

REPORT ON
THE CONTROLLED DANGEROUS SUBSTANCES ACT

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I. INTRODUCTION

During the past two decades widespread drug abuse has been the focus of increasing public attention and concern. In the early nineteen fifties it was a problem primarily limited in scope to a relative handful of drug addicts dependent upon morphine and heroin. Today it has become a national concern, with reports indicating that literally millions of individuals have "experimented" with such legally proscribed substances as marihuana, hashish, amphetamines, barbituates and hallucinogens.

Drug abuse is a problem which shows no preference for sex, race, or social class. It exists in our universities and secondary schools, and may be found in the suburbs as well as the slums. Although drug abuse would thus appear to be otherwise socially indiscriminate, it is alarmingly prevalent among our youth.

As might be expected with so vast and complex a problem, unanimity of opinion on specific issues is practically nonexistent. Nonetheless, there is little disagreement that while government's response may have arrested growth in some areas, it has been generally unsuccessful in curtailing the distribution or use of illicit drugs.

Despite the efforts of local, state and federal authorities to combat drug abuse, its effects continue to exact staggering social costs. Not only do the criminal elements who engage in illicit drug traffic

reap huge profits, but drug addicts, desperate to support habits costing upwards of \$100 a day, often resort to various crimes against the public. As a result, the crime rate spirals upward while law enforcement authorities, the courts and the penal authorities struggle to find a solution to the problem. Yet, the time, money and effort expended remain insignificant costs when compared to the loss to society through lives destroyed and wasted by drugs.

In 1970 our Legislature responded to the drug problem, as it then existed, by enacting the Controlled Dangerous Substances Act. Designed to combat the criminal dissemination and use of dangerous drugs, it sought to distinguish between numerous forms of narcotic and non-narcotic substances based upon their relative danger to society, and their therapeutic utility in connection with medical treatment. Penalties for violations of the Act were based upon the schedule in which the particular drug was found and the type of behavior criminally proscribed. The articulated objective was to mandate harsh penalties for offenders with a high degree of moral culpability. At the same time, an attempt was made to reduce the penalties contained in the prior law which had thwarted any meaningful attempt at rehabilitation.

On balance, the New Jersey Controlled Dangerous Substances Act was a welcome response to the deficiencies

and inequities prevalent in its predecessor, the Uniform Narcotic Drug Law. However, as with any institutional response it must be reviewed and, when appropriate, amended, to keep pace with scientific understanding and the community's expectations. Recognizing this obligation, the Governor issued the following mandate in his 1973 State of the State address:

"Two years ago, New Jersey began to operate under a new and enlightened statute controlling the manufacture, sale and use of dangerous substances. The time has come to review the operation and effectiveness of this law and to determine whether it requires strengthening to aid the drive against narcotics pushers.

Therefore, I will ask the Attorney General to investigate immediately this entire area, consulting with the courts and law enforcement authorities at all levels. The Attorney General will report to me... with his findings and recommendations. If any legislation is recommended, I will seek the cooperation and support of this Legislature."

Pursuant to this mandate, the Attorney General's Office solicited evaluations of the Controlled Dangerous Substances Act with primary but not exclusive emphasis upon the criminal law perspective. This report reflects the views of the various judges, prosecutors, police authorities, lawyers, scientists, rehabilitation personnel and administrators interviewed. However, as in any area so replete with numerous and diverse competing interests, even the most probing analysis does

not disclose a consensus of opinion. Nonetheless, the comments and criticisms elicited from personal interviews, as well as questionnaires, indicate widespread acknowledgment of the effectiveness of the Controlled Dangerous Substances Act. Most agreed that the Act clearly represented an enlightened approach to the drug problem. Thus, while the survey did disclose deficiencies, both of a philosophical and technical nature, it is believed that they can be remedied through legislative action within the existing codification.

The area dealing with proscriptions on the distribution, possession and use of cannabis (marijuana and hashish) evoked the most controversy, especially when the merits of decriminalization were discussed. This being the case it was deemed appropriate to consider this issue within a separate section of the report.

In conclusion, while this report is based upon the thoughts and reactions of the numerous people interviewed and surveyed, essential background information was obtained from current law review articles, the drug statutes of our sister states, as well as the Second Report of the National Commission on Marijuana and Drug Abuse. In addition, we have made various recommendations in an attempt to cure many of the problems which our survey has revealed. One caveat is plainly in order. In most instances, law enforcement personnel had differing views with regard to legislative solutions to present deficiencies in our law even in cases where there was virtual unanimity in identifying the problems. Thus, many of the recommendations contained herein should not be thought of as reflecting the views of a consensus within the law enforcement community.

II. DISPOSITION OF OFFENDERS

The predecessor statute, the Uniform Narcotic Drug Law, basically established one form of disposition - incarceration with a mandatory-minimum sentence. Often, the penalty provisions as applied, were harsh and unrealistic. In an attempt to remedy these drawbacks, the New Jersey Controlled Dangerous Substances Act completely restructured the penal provisions and provided for the non-criminal disposition of certain offenders. Still, however, our surveys of law enforcement agencies have indicated that improvements on the sentencing scheme of the Controlled Dangerous Substances Act can be made.

A. The Function of the Criminal Law and Sentencing

Prior to making any recommendations or proposals, one must understand the nature of the problem being confronted. An effective way to approach and understand the problem of disposition of offenders is to identify the participants and characterize their roles in illicit drug activities. Once this has been done, specific goals can be established as to law enforcement policies and preferred methods for the disposition of offenders can be suggested. Thereby a co-ordinated plan can be formulated which meets immediate problems, yet hopefully establishes the means for long-range solutions.

Thus, an effort will be made here to identify meaningful classes of drug offenders, recommend appropriate enforcement policies and priorities, and propose methods

of disposition which are consistent with the desired goals. These recommendations are made with the traditional goals of the criminal law in mind: (1) retribution, (2) deterrence of others, (3) rehabilitation of the defendant, and (4) protection of the public by isolation of the offender.¹ However, they are more specifically directed at the unique problems presented by the drug offender as perceived by law enforcement authorities in this State.

A common mistake made by many has been the overly simplistic categorization of drug law offenders into possessors-users and sellers. This characterization is made in our Controlled Dangerous Substances Act since the only differentiation is between the general categories of users,² possessors, and sellers. In fact, there are numerous other, more pertinent, categories of drug law offenders which will be noted as a survey is made of the range of participants. No effort is made in this particular section to deal with the question of marijuana as it will be dealt with separately in a subsequent section.

For the purpose of this report, offenders will be classified in six categories, persons who (1) use or are under the influence of any controlled dangerous substances; (2) possess any controlled dangerous substance;

1. State v. Ivan, 33 N.J. 197 (1960).

2. The term "users" refers to the statutory meaning denoting one who uses a controlled dangerous substance and does not indicate drug dependence.

(3) sell controlled dangerous substances and are themselves drug dependent;³ (4) sell controlled dangerous substances as an accomodation to friends; (5) sell a controlled dangerous substance for profit and are not drug dependent; and (6) engage in large scale trafficking of drugs for profit.

The distribution of drugs is accomplished in pyramid fashion, the source being a small number of large scale drug purveyors at the pinnacle. These dealers sell to smaller distributors who in turn sell to others and so on down the line to the "street-pusher." In different areas there may be fewer or more levels in the chain of distribution, but the general pattern remains the same.

In order to accomplish one of the primary goals in combatting the drug problem, the elimination of the availability of illicit drugs, it is obvious that efforts must be made to detect, prosecute, and punish the high echelon drug traffickers. Large scale dealers pose the gravest threat to society in that they provide the seeds of the drug problem and foster its growth in order to enhance

3. The term "drug dependent person" is used as it is defined in N.J.S.A.24:21-2:

"Drug dependent person" means a person who is using a controlled dangerous substance and who is in a state of psychic or physical dependence, or both, arising from the use of that controlled dangerous substance on a continuous basis. Drug dependence is characterized by behavioral and other responses, including but not limited to a strong compulsion to take the substance on a recurring basis in order to experience its psychic effects, or to avoid the discomfort of its absence.

their own profit-making position. They are, of course, the most morally culpable of all participants on the drug scene as they prey on the weaknesses of others for pecuniary gain.

In 1972, the New Jersey State Police directed their main efforts away from the "street sellers" and redirected them toward the apprehension of these wholesale dealers. However, our State Police have already encountered serious personnel and financial limitations in these efforts. It is estimated that once a "target" of such an investigation is identified, at least 10 or 11 investigators are required to conduct constant surveillance including telephonic interceptions. Presently only 70 men are assigned to the Narcotic Bureau of the State Police. Therefore it is clear that an effective assault on high echelon dealers can only be accomplished by the allocation of additional personnel and requisite funds.

Detection and apprehension, are only steps in the criminal process and are pointless unless penalty provisions are sufficiently severe to make convictions meaningful. Present penalty provisions make no distinctions as to the classes of sellers other than as to the type of drugs sold. The sole provision, N.J.S.A.24:21-19, provides that any person who manufactures, distributes, or dispenses, or possesses with intent to manufacture, dispense, or distribute, a controlled dangerous substance which is classified in Schedules I or II and is a narcotic drug is guilty of a high misdemeanor and shall be punished by imprisonment

for not more than 12 years and/or a fine of not more than \$25,000. Similar violators involved with any other controlled dangerous substance classified in Schedules I, II, III, or IV are also guilty of a high misdemeanor and are punishable by imprisonment of up to five years and/or a fine of not more than \$15,000. Violations relating to substances classified in Schedule V are punishable as misdemeanors with imprisonment of up to one year and/or a fine of not more than \$5,000.

In view of the grave danger posed by large scale traffickers of illicit drugs, it is considered that the present provisions are deficient in three respects:

- (1) The maximum sentences are inadequate;
- (2) A mandatory minimum sentence is necessary for certain offenders; and
- (3) The maximum fines are insufficient for certain offenses.

In light of the criticisms of the existing statute noted above, it is recommended that a new statute be enacted which provides for increased penalties, and which clearly designates the class of offender subject to its provisions. It is suggested that the statute include:

- (1) A maximum sentence of life imprisonment;
- (2) A mandatory minimum sentence of 10 years with no possibility of suspension or parole prior to the expiration of the minimum term; and

(3) A maximum fine of \$100,000.

The class of offender within the purview of the proposal should be the drug trafficker as previously described.

Due to the severe penalties imposed, the definition of a drug trafficker must be restrictive so as to include only high echelon drug dealers. An analogous provision in the United States Code requires continued criminal conduct undertaken by one in concert with five or more other persons with respect to whom that person occupies a position of organizer, a supervisory position, or any other position of management, and from which such person obtains substantial income or resources. The federal definition embodies, as essential elements, the concept of pecuniary gain combined with the leadership role in an illicit drug enterprise; however, a more specific definition of the essential elements than that in the federal statute would be useful.

As previously indicated present provisions provide a maximum penalty of twelve years. Therefore a violator, is initially eligible for parole under present law, in less than four years. In view of the dangers to society

4. It should be noted that present penalty provisions draw a distinction based upon the classification of drugs distributed. Although it may appear that a similar limitation should be made here, comments of the National Commission on Marihuana and Drug Abuse indicate that substances presently classified in Schedule III may also present a substantial danger to society. Therefore consideration should be given as to whether the proposed provision should be expanded beyond the scope of the present statute's application.

5. 21 U.S.C.A. §848.

6. N.J.S.A. 30:4-123-10.

previously noted, such maximum penalties are inadequate to deal with the professional trafficker. More commensurate with the offense and the nature of the offender is the availability of a sentence of life imprisonment. A maximum sentence of that degree provides an effective deterrent, discouraging embarkment on the criminal venture as well as an effective means to deal with an offender once the criminal process has been initiated.

Although mandatory-minimum sentences are generally disfavored, and are disfavored by a majority of law enforcement authorities in this State, the nub of such criticism is directed at penalties which seem harsh when generally imposed upon a broad class of offenders. Such criticism is vitiated when restrictive definitional portions of the statute are established which exclude all but the offender deserving of such sentence. Thus, mandatory-minimum sentences are appropriate where, as recommended here, steps are taken to single out those worthy of such punishment.

Present fines of up to \$25,000 are unrealistic in the case of the commercial trafficker. The sale of illicit drugs at high levels often involves profits of fantastic proportions. Therefore, fines should be commensurate with the profits attainable by such endeavors, and severe enough to be effective.

The importance of the proposed penalty provision cannot be overemphasized. High echelon drug traffickers.

present a grave and immediate threat to our society. Therefore effective enforcement and stern treatment of the trafficker are necessary tools in the battle to diminish the availability of drugs on the illegal market.

Below the high echelon traffickers are classes of sellers who play various roles in the distribution process. Each, depending on his particular role, is morally culpable to a different degree, and deserving of different treatment. The three classes included here are: (1) sellers of controlled dangerous substances for profit who are not drug dependent; (2) sellers of controlled dangerous substances who sell to friends as an accommodation; and (3) drug dependent sellers who sell to support their own habit.

All of the above-denoted offenders would fall within the existing statute dealing with the distribution of drugs.⁷ As previously noted such offenses are subject to 12 year, five year, and one year maximum sentences, depending upon the classification of the drug distributed. Thus, as each of the categories is discussed, an effort will be made to determine whether present provisions are appropriate to achieve the desired goals of enforcement and, where appropriate, rehabilitation.

Directly below the traffickers are offenders who engage in the sale of drugs for a profit motive. As noted previously, various levels of such sellers exist, each

⁷· N.J.S.A.24:21-19.

dealing in different quantities of drugs, growing progressively smaller as one descends the chain of distribution. These sellers present, though to a lesser extent, a similar threat to society as the traffickers. Therefore they are also deserving of active police scrutiny and exacting punishment.

It is our position that existing maximum penalties are adequate to deal with intermediate level distributors. However, the judiciary in imposing sentences on such offenders, must recognize the danger represented and must act accordingly. It is thus incumbent on the courts to distinguish between the profiteer and the offender, though not drug dependent, who sells to support his own use. Clearly the former is deserving of a substantial custodial sentence and a significant fine, while the latter is susceptible to more lenient treatment without sacrifice of the aims of criminal law enforcement.

The next category of seller-offenders is composed of those who sell to friends as a mere accomodation, i.e. they have access to a source of drugs and thus acquire same for friends desirous of these drugs. Although such a transaction is technically punishable as a violation of the distribution provisions, the offender is not as morally culpable as the profit-oriented sellers. As previously noted, no recommendation has been made to revise the penalty provisions in this area. However, this class of offender should be sentenced with recognition of his "degree" of culpability, in relation to others in the chain of distribution.

It is believed that drug-dependent sellers more commonly referred to as "street-sellers" or street-pushers", represent a significant number of participants in the drug scene. This class of offenders presents the most difficult problem in terms of preferred disposition; although the acts they have committed would ordinarily be morally culpable, they represent prime candidates for treatment rather than punishment due to their dependency. As this section deals only with penal provisions, treatment or medical dispositions of these offenders will be discussed in the section which follows.

Simple possession poses a lesser threat to society than any sale violation. Therefore it is tempting to recommend the reduction of penalty provisions for "possessors."⁸ However, since the quantum of drugs possessed does not dictate the penalty to be imposed, it is submitted that the present maximums be retained. Thus, one in possession of a relatively large quantity of prohibited substances may be sentenced to a substantial period of incarceration, if warranted. Since the statute in its present form has the flexibility to allow for lenient treatment, including dispositions outside of the criminal system, there appears to be little chance of the imposition of an undeserved sentence.

N.J.S.A.24:21-20a(1) provides that one in possession of a narcotic drug classified in Schedule I or II or any other controlled dangerous substance classified in Schedule I,II, III, or IV is guilty of a high misdemeanor and is subject to imprisonment of up to five years and/or a fine of not more than \$15,000. N.J.S.A.24:21-20a(2) provides that possession of any controlled dangerous substance classified in Schedule V is denoted a misdemeanor and is punishable by up to one year imprisonment and/or a fine of not more than \$5,000.

Results of our survey indicate that a majority of law enforcement authorities do not favor any present decriminalization of possession offenses. It is felt that the withdrawal of the criminal sanction would signify the approval of use and would encourage wider consumption of drugs. Thus, any effort to decriminalize possession offenses would be counterproductive at this time.

The retention of present possession offenses serves the preventive goal in three basic ways: first, by deterring people from using the drug; second, by facilitating the enforcement of availability controls, and finally, by symbolizing society's disapproval of their use. However, although there are valid reasons for maintaining the present scheme of offenses, it should be reemphasized that law enforcement must devote its resources to assaulting and apprehending high echelon traffickers.

It has also been suggested by several law enforcement agencies that the distinction between possession and possession with intent to distribute be removed, leaving one offense with a higher maximum penalty than now provided. This proposal would alleviate many problems of proof now presented in a trial for the possession with intent to distribute charge. Advocates of this position contend that the potential of disparate sentencing under this scheme would be dispelled by the proper exercise of judicial discretion.

Although this proposal would perhaps facilitate convictions, it is our position that a statutory scheme of offenses which clearly defines the classes of offenders

and provides appropriate penalties for each, represents a fairer approach to the problem. Providing wide latitude of discretion leads to potential abuses and has the capacity to result in inequities and injustices.

The "user", the final class of offender, is one who uses or is under the influence of any controlled dangerous substance. Punishment for such violations is the most lenient of any offense under the present Act, for they are treated as disorderly person offenses.⁹ Thus, they are subject to a period of incarceration of up to six months and/or a fine of \$500.¹⁰ In addition to this general penalty, N.J.S.A.24:21-20(c) provides the sentencing judge with the discretion to suspend the offender's right to operate a motor vehicle for not more than two years.¹¹

In reality, the "user" and the "possessor" are generally one and the same person. It is merely fortuitous that the "user" is arrested after the ingestion of the prohibited substance rather than while it remains in his possession. One meaningful distinction, however, which would justify disparate penalty provisions is that every "possessor" is a potential seller, while the "user" has already demonstrated that the prohibited substances were for personal use.

"Users" have traditionally and accurately been recognized as posing the least risk or threat to society. They confine their illicit action to personal use of drugs. If any emphasis is to be placed on enforcement in this area

9. N.J.S.A.24:21-20(b)

10. N.J.S.A.2A:169-4

11. The driving privilege, under the statute is not restored until certification is made by a physician that the individual is not a drug dependent person within the meaning of the Act.

it is to be done when the "user" manifests aberrant or anti-social public behavior. Therefore, it is recommended that the present penalty provisions be retained. However, it is noted that although the discretionary provision permitting suspension of driving privileges has been upheld by the New Jersey Supreme Court, there is substantial question as to whether this penalty should ever be imposed when the offender is not a drug dependent person. The restrictive application of this section would then comport with the recognition that the right to operate a motor vehicle today is virtually a necessity, and that the driving privilege should not be revoked absent some relationship between the individual's behavior and the use of his automobile.

Although no discussion of the rehabilitation factor was detailed in the assessment of the present penalty provisions, its consideration was implicit in the ultimate recommendations. As to each class of offender, the rehabilitation factor was balanced with the other concerns of the criminal law, and the recommendation formulated. Rehabilitation outside of the criminal justice system is a separate consideration, and as such will be discussed in the following section.

State v. Smith, 58 N.J. 202 (1971).

B. Rehabilitation - The Diversionary Program of the New Jersey Controlled Dangerous Substances Act.

1. Conditional Discharge, Programs and Solutions

N.J.S.A.24:21-27 provides that a person charged with first offense possession or use of a controlled dangerous substance may, in the discretion of the court and with the offender's consent, be discharged on the condition that he submit to a program of "supervisory treatment" to be set by the court. The section applies only to cases of simple possession or use, and is available only once with respect to any person. Any residential in-patient treatment program ordered by the court is limited to the maximum confinement period allowed for the substantive offense, but in no case longer than three years. Upon completion of the treatment program any pending judicial proceedings for the offense are dismissed.

A defendant who, in the court's judgment, poses a danger to the community shall not be eligible for conditional discharge.¹ As well, if the court determines that the terms and conditions of any treatment program available will not benefit the defendant by correcting his drug dependency, he may deem the defendant to be ineligible.²

The conditional discharge provision introduced the concept of addict diversion into New Jersey's scheme for the criminal treatment of persons charged with simple

1. N.J.S.A.24:27c(1).

2. N.J.S.A.24:27c(2).

possession and use of narcotics. Diversion refers to an intervention in the criminal process which takes place after arrest but sometime before the entry of a judgment of conviction. Under this concept, a defendant is afforded the opportunity for non-criminal disposition of charges through treatment, or supervision.

The diversion approach is grounded on two basic premises: (1) drug-dependency is properly classified, both medically and legally, as a disease requiring treatment; and (2) that while the criminal justice system is effectively utilized as a mechanism for detecting drug dependent persons and securing their entry into treatment, its involvement should be minimal.

While it is not clear to what extent the affliction is physical and to what extent it is psychological, there is no doubt that it constitutes a medical disability. The traditional criminal sanctions and criminal sentencing are ill-suited for rehabilitation of the drug dependent user or for deterring him from further use. Still, the criminal process is necessarily involved, because of the relationship between drug use and other criminal activity.

The cost of processing possessors and users through the courts and maintaining them in prison is enormous. Moreover, criminal prosecution and imprisonment probably aggravate the user's drug dependency by failing to provide effective treatment and by conferring the stigma of a criminal conviction on the drug dependent individual, thus making it

more difficult for him to return to a conventional life.

In light of the factors listed above, the primary purposes of a diversionary program are twofold: First, to reduce the exposure of certain individuals to the criminal process, thereby facilitating rehabilitation; and second, to dispose quickly and inexpensively of cases which are more effectively handled without full criminal disposition. The second purpose would permit the criminal process to concentrate its resources and attention on the problems with which it can effectively deal. Although a diversionary program requires that there be a separate treatment process running parallel to the criminal process, and which may be substituted for the criminal process in order to achieve the cited goals, such a program can generally be considered to conserve financial resources in the long run.³

The diversion from the criminal process allowed by subsection 27 can occur at one of two points after an arrest: (1) after arrest, but before trial; or (2) after a plea of guilt or finding of guilt, but before entry of a judgment of conviction. While no indisputable statistical base is yet available, it seems that diversion at the earlier of the two possible points is seldom utilized. This development is in part attributable to the relative newness of the Act. However, survey responses from prosecutors and judges clearly indicates that the low incidence of early

3. Second Report of the National Commission on Marihuana and Drug Abuse, supra at 175-176.

diversion is due to prosecutorial and judicial caution. Prosecutors and judges are reluctant to release defendants to a treatment program, to which they may or may not conform, without first obtaining a finding of guilt. The view is that if the drug dependent defendant violates the terms of the treatment program set for him after he has pleaded to or been found guilty of the offense, it will be a relatively clean and easy process to reimpose the criminal sanction. The prosecutor need merely move that a judgment of conviction be entered and that sentence be imposed.

Whereas, if there has been no finding of guilt and the treatment program is subsequently violated, the prosecution may be in the position of having to revive a stale case, often where there is little likelihood of conviction. In short, prosecutors and judges are concerned with ensuring that the lever that compels submission to medical treatment does not become ineffective. The validity of this concern is recognized. Yet, if the principal role of the criminal process in regard to the drug-dependent possessor and user is to function as the entry mechanism into a treatment program, it appears diversion logically should occur as early as possible after entry into the criminal process. Additionally, if we insist on criminally processing a drug-dependent person through a finding of guilt, many of the benefits of the diversionary program will be lost.

These countervailing considerations may be resolved by a simple expediency. It is suggested that the

present statute be amended to make violation of a conditional discharge to a prescribed treatment program a distinct offense in and of itself, punishable by up to a year imprisonment. With such a provision included in the Act, prosecutors will be armed with an adequate means of ensuring compliance with the prescribed treatment program, without necessitating the entry of a plea of guilty to the underlying offense. Such a provision will lessen the danger that the diversion program will deteriorate into an "easy way out".

Statistics presently available also demonstrate that conditional discharge, whether before or after a finding of guilt, has not been utilized extensively. This low utilization of the diversion pipeline for drug dependent persons charged with possession and use, stems from another aspect of judicial caution. Under the existing provision the court is given the discretion to decide whether or not conditional discharge is to be granted to a defendant. Yet, there is no indication of the criteria to be used in making this decision. Nor, is there any indication as to the sources of information to which the judge may resort in discharging this function. The court is placed in the unavoidable position of having to decide whether a particular defendant needs, and is ripe for, medical treatment. Furthermore, he is then called upon to set the terms and conditions of an appropriate treatment program. Obviously being ill-equipped to make these medical decisions, judges are understandably reluctant to utilize the provisions. This lack of information and of medical guidelines was cited by many

judges consulted during this study as a prime deficiency in the statute.

What constitutes an appropriate treatment response to a given drug-dependent individual is a complex problem. Treatment approaches for drug dependence vary widely in regard to method and objective. Most current treatment methods aim at ultimate elimination of drug dependency. On the other hand, long term methadone maintenance seeks to stabilize the dependency at a point where the drug dependent person can function normally in society. Another accepted goal of treatment is to minimize the anti-social, criminal behavior that attends drug dependency by making a sustaining drug freely available to the user, or by isolating the user from the community.

The most common methods of treatment are: long-term hospitalization, ambulatory drug-free treatment, therapeutic communities, methadone maintenance, and multi-modality programs.

The hospitalization method, as presently used, consists of three main stages. First, the patient is withdrawn from drug dependency by decreasing doses of oral methadone. Then, a prolonged stage of in-patient psychological therapy begins. This may consist of group therapy, work therapy, and/or individual psychoanalysis. Finally, the patient is subjected to supervised out-patient care which may include vocational training along with continued psychological therapy. According to the Second Report of the

National Commission on Marihuana and Drug Abuse, hospitalization is the most expensive and least effective method of treating drug dependency.⁴

Ambulatory drug-free treatment is essentially the same as the third stage of the hospitalization technique, but begins with a gradual withdrawal process utilizing decreasing doses of oral methadone. The report of the National Commission on Marihuana and Drug Abuse states:

"Ambulatory drug-free programs have essentially the same success patterns as hospitalization and supervised aftercare. During treatment, patients show considerable improvement, greatly reducing drug-taking, involvement with the criminal system, and with undesirable behavior. Like hospitalization with aftercare, though, program self-evaluations are biased toward recording successes; they usually do not count patients who leave treatment altogether and many of these persons presumably return to dependent status."⁵

The therapeutic community approach is residential treatment in small or mid-sized groups relying on encounter-group therapy and milieu therapy. They vary widely as to the length of treatment. The disadvantages are that this mode of treatment is expensive relative to ambulatory care, and capable of treating only a relatively few drug dependent persons. It is said that with its emphasis on self-

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4. Second Report of the National Commission on Marihuana and Drug Abuse, supra at 316.
 5. Second Report of the National Commission on Marihuana and Drug Abuse, supra at 317.

discipline and hierarchical status levels within the group, the approach does not relate to ethnic groups and subcultures.

Methadone maintenance is the most important drug treatment being employed at the present time. It has distinct advantages as a treatment method: (1) since it is administered on an ambulatory out-patient basis, its cost is low; (2) since it is suitable to most opiate dependent people it has wide scale application; and (3) it is attractive to the patient and thus achieves a high rate of patient retention. However, there are disadvantages. If the "high-dose" method of treatment is employed, the methadone will completely block the effects of any heroin taken by the patient. But, the eventual withdrawal from "high-dose" methadone is difficult. Further, the adverse side effects of long term, high dosage are unknown. On the other hand, the "low-dose method" stabilizes the patient's condition, but does not completely bar a "high" from being attained by "shooting" additional heroin. Thus, "low dose" methadone works well only for patients highly motivated toward breaking out of the entire drug syndrome. It seems that the preferable "low dose" method is not appealing to the younger drug-taking population who still enjoy the "hustling" life on the streets. Most methadone programs attempt to cancel out these disadvantages by supplying additional treatment in the form of vocational and social counselling and psychological therapies.

No one program can successfully be applied to all drug dependent types. And, no one program is free from drawbacks. Each drug dependent individual requires an individual examination and diagnosis of his problem for the appropriate treatment response varies widely from case to case. This point merely emphasizes the fact that any prescribed treatment must be devised by those medically knowledgeable in this field. And, the effectiveness of medical treatment can only be maximized if the alternative methods of treatment are available.

N.J.S.A.24:21-27 is deficient because the burden of devising the appropriate medical response to a given patient is placed upon the judge. For this reason the Division concurs in the recommendation made by some of the judges consulted that the conditional discharge provision be reshaped to introduce a medical judgment into the process at the earliest possible point. The envisioned scheme would work as follows:

Every person charged with the possession or use of a controlled dangerous substance, who, while in custody or when he appears before a court, states, indicates, or otherwise shows symptoms of drug dependency shall be referred to a state medical authority to undergo a medical examination to determine whether he is drug dependent, the extent of his dependency, and the recommended course of treatment for correction of this dependency. While in the custody of the medical authorities the defendant can be given the necessary

immediate treatment he requires, such as detoxification.

If it is determined that the defendant's drug dependency is such as to require a course of treatment and rehabilitation, the medical authority shall so certify to the prosecutor and the court. Either the prosecution or the court, with the defendant's consent, or the defendant, shall move that judicial proceedings be suspended and the defendant remanded to the custody of the medical authority for the commencement of supervised treatment.

Upon successful completion of the treatment program prescribed, the medical authority shall so certify to the prosecutor, who will then move to have the original charges dismissed. If the defendant fails to complete the program prescribed, the medical authority shall so certify and the prosecutor may either revive the original charges or prosecute the defendant for violation of the terms of his conditional discharge.

This proposal would retain for the prosecutor the ability to oppose conditional discharge in cases in which he feels that the treatment program will not adequately protect the public from any danger that the defendant presents to it. It is recommended as well that the court retain the discretionary power to bar conditional discharge to any defendant under subsection 27c(1) and (2), i.e., in cases where the defendant's participation in the treatment program will pose a danger to the community. It is to be hoped that the court, the prosecutor, and the medical authority

will constructively interact to produce a supervised treatment program acceptable to each.

Basic treatment decisions should be made by a medical agency, rather than by the prosecution or the courts. At the same time it must be recognized that the executive and judicial branches must discharge their duties to the public. Where a drug-dependent person presents a clear danger to the safety of others, legal controls must be exerted to bar his return to the community until such time as the danger recedes. To this end the court should retain the power to prevent an immediate return to the community, and to require that any treatment program commence with a period of confinement.

In the case of non-drug dependent persons who are arrested for consumption offenses such as possession and use, it is our assessment that the law enforcement community prefers that all of the following modes of disposition should be made available:

- (1) diversion to a prevention program administered by the medical authority in lieu of prosecution;
- (2) diversion to a prevention program after a finding of guilt but before entry of a judgment of conviction and sentence; or
- (3) normal adjudication within the criminal process for the offense.

The early diversion of opiate users who have not yet become drug-dependent can be an important element in the war against the spread of dependency. It is said that heroin users are most likely to influence their peers toward

drug use in their first year of use. It is during this period that the heroin user maintains contact with his social group, is employed and functional. It is then, before the acute dependency stage begins, that the individual promotes and shares his drug taking with his friends. Thus, apprehension of a non-dependent user and diversion into an effective prevention program may inhibit the contagious danger that he poses.⁶

Eligibility for conditional discharge under the current statute is limited to persons charged with their first CDS offense. A drug-dependent person who has successfully completed an earlier supervised treatment program under the statute, but who has relapsed into drug use, is not eligible for early diversion upon arrest for another consumption related offense.

The requirement that any one person be given only "one bite at the apple" reflects an unrealistic view of drug-dependency and its treatment. Compulsive drug use should be thought of as a chronic disorder which usually

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6. A small minority of the judges polled in connection with this study indicated that they interpreted Section 27 as being applicable only to persons who are drug-dependent at the time that application is made for diversion to supervisory treatment. These judges will not allow conditional discharge for those defendants otherwise eligible who do not have a physical addiction. As written, Section 27 does not make drug dependency a prerequisite of conditional discharge. The judges who do, construe the term "supervisory treatment" as imposing such an eligibility requirement. To remedy this misconception, and in order to retain the benefits of preventive treatment, it is recommended that the Attorney General issue an advisory opinion suggesting that drug-dependency is not an eligibility requirement under Section 27.

requires continual or intermittent treatment over a period of years. As pointed out above there is no one method of treatment which can guarantee "success", no matter what definition of "success" is used. The recently developed models, such as methadone maintenance, have had limited "success" in terms of returning the user to stabilized social-functioning. But, it must be recognized that no treatment method, or combination of methods, can guarantee social reintegration and abstinence.

With these considerations in mind, some judges and prosecutors have recommended that a relapse into drug use after successful completion of a treatment program pursuant to conditional discharge should not per se, disqualify a person from receiving diversion to treatment after his second offense. It is felt that the only limitation that should be placed on access to such treatment is whether or not there is space available to accomodate the recidivist. Likewise, it is felt that a person who chooses not to take advantage of conditional discharge treatment upon his first offense should not be precluded from opting for conditional discharge if he is charged with a consumption-related offense on a subsequent occasion.

Essentially, the benefit sought to be gained by removing the second-offender eligibility barrier is one of flexibility. There is evidence to indicate that the exclusion of all non-first offenders may disqualify those drug-dependent users who are most ready for rehabilitation. It

is the older, hard-core user, who has lived with the misery of addiction, that is the most amenable to treatment.⁷ It is felt that these persons should be eligible and that the court's discretionary power to prohibit diversion for any candidate is adequate to prevent abuses of the diversion program.⁸

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7. See Watson v. United States, 439 F.2d 442, 456 n.12 (D.C.Cir. 1970) (en banc).
 8. In its present form, the conditional discharge provision prohibits imposing, as a condition of supervised treatment, referral to a residential treatment facility for a longer term than that provided by law for the offense charged. Also, no supervisory treatment program is to run longer than three years. The Division would retain the first provision. As to the second, it is recommended that defendants be placed under the supervision of the medical authorities for an indefinite period that is terminated upon certification that the treatment program has been successfully completed, or, after three years, whichever comes first.

2. The Medical Authority

As pointed out above, an often-heard criticism of Section 27 voiced by the judicial community is the lack of information as to the treatment facilities available and the lack of a diagnostic and treatment process to aid in placing drug users in suitable supervised programs. A corollary to this criticism is the inadequacy of the treatment facilities presently available. Many judges feel that there must be a statewide system of treatment facilities offering all acceptable modes of treatment before there can be an effective implementation of the conditional discharge approach. It is felt that the goals of prevention and rehabilitation cannot be attained without such a system. Until it is available, diversion from the criminal process will not be widely accepted or utilized.

The restructuring of the conditional discharge provisions recommended above is mainly premised upon the development of a formal process for asserting medical and therapeutic control and treatment over drug dependent persons. What is needed is a comprehensive statewide drug dependence treatment and rehabilitation program including integrated medical, psychiatric, psychological, social and vocational services. This program would offer all presently acceptable treatment models, such as methadone maintenance, detoxification services, in-patient and out-patient drug-free treatment and therapeutic communities.

This state agency would conduct the medical examinations of the drug dependent persons referred to it by the prosecutor or the court. The examination would employ accepted techniques, including urinanalysis, to determine the presence and extent of drug dependency. With positive findings it would prescribe a supervised treatment program and submit its recommendations to the court. If there were negative findings it would so certify and state whether a preventive program could be effective. Finally, it would provide the care, custody and treatment prescribed to the drug dependent persons remanded to its custody through conditional discharge.

The Division of Narcotic and Drug Abuse Control, within the Department of Health, is in a position to assume the responsibility for this program. Among the duties charged to this Division by N.J.S.A.26:2G-5 are:

- a. To survey and analyze the State's need and formulate a comprehensive plan for the long-range development, through the utilization of Federal, State, local and private resources, of adequate services and facilities for the prevention and control of drug addiction and the diagnosis, treatment and rehabilitation of drug addicts, and from time to time to revise such plan.
- b. To promote, develop, establish, coordinate and conduct unified programs for education, prevention, diagnosis, treatment, aftercare, community referral, rehabilitation and control in the field of drug addiction. . . .
- c. To direct and carry on basic, clinical, epidemiological, social sciency and statistical research in drug addiction either individually or in conjunction with

other agencies, public or private and, within the amount made available by appropriation therefore develop pilot programs.

- f. To disseminate information relating to public and private services and facilities in the state available for the assistance of drug addicts and potential drug addicts.
- h. To submit to the Governor, the Legislature and the Commissioner of Health an annual report of the division's operations and specific recommendations pertaining to matters within the scope of its jurisdiction in proper bill form. . .

It is recommended that the Division of Narcotics and Drug Abuse Control undertake a study of the problem and devise and propose implementing legislation under subsection 5(h), supra.

A prime problem which such a study would have to address, is the need to supplement and expand the presently available treatment and rehabilitation facilities in the State. At the present time there are approximately 120 public and private treatment facilities in the State. Of this total 36 are publicly supported. Only 12 of these facilities provide a methadone maintenance program, and the publicly supported facilities providing methadone maintenance are capable of serving only approximately 1400 patients. Of the private facilities, approximately 20 offer methadone maintenance. Given the continuing upward spiral of opiate addiction, it should be determined to what extent these services need to be expanded and improved.

In addition, plans and procedures for coordinating the efforts of the various treatment and rehabilitation

programs are necessary. Toward this end, we recommend that the Division review and study the programs utilized by the Narcotic Addiction Control Commission of New York State, and the guidelines established by the Law Enforcement Assistance Administration for implementation of federally aided Treatment Alternatives to Street Crime Pilot Projects.⁹

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9. A Treatment Alternatives to Street Crime Pilot Project is being instituted in Newark for the summer of 1973.

3. Conditional Discharge and Other Drug-Related Offenses

Our discussion has concentrated on conditional discharge as it applies to the drug dependent possessor/user. A more difficult question is the eligibility of drug dependent offenders who are charged with the distribution of controlled dangerous substances, and drug dependent offenders who have committed non-drug offenses. As was pointed out above (II. A., supra), a drug dependent seller has a greater moral culpability than the simple possessor/user. Obviously, the same is true of a drug dependent offender who commits a substantive criminal offense in order to feed his narcotic appetite. In the latter two cases, the goal of rehabilitation of the defendant must be balanced against the need for deterrence of others.

The present conditional discharge provision can be applied only to persons charged with simple possession or use. Drug dependent persons charged with possession or use and other substantive offenses can be made eligible through prosecutorial discretion and bargaining which results in the dismissal of the non-possessory charges. However, this informal process based on discretionary power is not followed in any systematic fashion. Decisions are made without knowledge of the defendant's needs; without knowledge of the treatment programs available; and, without standards to assure some conformity of action from case to case.

Most judges and prosecutors are opposed to an expansion of the conditional discharge concept to include

drug dependent offenders charged with crimes other than possession and use. In regard to drug dependent sellers who "deal" to support their addictions, the most frequent response was a call for more severe sentencing. As for drug dependent offenders charged with substantive offenses the general feeling is that they should be dealt with as any other person who commits a similar offense, but that they be afforded custodial, in-patient treatment through sentencing. The prevalent view is that more drug treatment facilities within the penal system are badly needed.¹

The present reluctance to sponsor diversion to treatment for an expanded group of drug dependent offenders seems to be primarily grounded on the recognition that tightly supervised, multi-modality treatment programs are not sufficiently available; and, that those that are available are not effective. It may well be that if a responsible state-wide medical authority offering controlled programs were established, the law enforcement community's opposition to an expanded diversion approach would be relaxed.

Many responsible commentators have stressed the view that incarceration and compulsory in-patient commitment

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1. Senate Bill 2052, introduced in February, 1973, calls for the establishment of residential, minimum security "drug-work treatment centers" within the Department of Institutions and Agencies. This bill would require a mandatory minimum term of three years for all "hard drug violators" and for drug dependent persons convicted of any crime except murder or assault with intent to commit murder. Probation and parole would be unavailable to persons sentenced to a three year term at such a facility.

have generally proved unavailing in breaking the cycle of drug-related crime.² They feel that the diversion concept should be expanded to allow its application to drug dependent persons charged with drug-related offenses beyond mere possession and use. They emphasize that the goals of effective rehabilitation and resource conservation require that eligibility for diversion not be unduly restricted. Rather, they would screen a wide range of defendants for participation in diversion programs.³ This school of thought holds that differentiation for purposes of eligibility between consumption offenses and drug-related crimes ignores the integral relationship between drug dependency and both types of offenses.

The authority and empirical support for this viewpoint requires that greater attention be given to the possibility of expanding the conditional discharge provisions. Premised upon the establishment of the needed medical authority and thorough guidelines for its interaction with the prosecution and the courts, such a move might gain the support of a significant number of judges and prosecutors.

In the present climate any proposal calling for non-custodial diversion of drug dependent persons charged with any

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2. See District of Columbia Department of Corrections Study: Narcotics Treatment Administration, Summary of Twelve-Month Follow-Up Study, Table §3 (1971).
 3. President's Commission on Law Enforcement and Administration of Justice: The Challenge of Crime in a Free Society, p. 229 (1967).

drug related offense would have to be carefully circumscribed. The Division feels that non-custodial diversion should not be made available until after a finding of guilt. Furthermore, diversion should not be available at all where the offense committed was of an assaultive or violent nature, whether in the act itself or in the possible injurious consequences of the act. Nor, should diversion to non-custodial treatment be made available where the offense, whether distribution of a CDS or some other substantive offense, constitutes a second offense.

III. MARIHUANA AND HASHISH

The past decade has witnessed a spectacular and unprecedented increase in the use of marihuana and hashish, chiefly among the youth. Recent surveys indicate that an estimated 24 million persons have used marihuana and approximately 1. 8.3 million can be categorized as current users. Other surveys uniformly reveal that more than 40% of the nation's college population have tried marihuana and that 39% of young adults 2. between 18 and 25 years of age have used the substance. Our inquiries reveal that the prevalence of cannabis use is proportionately as great in New Jersey. While only a small percentage of users are ultimately prosecuted, the current legislative scheme thus criminalizes the behavior of a substantial portion 3. of the state's population. With this in mind, our inquiries

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1. Report of the National Commission on Marihuana and Drug Abuse, Marihuana: A Signal of Misunderstanding, pp.6-8 (March 22, 1972).
 2. The most current survey, conducted in December, 1971, among 1,063 students on 57 campuses disclosed that 51% had tried marihuana at least once. American Institute of Public Opinion (Gallup). Gallup Opinion Index: Results of 1971 Survey of College Students, Princeton, New Jersey (February 1971). See also Mc Clothlin, W.J., Marihuana: An Analysis of Use, Distribution and Control. Prepared for the Bureau of Narcotics and Dangerous Drugs U.S. Department of Justice (June 1971).
 3. Abelson, H., Cohen, R., and Schrayer, D., Public Attitudes Toward Marihuana, Part I, Princeton, New Jersey: Response Analysis Corporation (January 1972). Our survey reveals that 1,074 cases were pending in the County Courts in 1971 relating to charges of possession of marihuana. Another 210 cases involved charges of possession of hashish. In 1970, 1,174 marihuana cases were pending in the County Courts. Further, 760 cases relating to charges of possession of hashish were pending that year. In 1969, 848 cases relating to charges of possession of marihuana were pending in the County Courts. An additional 15 cases were then pending relating to possession of hashish.

were oriented toward determining the scientific and law enforcement basis for the proscription on the distribution, possession and use of marihuana and hashish.

The extensive use of the drug, by itself, would appear to call for an examination of the effectiveness of current statutes dealing with the subject. Likewise, our inquiries reveal that other factors as well dictate that special consideration be given to the problem. A large proportion of our youthful population have tried marihuana and hashish. Even more important is the fact that the majority of our youth attach no legal significance to the use of these drugs. Yet, adults often view illicit drug use as a sign of wholesale rejection of moral and social values. Mutual mistrust has resulted in a cultural conflict of symbols with corresponding emotional responses on both sides. Thus, youth have increasingly viewed law enforcement activity as an unreasonable and unjustifiable rejection of their generation. The image of law enforcement has been impaired and respect for the law is thereby diminished. Reconsideration of the extent to which marihuana and hashish use poses a serious threat to society would do much to repair vital lines of communication among the generations.

The results of our survey of the scientific community as to the effect of marihuana and hashish on the individual also compel legislative reevaluation of current laws. Succinctly put, advocates of the legalization of marihuana and hashish and proponents of the prohibitory legal system have grossly oversimplified

the question of the effects of use on the individual. Clearly, "any psychoactive drug is harmful to the individual, depending on the intensity, frequency and duration of use."^{4.} Marihuana and hashish are not exceptions. The effect of the drugs depend upon the manner in which they are taken, setting, tolerance, reverse tolerance, dosage, metabolism, duration and pattern of use.^{5.}

Suffice it to say that the risk of harm lies in the heavy, long-term use of the drug, particularly the most potent preparations. "Clear-cut behavioral changes and a greater incidence of biological injury occur as duration of use increases."^{6.} Heavy use of marihuana produces a strong psychological dependence with detectable behavior changes. Large doses cause distortion of body images, depersonalization, visual illusions and vivid hallucinations.^{7.} On the other hand, "there is no conclusive evidence that short-term marihuana use alone directly results in any physical damage to man.⁸ Studies indicate that "no significant physical, biochemical, or mental abnormalities" can be attributed to marginal marihuana use.^{9.} Thus, marihuana and hashish should not

4. Report of the National Commission on Marihuana and Drug Abuse, Marihuana: A Signal of Misunderstanding, supra at 65.

5. Id. at 66.

6. Ibid.

7. Id. at 36.

8. Ibid.

9. Fink, M.: "Summary Report: Marihuana Study Program" (November 1971)

be confused with physically addictive drugs causing severe organic injury. Nor should they be considered completely safe 10. for human consumption.

Implicit in our present law is the assumption that society in some way suffers by virtue of the use of marihuana and hashish. Many have considered these drugs as posing a severe threat to public order, and hence use of the drug has long been prohibited. "Crime, insanity and idleness" have been thought 11. to be the inevitable consequences of the drug. Finally, it has been commonly assumed that use of cannabis induces experimentation with other more harmful drugs.

It is clear that many of these fears are scientifically unfounded and that others are exaggerated. The belief that marihuana inexorably leads to violent criminal behavior, while deeply embedded in the public mind, is not based upon any empirical data. To the contrary, marihuana, by itself, is not a potent producer 12. of violent behavior, and certainly not of criminal conduct.

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10. The information available as to the effect of these drugs on the individual is generally in conformity with the observations made in Report of that National Commission on Marihuana and Drug Abuse, Marihuana: A Signal of Misunderstanding.
 11. Report of the National Commission on Marihuana and Drug Abuse, Marihuana: A Signal of Misunderstanding, supra at 67.
 12. See e.g. Goode, E., "Marihuana Use and Crime," prepared for the National Commission on Marihuana and Drug Abuse (January 1972); Mayor's Committee on Marihuana, The Marihuana Problem in New York City, Lancaster: Jaques Cattell Press (1944).

Nor does its use contribute to non-violent criminal acts. Simply put, laboratory studies provide no evidence that marihuana produces effects which can be construed as criminogenic. And, as measured by the succession of arrests and convictions, it can be said that 13. marihuana does "not initiate criminal careers." While statistics indicate that more marihuana users are involved in other crimes than are non-users, these differences are dependent not on marihuana use per se, but on other factors generally relative to the individual 14. and his situation.

The persistent belief that marihuana and hashish cause criminal behavior is based in part upon the erroneous view that these drugs are physically addictive. As previously noted, they are not. Prolonged and heavy use of marihuana may cause psychological dependence, but there is no evidence that offenses are committed in a desperate attempt to obtain the drug. What statistical variation there is between users and non-users involved in criminal behavior suggests that "sociological and cultural variables account for the apparent statistical correlation between marihuana use and 15. crime and delinquency."

13. Bromberg, W. "Marihuana: A Psychiatric Study," Journal of the American Medical Association, 113:4-12 (1939). Other experts have concluded, however, that the "use of cannabis enhances suggestibility in certain individuals, and this may be a factor in the commission of crime by these chronic abusers." Lambo, T.A., "Medical and Social Problems of Drug Addiction in West Africa," UN Bulletin on Narcotics, 17 (1): 3-13 (1965).

14. Goode, E., "Marihuana Use and Crime," supra.

15. Report of the National Commission on Marihuana and Drug Abuse, Marihuana: A Signal of Misunderstanding, supra at 45, 76.

Recent studies have, however, confirmed the association between the use of marihuana and the consumption of other drugs. In point of fact, current marihuana users are about twice as likely to have used another illicit drug than are those who have ceased 16. using marihuana. It would be error to conclude, however, that in the typical case, marihuana usage necessarily leads to serious and chronic drug involvement. The sources polled agree that factors other than cannabis use alone contribute to multi-drug consumption. The "drug culture", for example, provides a ready supply of other dangerous substances. To some extent, the ready availability of other drugs and peer group pressure add motivation to experiment. And heavy drug use might well reflect and 17. aggravate a total alienation from our society and its institutions. On balance, it would appear that in any given case, whether or not marihuana leads to other drug use depends on the individual, on his cultural and social setting, and on the nature of the drug market to which he is exposed.

The scientific community stresses another factor that should be considered in determining the extent to which marihuana and hashish ought to be proscribed, that is the lack of the individual's motivation resultant from heavy and prolonged use of the drugs. Extreme forms of amotivational syndrome have been reported 18. in populations of lower socioeconomic males in developing nations.

16. Id. at 45.

17. See Smart, R.G., Fejer. O. and White, F.J., "The Extent of Drug Use in Metropolitan Toronto Schools," Addictions 18:3-19 (1971).

18. See, e.g., Benabud, A., "Psychopathological Aspects of the

These studies reveal that very heavy, long-term users of marihuana are unlikely to manifest conventional levels of motivation. Such individuals become lethargic and passive tending to lose interest in work and other long-term goals. Diminished drive, apathy, decreased motivation and lessened ambition might represent an organic syndrome decreasing individual effectiveness. A similar, though less intense, decrease in motivation has been observed among young persons in the Western world. In common parlance, the phenomenon in this country has been termed "dropping out." At present, the incidence of amotivational syndrome is slight and current studies are inconclusive. One study has concluded that "expanded epidemiologic studies are imperative to obtain a better 19. understanding of this complex behavior."

What has been said thus far starkly reveals that many of the problems associated with the use of marihuana and hashish are scientifically peculiar to those drugs. Physically addictive drugs and those which have other bizarre and dysfunctional behavioral effects pose a severe threat to society. But marihuana and hashish are not nearly as dangerous. Nevertheless, historically, no distinction was drawn between marihuana and narcotic drugs or more potent psychoactive drugs. By 1931, most states in which marihuana use was at all common had formally responded with a total prohibitory policy. New Jersey was no exception. Our statute, modeled

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18. (cont.) *Cannabus Situation in Morocco: Statistical Data for 1956,*" United Nations Bulletin on Narcotics, 9(4):1-16 (1957); Miras, C.J. "Marihuana and Hashish," U.C.L.A. Lecture (September 11, 1956).
 19. Report of the National Commission on Marihuana and Drug Abuse, Marihuana: A Signal of Misunderstanding, supra, at 87.

after the Uniform Narcotic Drug law, defined marihuana and
hashish as narcotic substances. Conviction of possession
of marihuana or hashish subjected the offender to a sentence
of a minimum of two years to a maximum of fifteen years in
prison. This treatment was consonant with other states which
criminalized marihuana use by adopting adaptations of the
Uniform Narcotic Drug Act.

New Jersey was one of the first states to recognize
the distinction between cannabis drugs and other more dangerous
substances. In 1970, our Legislature enacted the Controlled
Dangerous Substances Act. In N.J.S.A.24:21-2, marihuana and
hashish were separately defined and deleted from the category
of narcotic drugs. Additionally, the penalty for possession of
marihuana and hashish was reduced. Both substances were classified
as Schedule I drugs, but persons convicted of possession of over
25 grams of marihuana or over 5 grams of hashish were subject to
imprisonment for a maximum term of five years. More importantly,
possession of 25 grams or under of marihuana or 5 grams or under
of hashish was defined as a disorderly persons offense.

20. N.J.S.A.24:18-2.

21. N.J.S.A.24:21-9(b).

22. Whitebread, Charles H., Bonnie, Richard J., The Marihuana Concensus: A History of American Marihuana Prohibition (1972).

23. N.J.S.A.24:21-1, et seq.

24. N.J.S.A.24:21-20(a) (3).

Implicit in this statutory scheme was the realization that persons in possession of small quantities of marihuana and hashish probably intend to personally consume these substances. While personal use of marihuana and hashish was not condoned, it was generally recognized that criminal penalties were inappropriate. Thus, the penalty imposed more realistically corresponded with the offender's moral culpability. Generally, those authorities surveyed applauded this legislative response as both enlightened and contemporary. Yet certain individuals, particularly field law enforcement officers, reacted to the legislation with tolerance rather than acceptance. Adverse opinion appeared to be based on two distinct considerations, only one of which was valid. Misinformation about the effects of cannabis use ranked high on the scale of the critics. More relevant, however, is the fact that lessening the controls on cannabis might encourage experimentation, and often exposure to sources of more dangerous psychoactive substances.

On balance, we believe that the Controlled Dangerous Substances Act represents a rational approach to the problem of marihuana and hashish consumption. The vast majority of those surveyed agreed. Nevertheless, many sources, including some prosecutorial and law enforcement authorities, suggested further decriminalization of possessory and use offenses. Our view is in accord.

An examination of society's interest in prohibiting the

use of marihuana and hashish bears out this conclusion. There is no doubt that the problem is a proper subject of public concern. While some have had reservations with respect to the existence of a governmental obligation to protect the individual from the folly of self-destruction, it is our view that freedom depends upon the capacity of our citizens to act responsibly. And wholly apart from this philosophical basis for legislative prohibition is the social cost shared by all members of our society caused by the illicit use of drugs weighed with the cost of enforcement considered in light of the diversion of resources away from other, arguably more serious, areas of public concern.

It should be emphasized that the criminal law is not the sole method of insuring compliance with society's rules. Nor is government ultimately responsible for all individual evils. The objects of the criminal law must necessarily be confined to protection of society and to a lesser extent, of the individual, and deterrence, punishment and rehabilitation of the offender. And as noted elsewhere in this Report, in another context, the punitive aspect of the criminal law in this area is outweighed by the importance of rehabilitation especially where the risk to society is slight and the moral culpability of the offender is not great.

It is plain that present statutes throughout the country have not adequately protected the public from the widespread use of cannabis-type drugs. This is confirmed by a recent

survey of prosecutors in various parts of the country. A majority agreed that marihuana laws do not deter, or deter minimally persons under 30 years of age from initiating use (53%), users from using regularly (56%), and users from trans-
ferring small amounts for little or no remuneration (55%).
On a national basis, "as one proceeds through the criminal justice system...the people responsible for the functioning of that system seem to be decreasingly enthusiastic about the appropriateness of criminal control..." To a large extent, our survey of prosecutors in this state, particularly in the larger counties, reflects this general attitude. Many have noted that when confronted with the possibility of a harsh penalty, juries tend to acquit defendants accused of committing minor violations of our drug laws. This trend, termed "jury nullification," is national in scope and is reflected in decreasing rates of conviction with respect to charges of marihuana and hashish possession. A national survey reveals that in 1965, 90% of those charged with marihuana and hashish possession

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- 25. Report of the National Commission on Marihuana and Drug Abuse, Marihuana: A Signal of Misunderstanding, supra at 113-114.
 - 26. This is not to imply that there was unanimity on the subject. Most of the chiefs of police who responded to our questionnaire were of the opinion that marihuana and hashish should be the subject of criminal penalties. On the other hand, many prosecutors felt that the County Courts should not be burdened with "minor offenses" such as violations of our marihuana and hashish laws. Some prosecutors wished to decriminalize the possession of "hard drugs" for much the same reason.

27.

were convicted. Much the same trend is apparent in New Jersey

Equally significant is the fact that, as a general rule, judges throughout the country have tended to avoid incarcerating those convicted of possession of marihuana and hashish. A survey conducted by the National Commission on Marihuana and Drug Abuse discloses that in 1965, approximately 52% of persons convicted were incarcerated. In 1971, only 28.5% were imprisoned. Moreover, the average length of the sentences imposed (in months) has been reduced from 58.2 in 1965 to 39.9 in 1971.^{28.} The Commission concluded that "the courts, prosecutors and police [have] applied existing law more leniently."^{29.}

The trend toward leniency was formally recognized by our Supreme Court in State v. Ward, 57 N.J. 75 (1970). There, the Court had occasion to establish guidelines for the sentencing of first offenders who were found guilty of possessing marihuana for their own use. Justice Proctor, writing for the Court, noted the "unhappy fact that our youth have been involved with marihuana in disturbing numbers." Id. at 83. While that trend was said not to palliate the wrong, the Court stated that it remained the policy of the law to reform the youthful offender. Too severe

27. Report of the National Commission on Marihuana and Drug Abuse, Marihuana: A Signal of Misunderstanding, supra at 107.

28. Ibid. This survey was based on the disposition of federal marihuana arrests.

29. Ibid.

a penalty would do little towards advancing this goal. Thus, the Court held that "a suspended sentence with an appropriate term of probation was sufficient penalty for a person who is convicted for the first time of possessing marihuana for his own use." Id. at 82. The Court further noted that "where appropriate under the facts of a case, the offender might be dealt with as a 'user' under the disorderly persons statute...rather than as a 'possessor' under the criminal act...in order that the conviction will not result in a criminal record." Id. at 83. See also State v. Reed, 34 N.J. 554, 573 (1961). The same judicial trend toward leniency has spread to non-commercial distribution of these substances. See State v. Brennan, 115 N.J.Super 400 (App.Div. 1971).

Many of those surveyed urged that this judicial leniency
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be reflected in appropriate legislation. More specifically, it is our opinion that possession of marihuana and hashish for personal use should no longer be subject to criminal penalties. Decriminalization of possessory offenses would better comport with common notions of fairness, current scientific evidence relating to the effect of marihuana consumption and contemporary expectation of conduct. We advocate the abolition of the 25 and 5 gram limitations which presently appear in our statute. Under our view, possession of marihuana or hashish for personal use should be reduced to a disorderly persons offense. And this

30. As previously noted, our surveys do not reveal any consensus of opinion regarding these issues.

should be true no matter the quantity of the substance found to be in the offender's possession. In essence, both possession for personal consumption and use of marihuana and hashish should be disorderly persons offenses. Practically speaking, such legislative action would free law enforcement authorities from investigation of these offenses while at the same time retain prohibition on public use of these substances.

Most of those surveyed doubted the efficacy of incarceration with respect to possessory and use offenses and considered that imprisonment was unduly punitive in light of current attitudes and scientific knowledge with respect to the consumption of marihuana and hashish. Our reasoning and independent research is in accord and we submit that the maximum penalty for such offenses should be a \$500.00 fine. Habitual offenders should be subject to a maximum fine of \$1,000.00. Thus, under our view, possession of marihuana or hashish for personal use and actual use would not be indictable. Rather, such offenses would be disorderly persons violations, but not subject to the penalty of incarceration.^{31.}

We advocate the retention of criminal penalties with respect to the offense of possession of marihuana or hashish with the intent to distribute to others. All prosecutorial and law enforcement authorities surveyed also recommended against

31. See N.J.S.A. 24:21-20 (a) (3).

the decriminalization of distribution or the institutionalization of cannabis-type drugs. At present, both offenses are categorized as high misdemeanors subject to a penalty of imprisonment for not more than 5 years, a fine of not more than \$15,000.00 or both.^{32.} One can envision the commission of technical offenses where imposition of such harsh penalties would not be appropriate;^{33.} i.e. distribution among friends without remuneration, etc. Incarceration under these circumstances would obviously serve little purpose. But judicial discretion in sentencing such offenders would alleviate the more punitive aspects of our current statute. And, of course, there is little defense for the predatory marihuana or hashish seller who exploits others for profit, or combines these substances as an attraction to other, more dangerous wares.^{34.}

Thus, possession of marihuana or hashish with the intent to distribute and actual distribution would not be decriminalized. Clearly, difficult evidentiary problems are presented with respect to the prosecution of the offense of possession with intent to distribute. But such problems of proof are not insurmountable. Obviously, possession of 50 pounds of marihuana generally is not for the purpose of personal consumption. But this is a proper subject for prosecutorial summation and the common sense of the jury. On balance, it is our view that

32. N.J.S.A. 24:21-19(a)(2).

33. See, e.g. State v. Brennan, 115 N.J.Super 400 (App.Div.1971).

34. Id. at 408

amendatory legislation should not include a presumption with respect to the offender's intent based upon the quantity
35.
possessed.

Concededly, our approach to the problem smacks of compromise. Society should not approve or encourage the recreational use of any drug. That is particularly true with respect to marihuana and hashish since scientific evidence relating to their long-term use is inconclusive. Moreover, marihuana and hashish consumption may well be a fad which, if not institutionalized, will recede substantially in time. On the other hand, criminal prohibition of possession of these drugs for personal consumption has plainly failed of its essential purpose. Current laws have not deterred their use. Rather, a total criminal prohibitory policy has tended to alienate a substantial portion of our youth and has bred mistrust among the generations. No useful purpose would be served by blind adherence to present practices.

35. There is no presumption under existing law. See N.J.S.A. 24:21-19.

IV. TECHNICAL DEFICIENCIES IN THE CONTROLLED DANGEROUS SUBSTANCES ACT

The comments which follow relate to technical deficiencies in the present Controlled Dangerous Substances Act. Judges, prosecutors, defense attorneys, the State Police, and Chiefs of Police have been consulted regarding their respective experiences in the administration, enforcement and defense of the Act. More specifically, they were asked to comment on the effectiveness of the Act and to indicate those sections which they felt needed improvement. Understandably, the responses were varied, and ran the gamut from general policy suggestions (e.g. eliminate this section, reword that section), to specific technical problems which they have encountered with certain sections of the Act. It would be impossible, as well as pointless, to set forth every criticism or suggested improvement. Rather, we tried to evaluate each response realistically, with a view towards its practicability and its importance in relation to the total viability of the Act. In addition, we have exhaustively reviewed each of the provisions of the Act, regardless of whether it was cited as a trouble spot in the responses to our survey.

Our evaluation, utilizing the responses of those surveyed and interviewed, as well as our own independent analysis of the Act, has centered about two principal areas. First, we have attempted to determine whether the Act clearly and concisely identifies criminal behavior in reasonably understandable and definitive terms. And second, we have

sought to modernize and improve the statutory scheme by suggesting substantive alterations in aid of its enforcement. The following constitutes a summary of those responses to the survey pertaining to technical deficiencies in the Act, and our recommendations to eliminate those deficiencies.

A. Definitions

Article 1 of the Controlled Dangerous Substances Act is comprised mainly of the definitions of terms employed throughout the remainder of the statute. The objective of including clear, concise and accurate definitions is paramount. The utilization of "loose" or ambiguous terminology is often the "legal technicality" which breeds police frustration and public distrust in the criminal justice system.

As expected, many of the persons responding to the survey pointed to problem areas in various definitions, or indicated that a problem existed when applying the definition to the substantive sections of the Act. However, the deficiencies in the definitions are not solely due to the language employed by the original drafters of the Act. Rather, developments in the modes of drug use, and the ever increasing ingenuity of defense attorneys have created new problems.

Of this genre is an important definitional problem which has been raised by virtue of the development of new methods of processing hashish. The Act presently defines

hashish as "the resin extracted from any part of the plant Cannabis Sativa L."¹ However, several law enforcement personnel reported that many drug abusers and traffickers do not "extract", i.e. chemically remove the resin from the plant, but achieve the same result by mechanical methods. The problem is obvious; although the mechanically produced resin has the same potential for abuse as the chemically "extracted" resin, the former does not fall within the present definition of hashish. The definition of hashish might easily be made to encompass the mechanically produced resin by an amendment providing that the term is to include "the resin extracted or removed by any means..." This minor change would not alter the original intent of the drafters of the Act.

It should be noted that the definition of hashish was not contained in the original statute, but was the result of a later amendment. However, the addition of that definition would appear to necessitate the deletion of the identical phrase, i.e., "the resin extracted from any part of such plant", from the definition of marihuana.² Overlapping definitions cause confusion since distinctions are presently made in the penalties imposed for possession of marihuana and hashish based on the type and amount of the substance possessed.³ Thus, the survey revealed that persons accused

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1. N.J.S.A. 24:21-2
 2. N.J.S.A. 24:21-2
 3. N.J.S.A. 24:21-20(a)(3)

of possession of over 5 grams of hashish have been heard to argue that the substance within their possession fell within the definition of marihuana under the Act. Accordingly, these individuals have claimed that they could only be convicted of possession of less than 25 grams of marihuana, a disorderly persons offense. While the issue would lack significance were the 25 and 5 gram limitations abolished as recommended elsewhere in this Report, this definitional confusion has provided a ready means of escape from criminal liability under existing provisions. The simple deletion of the phrase "the resin extracted from any part of such plant" from the definition of marihuana would easily resolve the problem.

Additionally, several persons involved in the prosecution of drug offenses have reported a problem in the relationship between the definition of marihuana and the section of the act which proscribes its possession. As noted, N.J.S.A. 24:21-20(a)(3) provides that "possession of more than 25 grams of marihuana, including any adulterants or dilutents...is...a high misdemeanor...." The definition of marihuana contained in Article 1 provides that the term "marihuana" shall "not include the mature stalks of such plant, fiber produced from such stalks...fiber...or the sterilized seed of such plant which is incapable of germination." It has been revealed that several trial courts have reached the conclusion that the "adulterants and dilutents" referred to must be foreign to the plant. Therefore, it is asserted that the parts of the plant excluded from the definition of

marihuana in Article 1, i.e., the so called indigenous adulterants and dilutents, cannot be included in determining whether the sample is more or less than 25 grams.

It is apparent that no reasonable legislative purpose can be served by drawing a distinction between foreign and indigenous dilutents. The problem could be resolved by amending the definition of marihuana, or by altering the section defining the offense of possession. It is suggested that the more appropriate method would be to amend the definition of possession to include any "adulterants or dilutents, whether foreign or from other portions of the plant."

B. Classification of Substances

Article II of the Controlled Dangerous Substances Act provides the classification system for the drugs and substances which are to be controlled. The method of classification of the substances under the Act represented a major departure from pre-existing law. Under the prior statute, drugs, in addition to opiates, were defined as coca leaves, opium, marihuana and every substance chemically identical to them.⁴

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4. N.J.S.A. §24:18-2 (Supp.1970), as amended, N.J.S.A. §24:21-45 (R.S.Cum.Supp.1970).

Repealer. The following acts and parts of acts are repealed: R.S. 24:18-1 to 24:18-7, 24:18-9 to 24:18-16, 24:18-18 to 24:18-28, 24:18-30 to 24:18-48 (constituting the remaining sections in chapter 18 of Title 24 of the Revised Statutes not previously repealed); P.L. 1953, chapter 190 (C.24:18-24.1, 24:18-24.2); P.L. 1951, chapter 57 (C.24:18-38.1 to 24:18-38.3; P.L. 1966, chapter 314, sections 1-3 (C.24:6C-1 to 24:6C-3); N.J.S.A. 2A:170-8.

The remaining "dangerous drugs" were classified under
a single disorderly persons statute.⁵

The present Act distinguishes between the various forms of narcotic and non-narcotic substances and their relative potential for abuse. Controlled dangerous substances are placed in one of five different schedules according to their relative danger and potential for abuse.⁶

Schedule I includes those substances having a high potential for abuse and no currently accepted medical use in the United States.⁷ The substances listed in Schedule I are further subdivided into opiates, narcotics and hallucinogens. Heroin is listed as a narcotic, whereas "LSD", "speed", marihuana, mescaline and peyote are classified as hallucinogens.

Schedule II includes those substances having a high potential for abuse which may lead to severe psychic or physical dependence but which have a currently accepted medical use in the United States.⁸ Thus, Schedule II is distinguished from Schedule I in that the substances contained in the former classification may be prescribed by a physician.

Substances having a currently accepted medical use and less potential for abuse than those enumerated in the first two schedules are incorporated in Schedule III if their abuse may lead to moderate or low physical dependence

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5. N.J.S.A. §2A:170-77.8 (Supp.1970), as amended, N.J.S.A. §2A:170-77.8 (R.S.Cum.Supp.1970).
 6. N.J.S.A. 24:21-4 et seq.
 7. N.J.S.A. 24:21-5 (a)
 8. N.J.S.A. 24:21-6 (a)

or high psychological dependence.⁹ Schedule IV substances are those which have an accepted medical use in the United States and a low potential for abuse, although prolonged use may lead to more limited physical or psychological dependence than the substances enumerated in Schedule III.¹⁰ The substances listed in Schedule V have a low potential for abuse relative to the preceding schedule.¹¹ These substances have a currently accepted medical use and possess a limited capacity for inducing physical or psychological dependence relative to the substances listed in Schedule IV.

It is apparent that a specific and technical approach to classification of the substances was necessary because of the technical nature of the substances proscribed or otherwise regulated. From the relatively small number of criticisms or suggestions received which related to the classification system, it appears that the present system provides a sufficient and workable method of control. The few responses which did concern the classification system merely suggested that the distinctions between the schedules be eliminated so that all controlled substances were treated the same, or suggested that the classification system be studied to determine if a better method was available.¹²

9. N.J.S.A. 24:21-7 (a)

10. N.J.S.A. 24:21-8 (a)

11. N.J.S.A. 24:21-8.1 (a)

12. Another suggestion received from several members of the police community was that the drug methaqualone (Quaalude) be classified as a controlled dangerous substance. It is understood that the drug is presently under study to determine whether it should be so classified.

Regarding the former suggestion, it is apparent that some distinction between substances is necessary, for there is a wide difference between substances in terms of their relative danger and potential for abuse. However, regarding the latter suggestion, it is possible that other classification alternatives may be more realistic.

From a medical standpoint, the existing system has some validity. The particular drug is examined in light of its potential for harm and its medical use. But classification for the purpose of penal sanctions may demand an alternative method. Simply put, what is ideal and workable from a medical viewpoint may not be adequate to solve the social problems attributable to drug abuse.

Alternative means of classification are available. For example, a fourfold categorization of the most abused drugs has been proposed.¹³ Under this system, the first schedule would consist of the narcotics which are actually physically addictive, such as heroin and morphine. The second category would include the hallucinogenic drugs such as LSD and phenlocybin which may cause damage to bodily functions. Marihuana, the controlled substance most resorted to by young individuals, would be a third category necessitating special attention. The fourth group would include all other dangerous drugs, such as barbiturates and amphetamines. This approach, i.e., categorizing drugs according to their potential for

13. Chayet, "Legal Aspects of Drug Abuse," 3 Suffolk U.L.Rev. 1 (1968).

abuse, might be more realistic from the standpoint of
deterrence and rehabilitation.¹⁴

Thus, it is submitted that the present system of classification be studied and reexamined to determine if another means of classification would better satisfy the objectives of deterrence and rehabilitation.

Additionally, under the present Act the Department of Health is responsible for reviewing and revising the list of substances enumerated in the five schedules. Any substance not currently listed may subsequently be the subject of classification.¹⁵ Thus, the Act provides a continuous review of substances having a potential for abuse.

Although it was not noted in any of the responses to the survey, we have observed that in other states whose controlled dangerous substance statutes are substantially identical to ours, the ability of the Commissioner to schedule substances has come under constitutional attack. The Commissioner is empowered to add, delete or reschedule substances falling within the purview of the Act.¹⁶ Thus, it has been argued

14. Student Comments, "The Uniform Controlled Substances Act of 1971: An Adequate Answer to Mississippi's Drug Abuse Problem", 43 Mississippi L. Rev.

15. N.J.S.A. 24:21-3

16. N.J.S.A. 24:21-3 (a) provides:

a. The Commissioner shall administer the provisions of this Act and may add substances to or delete or reschedule all substances enumerated in the schedules in sections 5 through 8 of this Act. In determining whether to control a substance, the Commissioner shall consider the following:

1) Its actual or relative potential for abuse;
2) Scientific evidence of its pharmacological effect, if known; (Cont'd.)

that as a practical matter, the power to add or delete substances confers upon the Commissioner the authority to create new criminal liabilities with respect to substances previously uncontrolled, and on the other hand, to decriminalize activities which are presently the subject of penal sanctions. Therefore it is alleged that the Act gives the Commissioner legislative powers, and as such, may violate the State Constitution¹⁷ as an unconstitutional delegation of power.¹⁸

The state of Iowa recently resolved the above problem by enacting appropriate legislation. In that state, permanent revisions in the schedules may only be made by the General Assembly.¹⁹ Although the state Board of Pharmacy has power to make interim changes while the Assembly is not in session, the legislative body must rule on such modifications within 60 days of reconvening. If the General Assembly does not act within the time permitted the changes made by the Board become null and void.²⁰ The Iowa procedures were enacted

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16. (cont'd) 3) State of current scientific knowledge regarding the substance;
4) Its history and current pattern of abuse;
5) The scope, duration, and significance of abuse;
6) What, if any, risk there is to the public health;
7) Its psychic or physiological dependence liability; and
8) Whether the substance is an immediate precursor of a substance already controlled under this article.

After considering the above factors, the Commissioner shall make findings with respect thereto and shall issue an order controlling the substance if he finds that the substance has a potential for abuse.

17. N.J. Const. Art. 4 §1, par. 1 provides that "The Legislative power shall be vested in a Senate and General Assembly."
18. In addition, see Comments, "The Uniform Controlled Dangerous Substances Act: An Expositive Review", 32 Louisiana L. Rev. 56, 68-70; An Appraisal", 24 Ala. L. Rev. 491, 403-505 (1972).
19. Uniform Controlled Substances Act, Iowa Acts ch. 148 §201 (1971).
20. Id.

on the basis of findings by that state's "Drug Abuse Study Committee" which concluded:

[I]t is not advisable to vest any administrative agency with the authority to, in effect, make sale or delivery of a substance which may not previously have been restricted a public offense, without action by the General Assembly. ²¹

Accordingly, it is recommended that consideration be given to enactment of procedures similar to those adopted in Iowa. An amendment to our statutory scheme would put to rest the recently expressed fears with respect to the constitutionality of existing classification procedures.

C. Regulation of Manufacturers and Distributors

Several people responding to the survey suggested that the sections concerning regulation of manufacturers and distributors be evaluated and improved to aid in their enforcement. Since the suggestions were couched in general terms, the following is our own independent analysis.

Under the present statutory scheme, the Commissioner of Health is empowered to regulate the manufacture and distribution of controlled dangerous substances. The Act provides that every person²² who manufactures, distributes or dispenses any controlled substance "shall annually obtain a registration from the State Department of Health".²³ A number

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21. "Iowa Drug Abuse Study Comm., Final Report," Appendix II, at 9 (1970).
 22. "Person" is defined in Article 1, §2 as any corporation, association, partnership, trust, other institution, entity or one or more individuals.
 23. N.J.S.A. 24:21-10 (a)

of exceptions to the registration requirement are also provided.²⁴ Among these exceptions are agents of registered manufacturers, common carriers, peace officers in the performance of their official duties, and persons in possession of drugs pursuant to a lawful order of a physician

The criteria to be considered by the Department of Health in determining whether to issue a registration are also enumerated.²⁵ Similarly, procedures relating to the denial of an application, and the revocation or suspension of a registration²⁶ are set forth. Statutory standards

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- 24. N.J.S.A. 24:21-10 (c)
 - 25. Among the considerations suggested by N.J.S.A. 24:21-11(a) are: (1) the maintenance of effective controls against diversion of controlled dangerous substances into other than legitimate channels; (2) compliance of the applicant with applicable state and local laws; (3) convictions of the applicant under Federal or state laws relating to any controlled dangerous substance; (4) past experience of the applicant in the manufacture of such substances; (5) the existence in the applicant's establishment of effective controls against diversion; (6) furnishing by the applicant of false or fraudulent material in any application; (7) suspension or revocation of the applicant's Federal registration to manufacture, distribute, or dispense controlled dangerous substances; and, (8) such other factors relevant to the public health and safety.
 - 26. Briefly, the procedure provided in N.J.S.A. 24:21-12 (c) is that prior to the revocation or suspension of a registration or pursuant to the denial of an application, the commissioner must serve upon the applicant or registrant an order to show cause why registration should not be denied, revoked or suspended. The order to show cause must contain a statement of the basis of the denial, revocation or suspension, and must call upon the applicant to appear before the Commissioner at a time and place stated in the order, but in no event less than 30 days after the date of receipt of the order. The hearing is to be conducted in accordance with the provisions of the "Administrative Procedure Act". (C.52:14B-1).

governing the suspension or revocation of registrations²⁷ are also provided.

The Commissioner may temporarily suspend any registration pending suspension or revocation proceedings, where he finds that "there is an imminent danger to the public health or safety."²⁸ Such a suspension is to continue in effect until the conclusion of such proceedings, including judicial review.²⁹

Although the registration provisions contained in the Act provide adequate and generally acceptable procedures for the registration of manufacturers and distributors of controlled dangerous substances, certain comments are warranted. It should be noted that there is no provision permitting the Commissioner to impose a fine upon a registrant who has committed an act which could result in the suspension or revocation of his registration. The only alternatives presently available to the Commissioner are suspension or revocation of the registration.³⁰ The imposition of a fine would be

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27. Pursuant to N.J.S.A. 24:21-12(a), the registration may be suspended or revoked upon a finding that the registrant has materially falsified any application filed pursuant to this act; or has been convicted of any indictable offense under this act, or any law of the United States, or of any state; or has violated or failed to comply with any duly promulgated regulation of the Commissioner and that violation or failure to comply reflects adversely on the registrant's reliability and integrity with respect to controlled dangerous substances; or has had his federal registration suspended or revoked; or has had his registration revoked by competent authority of another state.
 28. N.J.S.A. 24:21-12 (d)
 29. Id.
 30. But see N.J.S.A. 24:21-12(b) which provides that the Commissioner may limit revocation or suspension of a registration to the particular controlled dangerous substance.

an effective remedy for punishing misconduct not sufficiently grievous to warrant either suspension or revocation.

A large portion of our statute deals with the records required to be kept by registrants,³¹ the order forms pursuant to which registrants may distribute certain controlled dangerous substances,³² and prescriptions.³³ While it appears that the sections pertaining to records and order forms are legally sufficient, several responses to the survey indicate that the statutory provision regarding prescriptions is clearly in need of improvement.

The entire tenor of the section is exemplified by the initial statement that:

"Except when dispensed directly in good faith by a practitioner, other than a pharmacist, in the course of his professional practice only, to an ultimate user, no controlled dangerous substance included in Schedule II, which is a prescription drug as defined in R.S. 45:14-14 may be dispensed without the written prescription of a practitioner;
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The ambiguity and awkwardness of this section are clearly apparent.

The purpose of the above quoted section is to proscribe the dispensing of controlled dangerous substances listed in certain schedules without a prescription. However, the wording is so compound that it is not clear, by whom, or under what circumstances such drugs may be lawfully dispensed.

31. N.J.S.A. 24:21-13

32. N.J.S.A. 24:21-14

33. N.J.S.A. 24:21-15

Additionally, the phrase "which is a prescription drug as defined in R.S. 45:14-14" is of little value. The statute referred to does not define a prescription drug, but rather defines a "prescription" as an "order for drugs... written or signed by a duly licensed physician...for the treatment or prevention of disease..." Thus, for the term "prescription drug" to have any viability whatsoever, the Act should be amended to clearly specify which drugs are included in that term.

A problem of major proportions presently exists with respect to the dispensation of prescription drugs by doctors and pharmacists. Simply put, experience reveals that many in the medical profession have prescribed drugs in an irresponsible fashion for purposes other than treatment. Statutory regulation must permit doctors and pharmacists to distribute drugs for proper medical purposes. Nevertheless, the survey indicated that the majority of the law enforcement community advocate stronger controls to prevent the illicit distribution of drugs in the guise of "medical Treatment".

D. Containers and Labels

The Controlled Dangerous Substances Act specifies requirements pertaining to containers and the labeling of containers in which controlled dangerous substances are sold or dispensed. Although these provisions are clear and unambiguous as written, it was generally felt that certain sections should be amended, and others added, to increase the effectiveness of existing regulations.

The Act presently provides that whenever a manufacturer sells or dispenses a controlled dangerous substance in a package prepared by him, he must attach thereto a label disclosing his name and address, and the quantity, kind, and form of the substance contained therein.³⁴ A wholesaler, on the other hand, when selling a controlled dangerous substance in a package other than the one in which it was received from the manufacturer, must affix a label revealing only his name and address.³⁵ It is obvious that the requirements imposed upon the wholesaler are substantially less strict than those which apply to the manufacturer. No logical reason is advanced to support this distinction. Thus, it would be appropriate to amend the statute to also require the wholesaler to label his containers with quantity, kind and form of the substance contained therein.

The Act presently provides that a manufacturer who sells an unlabelled package to a wholesaler is guilty of a misdemeanor. A wholesaler, however, is not required to affix a label to a package he has received from a manufacturer. More importantly, he is under no duty to make certain that the packages which he sells are properly labelled. Thus, he is not obliged to correct an error made by a manufacturer. To cure this problem, it has been suggested that our statute be amended to prohibit a wholesaler from selling a controlled dangerous substance in a package received from a manufacturer

34. N.J.S.A. 24:21-16

35. Id.

not having the required label. This could effectively be accomplished by prohibiting the sale of any package without a label showing the quantity, kind and form of the controlled dangerous substance contained therein.

A noticeable omission from Article 4 is a requirement pertaining to the type and manner of sealing a container in which a controlled dangerous substance may be sold. The Federal Act at 21 U.S.C. §825 (d) presently provides:

"It shall be unlawful to distribute controlled substances in Schedule I or II, and narcotic drugs in Schedule III or IV, unless the bottle or other container, stopper, covering or wrapper thereof is securely sealed as required by regulations of the Attorney General."

It has been suggested that a similar, if not more expanded provision, be added to Article 4 of the New Jersey Controlled Dangerous Substances Act. Such a provision would clearly fall within one of the purposes of the act, i.e., the health and safety of the general public.

E. Enforcement and Administrative Provisions

N.J.S.A.24:21-31(a) specifically mandates that the duty of enforcement of all provisions of the Controlled Dangerous Substances Act is vested in the State Department of Health, as well as in all law enforcement personnel of this state. Additionally, the Board of Pharmacy is commanded to "assist" in enforcing the provisions of the Act relating to the "handling" of controlled dangerous substances by pharmacy owners and pharmacists.³⁶

One problem in this subsection inheres in the vagueness of the terms describing the duties of the Board of Pharmacy. For example, does "assist" mean that the Board should aid the Commissioner in a purely advisory capacity, or is a more active participation envisioned? Is "handling", a term most often synonymous with management or treatment also broad enough to encompass acts such as dispensation, storage and shipment of regulated substances? Although it is to be expected that the Board of Pharmacy will cooperate to the fullest extent possible in effectuating the general purposes of the Act, some clarification of duties may well serve to avoid possible administrative clashes.³⁷

It is assumed, for the purpose of recommending ameliorative legislation, that the drafters intended to command the Board

36. See N.J.S.A. 24:21-3 for definitions of pharmacist and pharmacy owners.

37. In point of fact, contact with the Department of Health indicates that the problems noted here are real. We were informed that cooperation between the two agencies has been minimal in recent months and that little "assistance" has been forthcoming from the Board.

of Pharmacy to "assist" the Commissioner in the broadest sense possible without impairing the ability of that agency to function within its own domain. This interpretation of legislative intent, we feel, is in the spirit of the broad remedial purposes of the Act.³⁸

Another problem is the subsection's failure to delineate the chain of command. It is unclear whether agencies such as the Board of Pharmacy are to have power co-equal to that of the Department of Health, or whether such agencies are subordinate. Since the Department of Health is the prime repository of all power to regulate and administer the Controlled Dangerous Substances Act, it would be appropriate to require all boards and agencies, including the Board of Pharmacy, to operate under the authority of the Commissioner of Health. Such a pyramidal chain of command would serve to avoid haggling and confusion, while aiding the Commissioner in achieving the desideratum of "efficient" administration. Therefore, it is suggested that N.J.S.A.24:21-31(a) be amended to specify that the Board of Pharmacy is required to act at the behest of the Commissioner within the range of the Board's statutorily mandated duties.

N.J.S.A.24:21-31(b) broadly grants to the Commissioner of Health the power to promulgate rules, regulations and orders for the "efficient" enforcement of the Act. Left unanswered is

38. One recommendation is to append the adjective "active" to the noun "assist". Another possibility is to either clearly define the term "handling" or add other terms which would better explicate the scope of the Board's duties.

the question whether the Commissioner can subdelegate the rule making-power.³⁹ We recommend that the Commissioner be empowered to subdelegate the rule-making authority when he deems that course of action appropriate. This would afford him added flexibility in effectively and efficiently performing his duties under the act. Therefore, a short statement clearly granting the Commissioner power to subdelegate his authority is suggested.⁴⁰

As noted, the power to promulgate all necessary rules and regulations for the efficient enforcement of the Act is conferred upon the Commissioner of Health.⁴¹ What is lacking here is a failure to indicate the requisite procedural process to govern the promulgation of those rules or regulations. Since the State Department of Health is an "agency", as that term is defined in the Administrative Procedure Act (see comments to N.J.S.A. 24:21-31(b) (3) infra), it is more probable than not that the notice and hearing provisions of that statute govern the conduct of rule-making activity. However, it is strongly urged that future drug legislation clearly incorporate by reference the applicable provisions of the Administrative Procedure Act. That Act represents

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39. By comparison, the Federal Food and Drug Act, after which the New Jersey Controlled Dangerous Substances Act was modeled, has a specific provision granting the Attorney General the authority to delegate his functions under the subsection dealing, as here, with administrative and enforcement procedures. 21 U.S.C.A. §871. Compare United States v. Barenco, 50 F.Supp. 520 (D.C.Md.1942) to Cudahy Packing Co. v. Holland, 315 U.S. 357 (1942).
 40. A statement comparable to the one found in the Federal Act would suffice. Rewording it slightly, the subsection reads "The Commissioner of Health may delegate any of his functions under this subchapter to any officer or employee of the Department of Health".
 41. N.J.S.A. 24:21-31

the codification of prior law in reference to administrative procedure and provides a suitable frame of reference for agencies created or empowered to deal with drug laws.

Under N.J.S.A. 24:21-31(b)(3), the Commissioner is empowered to promulgate an order in lieu of a regulation when the latter course of action "would constitute an imminent danger to the public health or safety". The companion provision in the Administrative Procedure Act is N.J.S.A. 52:14B-4(c).⁴² By comparison the version of the above quoted clause contained in the latter statute replaces imminent "danger" with imminent "peril". Further, in lieu of "order" the term "rule" is employed. Additionally, the Administrative Procedure Act permits the agency to exercise its emergency rule-making power whenever the public health, safety or welfare is at stake, while the subsection under scrutiny dispenses with the term "welfare". More importantly, the clause in the Administrative Procedures Act requires the agency to state in writing its reasons for the emergency action. The Controlled Dangerous Substances Act is silent with respect to the writing requirement. This silence provides little guidance. Whether or not the Legislature intended to include the writing requirement in the Controlled Dangerous Substances Act is a question that should be clearly resolved.

Two recommendations are offered to correct the above ambiguity. Either a writing requirement should be added

42. This subsection of the Administrative Procedure Act regulates, inter alia, rule-making requirements and the conduct of administrative hearings. Therefore, it provides a framework for testing the authority vested in the Commissioner under this subsection.

to the present subsection,⁴³ or the subsection itself should be deleted leaving the Commissioner in a position to be guided by the Administrative Procedure Act. Requiring the Commissioner to state the reasons for the issuance of emergency orders would tend to avoid the possibility of arbitrariness. It would also aid a reviewing court in passing on the claims of an aggrieved party in an injunctive action pursuant to N.J.S.A.24:21-31(b)(3)(b).

N.J.S.A.24:21-31(b)(3)(a) provides for the automatic expiration of an order promulgated by the Commissioner after 120 days. In the interim, the Commissioner has the authority to promulgate rules and regulations to aid in the administration of the order. Such rules or regulations cannot be promulgated without providing "due notice" to interested parties followed by public hearings.

N.J.S.A.52:14B-4 of the Administrative Procedure Act, covers the notice and hearing provisions applicable to agencies generally. Since this subsection has an "otherwise provided" clause it could be contended that N.J.S.A.24:21-31(b)(3)(a) has provided otherwise, thereby exempting the Commissioner from the operation of the Administrative Procedure Act. If that is so, then there is little or no guidance for the Commissioner on how or to whom he should give notice, and the type of public hearing to conduct. The potential for abuse is obvious. The

43. The language used in the Administrative Procedure Act, "and states in writing its [the agency's] reasons for that finding" [N.J.S.A.52:14B-5(c)] would blend effectively if placed at the end of this subsection and solve the problem.

better solution would be to incorporate by reference the notice and hearing provisions of N.J.S.A.52:14B-4 into the Controlled Dangerous Substances Act.⁴⁴ This method best guarantees interested parties the procedural protections required by due process of law. Therefore, it is suggested that future legislation provide accordingly.

N.J.S.A.24:21-31(3)(b) permits a party aggrieved by an order the opportunity to request a hearing which must be provided by the Commissioner. However, a second party aggrieved by the same order only has a right to a subsequent hearing when the Commissioner deems such course of action appropriate. Furthermore, a party aggrieved by the Commissioner's decision has the right to apply for injunctive relief in the Superior Court.

The first problem in this subsection centers on the timeliness of the hearing. There is no requirement under the subsection to promptly hold a hearing. But promptness is essential of the hearing is to have meaning to the aggrieved party, particularly in light of the fact that an order expires 120 days from the date of promulgation. N.J.S.A.24:21-31(3)(2).

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44. The Administrative Procedure Act devotes itself exclusively to the problem of administrative law. It was enacted with a view towards harmonizing and unifying the practice and procedure of administrative agencies. It would be foolhardy to now reject the wisdom and experience accumulated therein. Our recommendation is not only to adopt the notice and hearing provisions of the Administrative Procedure Act, but to specifically adopt and apply that Act generally where needed in the Controlled Dangerous Substances Act.

The suggestion here is to insert either the adjective "prompt", or a synonym thereof, before the word "hearing".⁴⁵ This would ensure persons adversely affected by an order a hearing on the merits while there is still a present controversy.

Another problem relates to the term "decision" as that word is used in the last sentence of this subsection. It is unclear whether "decision" refers to the denial of a hearing by the Commissioner to a party not entitled to one, or whether the term is broad enough to include the finding of the Commissioner after a hearing on the merits. Apparently, the section was intended to provide a forum for the person who was aggrieved by an order and was denied a hearing on the merits. Since the individual who has been aggrieved by an adverse finding is substantially protected in his right to seek appellate review by the Rules of Court, it is unwise and unnecessary to extend to him the right to apply for injunctive relief in the Superior Court. See R. 2:2-3.⁴⁶

In an effort to draft legislation to meet the needs of this jurisdiction, while remaining faithful to the goal of national uniformity, the authors of the Controlled Dangerous

45. The specification of an exact time period should also be considered.

46. It is suggested that "decision" should be defined, within this subsection, to mean the denial of a hearing to an aggrieved party by the Commissioner of Health.

Substances Act endeavored to abstract various substantive provisions from the federal statute. However, in so doing, several internal inconsistencies were created which now fairly demand honest comment. A case in point is the "cooperative arrangement" subsection.

Our statutory scheme provides that the Commissioner may cooperate with federal and other state agencies concerning "traffic" in dangerous substances. Essentially, N.J.S.A. 24:21-34 is patterned after 21 U.S.C.A. §873, which also pertains to cooperative arrangements.

In N.J.S.A. 24:21-31, the Commissioner was specifically commanded "to cooperate with all agencies charged with the enforcement of the laws of the United States, this state, and of all other states, relating to narcotic drugs or controlled dangerous substances."⁴⁷ In the present subsection, the Commissioner is advised that he "may cooperate"⁴⁸ with federal and other state agencies in discharging his responsibilities concerning traffic . . ." The cooperative arrangement subsection in the federal law, unlike the Controlled Dangerous Substances Act, in no way derogates from the integrity of an

47. The Federal Act contains no provision comparable to this one.

48. The cooperation arrangement subsection of the Federal Act utilizes the clause "shall cooperate". 21 U.S.C.A. §873(a). It is unclear why under the Controlled Dangerous Substances Act the Commissioner should have a duty to cooperate in one subsection and the discretion whether or not to cooperate in another.

earlier cooperation clause. The subsection here can only be a source of confusion, particularly in light of the mandatory provisions of N.J.S.A. 24:21-31.

When the subsection itself is scrutinized numerous other problems become apparent. The Commissioner is advised that he "may" cooperate. See n.48, supra. Why there should be discretion in this regard is singularly mystifying.⁴⁹ Definitional problems also exist. For example the cooperation suggested is in reference to "traffic" in dangerous substances. But the term "traffic" is not defined anywhere in the entire Act, leaving one to guess at its meaning. Other undefined terms are discussed below.

N.J.S.A. 24:21-34(a)(1) contains a proviso (not in the Federal Act) that completely eludes meaningful interpretation. In the proviso, an officer is ordered not to divulge any knowledge obtained by virtue of his office in reference to "any such prescription, order or record." The allusion to any such prescription, order or record has no meaning when the entire subsection is perused. Nor do any of the immediately preceding subsections refer to any of those terms. One must go back 20 subsections and three articles before terms such as "prescriptions, "order forms", and "records of registrants" appear. See N.J.S.A. 24:21-13-15. An individual should not be expected to ferret out statutory

49. It is recommended that "may" be changed to "shall" if this subsection were to otherwise survive.

intent under such conditions. The need for correction is apparent.

There are two possible ways of correcting the problem engendered by the proviso: (1) the proviso in question could be relocated in the earlier part of the Act where the terms encompassed are set forth; or (2) the terms themselves could be followed by proper statutory citations leaving no room for doubt as to what is meant.⁵⁰

N.J.S.A.24:21-35 is the nuisance and forfeiture section of the Controlled Dangerous Substance Act. N.J.S.A. 24:21-35(a) declares that any "building . . . resorted to by persons for the unlawful manufacture . . . of controlled dangerous substances shall constitute the keeping of a common nuisance."⁵¹ Apparently, the thrust of this subsection is to subject buildings, utilized for illegal manufacture of drugs, to abatement. To the extent that this provision fails

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- 50. The provision could be amended to read ". . . any prescription [N.J.S.A.24:21-15], order [N.J.S.A.24:21-14] or record [N.J.S.A.24:21-13] . . ."
 - 51. The term "common nuisance" is functionally the equivalent of the more currently employed term "public nuisance". See State v. Rodgers, 91 N.J.L. 212 (E. & A. 1917). For an excellent review of the law of nuisance see Judge Lynch's opinion in Ajamian V. North Bergen Twp., 103 N.J.Super. 61 (Law Div. 1968), aff'd 107 N.J.Super. 175 (App.Div. 1969) cert. denied 398 U.S. 952 (1970).

to provide aggrieved parties with an opportunity for a hearing on the abatement, a constitutional due process issue is presented.⁵² Ajamian v. North Bergen Twp., 103 N.J.Super. 61, 75 (Law Div. 1968). In Ajamian it was held that the one's property cannot be taken summarily, without affording the aggrieved party some opportunity to be heard at some stage in the proceedings. N.J.S.A.24:21-35(a) provides no such opportunity.

Aside from the constitutional problems, the subsection itself is of doubtful validity as an aid to law enforcement officers.⁵³ Therefore, consideration should be given to complete deletion of the subsection. Certainly, an aim of the Controlled Dangerous Substances Act is more efficient enforcement of the drug laws. But the Act should not be used as a vehicle to deprive individuals of their property without due process of law.⁵⁴

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- 52. The subsection should be clarified to ensure aggrieved parties a forum to contest a declaration that property they have an interest in is subject to abatement. The procedural mechanism for branding property a "common nuisance": is also subject to question. Nowhere does the subsection provide who can declare a building a "common nuisance", how such a declaration can be contested, or where the issue is to be decided.
 - 53. Several law enforcement officers expressed their doubts as to both the meaning and efficacy of the "common nuisance" provision.
 - 54. In addition to the other criticisms, it should be noted that this subsection has numerous definitional problems. Such terms and clauses as "maintenance", "premises whatever," "restored to", and "common nuisance", are all undefined.

N.J.S.A.24:21-35 (b) is a forfeiture provision providing, inter alia, for the forfeiture of controlled dangerous substances, raw materials used or intended for use in their manufacture, containers for the drugs and conveyances used or intended for use, in transporting or facilitating the transportation of dangerous substances.⁵⁵ Additionally, books and records used or intended for use, in violation of the Act, are also subject to forfeiture.

The traditional rationale for working a forfeiture of property used in the commission of a crime is that the property itself has offended and should be punished.⁵⁶ More recently, this fiction has been abandoned in favor of the theory that forfeiture is another penalty exacted from the criminal.⁵⁷ In a well reasoned opinion, Judge Clapp interpreted the forfeiture subsection in the predecessor drug statute (N.J.S.A.24:18-138.1) as requiring a causal relation between the property forfeited and the crime.⁵⁸

55. For the most part the forfeiture provisions here are analogous to the Federal Act. 21 U.S.C.A. §881.

56. See Various Items of Personal Property, etc. v. United States, 282 U.S. 577, 581 (1931); Farley v. \$168,400.97, 55 N.J. 31, 37-38 (1969).

57. This appears to be a more rational theoretical approach but the traditional theory is still verbalized in forfeiture cases. Farley v. \$168,400.97, supra; State v. Garcia, 114 N.J.Super. 444, 447 (Law Div. 1971).

58. Ben Ali v. Towe, 30 N.J.Super. 19 (App.Div. 1954).

There the property seized was an automobile, the crime charged was possession of cocaine, and the statute challenged provided for forfeiture of motor vehicles "used in, for or in connection with the violation" of the Uniform Narcotic Drug Law. Here, the statute states, in effect, that property, raw materials, and containers, "which are used, or are intended for use" are subject to forfeiture. Conveyances are subject to forfeiture when they are used or intended for use "to transport, or in any manner to facilitate the transportation, for the purpose of sale or receipt of property described in b(1) or (2) above (controlled dangerous substances and raw materials).⁶⁰

The present forfeiture subsection is an improvement over the former one, as it limits the right to a forfeiture except in situations where the property is clearly an instrumentality of the crime. The possibility of abuse by law enforcement officers is thereby minimized without sacrifice to the purpose of the forfeiture provision, i.e., deterring the trafficking in controlled dangerous substances by profiteers.

59. Conveyances include aircraft, vehicles, or vessels.
N.J.S.A. 24:21-35(4).

60. Strangely enough, containers for controlled dangerous substances (b(3) of the subsection) are not included here. The omission was probably an oversight and should be corrected if the subsection is amended, as there seemingly is no rational reason for such an omission.

An oft repeated criticism by prosecutors is that the seizure provisions of N.J.S.A.24:21-35(b) are too cumbersome.⁶¹ Because of this the forfeiture mechanism has been rarely, if ever, used. Most of the same prosecutors that criticized this subsection recommended that the statute be amended to adopt the summary disposition procedure set forth in R.4:67.

Prosecutors from several of the larger counties also suggested that N.J.S.A.24:21-35 be amended to include a provision specifically including money among the other property subject to forfeiture. The theory advanced in support of a money forfeiture provision is that "trafficking" in drugs is a large scale business often involving huge cash investments while providing enormous profits. This theory is a sound one and law enforcement officers should be provided with the mechanism for implementing the theory. This could be done by adopting the procedures set forth in N.J.S.A. 2A:157 to 11 which provide for the forfeiture of money seized from illegal gambling operations.

61. The problem that concerned law enforcement most is the question of the retention of the seized property pending plenary disposition of the matter. This might well mean that the seizing agent has to provide storage facilities for the property for more than a year in some cases, creating serious spatial and monetary problems.

N.J.S.A. 24:21-25(c), another forfeiture subsection, is similar to 21 U.S.C.A. §881(b) of the Federal Narcotics Law. A major distinction between the two is that the federal provision is limited in scope, applying only to admiralty and maritime claims, while the New Jersey counterpart is employed generally. As used in our statute this provision is of little value and is suspect from a constitutional point of view.

In N.J.S.A. 24:21-35(c)(4), for example, the Commissioner is empowered to seize property without process if he has probable cause "to believe that the property has been used or intended to be used in violation of this Act." It is axiomatic that the Fourth Amendment forbids seizure of property without a warrant issued by a magistrate who has passed on the probable cause issue. Through the years, numerous exceptions to the warrant requirement have arisen under the "exigent" circumstances doctrine. As written, the subsection examined here allows seizure of property without a warrant and without an "exigent" circumstances requirement. Viewed thusly, it could not withstand a constitutional assault.

Furthermore, the Commission has already been empowered to conduct administrative searches with a warrant, and searches and seizures without a warrant when the situation demands emergency action.⁶² Thus, the forfeiture subsection

62. N.J.S.A. 24:21-32, supra.

is, at best, merely redundant and at worst, unconstitutional.
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N.J.S.A. 24:21-39 requires every practitioner to report, within 24 hours, of contact any person whom he has determined to be drug dependent by reason of the use of controlled dangerous substances for purposes other than treatment.
64 Deletion of this entire subsection is suggested.

An essential goal of the Controlled Dangerous Substances Act is to assist in rehabilitation and treatment of the drug dependent person. But such a person should be able to seek treatment for his illness outside of the criminal process, free from the fear of reprisal wrought by the reporting provisions of this subsection. Moreover, a physician consulted for treatment is placed in the uncomfortable position of either violating his patient's confidences or violating the criminal law. Indeed several law enforcement officers have noted that many doctors simply ignore the reporting provisions of N.J.S.A. 24:21-39 and in turn these law officers have expressed, understandably so,
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- 63. For the foregoing reasons, deletion of all of N.J.S.A. 24:21-35(c) is recommended.
 - 64. Failure to make a report could result in a disorderly persons conviction for the practitioner. See N.J.S.A. 2A:169-4 wherein the quantum of punishment for a disorderly person is set forth.
 - 65. Unfortunately, law officers are confronted with the difficult problem of condemning of a professional man, who while observing his code of ethics, has committed a technical violation of the criminal law.

their reluctance to prosecute.

A problem of law enforcement, not specifically covered by the Controlled Dangerous Substances Act, is the disposition of controlled dangerous substances after seizure. Provisions must be made for safe storage prior to trial. Similar provisions must be made for proper disposal when the substances are no longer needed for prosecution. ⁶⁶ The problem was dramatically illustrated in the recent New York City scandal involving the "French Connection" drugs. Prevention of such a catastrophe in this jurisdiction is reason enough to provide the impetus for preventive legislation.

Another area, not covered by the present drug laws where legislation is badly needed is the admission in evidence of the results of chemical analysis without the accompanying testimony of the chemist who performed the tests. At present such chemical reports would be considered hearsay and could not be received in evidence absent appropriate introductory testimony. It is obvious then that the prosecutor must expend considerable time, effort and money to produce the chemist, who for the most part will testify in a perfunctory matter adding little of value to the trial. It must also be noted that since the chemist is considered

66. There was considerable agreement among law enforcement officers in reference to this particular issue. All those who are commented on the safekeeping of drugs underscored the need for remedial legislation to alleviate the problem.

an expert, valuable trial time is wasted while the prosecutor reviews in detail the chemist's educational background and practical experience in the field. This all in turn seriously interrupts the ongoing trial. Moreover, since the chemist is a nonadverserial party to the proceedings, concerned only with the scientific probity of his findings, defendants gain next to nothing from their cross-examination of such witnesses.

It is, therefore, recommended that serious consideration be given to amendatory legislation permitting a Certificate of Chemical Analysis in lieu of direct testimony from the chemist. We propose the following:

In any prosecution for the unlawful manufacturing, possessing, controlling, selling, purchasing, administering, dispensing or compounding any controlled dangerous substance contrary to N.J.S. 24:21-1, the character of the substance involved may be established at trial by the production of a Certificate of Chemical Analysis attesting to the nature of the substance. Such Certificate of Chemical Analysis may be offered as the sole proof at trial as to the character of the substance involved provided:

A. The Certificate shall indicate
(1) the date the substance was received from the submitting agency, (2) the name of the submitting agency, (3) the name of the individual delivering the substance, (4) any identifying numbers which were appended to the specimen, (5) the name of the individual receiving the specimen from the submitting agency, (6) the date returned to the submitting agency, (7) the individual to whom the specimen was returned;

B. The Certificate shall also contain the (1) name of the individual conducting the tests, (2) a recitation of his formal training and experience, (3) the specific tests employed, (4) the results of such tests, (5) and the attestation of the individual performing these tests.

If the foregoing conditions have been complied with to the satisfaction of the Court, the Certificate of Chemical Analysis shall be admitted into evidence as proof of the character of the substance in question without any further identification or verification.

The prosecutor shall notify the defendant of his intention to introduce at trial a Certificate of Chemical Analysis and shall furnish the defendant with a true copy of the Certificate 10 days prior to trial.

It should be borne in mind that the certificate is not the result of an investigatory finding based on a number of primary and secondary sources but is a directly observable scientific fact ascertainable through the performance of widely accepted laboratory tests. The conclusiveness of the test results is the fact which minimizes if not obviates the utility of cross-examination. There is a strong presumption that the State Chemist employs methods which are reliable and whose findings are accurate. The certificate obviously would have to describe the type of tests utilized and the specific observations made. The defendant, of course, could introduce contrary evidence regarding the efficacy of such tests; such evidence would, however, pertain to the weight accorded to the State's evidence not its admissibility.

V. CONCLUSION

The articulated objective of this Report has been to evaluate the effectiveness of the Controlled Dangerous Substances Act. Enacted two years ago, the statutory scheme substantially amended and revised prior legislation regulating the distribution, possession and use of narcotics and other related drugs. In pursuing our mandate, we have consulted with members of the judiciary, prosecutors, police officers, defense attorneys, medical authorities and prison officials. Additionally, we have reviewed the findings and conclusions of the National Committee on Marihuana and Drug Abuse as well as various studies which have been performed in other states.

Those surveyed indicated that on balance the Controlled Dangerous Substances Act represents an enlightened and rational approach to the problem of drug abuse. Conceptually, the objective of the statutory scheme is to punish those offenders having a high degree of moral culpability while, at the same time, affording others rehabilitatory services. Implicit in the Act is the recognition that drug abuse constitutes a profitable occupation to some and a dehabilitating disease to others. The obvious goal is to punish those who exploit the unwary and to rehabilitate others whose behavior evidences a lesser degree of criminality. To further effectuate this laudatory objective, most have recommended that harsher penalties be imposed with respect to large scale drug traffickers. In addition, virtually all of those surveyed have

indicated that existing rehabilitatory services are not sufficient and, for that reason, the conditional suspension provision contained in our present Act has rarely been utilized. They have thus recommended greater coordination of treatment centers permitting diversion of many offenders from the criminal justice system.

Some prosecutors and judges have also recommended decriminalizing the offense of possession of marihuana and hashish for personal consumption. Neither drug induces criminal behavior. Nor are they physically addictive. In essence, they have concluded that possession for personal use should fall within the purview of the disorderly persons statute. Violators would not be subject to imprisonment. Nevertheless, it must be noted that this proposal has not met with universal approval.

In addition to substantive recommendations, the survey revealed technical deficiencies in the Controlled Dangerous Substances Act. Law enforcement experience with the Act has various technical flaws which should be corrected. Efforts in this regard should be directed toward clarifying the statutory scheme in aid of its execution.

Lastly, it has been observed that drug abuse continues to increase at an alarming rate. While law enforcement personnel have reported an increase in the number of persons arrested and convicted of offenses under our drug laws, the problem has in no sense abated. This phenomenon is not, however, a function of the present statutory scheme. Simply put, most

agree that the problem is not wholly capable of solution by the criminal justice system. All too often, citizens have asked far too much of our system of criminal justice. At times, we have "responded to difficult problems of social control by making the undesired conduct criminal." President's Commission on Law Enforcement and the Administration of Justice, Task Office Report: The Courts, p. 98. This has resulted in a strong feeling that existing law has over-criminalized society. But plainly, the criminal law is not the sole method of insuring compliance with society's rules. Other institutions such as the family, the church and the school, must bear part of the responsibility for controlling the dissemination of dangerous drugs.

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