolating the variability of effect that accompanies different dosages, different manners of ingestion, or different levels of purity. Nor is there a clear concept of cocaine's effect in combination with other drugs, or how it affects "normal" as opposed to "disturbed" persons. In the federal cases, however, affidavits for the defense were submitted by physicians and observers who had obtained some first-hand knowledge of the common experiences of cocaine users and of the rarity of medical reports as to problems linked to cocaine use. This led one of the federal judges³³ to question whether cocaine was an ordinary stimulant rather than the fearfully destructive substance it is commonly said to be.³⁴

29. *United States v. Brookins*, 383 F. Supp. 1212 (D.N.J. 1974).

30. This affidavit was filed only in *United States v. Castro*, 16 CRIM. L. RPTR. 2511 (N.D. Ill. 1975).

31. See, e.g., *Hearings on S. 1895, 2590, 2637 Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Subcomm. on the Judiciary*, 91st Cong., 1st Sess. (1969); *Hearings on S. 2608 and S. 1816 Before the Special Subcomm. on Alcoholism and Narcotics of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 1st Sess. (1969); *Hearings on S. 3562, id.*, 2d Sess., pts. 1-3 (1970); *Hearings on H.R. 11701 and H.R. 13743 Before the Subcomm. on Public Health and Welfare of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess., pts. 1-2 (1970); *Hearings on H.R. 17463 and H.R. 13742 Before the House Comm. on Ways and Means*, 91st Cong., 2d Sess. (1970).

32. See, e.g., Woods & Downs, *The Psychopharmacology of Cocaine*, in *DRUG AMERICA*, *supra* note 5, at 116, 136-39 (App. I).

33. *United States v. Castro*, 16 CRIM. L. RPTR. 2511 (N.D. Ill. 1975) (dictum).

34. For example, the statement by a highly experienced narcotics investigator: "A mere pinch of the drug . . . turns a docile thief into a killer . . . and murder, instead of simple assault, is the easiest thing in the world." C. SIRAGUSA, *THE TRAIL OF THE POPPY* 186-87 (1966). Taking a more sanguine view of the drug is R. ASHLEY, *COCAINE: ITS HISTORY, USES AND EFFECTS* (1975).

Only last year, in fact, did the government authorize, on an experimental basis, intravenous administration of cocaine to humans. Though additional subjects are required, preliminary data indicate that within the range of doses tested (a range which covered most street use) the cardiovascular and other physiological changes recorded were not toxic.³⁵

Likewise without precedent, the same researchers have conducted structured interviews of other persons with backgrounds as users of cocaine by sniffing. The results tend to point out that cocaine, although it has a high abuse liability, does not produce a strong psychological dependence in all who use it. In fact, because of its high cost as well as its stimulant properties, it is used only sporadically even by those who use it.³⁶

The Marijuana and Heroin Campaigns

The picture is even more blurred if attention is focused on national attitudes toward the use of the most visible drugs, marijuana and heroin. Prohibition of marijuana, it will be recalled, was urged forty-some years ago by the head of the recently formed Federal Bureau of Narcotics.³⁷ The argument successfully made to Congress was:

How many murders, suicides, robberies, criminal assaults, hold-ups, burglaries, and deeds of maniacal insanity it [marijuana] causes each year, especially among the young, can only be conjectured.³⁸

As to heroin, it is enough to say that while there are few supporters of the use of addictive substances, our national policies in regard to addicts do not follow from such a consensus. That is, the dialogue about heroin ignores the fact that our laws create most of the harm and problems associated with use of the drug. The deaths attributable to heroin are traceable for the most part³⁹ not to it but to infections and diseases attending the use of contaminated needles and the ingestion of such substances as strychnine (sometimes used as an agent to dilute the

35. Interview with Charles R. Schuster, Ph.D., and Marian Fischman, Ph.D., Department of Psychiatry, University of Chicago, in Chicago, Illinois, June 4, 1975.

36. *Id.*

37. The prohibition was proposed by Harry J. Anslinger, who had been a former prohibition agent, as were a number of the Bureau's agents. SZASZ, *supra* note 27, at 200.

38. *Id.* at 201.

39. There is, however, a much higher death rate among addicts in England, where maintenance doses of heroin are available, than for the population as a whole, Wilson, Moore & Wheat, Jr., *The Problem of Heroin, THE PUBLIC INTEREST*, Fall, 1972, at 3, 26 [hereinafter cited as PROBLEM OF HEROIN]. While the cause is uncertain, it is speculated that many of these addicts do not work or otherwise manage their lives properly. *Id.*

heroin), or to malnutrition and other ailments.⁴⁰ The latter are not the results of drug use, but of the lifestyle required in this country of most addicts—an all-consuming search, usually through criminal means, for the funds with which to pay the exorbitant cost required by a habit, estimated to average \$50 a day.⁴¹ That cost in turn is a product of law enforcement actions that do not succeed in making the drug unavailable, only vastly more expensive than it would be otherwise.⁴²

Efforts to curb the cultivation of illicit opium have been publicized widely of late.⁴³ Little is mentioned, though, of the realities of the situation. First, something like one percent of the world production of opium is consumed illegally in the United States.⁴⁴ Ten thousand acres or less are adequate to supply the demand for heroin in this country if it is assumed that there are 500,000 addicts.⁴⁵ Considering that one of the richest opium growing areas is controlled by tribesmen in Burma, Laos and Thailand who are apparently beyond government influence⁴⁶ and (according to one study)⁴⁷ supported by the Central Intelligence Agency, the strategy of production control remains to be explained satisfactorily.⁴⁸

More important and depressing, perhaps hundreds of synthetic opiates are now known to exist. Their effects are often indistinguishable from heroin, though some are infinitely more potent; their production typically requires only inexpensive laboratory glassware and common industrial compounds.⁴⁹ Should the infusion of fortunes into law enforcement efforts, or indeed military measures, somehow halt the flow of heroin into the country, substitution of these substances is predictable. A problem more serious than that of heroin might thus emerge.⁵⁰

40. See, e.g., DRUG AMERICA, *supra* note 5, at 193-94.

41. *Id.* at 173-75.

42. *Id.* at 174; SZASZ, *supra* note 27, at 211: "In England, the pharmacy cost of heroin is \$.04 per grain (60 mg.), or \$.00067 per mg. In the United States, the street price is \$30 to \$90 per grain, or \$.50 to \$1.50 per mg."

43. See, e.g., U.S. NEWS AND WORLD REPORT, Apr. 1, 1974, at 38 (interview of John R. Bartels, Jr., then Administrator of Drug Enforcement, United States Department of Justice); *Search and Destroy—The War on Drugs*, TIME, Sept. 4, 1972, at 22.

44. NEW PERSPECTIVES, *supra* note 5, at 39.

45. Heller, *The Attempt to Prevent Illicit Drug Supply*, DRUG AMERICA, *supra* note 5, at 383, 384 (App. III).

46. NEW PERSPECTIVES, *supra* note 5, at 39.

47. A. MCCOY, THE POLITICS OF HEROIN IN SOUTHEAST ASIA (1972).

48. The National Commission on Marijuana and Drug Abuse expressed optimism in 1973 that the current budgets for narcotics law enforcement might make a difference in the supply of drugs, DRUG AMERICA, *supra* note 5, at 225-30, but concluded nonetheless that it was unrealistic to expect substantial reductions if the demand remained. *Id.* at 217.

49. Schuster interview, *supra* note 35; Heller, *The Attempt to Prevent Illicit Drug Supply*, DRUG AMERICA, *supra* note 5, at 383, 386 (App. III).

50. Cf. the discussion in LINDESMITH, *supra* note 22, ch. 7, as to the development of heroin use in the Far East after bans on opium.

*The Place of Addicts in Society and
the Criminal Justice System*

Twenty years ago there was no question that an addict lacked rights of any sort.⁵¹ An official could boast before a committee of Congress:

Now we have the house of correction loaded. I was talking to the warden today, and he said the place is loaded with addicts. The county jail is pretty well loaded. And last week at this hearing, there was a State Senator from the State of Illinois who testified as to the prisoners in Joliet; there is pretty close to a thousand addicts down there.⁵²

Federal penitentiaries reported that half the inmates convicted of drug offenses were addicts.⁵³

The addict's life in custody, however, was in many ways preferable to that outside. Then, as now, the focus of enforcement efforts was on the addict's possession and use of drugs.⁵⁴ The unpleasant story of the interaction between addict and policeman is described best by Professor Lindesmith,⁵⁵ but its outlines are well known. In brief, the addict is highly visible in most communities unless he is affluent. Given the demands of a heroin habit, and the methods the addict must employ to satisfy it, he or she is subject on a daily basis to arrest for possession of narcotics or its associated paraphernalia. Regular arrests are to be expected for one of two general reasons. The police may operate on a quota system that mandates the apprehension of the addict or others like him.⁵⁶ Or the arrest may represent only the need for an informer from the community in which the addict lives. In either case, incarceration is likely to result, which means that the subject will undergo the suffering associated with the symptoms that mark withdrawal from heroin use.⁵⁷ Many if not most of such arrests are patently illegal.⁵⁸

Unlike other citizens, who may choose to become informers for personal, patriotic or financial reasons, the addict is both a necessary and vulnerable subject for recruitment. He is necessary because the police experience difficulty in making contact

51. See generally *id.* ch. 2.

52. *Id.* at 95.

53. *Id.* at 42-43.

54. Recent surveys by the National Commission on Marijuana and Drug Abuse of arrest patterns at the local level showed that 80% of arrests were for possession offenses, and that few trafficking offenses involved more than small amounts. DRUG AMERICA, *supra* note 5, at 228; accord, SEABERG, *supra* note 12, at 361-62.

55. LINDESMITH, *supra* note 22, at 35-98.

56. *Id.* at 52-57.

57. See, e.g., Fingarette, *Addiction and Criminal Responsibility*, 84 YALE L.J. 413, 436-38 (1975) and cited authorities [hereinafter cited as FINGARETTE].

58. LINDESMITH, *supra* note 22, at 36-38, 90-93.

with other users or dealers. He is vulnerable primarily because of the physiological imperative to gain release from custody and hence from withdrawal pains. He is also subject to conviction, it being relatively easy to prove that he possessed drugs or paraphernalia. Since he is likely to be on parole or probation, additional leverage may exist. The addict is thus apt to become an informer of one sort or another, and to be a particularly desirable one since it may not be necessary to pay him.

The addict also develops a view of the criminal justice system that is approached only by the most cynical or revolutionary. To him the system is represented by police and agents, not by lawyers and judges. The police decide in the first instance whether to lodge charges; if the decision is not to do so, they decide when and how the addict's release from custody will occur. If criminal charges are preferred, the addict probably feels the constitutional right to bail will be controlled by the policeman. That is, the latter's recommendation that a signature bond be set is invariably followed. A contrary recommendation, one for a secured bond that the addict cannot satisfy, is less certain to be followed, but not much. Not only do bonds in narcotics cases often require the posting of security, but aggravating circumstances may be presented to the judge, such as prior uncharged offenses or the defendant's status as a probationer or parolee.

The addict may further come to believe that the courts' processes themselves are under police control. Hence, a condition of his agreement to become an informer may be official forbearance to execute a warrant issued previously for his arrest. The police may also agree not to bring to the court's attention the addict's violation of the terms of a probationary sentence or to dissuade the prosecutor from presenting an offense to the grand jury. Similarly, agreements can produce the release from custody of relatives or friends.

Police influence does not abate when charges have reached the trial stage. Less serious charges may be prosecuted and others dismissed, a plea of guilty may be accepted to a lesser included offense, or the evidence presented at trial may be restricted to the minimum necessary to secure a conviction. It is an ineffective policeman or agent indeed who cannot arrange a probationary sentence in 95% of the prosecutions against addicts.

The typical addict may feel that the enforcement of the narcotics laws is limited to particular minority groups, particularly the poor. His experience may parallel that of Judge Jonah J. Goldstein of the New York Court of General Session, who said in 1959: "In the twenty-four years of my judicial service, I have never had a rich narcotic user before me, nor have I heard of

a rich narcotic user being brought into the court before any other judge."⁵⁹

In short, there is no reason to believe that today's attitudes differ significantly from those suggested by the former Commissioner of the Federal Bureau of Narcotics, Harry J. Anslinger. He felt that the powers of law enforcement should be used selectively, avoiding those addicts who are reputable. He said before a Congressional committee:

There is no single set way to deal with those trapped in the tentacles. I personally have dealt with many of the individual cases. Each has been different. I am not, for instance, a believer in what doctors call 'ambulatory treatment'—giving a patient withdrawal treatment in his office, with no check on what the patient may do, or how much he may use between visits. Yet in one or two exceptional cases, I have, unknown to the addict, employed this method.

The addict in one case was a Washington society woman. I had known her personally for some years. She was a beautiful, and gracious lady. She had become so badly addicted to demerol that no doctor would prescribe for her; her demand was too great.

Word of her case came to me through some of her friends. Was there any way I could help? The woman, I learned, was ready to kill herself. She would not deal with pushers nor would she take a cure or go voluntarily to a hospital herself. Moreover, if I made a case against her, it would destroy her completely—along with the unblemished reputation of one of the nation's most honored families.

I agreed to help her, through a trusted physician to whom she appealed for drugs. She was not to know my role. I also learned that she was so afraid that pharmacists would try to cut the strength of her demerol, with sugar of milk or some other non-narcotic substance, that she insisted on receiving only unopened, sealed bottles of demerol from the druggist.

That complicated the business but I called in a pharmaceutical manufacturer who agreed to work with us. Each bottle of demerol, specially packaged and sealed, delivered in routine fashion from the drug store, on the prescription of the physician, contained less actual demerol than the previous bottle.

Within three months, without the woman realizing, she went from a large daily 'ration' of demerol to none at all. What she was getting, in the bottles, was not demerol but sugar of milk.⁶⁰

Lindesmith also describes a different treatment approach:

Another similar instance involved an addict who was described as one of the most influential members of the Congress of the United States. This man was completely 'intractable', re-

59. *Hearings Before the Subcomm. on Improvements in the Federal Criminal Code of the Senate Judiciary Comm.*, 84th Cong., 1st Sess., pt. 5, at 1347 (1959). See also *DRUG AMERICA*, *supra* note 5, at 252-53.

60. LINDSMITH, *supra* note 22, at 281-82.

fusing to consider medical treatment and defiant of anything that might be done to him by the police. In this case Mr. Anslinger offered the congressman the proposition that if he would agree not to go to underworld pushers his supply of morphine would be underwritten by the Bureau. It was stipulated that the man was to obtain his supplies from an 'obscure druggist' on the outskirts of Washington. The lawmaker naturally accepted the offer and went on using legal morphine till he died with only Mr. Anslinger, the druggist, and the addict himself knowing what was going on.⁶¹

Today, to be sure, the addict stands in a different position. There is general acceptance of the need to employ tactics other than prosecution. Widespread sympathy exists for approaches through treatment.⁶² Heroin users are now less likely to be regarded as subhuman or merely hedonistic tripsters; a consensus is emerging as to the causes of addiction, though the debate continues as to the basic ways in which heroin operates and as to what hope there is for addicts.⁶³ Thus, the final report of the National Commission on Marijuana and Drug Abuse recognizes the variety of means under which illicit drugs are used,⁶⁴ rejects the "unidimensional concept of individual loss of self-control which has long dominated scientific and lay concepts of 'addiction',"⁶⁵ and has this to say about the root causes of drug dependence:

[W]e note that the development within certain individuals of a chronic and intense coping need involves a problem which all social systems face, to a greater or lesser degree: the problem of those who cannot function adequately within the dynamics of the society. These are people who accept the system's value system, who apply the prevailing measure of individual worth, and discover that they fall short of their goals. They cannot operate properly within the social machine, and consequently it breaks them off as it turns. In a highly materialistic, competitive, and mobile social system like ours, which emphasizes individual opportunity and coordinate individual responsibility, the number of misfits will be higher than in a traditional, cooperative, and status-oriented society. Mobility in America is not just an opportunity; for many, it is also an obligation. Failure to rise and to prosper may become more than a disappointment of material ambitions; it can become a sign of personal unworthiness.

The individual who thus sees himself as a potential failure, whose achievement or future prospects do not measure up to his self-concept, may begin to feel a pressure to reconcile the difference between what he is and what he should be. Yet, a com-

61. *Id.* at 282.

62. See, e.g., Cuskey & Krasner, *The Eyes of the Beholder: The Drug Addict as Criminal, Patient or Victim*, 2 CONTEMP. DRUG PROBS. 579 (1973).

63. See generally FINGARETTE, *supra* note 57.

64. DRUG AMERICA, *supra* note 5, ch. II.

65. *Id.* at 139.

plex of factors involving self-worth and identity will determine the person's capacity to cope with stress, either by achievement or accommodation with reality. For some, the result may be an attempt to avoid the painful reality by substituting a new one. And if this change in perception is accomplished with the aid of chemicals, the person is likely to become a drug-dependent person. The origin of drug dependence lies not in the individual's inability to meet social standards and values that he accepts, but in his failure to find in those values either a guiding source of authority or a life-informing purpose.

One other point must be made here. The development of chronic drug-using patterns is often associated with minority populations, and the incidence of dependence does appear to be higher among minority group males than among the general male population. Researchers have long observed that the ghetto environment produces a disproportionately high level of visible forms of deviant behavior. By the same token, it has also been observed that as a consequence of its greater visibility, the deviant behavior of ghetto dwellers is more likely than that of middle class society to be officially recognized, to be labelled and to generate anxiety.

This is why the Commission has emphasized that chronic alcoholism and hidden barbiturate dependence within the economic mainstream of our society share much in common with chronic heroin use. . . .⁶⁶

Prospects for a New Look at Illicit Drug Use

As a powerful tranquilizer and depressant, heroin is a hazardous substance.⁶⁷ But one would hope that at some point legislators would recognize that individuals have achieved success despite its use⁶⁸ and that many addicts function adequately in those European countries that permit the use of heroin, as indeed do persons in this country who use methadone, a synthetic opiate.⁶⁹ The way would then be clear for an assessment of whether the potential deterrence felt by persons who might otherwise use drugs is worth the cost of our present course, which may be summarized as the ritualistic punishment of drug users⁷⁰ and negligible successes with traffickers.⁷¹ Indeed, while it is an article of faith in the law enforcement community that the use of heroin would spiral if supply was unrestricted, demand for the drug is said to have stabilized in the early '70s despite current ample supplies and even price cuts.⁷² Nor, to

66. *Id.* at 110-11.

67. *See, e.g., id.* at 193-96.

68. *See E. BRECHER, LICIT AND ILLICIT DRUGS* ch. 5 (1972).

69. *See text accompanying notes 177-87 infra.*

70. *See generally* SZASZ, *supra* note 27.

71. "There is little doubt that the user and the addict have become the scapegoat of the enforcement agencies." SEABERG, *supra* note 12, at 361-62.

72. *See the cautious statement in DRUG AMERICA, supra* note 5, at 406-

date, has thought been given to legislative action that would limit law enforcement efforts to the suppliers of substantial amounts of drugs, somewhat along the lines of the control strategies in force to curtail vice.⁷³ Finally, as society ignored the massive cost of enforcement of the marijuana laws,⁷⁴ the cost effectiveness of the entire drug effort has yet to be examined, with or without adding into the balance the human costs involved in jailing drug users.

It is perhaps too much to hope that such dialogues will take place, given the hold that simplistic panaceas seem to have on the public and lawmakers. Should they occur, however, perhaps the voices would also be heard which call for rational attention to the proposition that we should go only so far, constitutionally and ethically, to discourage people from doing, seeing or ingesting things that society regards as harmful.⁷⁵ The principal reasons that such developments should not be anticipated are twofold. First, there is an enormous amount of drug use currently, some approved,⁷⁶ some not. And the public mood is that use of the unpopular drugs can and should be either discouraged or curtailed. Second, the public opposition to illicit drug use is so emotional as to validate the positions of those who see in such opposition a deep-seated need for scapegoats in a time of national crises,⁷⁷ or a correlation in the public mind between drug use by the young and their espousal of anti-establishment views.⁷⁸ Certainly one form or another of these attitudes would seem necessary to explain the ferocity with which the marijuana laws have been applied in this country,⁷⁹ whatever view one takes of that drug's dangerousness to health.

It is anomalous that such emotion against drug users and sellers should exist today, or that our expectation should be that

07 as to heroin; cf. the similar finding as to marijuana use. See also GOVERNMENTAL RESPONSE, *supra* note 7, at 14:

The opiate crisis is waning according to the administration, and the administration is unwilling to make a federal commitment to treat polydrug abusers. In other words, the government believes that 'we have turned the corner' on opiate abuse, and that it is the only type of drug abuse the administration wishes to consider.

For the claim that the street price of heroin fell twenty-five percent in the spring of 1975 in Chicago, see Mooney & Clements, *Chicago Heroin Flood: U.S. Losing Smuggler War*, Chicago Daily News, June 6-7, 1975, at 1, col. 3 (Red Flash ed.). No mention is made of the experience in other locales so that the price change may be a local phenomenon.

73. See J. KAPLAN, MARIJUANA—THE NEW PROHIBITION ch. IX (1971) [hereinafter cited as KAPLAN].

74. See *id.* ch. II.

75. See generally SZASZ, *supra* note 27; compare SZASZ, *The Ethics of Addiction*, HARPERS', Apr., 1972, at 74, with Cohen, *A Commentary on 'The Ethics of Addiction'*, 128 AM. J. PSYCHIATRY 547 (1971).

76. DRUG AMERICA, *supra* note 5, at 43, recites the fact that retail sales of alcohol were \$24.2 billion in 1971, an increase of \$7 billion from 1966.

77. See generally SZASZ, *supra* note 27, at 3-29, 125-36.

78. See DRUG AMERICA, *supra* note 5, at 7-14.

79. See note 2 *supra* and accompanying text.

young people will not use drugs, for we seem to have embraced as never before the notion that the way to happiness and fulfillment is through drugs, albeit of the licit variety. Legal drug usage, of course, rises constantly.⁸⁰ More important from the standpoint of the attitudes of the young, the most persuasive (or at least pervasive) voice is that of television. An unscientific impression of that medium, certainly the advertising carried, is that it is dedicated to the message that mood-altering drugs are both effective and desirable.⁸¹ Consider, for example, the connection which is preached between the absence of stress, personal and sexual success and happiness, and manliness, and such products as beer, aspirin, sleeping pills, and cigarettes.

Raising Questions in Criminal Cases

The above, of course, vastly oversimplifies some of the factors that should be weighed in a narcotics case. And it is not suggested that the lawyer's role normally includes raising such policy questions, save within narrow limits. That is, judges properly reject opportunities to re-write legislation merely because it generates uncertainty or controversy. Some judges do not welcome criticisms of prosecutive tactics, or they may have orientations similar to that of the academician and former prosecutor, John Kaplan. Writing in 1971 of the marijuana laws, he mentions that while prosecuting many violators of the federal drug laws, and until he began the study that led to his leading work,⁸² it never occurred to him to question whether the penalties for marijuana violations were too stringent.

On the other hand, the lawyer representing a drug user cannot be subservient to popular attitudes. Take, for example, the case of a judge who is hostile toward drug users, but familiar with the Prohibition era. It can hardly hurt the client if an effective case is made for the proposition that the same sorts of needs led the defendant into drug abuse that prompted the consumption of illicit alcohol in the 1920's, and that his or her violation of the drug laws is not qualitatively different from a drinker's association with bootleggers and the like during Prohibition. Or the judge may not harbor personal animus toward drug users but feels that lengthy sentences are necessary and effective steps to discourage others from use or trafficking. To the extent that this belief is arguably faulty,⁸³ it should be chal-

80. See note 76 *supra*.

81. *E.g.*, *Contemporary Problems of Drug Abuse: A National Symposium for Law and Medical Students*, 18 *VILL. L. REV.* 787, 851-65 (1973).

82. KAPLAN, *supra* note 73, at x-xi.

83. One of the unfortunate aspects in matters involving drugs is that most any claim can be made without fear of concrete refutation. See, *e.g.*, the statement of John R. Bartels, Jr., then Administrator of Drug

lenged. That is, if the history of incarcerative penalties cannot be shown to have had the desired effect or if reason does not exist to believe that the policy has deterred or will deter the use of the particular drug, then the issue of penalty at least appears in a different light.

Other approaches should be considered by the attorney, though they may have more relevance and utility at the trial stage than at sentencing. For example, narcotics cases sometimes are developed and prosecuted in ways that may prove helpful to the accused. Recent commentary⁸⁴ and case law⁸⁵ bear witness to the seeming inevitability of questionable governmental practices in narcotics cases. For one thing, from a law

Enforcement, United States Department of Justice, that the administration's crackdown had reduced the number of heroin addicts in this country to between 150,000 and 300,000, down from 1970 when there were 500,000 or 600,000 addicts. U.S. NEWS & WORLD REPORT, Apr. 1, 1974, at 38.

84. See, e.g., J. ESTERHAS, NARK! (1972); LINDESMITH, *supra* note 22; Harris, *An Inside Look at Federal Narcotics Enforcement: Three Ex-Agents Tell Their Tales*, ROLLING STONE, Dec. 5, 1974, at 65; Mooney & Clements, *Chicago Heroin Flood: U.S. Losing Smuggler War*, Chicago Daily News, June 6-7, 1975, at 1, col. 3 (Red Flash ed.); *id.*, *Congress, Courts Draw Drug Blame: Agents Complain*, June 9, 1975, at 1, col. 7; *id.*, "Buy and Bust" Tactics a Failure in Narcotics War, June 10, 1975, at 15, col. 1.

85. See, e.g., *United States v. Hart*, — F.2d —, 17 CRIM. L. RPTR. 2155 (9th Cir. 1975) (reversal and order to dismiss indictments for failure to produce principal informer, a Mexican citizen; informers given no training, picked own investigatory targets, were paid on "reward" basis, and customarily retreated across border after arrests made); *United States v. Butler*, — F.2d —, 16 CRIM. L. RPTR. 2345 (9th Cir. 1974) (failure to disclose promises to witness); *Lugan v. Gengler*, — F.2d —, 16 CRIM. L. RPTR. 2341 (2d Cir. 1975) (kidnapping of narcotics defendant not ground for relief, distinguishing *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974), another kidnapping case, but involving additional allegations of beatings, starvation, administration of electric shocks, and other forms of physical violence in Uruguay); *United States v. DeLeon*, 498 F.2d 1327, 1333-34 (7th Cir. 1974) (agent destroyed handwritten notes after magistrate's order to produce them); *United States v. Marshall*, 488 F.2d 1169, 1171 (9th Cir. 1973):

Two of the agents seem quite willing to make false affidavits, in which facts are distorted to achieve a result, such as a finding that seized evidence was in plain view. One agent, when confronted with the facts demonstrating that his affidavit was false, did not admit that it was false; it was merely 'inconsistent.' These agents do not search a citizen; they 'frisk' him even if that involves fishing paper money out of his pocket and his wallet. Their fear for their own safety approaches paranoia. Even when 6 or 8 agents, all armed, have a group of citizens herded into a room, a search of a citizen's wallet is justified on the ground that it might contain a razor blade. These agents do not break into a house without a warrant; they 'secure' it, even if this means rushing in with drawn guns, rounding up everyone in the place and searching them all. They do this for their own protection. They seem to think that every citizen must carry some sort of identity card or paper, which they call 'I.D.', and must display it to them on demand.

United States v. Mele, 462 F.2d 918 (2d Cir. 1972) (false witness statements prepared by prosecutor and agents); *United States v. Corso*, 389 F. Supp. 659 (S.D.N.Y. 1974) (illegal wiretaps not used, therefore harmless); *United States v. Acosta*, 386 F. Supp. 1072 (S.D. Fla. 1974) (convictions vacated because of concealment and perjury).

enforcement officer's point of view, and objectively as well, undercover narcotics work is highly dangerous, thus generating unusually hostile attitudes toward offenders.⁸⁶ For another, as is discussed below, corner-cutting may be an inevitable result of the recent flow of funds and the concomitant need to recruit thousands of agents and informers.

Recent Trends in Investigations and Prosecutions

The fact that the budgets of narcotics agencies have soared in the past few years⁸⁷ is of real significance to the practicing bar. Whether or not such funding is now adequate need not be considered here; but these large infusions of money have meaning in the context of investigations in narcotics cases. That is, informers and "buy" money are the mainstays of this work. If recruiting for large numbers of agents presents problems, as it assumedly does, the comparable need for informers would seem impossible to satisfy without major sacrifices in quality control. One would expect, therefore, that major efforts would be required to recruit addicts through pressure, and to offer tempting sums to non-addicts willing to act as informers. One would expect also that ample funds would be available to offer to persons in return for their agreement to find drugs, particularly as a gap appears between budgetary advances.

Solid data is not available to corroborate or refute such speculation, though the inferences that may be drawn from recent decisional law are significant. A federal appellate decision this year, for example,⁸⁸ advises us that informers were recruited in Mexico, brought to this country, and paid "rewards" based on their ability to develop cases. The key informer then vanished across the border and was unavailable for testimony at trial. In ordering the convictions reversed and the indictment dismissed, the court recognized the great potential for abuse in such practices.⁸⁹ If traffickers are attracted into the heroin trade by its monetary rewards, can we expect that similar in-

86. Myles J. Ambrose, one-time Special Attorney General in charge of the Office for Drug Abuse, is quoted as having said in 1973: "Drug people are the very vermin of humanity. . . . Occasionally we must adopt their dress and tactics." Szasz, *supra* note 27, at 212.

87. See chart accompanying note 3 *supra*.

88. *United States v. Hart*, — F.2d —, 17 CRIM. L. RPTER. 2155 (9th Cir. 1975) (reversal and order to dismiss indictments for failure to produce principal informer paid on "reward" basis). As to contingent fee payments, which essentially resemble the reward system, see *United States v. Oquendo*, 505 F.2d 1307, 1310 (5th Cir. 1975).

89. *United States v. Hart*, *supra*, slip opinion at 4, 17 CRIM. L. RPTER. at 2156, citing *Velarde-Villarreal v. United States*, 354 F.2d 9, 13 (9th Cir. 1965).

duancements to informers will not produce suspect accusations or investigations if they have no accountability in court?

With the addict-informer, of course, immunity from prosecution may be enough to guarantee cooperation with police officials. The informer who is paid, however, is not often a governmental employee. Rather, he is subject to after-the-fact assessments of the value of his work, resulting in payments that range from less than a hundred dollars to many thousands.⁹⁰ Apparently there are no educational requirements for such informers and they receive no training. In such a milieu personalities and actions are a mixed and questionable bag. Thus, in a recent case, a person became an informer after he and his wife were arrested on drug charges and their house was stripped of personal possessions. Undoubtedly hoping to free his wife and his television set and fishing tackle (in whatever order), the informer gave narcotics agents the names of alleged dealers. One such name was that of an indigent 37-year-old with no criminal record. The informer knew this person was not involved with heroin but nonetheless offered him several hundred dollars to get some. The government provided the funds, the citizen got the heroin on several occasions, and then was charged with selling the drug. While the defendant had acquiesced willingly enough in the proposal, the court acquitted him, finding entrapment.⁹¹

In another case the informer was a free-lance operative, not a drug user. He and his relatives had been friendly in Cuba with another family, a member of which fled that country, was a member of a profession, and owned a Chicago business. The businessman apparently was not a drug user or dealer. According to him (his credibility is possibly established by the fact that he later pleaded guilty and became a government witness) the informer's approach was that an easy \$20,000 could be made if heroin or cocaine were produced. In short order this was done. The businessman and the persons he contacted for the drugs then were arrested.

If a recent Seventh Circuit case is any indication, time and money are ample in the narcotics investigation field, but subjects of investigation are in short supply. An investigation was commenced in a college community when undercover agents picked up a hitch-hiking student. Seeking drugs, the agents then began

90. *E.g.*, *United States v. Acosta*, 386 F. Supp. 1072, 1077-78 (S.D. Fla. 1974) (payments to informer of more than \$27,500 in less than two years, plus immunity from execution of state warrants and "a 'license' to participate in all types of criminal activity with no fear of prosecution or punishment.").

91. *United States v. Rivers*, No. 73 CR 627 (N.D. Ill. 1973) (unpublished opinion), *citing* *United States v. Jones*, 362 F. Supp. 114 (E.D. Pa. 1973).

dropping around the residence of the student. One of his roommates, a college senior, eventually obtained some, sold them to the agents at cost, and was duly convicted of a felony and sentenced to jail.⁹²

The point here is that improper governmental tactics increasingly provide the means for lessened punishment of former addicts (and others as well) should they be convicted. Thus, but for the aggravating circumstances just described, the college senior probably would have drawn more than a six-month sentence. Should a trial be planned, thought must be given to the impact of such tactics on jurors. While a concession that the defendant was involved with drugs was once thought to almost certainly guarantee a conviction, jurors appear increasingly skeptical of prosecutions that rest upon the testimony of dubious informers.⁹³

Likewise, the defense of entrapment may acquire new vitality if courts share such skepticism, which would seem to be occurring from the decreasing lengths of sentences in federal narcotics cases.⁹⁴ Concerning that defense, the inaccurate impression seems to have gained currency that the Supreme Court's decision in *United States v. Russell*⁹⁵ was a clear setback for defendants.⁹⁶ It is possible to say, as Mr. Justice Rehnquist did

92. *United States v. Smith*, 508 F.2d 115 (7th Cir.), cert. denied, 95 S. Ct. 1983 (1975).

93. In the past few months in the United States District Court for the Northern District of Illinois, there have been acquittals in multi-ounce heroin cases in which reasonable doubt defenses were advanced, but the defendants did not testify. In another case, two non-addict informers, the two co-defendants, and several agents implicated the defendant in several transfers of heroin and the possession of cocaine valued at \$1.5 million. The jury chose to credit the defendant's denials.

94. Average federal sentences on drug charges, drawn from the annual publications entitled ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR, Table D.5, are listed below (omitting the numerically insubstantial cases involving violations of border regulations):

<u>Fiscal Year</u>	<u>Marijuana</u> (months)	<u>Other</u> <u>Drug Offenses</u> (months)
1964	57.9	68.7
1965	N/A	N/A
1966	53.7	66.7
1967	51.0	69.1
1968	51.2	74.6
1969	52.6	74.3
1970	46.7	79.5
1971	39.9	78.3
1972	33.5	57.4
1973	32.4	58.7
1974	27.5	56.0

95. 411 U.S. 423 (1973).

96. See, e.g., *United States v. Oquendo*, 490 F.2d 161 (5th Cir. 1974) (concurring opinion). As construed by Judge Gee, *Russell* "deliberately rejects" the traditional view, albeit the minority one, "which focused ei-

there,⁹⁷ that the "focus" or "principal element" of the inquiry as to entrapment is the defendant's predisposition to crime, without losing sight of the character of the government's actions, which is the other factor under the leading decisions, *Sorrells v. United States*⁹⁸ and *Sherman v. United States*.⁹⁹ In *Russell* the Court examined both aspects of the question and affirmed the conviction, finding that the defendant was more than disposed to crime (being involved in it at the time the government agent appeared), and that the agent's actions were appropriate under the circumstances.¹⁰⁰ This is a far cry from condonation of unrestrained approaches to previously innocent persons.¹⁰¹

ther solely or in addition [to consideration of the defendant's predisposition] on the activity of the governmental agents" *Id.* at 167.

97. 411 U.S. at 433.

98. 287 U.S. 435 (1932).

99. 356 U.S. 369 (1958).

100. 411 U.S. at 430-31.

101. In *Sorrells*, it will be recalled, the government agents had reason to believe that the defendant was dealing in bootleg whiskey (three witnesses testified for the government in rebuttal that the defendant had the general reputation of a rum runner). 287 U.S. at 441. Nonetheless, it was clear that the criminal design originated with the government agent, who implanted the disposition to commit the offense for the purpose of initiating a prosecution. *Id.* at 442. The test, or "controlling question" as the majority put it, was not solely the "predisposition and criminal design of the defendant." *Id.* at 451. These factors were said merely to be "relevant" to the ultimate question whether "the government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials." *Id.* If so, the statute was to be construed to exempt the defendant's conduct from punishment. *Id.* at 450-51.

Thus, while the "focus" may be on the defendant's conduct, *United States v. Russell*, 411 U.S. 423, 429 (1973), Chief Justice Hughes recognized in *Sorrells* that all pertinent interests and conduct must be scrutinized when he held out the possibility that some crimes were so "heinous or revolting" that entrapment would not be a defense regardless of the amount or type of governmental activity. *Id.* That the nature of the government's conduct is an element in the inquiry concerning entrapment is also clear from the Court's conclusion that the sources of the defense were the interests of insuring justice, deterring illegal police conduct, and preserving the purity of the judicial process. *Id.* at 446, 448-49.

It is significant also that in neither *Sorrells* nor *Sherman* were the governmental overtures to the defendants of a reprehensible nature or calculated to draw an ordinary citizen into crime. In *Sorrells* the only factors that permit the conclusion that the government afforded more than an opportunity to break the law was the agent's reference, unaccompanied by sentimental appeals so far as the opinion discloses, to a commonality of ties from military service, and repetition of his request for bootleg whiskey after initial declinations by the defendant. In *Sherman* the court of appeals found that the informer was drawn into discussions about drugs when the defendant stated he was purchasing heroin. The informer then made requests to be supplied, but they were of an undemanding sort that might characterize any addict's efforts to obtain drugs. See 240 F.2d 949, 950 (2d Cir. 1957), *rev'd*, 356 U.S. 369 (1958).

However, while courts in the past have weighed the different considerations of the defendant's predisposition and the nature of the government's conduct, *e.g.*, *United States v. Grimes*, 438 F.2d 391, 393-94 (6th Cir.), *cert. denied*, 402 U.S. 989 (1971); *Waker v. United States*, 344 F.2d 795 (1st Cir. 1965); *Morei v. United States*, 127 F.2d 827 (6th Cir. 1942) (entrapment despite willing acquiescence in proposal that defendant obtain heroin after it was said that there would be "good money" for him),

THE CONVICTED HEROIN USER AT SENTENCING

General Considerations

Federal district court judge Marvin E. Frankel has written recently of his concern with the absence of standards in sentencing and the lack of consensus as to the proper purposes of sentencing, let alone the weight that is properly assignable to such diverse ingredients as rehabilitation, punishment, deterrence, incapacitation and denunciation.¹⁰²

The sentencing powers of the judge are, in short, so far unconfined that, except for frequently monstrous maximum limits, they are effectively subject to no law at all. Everyone with the least training in law would be prompt to denounce a statute that merely said the penalty for crimes 'shall be any term the judge sees fit to impose.' A regime of such arbitrary fiat would be intolerable in a supposedly free society. . . . But the fact is that we have accepted unthinkingly a criminal code creating in effect precisely that degree of unbridled power.¹⁰³

And further:

The judge is likely to read thick briefs, hear oral argument, and then take days or weeks to decide who breached a contract for delivery of onions. The same judge will read a presentence report, perhaps talk to a probation officer, hear a few minutes of pleas for mercy—invest, in sum, less than an hour in all—before imposing a sentence of ten years in prison.¹⁰⁴

In no type of case, perhaps, have individual judicial views varied so widely as in sentencing for drug offenses. (Again, this discussion is not concerned with the relatively rare charges against addicts, certainly at the federal level, of violent crimes.) As once was the case as to violators of the Selective Service laws,¹⁰⁵ sentences in drug cases seem to depend to some extent upon the courts' personal views of the hazards of the par-

the impact of *Russell* is unclear. It is perhaps an ominous sign that the Court has accepted *Hampton v. United States*, 507 F.2d 832 (8th Cir. 1974), cert. granted, 95 S. Ct. 1445 (1975). In affirming a narcotics conviction, *Hampton* rejected the view of the Fifth Circuit that an instruction is required as to an entrapment defense, regardless of predisposition, if the informer provided the contraband. 507 F.2d 835. *Hampton* also cited in support *United States v. McGrath*, 494 F.2d 529 (7th Cir. 1974), 507 F.2d at 835-36, though in that case the defendant clearly had commenced his criminal activity before the agents' intervention. See *United States v. McGrath*, 468 F.2d 1027 (7th Cir. 1972), vacated for reconsideration in light of *Russell*, 412 U.S. 936 (1973).

102. M. FRANKEL, *CRIMINAL SENTENCES—LAW WITHOUT ORDER* 1-11, 106-07 (1973) [hereinafter cited as FRANKEL].

103. *Id.* at 8.

104. *Id.* at 15.

105. The ebb and flow of sentences, and convictions as well, seemed to coincide roughly with the national mood toward the Vietnam engagement in the '60s and early '70s. See generally Beytach, *Judicial Review in Selective Service Cases—Lessons from Vietnam*, 48 N.D. LAWYER 1164 (1973); Comment, *Prosecutions for Selective Service Offenses: A Field Study*, 22 STAN. L. REV. 356 (1970).

ticular act in question,¹⁰⁶ as well as their acceptance of the notion that stern penalties do or may deter drug use.¹⁰⁷ What Judge Frankel also says of the lawmaking process, noting *inter alia* that Colorado statutes provided a ten-year maximum for stealing a dog, but six months for killing one,¹⁰⁸ is equally applicable to sentencing in drug cases. Quoting Churchill's remark that an unfailing test of the civilization of any country is the "mood and temper of the public with regard to the treatment of crime and criminals," Judge Frankel writes:

The 'mood and temper' reflected in our laws assigning punishments include a kind of simple-minded puritanism in which it is premised that conduct we dislike will end or sharply decrease if we pass a criminal law, with harsh sanctions, against it. Many of our criminal laws are enacted in an excess of righteous indignation, with legislators fervidly outshouting each other, with little thought or attention given to the large numbers of years inserted as maximum penalties. Written at the random, accidental times when particular evils come to be perceived, the statutes are not harmonized or coordinated with each other. The resulting jumbles of harsh anomalies are practically inevitable.¹⁰⁹

An additional factor that may influence judges toward incarceration for former addicts is recognition that they may have committed hundreds or thousands of crimes while using heroin yet have been punished for few. A final consideration is the persistence of the claim that the "drug problem" is partially the result of soft sentences: "Irregular or inadequate penalties imposed by courts can affect the entire [drug] supply control effort."¹¹⁰

Incarceration of heroin addicts, though, is not known to accomplish more than a temporary cessation of drug use.¹¹¹ It probably hinders the addict's chances of later abstinence, since

106. Compare *United States v. Hartford*, 489 F.2d 652, 656-59 (5th Cir. 1974) (first-time offender sentenced to maximum term of imprisonment for hashish distribution, the court noting his admitted personal involvement with cocaine, "one of the most dangerous substances the world has ever known"), and *United States v. Foss*, 501 F.2d 522, 524 (1st Cir. 1974) (since cocaine is a "hard drug," a "hard sentence" is compelled), with *United States v. Castro*, 16 CRIM. L. RPTER. 2511 (N.D. Ill. 1975) (finding cocaine classified erroneously as addictive, and recognizing that it "is generally considered as an anti-fatigue, anti-soporific stimulant often used to stimulate alertness or euphoria").

107. Cf. the history of marijuana arrests in this country, see chart accompanying note 3 *supra*, during the 1960's when severe sentences were common.

108. FRANKEL, *supra* note 102, at 8.

109. *Id.* at 9.

110. 1974 STRATEGY, *supra* note 6, at 79. The same publication states that the Administration is committed to seeking legislation that would provide "more stringent penalties for drug traffickers." *Id.* Cf. note 19 *supra*; Mooney & Clements, *Agents Complain: Congress, Courts Draw Drug Blame*, Chicago Daily News, June 9, 1975, at 1, col. 3.

111. See SEABERG, *supra* note 12, 361-62 concerning the relapse rate among heroin users.

the prison environment may tend to reinforce the antisocial values learned as an addict.¹¹² The presence of addicts in the prison community also exposes others to the attitudes and bent of the addict.

Incarceration increasingly serves another negative function. Heroin users once were likely to have served time in jail before experimenting with drugs and to have been sufficiently mature to abide incarceration. Today's abuser of drugs is more often a teenager without a background as an offender.¹¹³

A final and important reason to question incarceration exists when the person to be sentenced is participating successfully in a community-based drug program. Only a few years ago the only treatment option available to addicts was the notoriously unsuccessful "hospital" of the sort operated by the federal government at Lexington, Kentucky.¹¹⁴ Increasingly, though, persons entering into the criminal justice system are being directed to such programs as those operated by the State of Illinois Drug Abuse Program. If seemingly successful treatment is interrupted by incarceration, rehabilitation of the offender is jeopardized.

The alternative to incarceration, continued participation in a treatment program, received the tacit support of Congress in 1966 with the passage of the NARA legislation.¹¹⁵ As the Supreme Court recognized in *Marshall v. United States*,¹¹⁶ Congress' intent was that rehabilitative approaches be tested, whatever the difficulty. And it is increasingly recognized that the potential benefits from drug treatment programs are such as to outweigh the considerations that might otherwise call for incarceration.¹¹⁷

Addiction and Crime

An important but controversial, even overworked, aspect of heroin use is its relationship with crime.¹¹⁸ It is a controversial subject because of the widely varying conclusions reached by all observers as to the profile of the typical addict in two

112. See FINGARETTE, *supra* note 57, at 432.

113. Doane interview, *supra* note 8.

114. See DRUG AMERICA, *supra* note 5, at 307-10.

115. Narcotic Addict Rehabilitation Act of 1966, 28 U.S.C. §§ 2901-06 (1970) (Title I); 18 U.S.C. §§ 4251-55 (Title II); 42 U.S.C. §§ 3411-26 (Title III).

116. 414 U.S. 417 (1974).

117. See, e.g., DRUG AMERICA, *supra* note 5, at 301-45; Cushman, *Relationship Between Narcotic Addiction and Crime*, 38 FED. PROBATION (No. 3) 39, 42 (1974), distinguishing the circumstances that gave rise to a less optimistic report in Vorenberg & Lukoff, *Addiction, Crime, and the Criminal Justice System*, 37 FED. PROBATION (No. 4) 3 (1973).

118. See generally NEW PERSPECTIVES, *supra* note 5, at 25-64.

regards—his propensity to crime and criminal record before using drugs, and the amount of crime he commits after the onset of addiction and abstinence during treatment. It is perhaps an overworked subject because of the seeming impossibility of isolating or agreeing on benchmarks or even of collecting accurate data. Thus, for example, some of the early studies dealt with addicts who would not be representative of today's users by reason of background and age; much of the data is dependent on unreliable self-reports or other measurement techniques.¹¹⁹ Writing for the National Commission on Marijuana and Drug Abuse, one observer recognized

[t]he futility of attempting to simplistically dichotomize opiod-crime relations either into the category of delinquency antecedating drug use or the category that drug use per se is criminogenic. Drug-behavior interactions are complex processes involving multiple variables that operate over time; identifying one factor as causal is misleading. . . .

. . . Despite attempts by skilled investigators to ferret out which of the many non-pharmacological factors are relatively more important and which less, generalizations at this time would be premature.¹²⁰

There is, however, general agreement that addiction is not a cause of violent crime, in fact that addicts commit fewer such offenses than others.¹²¹ Still, the disturbing fact remains that addicts commit a substantial amount of crime to support their habits. Many persons only use heroin occasionally or raise funds through efforts that do not victimize innocent persons, such as through prostitution or sales to other addicts. The fact remains, whatever the accuracy of the figures, that it is commonly assumed each heroin user will steal between \$25,000 and \$50,000 annually in support of his habit.¹²² And the public increasingly is fearful of drugs and the relationship they are perceived to have with crime.¹²³ The issue, therefore, is one which defense counsel must face when representing either a present or former addict.

Clearly, many persons in the criminal justice system have the attitude that addicts' presumed depredations, though uncharged, should be considered at the time of sentencing. It may be that, if the judge is suspected of this tendency or is otherwise regarded as hostile to drug users, the client would prefer that

119. DRUG AMERICA, *supra* note 5, at 154-65.

120. Tinklenberg, *Drugs and Crime*, DRUG AMERICA, *supra* note 5, at 242, 262 (App. I).

121. See L. BERNHEIM, DEFENSE OF NARCOTICS CASES § 7.03 (1972); cf. DRUG AMERICA, *supra* note 5, at 162-63.

122. See, e.g., DRUG AMERICA, *supra* note 5, at 171-72; NEW PERSPECTIVES, *supra* note 5, at 31.

123. See DRUG AMERICA, *supra* note 5, at 154.

his addiction not be mentioned. If the condition is known to the courts, it should be assumed that the court will not express hostile feelings at the sentencing. The question then is whether counsel should raise the issue of crime and addiction or forego it as fruitless or harmful to the client.

The emotional impact of the addiction-crime issue also should be considered in determining whether or not to take a jury trial. If the decision is to do so, pertinent questions obviously should be directed to members of the venire.

The Inefficacy of Incarceration

As mentioned earlier,¹²⁴ there is reason to question the efficacy of incarceration of narcotics users. Whatever case can be made for alternatives to imprisonment on behalf of the great majority of offenders,¹²⁵ the lawyer should be aware of the unique failure that the incarcerative approach has had with addicts.

Imprisonment assumedly removes the offender from access to drugs, though exceptions do appear. Nonetheless, this technique results in the return to heroin use upon release of all but 5% to 10% of addicts.¹²⁶ As one noted medical researcher and commentator puts it:

From a medical perspective, addiction is a dysfunctional condition—a disease, not a crime. . . . It is . . . not surprising that prisons have failed to cure addiction. But what is disturbing is that so few people have learned from the failures . . . of punitive treatment how unproductive it is to lock up addicts.¹²⁷

Several explanations have been advanced to explain the futility of temporary cessation of heroin use. For one thing, prison may confer a grim bonus of sorts. After a period of use a tolerance sets in and the seductive "high" associated with heroin is no longer obtainable. The drug is then used for its tranquilizing effect and to ward off withdrawal symptoms.¹²⁸ When the

124. See text accompanying notes 11-16 *supra*.

125. See, e.g., *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971) (state prison system unconstitutional); Board of Directors, National Council of Crime and Delinquency, *The Non-Dangerous Offender Should Not Be Imprisoned*, 19 CRIME & DELINQ. 450 (1973) (commentary on a citizen's study committee report to the Governor of Wisconsin recommending a phase-out of state penal institutions); Dole, *Medicine and the Criminal Justice System*, 81 ANNALS INT. MED. 687 (1974); ABA STANDARDS RELATING TO PROBATION 1.3 (Approved Draft 1970).

126. Wald & Hutt, *The Drug Abuse Survey Project*, in DEALING WITH DRUG ABUSE 32 (1972).

127. Dole, *supra* note 125.

128. See FINGARETTE, *supra* note 57, at 438; PROBLEM OF HEROIN, *supra* note 39, at 7.

prisoner is released, however, he can anticipate a renewal of the most pleasurable use of the drug, since the tolerance level dropped during incarceration.

Particularly as the onset of addiction has increasingly come to occur in the teenage years,¹²⁹ imprisonment carries with it all the hazards of which we are aware, including personal danger and the influence of hardened criminals.¹³⁰

The argument has been made that incarceration of narcotics users may at least deter others from drug use.¹³¹ While superficially attractive, the proposition is not supported by hard data, and in fact it flies in the face of our national experience during the past ten years, when drug use and the budgets of narcotics agencies seemingly were in competition for the greatest increases. Nor do claims¹³² ring true that police efforts and jail sentences have not yet been tested adequately. For one thing, no mechanism exists to measure the number of drug users who are arrested or convicted of non-drug offenses. As most lawyers would agree, charges of theft and the like generally outnumber the number of arrests addicts sustain on drug charges. And if the defendant is incarcerated, he may well decline comment on his addiction. It also seems incredible that anyone who participated in the surge of drug use in the late '60s, for example, was unaware of the draconian sentences being meted out for marijuana offenses, let alone on heroin charges,¹³³ or of the fact that an addict's life in general is bound up inextricably with the police and jails.¹³⁴

Nor has progress been experienced through the civil commitment programs established by some states and the federal government. The programs have diverted only a small number of addicts and have suffered from cumbersome legal machinery, restrictive requirements for admission, inflexible terms of residence, lack of dynamic programs, and resentment by the patients because of the prison-like atmosphere and the lack of real treatment efforts.¹³⁵ A variation to this approach is now being tested by the United States Bureau of Prisons, which operates drug treatment programs in several prisons.¹³⁶ To date, how-

129. See *DRUG AMERICA*, *supra* note 5, at 194 (median age in heroin related deaths in New York—1960 (31 years), 1972 (23 years)).

130. For comments on these issues, see Bates, *How Many Years?*, 19 *CRIME & DELINQ.* 15, 17 (1973).

131. *E.g.*, *PROBLEM OF HEROIN*, *supra* note 39, at 18-21. Compare the discussion in *KAPLAN*, *supra* note 73, ch. IX, as to means of control that do not focus on users or consumers in prohibited conduct, for example, regarding gambling and prostitution.

132. *E.g.*, *PROBLEM OF HEROIN*, *supra* note 39.

133. See note 94 *supra*.

134. See text accompanying notes 51-60 *supra*.

135. Cf. *Marshall v. United States*, 414 U.S. 417 (1974).

136. The programs are located in institutions for both youthful and adult offenders and are operated by Bureau personnel.

ever, access to such programs is open only to inmates who expect to be released within a year or so. No information is available as to the effectiveness of the programs, but it should be anticipated that prosecutors will argue their availability as a reason for denials of probation.

Finally, mention is required of the growing sentiment for incarceration or "quarantine" for all addicts.¹³⁷ Considering that the prison population of such states as Illinois is less than 5,000 inmates, while one observer estimates the size of the addict population in Cook County to be 40,000,¹³⁸ systemic questions obviously are raised by proposals to lock up addicts. These views must be kept in mind, though, as reflective of the secret wish of many who deal with addicts: If only we could be rid of them. Practical considerations aside, the attorney should be prepared to argue the futility of the hope that progress will result from sentencing policies toward the small number of addicts who will reach that stage of the criminal justice system.

Incarceration as Counter-Productive

Even if incarceration is viewed as a possibly effective device with some heroin users, it may be that negative effects on the great majority of such persons, as well as other inmates, weigh against it. The user in prison is apt to sharpen his anti-social skills and gain exposure to the techniques of violent criminals. And, of course, prison is an unlikely place to make the sorts of internal adjustments that are required if further heroin use is to be avoided.¹³⁹

The effect on other inmates of contact with addicts has yet to be measured. Recently, though, observers have accepted what is known as the "contagion" model of the onset of heroin use:

Heroin use spreads through peer-group contacts, and those peer groups most vulnerable to experimenting with it are those that include a person who himself has recently tried it and whose enthusiasm for it is contagious. . . .

. . . Strikingly, the new user usually does not seek out heroin the first time he uses it, but rather begins to use it almost fortuitously, by the accident of personal contact in a polydrug sub-culture. In these groups, a *majority* of the members usually try heroin after it is introduced by one of them, though not all of these become addicted.¹⁴⁰

It is only speculation whether and to what extent addicts in prisons thus serve to encourage drug use by other inmates. It

137. *E.g.*, PROBLEM OF HEROIN, *supra* note 39, at 22-23, 27.

138. Doane interview, *supra* note 8.

139. See notes 14-16 *supra* and accompanying text.

140. PROBLEM OF HEROIN, *supra* note 39, at 9-10.

would seem, however, that a cautious approach to sentencing would include assessment of the potential.

*The Success and Desirability of
Court-Ordered Treatment and Probation*

Impressive support has arisen of late for approaches to addiction control that would emphasize treatment and discard a strategy centered around law enforcement methods.¹⁴¹ The existence of several successful programs, described in the following section, has given rise to optimism that the approach has merit. However, because these programs are new, questions have been raised about the manner in which progress has been tested and about whether those who came under treatment were representative of the addict community as a whole.¹⁴² While controversy assumedly will continue, the issue is mainly one of interest to budgetarians and academicians, not lawyers and judges. The reason is that by any standard the drug programs, good ones at least, have established a pattern of success that is deserving of recognition by the judicial system in dealing with former addicts.

Such success may be measured solely by the results that are discussed below in connection with specific programs. In addition, however, the criterion for our purposes is not whether the rates of success approach perfection but whether they better the record achieved by our penal institutions. The answer to this question is clear.

Another factor to keep in mind relates to the nature of the trial process. Hopefully, the client will have entered a treatment program soon after arrest. At the time of sentence, then, he or she will have a record of heroin-free existence for possibly a year. For purposes of assessing the likelihood of continued progress, therefore, the inquiry into the success rate of a particular drug program should take note of the typically high drop-out rate of the mass of volunteers in early stages of treatment.¹⁴³ Those who have participated for a year or more are much better risks for the future.¹⁴⁴ And if the focus is not on relapse inci-

141. For the views of the Special Committee on Crime Prevention and Control, see NEW PERSPECTIVES, *supra* note 5, at 61-64; see also Cuskey & Krasner, *The Eyes of the Beholder: The Drug Addict as Criminal, Patient or Victim*, 2 CONTEMP. DRUG PROBS. 579 (1973).

142. E.g., Vorenberg & Lukoff, *Addiction, Crime, and the Criminal Justice System*, 37 FED. PROBATION (No. 4) 3 (1973).

143. See, e.g., Epstein, *Methadone: The Forlorn Hope*, THE PUBLIC INTEREST, Summer, 1974.

144. See as to the reduction of illicit drug use and improvement in employment rates, Senay, *et al.*, IDAP—*Five-Year Results*, 1973 PROCEEDINGS, FIFTH NAT'L CONF. ON METHADONE TREATMENT 1437 (1973); GATEWAY'S SUCCESS IN THE REHABILITATION OF DRUG USERS (1973); Vorenberg

dents involving former addicts, but on their overall ability to stay free of heroin and associated criminal activity, program achievements are the more impressive.¹⁴⁵

An additional reason exists for urging the continued treatment of the client in preference to incarceration. It has to do with the diminishing vitality of the traditional view that "there seem to be no forms of therapy that will 'cure' addicts in any large numbers of their dependence on heroin."¹⁴⁶ In part, this view is irrelevant since society is coming to recognize that methadone maintenance, despite continuance of an addictive habit, is an acceptable compromise between heroin addiction and a drug-free existence.¹⁴⁷ Moreover, the traditional view may be seriously inaccurate.

The alleged intractability of the heroin habit has long bothered observers who were aware of the rarity of addictive patterns among persons who received morphine for medical purposes.¹⁴⁸ Recent studies of returning Vietnam veterans show both a surprising incidence of heroin use while overseas and an extremely low rate of use upon return. One such study¹⁴⁹ involved interviews of 13,240 servicemen. Almost half of the veterans experimented with the pure, inexpensive forms of heroin or opium that were available in Vietnam, but only about 20 percent developed signs of physical or psychological dependence. Of that number, only one percent experienced addictive signs at any time after their return to the United States. Then some did use narcotics, but without addiction.¹⁵⁰

The foregoing of course puts into question the traditional wisdom as to the degree of physiological dependence that develops with heroin use. By reason of the adulteration that is characteristic of the heroin sold to addicts—one percent to five percent active material—Fingarette concludes that it is "highly unlikely that much physiological addiction exists," that "the addict's strictly physiological dependence is at most moderate and

& Lukoff, *Addiction, Crime, and the Criminal Justice System*, 37 *FED. PROBATION* (No. 4) 3 (1973) (as to arrest rates).

145. See FINGARETTE, *supra* note 57, at 429 and cited authorities. The qualitative difference that exists when a person limits drug use to isolated occasions, as compared with a daily habit, requires little discussion. One observer also notes, as to relapses into criminal behavior by persons in the Illinois Drug Abuse Program, that the charges typically are less serious than before treatment, with alleged probation violations being the most common. Doane interview, *supra* note 8.

146. *PROBLEM OF HEROIN*, *supra* note 39, at 4.

147. *E.g.*, *DRUG AMERICA*, *supra* note 5, at 319-23.

148. See FINGARETTE, *supra* note 57, at 428-29, and cited authorities.

149. L. ROBINS, *A FOLLOW-UP OF VIETNAM DRUG USERS* (Interim Final Rep., Special Actions Office for Drug Abuse Prevention, Executive Office of the President, 1973), discussed in FINGARETTE, *supra* note 57, at 430-31.

150. FINGARETTE, *supra* note 57, at 430-31.

very often quite mild in degree," and that withdrawal symptoms are comparable for the moderately addicted to a bad case of the flu.¹⁵¹

It seems fair to say that the hesitance many judges have felt about foregoing incarceration has had to do with the common assumption that treatment programs were useless because the pull of heroin was too strong. That being the case, the feeling may have been that the offender should not be spared incarceration if a non-addict would have been so sentenced. This approach may now be challenged if encountered.

Fingarette recognizes, however, that "the social inducements to adopt addictive patterns of behavior are often maximal."¹⁵² He describes these pulls in an interesting way:

. . . Young people who are disadvantaged, and alienated, may find the foundation of a socially authenticated identity in addiction. For such persons, drug use provides at last a 'constructive' focal activity in life, generating its own occupational responsibilities, opportunities for success and achievement, social status, and ideological, philosophical, or religious meaning. The 'hustling' required by drug addiction is not always a burden or a separation from a socially productive life; for certain groups it may be one natural outgrowth of the values of an alienated subculture, values that are by definition inconsistent with those of the dominant society. When some writers characterize the addict as one who will seek the drug at 'great risk' or 'at the cost of unbelievable sacrifices,' the sacrifice in question may be one of values important only to the writer and not to the addict. . . .¹⁵³

The primacy of environmental and mental factors as causative of addictive patterns, and as the key to withdrawal, possibly was recognized years ago by Mr. Anslinger, the narcotics czar, when he substituted a placebo for the demerol to which a person was addicted.¹⁵⁴ That tactic is still employed with success.¹⁵⁵ If these views are accurate, it would seem that the treatment approach with an addict would stress not only the physiological needs of the addict but also the problems of employment, housing, family, and attitudes.¹⁵⁶ And that is the way drug programs are structured.

When the author first encountered addicted clients who evidenced interest in entering the Illinois Drug Abuse Program, whether as a condition of bond or otherwise, it sometimes seemed questionable whether that step should be taken before the resolution of the case. That is, would the pressure and uncer-

151. *Id.* at 431 and cited authorities.

152. *Id.*

153. *Id.* at 432.

154. See text accompanying note 60 *supra*.

155. FINGARETTE, *supra* note 57, at 437 n.110.

156. *Id.* at 437-44; Doane interview, *supra* note 8.

tainty produced by the pending proceedings make the client a poor prospect for success in the program? If so and if the client breached the condition of bond, it could affect the court's attitude toward the sentence if a conviction resulted. These misgivings have proven without foundation in the past several years, during which possibly ten clients have been represented who opted for entry into a drug program. Each to date apparently has kept free of heroin use. While hardly a valid sample, this experience appears to have been duplicated in a number of other local cases, thus suggesting that the incentive provided by such pressure (or later under probation) may be helpful to the person attempting to abstain from heroin. This is also the import of the statement by Fingarette:

Because addiction in this country has far deeper social roots than physiological ones, judicious use of sanctions and threats of sanctions, especially if coupled with suitable constructive aid, can be an effective tool in deterring addicts from continuing drug use. Such sanctions may be rooted in the powers of the criminal law; they often are under present policies (e.g., revocation of parole, use of prison sentences). Sanctions and aid may also be rooted in other values and institutions—for example, in personal freedom, work or family. What is essential, however, is that the addict perceive both the sanctions and the aid in terms of his own values.¹⁵⁷

The efficacy of the prison sanction has been questioned above. Characterizing continued participation in a drug program as a sanction, however, is probably an effective way in which to argue for probationary sentencing.

It should be recognized, on the other hand, that the deterministic view will occasionally result in more humane sentencing treatment for the client. That is, if the court does not regard the defendant as the helpless slave of his or her habit, but as one who made a conscious choice to pursue pleasure through criminal means, the outcome at sentencing may be unsatisfactory.

*Court-Ordered Treatment as Easily Supervised
and Involving Minimal Risk to Society*

The decision of whether or not to place a convicted offender on probation is often affected by the court's view about the likelihood that the defendant will pose a danger to others or will continue to commit numerous non-violent crimes. To the extent that the offender's possible future criminal activity may be difficult to detect, the court may tend to favor incarceration. That the former addict stands in a distinctly different position should

157. FINGARETTE, *supra* note 57, at 432-33 (omitting footnotes).

be understood by the sentencing judge. Probably the client has not committed violent crimes. Whether or not a lapse into the use of heroin occurs, there is no reason to doubt the continuation of this non-violent pattern.

There is of course the risk that the defendant will take up heroin use again. But, as noted above, the chances are excellent that a relapse will not occur. Even if it should, however, a probationary sentence, conditioned as it would be on participation in a drug program, provides a good deal more assurance to the court than in the ordinary case. First, a reliable check, the urinalysis, exists to signal the recurrence of heroin use. The court is thus not faced with the common problem of sorting out suspicion from fact when questions are raised of a defendant's adherence to the terms of probation. Second, should the former addict continue to abstain from drug use, the chances are good that further criminal charges will not result. If offenses are committed by the probationer and if they follow the earlier pattern of non-violence, the court may then deal with the matter. The injury to society will have been minimal enough that the earlier risk, placing the former addict on probation, clearly was warranted.

Successful Drug Treatment Programs

Compared with the efforts of law enforcement agencies to discourage drug abuse, the history of treatment programs was insignificant until the last fifteen years or so, save as the early programs generated pessimism. Thus, beginning in 1935 hospitals operated by the federal government were the only source of medical assistance, and ninety percent of their volunteer patients resumed the use of narcotics after release.¹⁵⁸ Not until 1952 was a state institution opened for the treatment of addicts, although mental hospitals had treated some persons.¹⁵⁹

Beginning around 1960, however, a movement began to explore alternatives to the status quo, which emphasized the prosecution of drug users. A proliferation of drug treatment programs followed in the latter part of the decade. While many approaches have been tried, they are still experimental, although the National Commission on Marijuana and Drug Abuse has expressed optimism as to the national effort.¹⁶⁰ Discussion of several of the successful programs is warranted here in light of the fact that many developments have occurred without publicity.

158. DRUG AMERICA, *supra* note 5, at 309-10. See generally DRUG AMERICA at 305-25.

159. *Id.* at 310.

160. *Id.* at 337-38.

Treatment Programs in Illinois

The Illinois Drug Abuse Program was recognized by the National Commission as "one of the earliest and most diverse of the multi-modality" approaches to treatment, offering methadone maintenance, detoxification services, inpatient and outpatient drug-free programs, therapeutic communities, halfway house facilities, and opiate antagonist treatment.¹⁶¹ It has been termed the "most systematic and realistic in origin" of all the programs because of its planning and concepts.¹⁶² Established in 1968, by mid-1970 eleven facilities operated in Chicago and four in other cities and towns.¹⁶³ Presently about 35 clinics and facilities exist in the Chicago area.¹⁶⁴

In the first assessment of the program, the then Director, Jerome Jaffe, found that the following had been achieved: The program showed that it was possible to develop a multi-method treatment system within a single administrative structure; it proved that this kind of system can reduce or eliminate many of the inefficiencies and destructive rivalries that had characterized other single-modality programs; and it demonstrated that people with differing philosophies can cooperate where vested interests are not developed and the treatment of heroin users is not politicized.¹⁶⁵

Testifying before a Congressional committee in 1971, Dr. Jaffe was asked about the correlation between treatment and the crime rates among patients. He said:

From the beginning of our program one of the criteria by which we measured effectiveness was the extent to which treatment reduced antisocial behavior. We have done at least four separate studies in which we have compared the self-reported arrest rates of patients prior to treatment and their arrest rates during treatment. In every one of these studies we have observed a very substantial drop in the arrest rates. In some instances the rates were reduced to one-half of the pretreatment rates. In others, the rates were reduced to one-third of the pretreatment rate.¹⁶⁶

161. *Id.* at 324. See generally Senay, *et. al.*, *IDAP—Five-Year Results*, in 1973 PROCEEDINGS, FIFTH NAT'L. CONF. ON METHADONE TREATMENT 1437 (1973); Jaffe, *Development of a Successful Treatment Program for Narcotic Addicts in Illinois*, in *DRUG ABUSE: DATA AND DEBATE* 48 (P. Blachcy ed. 1970).

162. R. GLASSCOTE, *et. al.*, *THE TREATMENT OF DRUG ABUSE: PROGRAMS, PROBLEMS, PROSPECTS* 127 (1972) [hereinafter cited as *TREATMENT*].

163. Jaffe, *supra* note 161, at 130.

164. Senay interview, *supra* note 8. Contrary to the current federal view, Dr. Senay stated that the IDAP facilities have always been near capacity, and that considerable expansion would be necessary to meet community needs.

165. Jaffe, *supra* note 161, at 132.

166. "Narcotics Research, Rehabilitation, and Treatment," *Hearings on H.R. 115 Before the Select Comm. on Crime*, 92d Cong., 1st Sess. 212-13 (1971).

In the past several years there has been a radical drop in the mean age of persons entering IDAP programs, with a perceptible increase in suburban residents. The implications of these changes are now being studied.¹⁶⁷

For most persons enrolled with IDAP, methadone maintenance and counseling are the major treatment methods. Patients are not told what dosage they receive, though the average is about 30 to 40 milligrams daily, 120 milligrams being the maximum allowable under regulations of the Food and Drug Administration. The goal for each patient is cessation of all drug use, but the pace is set according to mutual assessments of the patient's need for the support of the drug.¹⁶⁸

The controversiality of methadone treatment is recognized by IDAP,¹⁶⁹ but the results far outweigh the disadvantages of the technique in the opinion of staff members.¹⁷⁰

At the other extreme, the opportunity for abstinence from the outset is offered persons who enroll in Illinois drug programs. One such private program, Gateway Houses Foundation, Inc., operates three therapeutic communities that intermix former addicts and those who have abused other varieties of drugs. A therapeutic community is a treatment plan derived from psychodynamics and behavior modification or conditioning. The basis of treatment is a set of group transactions which explore behavior in order to determine its origin, develop insight and encourage change. Behavior which is considered positive is rewarded with privileges, while misbehavior is punished by removal of privileges. Traditionally, therapeutic communities have been entirely "drug free." At Gateway and many others, the staff members usually are ex-addicts.¹⁷¹

167. Doane interview, *supra* note 8.

168. *Id.*

169. *E.g.*, Report Series, Series 31, No. 1, NAT'L. CLEARINGHOUSE FOR DRUG ABUSE INFORMATION 13 (1974):

Methadone maintenance for drug dependence of the morphine type remains experimental . . . and has not yet been adequately evaluated. The techniques of well-designed clinical drug trials including scientifically controlled series and/or comparison groups are required on these trials. It is important that the influence of factors other than methadone itself be evaluated. . . . To date, patients involved have, in the main, been highly motivated, carefully selected and provided with organized aftercare arranged so as to develop a supportive group process. Furthermore, these patients have not been shown to be a representative sample of drug-dependent population in other respects. . . . Finally, it must be not forgotten that methadone itself is a drug of dependence and that persons taking it regularly in the methadone program continue to have a drug dependence of the morphine type. . . . It will, therefore, be necessary to keep in view the question of final withdrawal of methadone from these patients.

170. Doane interview, *supra* note 8.

171. TREATMENT, *supra* note 162, at 142.

The program has three phases: Phase I, in which the patients progress from menial jobs to more responsible positions, thus "proving" themselves; Phase II, in which the patients continue to reside in the community but find employment or enter school; and Phase III, in which the patients live outside the community but return to participate in particular program components.¹⁷² Training is emphasized and most residents enroll in programs, often under the sponsorship of the state Division of Vocational Rehabilitation. Remedial courses are also given within the House and arrangements are made for patients to take the General Educational Development equivalency examinations.

In 1973 Gateway published the first cohort analysis of patients entering the therapeutic community in order to approximate the true success rate of its operations.¹⁷³ The study treated two groups of people identified by a specified period of admission as a cohort (Cohort I and Cohort II), and it followed their progress for a number of years. Criteria for success, either total or partial, were established. A total success was defined as a person who was leading a constructive life after leaving the program, that is, attending school or working full-time, attending school and working part-time, or temporarily unemployed (if the person had only recently lost his job). Complete abstinence from drugs was another condition. Partial success was defined as a person living a constructive life, but using marijuana or still in treatment in another program.¹⁷⁴

Gateway claimed as successes its graduates (those who completed the two year program) as well as persons who left before graduation but otherwise fit into the definition of total success. For Cohort I, this figure was 14.5 percent; for Cohort II the figure was 21.0 percent as of December 31, 1972, and 24.2 percent as of May 15, 1972.

Gateway's publication also included information pertaining to the lifestyles of the members of the Cohorts since they left the therapeutic community. In Cohort I, all the graduates were working except for one who was attending school full-time. Half of those who were working held a second part-time job. The rest were working full-time at a regular job. In Cohort II, 88 percent of the graduates were working. Twenty percent held full-time positions and also had a second part-time job; 56 percent were working full-time; and 12 percent were working part-time. In contrast, of those who left before graduating, work was the source of support for only 51.5 percent of Cohort I and 54.5 percent of Cohort II.¹⁷⁵

172. *Id.* at 144.

173. GATEWAY'S SUCCESS IN THE REHABILITATION OF DRUG USERS (1973).

174. *Id.* at 1-2.

175. *Id.* at 19-21.

About 39 percent of the graduates from Cohort I reported that they were attending school; two-thirds were going to college. Nearly a quarter of the graduates from Cohort II were enrolled in school, most of them in college.¹⁷⁶

Methadone Maintenance in New York

In 1964 Doctors Marie Nyswander and Vincent Dole began an experimental maintenance program with methadone. The subjects, who were thoroughly addicted to heroin, were hospitalized and administered oral doses of methadone, between 80 and 120 milligrams daily. After release from the hospital, the patients were free to return to the clinic for methadone medication and counseling.¹⁷⁷ The success of the program was remarkable. The patients began to function as normal individuals and began to plan constructively for their future lives. The federal government, impressed by the success of the Dole-Nyswander experiment, permitted the establishment of other methadone maintenance programs. By 1972, methadone maintenance had become the largest single modality of treatment for heroin addicts, with 70,000 patients undergoing treatment.¹⁷⁸

The methadone maintenance program in New York, begun as a research project, was an effort to find an effective method of dealing with relapsing criminal addicts. The immediate goal was to halt their criminal behavior. Its longer-term goal was described by Doctor Harvey Gollance, Associate Director at the Beth Israel Medical Center, as one of "social rehabilitation for those who have been unable to achieve abstinence."¹⁷⁹ At first, very strict criteria for admission to the program were applied to ensure the admission of addicts with proven histories of heroin addiction. Age limits were set between 21 and 40. Since 1965 the criteria have been relaxed as to age, and applicants with physical or mental health complications or with mixed drug abuse histories are now admitted to the program.¹⁸⁰

The program considers the addict to be a person with a chronic disease who "is unable to function socially or economically and must take drugs to relieve his physical misery."¹⁸¹ The patients in treatment are administered doses of methadone; when tolerance to the medication is established, the dose can be held constant. But the program does more than administer medication; its administrators assert that methadone frees the heroin

176. *Id.* at 22.

177. DRUG AMERICA, *supra* note 5, at 312.

178. *Id.*

179. TREATMENT, *supra* note 162, at 66.

180. Joseph & Dole, *Methadone Patients on Probation and Parole*, 31 FED. PROBATION 42, 43 (1970).

181. TREATMENT, *supra* note 162, at 67.

addict from drug hunger so that he becomes receptive to rehabilitation. Social rehabilitation, in turn, is defined as: (1) abstinence from all abusive drugs; (2) absence of arrests; (3) employment or enrollment in school.¹⁸²)

The Methadone Maintenance Treatment Program consists of three phases. Phase I begins when a new applicant reports to the clinic for the first time. There he sees a psychiatrist to ascertain the degree of his addiction and to establish the dosage of methadone, which is usually about 40 milligrams at the outset. Within three weeks the dosage is increased to between 80 and 100 milligrams. Thereafter, those patients who are neither employed nor enrolled in school must continue to come to the clinic five days a week; those who are in school or working may cut their visits to three times a week and bring the rest of their doses home. Individual psychiatric services and group sessions are available.¹⁸³

In Phase II, the serious rehabilitation process begins. A wide spectrum of services is offered in areas of medical care, problems of everyday life, social services, vocational guidance, and legal advice if needed. Employment counseling and assistance are emphasized.

Phase III is reserved only for those patients who have led productive lives for at least a year. They are considered sufficiently stable at this point to require little more than the methadone itself.¹⁸⁴

One of the witnesses before the House Select Committee on Crime in 1971 was the physician who had conducted an ongoing evaluation of the first thousand patients in New York's methadone maintenance program. Reviewing the patients' criminal records before entering treatment and comparing them with their criminal records thereafter, Dr. Gearing found:

Our latest review would say that you could almost look at methadone as some kind of a vaccine against crime and look at it in a vaccine efficacy-type model and in that light we would say that methadone maintenance patients have a decrease in their criminality in the first year of 81.5 percent; in the second it is about 92 percent; in the third year, 96 percent; and for those who stay in the fourth year, it becomes close to 99 percent.¹⁸⁵

A similar study, conducted of 600 patients who had been admitted without a period of hospitalization, yielded similar results.¹⁸⁶

Gearing also testified as to her analysis of the patients' in-

182. *Id.* at 67-68.

183. *Id.* at 75.

184. *Id.* at 78.

185. Hearings, *supra* note 166, at 105.

186. *Id.* at 106.

volvement with education or employment. The average employment rate for patients entering the program during the early phases was about 25 percent. For those who stayed in the program for six months, about 45 percent were employed. The percentage increased to 55 percent for those who stayed in the program for over a year, and reached 90 percent when the patient had been in the program for 5 years or longer.¹⁸⁷

To emphasize again, drug treatment programs such as those in New York and Illinois are still in experimental stages. Problems may be expected, but the results thus far justify judicial faith at the time of sentencing a former addict.

Presenting the Case for Probationary Sentencing

When the former addict is convicted or enters a plea of guilty, it is suggested that counsel consider the utility of a memorandum in support of a sentence of probation, whether or not a presentence report will be ordered. A prime reason is the suspicion felt toward drug dependent persons in general. "Never trust a junkie" may be a trite expression, but it should signal the need for corrective action by counsel.

If the procedure will be to order a presentence report and if counsel may examine the report a sufficient time before sentencing, the memorandum may be delayed until the report has been reviewed. Challenge may then be made in the defense memorandum to inaccurate or unsupported statements in the report.

If counsel does not have access to the presentence report or if discovery is not granted as to the portion in which the probation officer recommends a particular sentence, the memorandum should be filed earlier than the report. Likewise, if the question of sentencing will be presented to other judges through a routine procedure for exchanging ideas about dispositions in criminal cases, the filing of the memorandum should precede the date of that meeting.

Whatever the timing, counsel should anticipate the need to counter either an ingrained prejudice or distaste on the part of the judge or overt skepticism by the probation officer. The latter, in particular, likely has struggled with a sufficient number of addicts that little sympathy remains. Thus, it is somewhat routine that mention will be made in the presentence report that the defendant may be attempting to "manipulate" the case for the purpose of obtaining a probationary sentence. (That, of

187. *Id.* at 107.

course, is exactly what the defendant wants; but whether he is cynically manipulating or simply trying to obtain a sentence consonant with his reformed conduct is for philosophers to answer.) Another common sight is the presentence report that covers the defendant's criminal record in the most explicit form. But in referring to his or her year-long struggle to stay free of heroin, something like the following will appear: "The defendant claims to have participated satisfactorily in a drug program."

The conference between judges for sentencing presents another pitfall. The defendant may appear as an individual to the judge to whom the case is assigned, but the recommendations of the other judges are more apt to be influenced by general ideas about the sentencing of former addicts. The chances for probation probably would be enhanced if such judges have access to the defendant's version of the facts, his background, and the progress being made in the drug treatment program.

As to content, some of the ideas expressed herein may be helpful. If so, a standard section of the sentencing memorandum may be prepared to save re-typing for each case. The defendant's background may or may not be helpful. Often, though, an interview will disclose that the addiction to heroin was triggered by traumatic events. Likewise, the efforts made by the client in the past to cope with his or her habit may attest to a potential for continued progress, certainly in light of the hopeful conditions that prevail at the time of sentencing.

Consideration should also be given to testing. Many addicts have skills or intelligence that are unusual for their environments. Perhaps such persons are more prone to frustration than others with less promise, and hence susceptible to drug abuse. Similarly, employers and friends may attest in writing to positive aspects of the defendant's life or talents. (While a written submission may be supplemented by the presence of the author at the time of the sentencing, the difficulty is that the judge may have decided the question in advance.)

Aside from counsel's impressions, a submission from the administrator of the treatment program also should be obtained. An unsupported account by a former addict may be regarded as suspect.

Steps After Incarceration

If the court avowedly imposes a jail sentence for the purpose of punishment or deterrence, there may be little the lawyer can do thereafter. But if the court directs or requests that the defendant be assigned to an institutional drug treatment program, compliance with the order should be monitored. First, the

court's request may be ignored by the assignment of the defendant to an institution that has no program, or by failure to assign him to a program at the institution. Second, entry into the program may be barred administratively until the concluding months of inmates' sentences. Third, the program may lack features envisioned by the sentencing judge, or it may take an approach of which the judge disapproves.

If the court's expectations are not met for any reason, or if the client reports an unsatisfactory situation, verification of the facts generally may be obtained from the client's caseworker or counselor at the prison. Corrective steps may then be taken by the lawyer.

In most jurisdictions post-sentence relief is available. In the federal system, for instance, a motion to reduce the sentence may be made within 120 days of its imposition.¹⁸⁸ If the sentence followed the entry of a plea of guilty, relief is available at any time under rule 32(d) of the Federal Rules of Criminal Procedure "to correct manifest injustice." Under the rule the court may allow the withdrawal of the guilty plea and set aside the conviction.

If the time has not elapsed for a motion to reduce the sentence under rule 35, the extraordinary relief obtainable under rule 32(d) need not be considered. If the institution's failure to honor the court's request concerning a treatment program is not uncovered before the passage of 120 days, though, rule 32(d) may provide the only relief.¹⁸⁹

Because the case law is silent on the subject of whether and under what conditions a plea of guilty may be set aside for the reasons under consideration,¹⁹⁰ an understanding with the court should be sought. For example, if the defendant would be eligible immediately for admission to an institutional drug treatment program if his sentence had been two years instead of three, the facts should be made known to the court as well as the defendant's willingness to enter a new plea of guilty if the conviction is set aside.

188. FED. R. CRIM. P. 35.

189. See, e.g., *United States v. Houssein*, 326 F. Supp. 1194 (D. Md. 1971). Having pled guilty and served a prison sentence for a marijuana violation, the defendant was ordered by the Immigration and Naturalization Service to report for deportation. The court permitted the withdrawal of the plea of guilty.

190. See 2 C. WRIGHT, FEDERAL PRACTICE & PROCEDURE § 539 (1969), collecting cases. It is accepted, however, that the court has more leeway under the "manifest injustice" standard than is provided under 28 U.S.C. § 2255. See *United States v. Kent*, 397 F.2d 446, 448 n.1 (7th Cir. 1968), cert. denied, 393 U.S. 1081 (1969). Cf. *Rivera v. United States*, 341 F.2d 746 (1st Cir. 1965) (motion under 28 U.S.C. § 2255; significance of collateral allegation that petitioner had received no treatment for drug problem during two-year period of incarceration not discussed).

Administrative relief is also possible. Correspondence or phone calls with a counselor, caseworker or prison supervisor may produce a transfer or a change in position regarding the client's eligibility for treatment at the institution. As with other aspects of representing a former addict, there is no harm in asking.