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# Competition In The Regulated Industries: Transportation (Book)

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## Book Reviews

**PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT.** By Frederick M. Rowe. Boston and Toronto: Little, Brown & Co. 1962. Pp. xxx, 675. \$22.50.

A society that leaves the production and distribution of goods and services (at least in the major sector of its economy) to the initiative of, and arrangements by, private individuals and groups, must of necessity arrive at prescriptions and proscriptioins designed to keep the processes thus unleashed from interfering with the attainment of the fundamental goals and aspirations of the community and, ultimately, from destroying the very framework in which they operate. In fashioning the controlling precepts, a set of political judgments centering on income distribution, the need for the preservation of a broad middle class, and other social issues, is brought into play and determines the admixture of laissez faire and welfare state principles that is to govern the order of the market. Professor Jacob Viner, in his thoughtful paper on "The Intellectual History of Laissez Faire,"<sup>1</sup> lately has underscored the fact that modern society cannot forego providing for "other ingredients of the good life not consistent with laissez faire" and thereby has tacitly admitted that structuring the proper model is not exclusively, and perhaps not even primarily, the province of economic science.

In the United States, as elsewhere, a vast array of legal measures exists to assure that societal forces move towards, rather than away from, the prevailing goals of distributive and commutative justice, ranging from social security and tax legislation to the laws for curbing anticompetitive practices. Consistency between and harmony among all these enactments can hardly be expected; certainly one of the most perplexing branches on the spreading normative tree is the law of the so-called Robinson-Patman Act.

The blurred and incongruous mandates of the 1936 legislation, couched, with one exception, in terms of amendments to the Clayton Act, have long been in need of a systematic and comprehensive treatise which maps the possible courses of compliance and traces the open channels through the turbid crosscurrents of administrative and lower court decisions and the swirls surrounding the twelve or so markers staked by the Supreme Court. Mr. Rowe has for some time been looked upon as one of the foremost experts on this treacherous subject. Hence his volume, which took ten years to complete, has been awaited with high hopes. The final product shows that these expectations were not misplaced and have been amply fulfilled. Mr. Rowe's treatise is a painstaking, carefully organized, and all-inclusive analysis of the provisions of the law, in the light of the vast accumulation of decisional materials and the critical comments by other writers bearing on their scope and thrust.

The author strives hard to create order out of chaos and to delineate the basic flow patterns of the eddies of judicial thought. He does not hesitate to register disagreement with many decisional approaches and constructions even if they come from as high a place as the Supreme Court and he bends every effort to assess the present status of authority retained by each particle in the sedimentation of case law. Judges, in some fashion, are word merchants and not seldom dispense from their counters wares that have not been bargained for and will not stand up to the test of time.

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<sup>1</sup> 3 J. L. & ECONOMICS 45 (1960).

Two of the most perplexing principal substantive problems of the Robinson-Patman Act are presented by the contours and the proper scope of the concept of price discrimination, direct or indirect, and the relations between the provisions pertaining thereto and the other proscriptions directed against particular types of masked discrimination. As a result, considerable space is given to a discussion of the significance and implications of the Supreme Court's decisions in *FTC v. Anheuser-Busch, Inc.*<sup>2</sup> and *FTC v. Henry Brock & Co.*<sup>3</sup>

The author always speaks his mind clearly and without mincing words. "Aber-rational" is one of his favored epithets. Throughout the book Mr. Rowe labors mightily to arrive at consistent and rational results, although occasionally one might detect slight traces of economic predilection. While Mr. Rowe's treatment is primarily of a technical legal character, he pursues a policy-oriented and trend-conscious approach. He justly stresses the need for a full understanding of the economic notions and ideas upon which the legislation rests, and for a reassessment of their validity and merits. But he is also fully aware of the fact that economic cognitions and theories are not the exclusive keys to the construction of the statute and that the principal objective of the act is not the achievement of maximum economic efficiency for the distributive apparatus but the protection of a constellation and stratification of competitive power deemed to be politically desirable.

While in a work of such compass it is always possible to take issue with some of the positions and analyses of the author, there can be no doubt that Mr. Rowe has supplied the profession with a masterful, authoritative, and dependable presentation of the operation of the statute over a quarter of a century and that his book constitutes an indispensable tool for any business advisor.

*Stefan A. Riesenfeld\**

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**COMPETITION IN THE REGULATED INDUSTRIES: TRANSPORTATION.** By Carl H. Fulda.<sup>1</sup> Boston and Toronto: Little, Brown and Company. 1961. Pp. x, 533. \$20.00.

The winds of change are penetrating even those remote sectors of our economy inhabited by Regulated Industry. Their vigor ranges from the tentative puffs of antitrust enforcement probes in banking<sup>2</sup> and insurance,<sup>3</sup> fields long attuned to the zephyrs of State Supervision, to the destructive gale of innovation now raising havoc—or hope, depending upon whether one is participant or onlooker—in transportation. In the latter, competition has always been a lusty but doubtfully legiti-

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<sup>2</sup> 363 U.S. 536 (1960).

<sup>3</sup> 363 U.S. 166 (1960).

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<sup>2</sup> See, e.g., *United States v. Philadelphia Nat'l Bank*, 201 F. Supp. 348 (E.D. Pa. 1962), *prob. juris. noted*, 30 U.S.L. WEEK 3363 (U.S. May 22, 1962); *Complaint in United States v. Hunterdon County Trust Co.*, Civ. 1100-61 (D.N.J. Dec. 26, 1961), reported in 5 TRADE REG. REP. ¶ 45061, at 52454 (Oct. 9, 1962); *Consent decree entered in United States v. Hunterdon County Trust Co.*, 5 TRADE REG. REP. (1962 Trade Cas.) ¶ 70263 (D.N.J. April 16, 1962).

<sup>3</sup> See, e.g., *Remarks of Baddia J. Rashid*, Chief of the Trial Section, Antitrust Division, Department of Justice, to the National Association of Independent Insurers, Nov. 15, 1961, in 5 TRADE REG. REP. ¶ 50109 (Nov. 27, 1961); *Complaint in United States v. Chicago Title & Trust Co.*, Civ. 14130-3 (E.D. Mo. Nov. 9, 1962), reported in 5 TRADE REG. REP. ¶ 45062, at 52503 (Nov. 13, 1962).

mate phenomenon; the unruly concomitant of tying together several modes of transport within a regulatory structure that actually controls only a minority percentage of all transport activities.<sup>4</sup>

A fantastically variegated group of producers sells the service of transporting goods and passengers. Since approximately 1925, at least in land transport, their respective market shares have been highly unstable; initially because of the constant growth of more flexible motor transport service, more recently due to major technological advances in railroad transport. The federal pattern of regulation—fashioning competition by supervising entry, consolidation, pricing, and price-related behavior—has of course never successfully resisted the pressures of the market place, yet has prevented it from functioning even as imperfectly as it does in the industrial sectors. This conflict has always been a rewarding source of economic studies, including some excellent recent items,<sup>5</sup> but until now there has not been a legal synthesis of the field, useful to practising attorneys and teachers alike, acquainting them with the transportation industry from the standpoint of anti-trust policy.<sup>6</sup> Professor Fulda's book, one of Little, Brown's Trade Regulation Series,<sup>7</sup> admirably fills this need and can be unreservedly recommended to the profession.

After a short introduction dealing generally with the history of federal regulation and inter-modal competition, the first half of the book describes the industry structure of railroads, motor carriers, water carriers, airlines, and freight forwarders, and discusses the antitrust problems which while to a great extent common to all these modes, cannot be well understood except in their particular setting. To some extent a similar pattern is used in each chapter: Behavior problems are subordinated to problems of structure, such as new entry, restrictive certification (routes, commodities, etc.), and unification.<sup>8</sup> The motor transport chapter is perhaps the best of this group, reflecting both the richness of the available material and the greater significance of this material to attorneys. Behavior questions, how-

<sup>4</sup> See, e.g., Senate Comm. on Commerce, Special Study Group on Transportation Policies in the United States, *National Transportation Policy*, S. REP. No. 445, 87th Cong., 1st Sess. 407-08 (Doyle Draft Rep. 1961) [hereinafter cited as Doyle Report].

<sup>5</sup> See, e.g., CAVES, AIR TRANSPORT AND ITS REGULATIONS (1962); FERGUSON, LERNER, MCGEE, OL, RAPPING & SOBOTKA, THE ECONOMIC VALUE OF THE UNITED STATES MERCHANT MARINE (1961); LOCKLIN, ECONOMICS OF TRANSPORTATION (5th ed. 1960); MEYER, PECK, STENASON & ZWICK, THE ECONOMICS OF COMPETITION IN THE TRANSPORTATION INDUSTRIES (1959); NELSON, RAILROAD TRANSPORTATION AND PUBLIC POLICY (1959); RICHMOND, REGULATION AND COMPETITION IN AIR TRANSPORTATION (1961); WILLIAMS, THE REGULATION OF RAIL-MOTOR RATE COMPETITION (1958).

<sup>6</sup> The closest item is the casebook by Auerbach and Nathanson, *The Federal Regulation of Transportation*, published, however, in 1953 and not designed to fit the above description. Another study of interest, although older and not so wide-ranging, is OPPENHEIM, THE NATIONAL TRANSPORTATION POLICY AND INTER-CARRIER COMPETITIVE RATES (1945). The standard practitioner's compendia-guides are SHARFMAN, THE INTERSTATE COMMERCE COMMISSION pts. I & II (1931), pt. III-A (1935), pt. III-B (1936), and some looseleaf services. See also Hale & Hale, *Competition or Control VI: Application of Antitrust Laws to Regulated Industries*, 111 U. PA. L. REV. 46 (1962), summarizing a series of studies that included the transportation industries; *The Interstate Commerce Commission, Seventy-Fifth Anniversary Commemorative Symposium*, 31 GEO. WASH. L. REV. 1-326 (1962), which also contains a selected bibliography under "Practice and Procedure," "Legislation," and "Regulation," at 313-26.

<sup>7</sup> For a review of the latest volume in this series, ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT (1962), see Riesenfeld, Book Review, 50 CALIF. L. REV. 915 (1962). Professor Fulda is preparing a second volume covering power and communications.

<sup>8</sup> This "structure, behavior, performance" terminology is not Professor Fulda's; I have imposed it upon his material from BAIN, INDUSTRIAL ORGANIZATION (1959).

ever, are not ignored here. The railroad chapter discusses pooling and exclusive dealing problems fully, especially in light of the *Pullman*<sup>9</sup> and *Railway Express*<sup>10</sup> cases; the air transport chapter has a detailed treatment of the domestic and international industry agreement situation created by the activities of the Air Transport Association and the International Air Transport Association.

The second part of the book is concerned with behavior issues: Rate-making practices under the Reed-Bulwinkle exemption<sup>11</sup> and their limits and abuses; the conference and dual-rate agreement system of international shipping; inter-modal price competition and its regulation; and a final chapter on primary jurisdiction. Presumably the overwhelming predominance of conduct questions prompted treating international shipping in this part rather than as a separate mode in the first half of the book. The isolated treatment of primary jurisdiction, divorced from the particular context of the cases, is perhaps questionable but does insure an unhurried review of at least the leading decisions in this field.<sup>12</sup>

The only significant "defect" of the book is its date of completion, coming as it did in the middle of an exciting period of change in the substantive criteria governing competition and regulation.<sup>13</sup> Thus the entire chapter on international shipping leads up to the expected revision of the Shipping Act, which occurred in October 1961,<sup>14</sup> just too late to be included. Unfortunately, the House bill discussed by Professor Fulda,<sup>15</sup> which itself already embodied significant compromises toward retention of the dual rate system in the great majority of cases, was further weakened by deletion of even the minimal requirement that such agreements at least should not intend or effect the exclusion of independent carriers. As it now stands, the new act leaves this question of unreasonable pressure on independents completely to the discretion of the Federal Maritime Commission, and contains no expression of disapproval of the dual rate system.<sup>16</sup> Thus the *Isbrandtsen*<sup>17</sup> doctrine is again a dead letter and the procompetition legal flurry of the mid-fifties<sup>18</sup> has been calmed.<sup>19</sup>

<sup>9</sup> *United States v. Pullman Co.*, 64 F. Supp. 108 (E.D. Pa. 1946), *aff'd by an equally divided Court*, 330 U.S. 806, *rehearing denied*, 331 U.S. 865 (1947).

<sup>10</sup> *United States v. Railway Express Agency, Inc.*, 89 F. Supp. 981 (D. Del. 1950), *motions renewed following stay of proceedings*, 101 F. Supp. 1008 (D. Del. 1951).

<sup>11</sup> 62 Stat. 472 (1948), 49 U.S.C. § 5(b) (1958).

<sup>12</sup> This in any event seems to be the practice in treatments of primary jurisdiction. See, e.g., Jaffe, *Primary Jurisdiction Reconsidered: The Antitrust Laws*, 102 U. PA. L. REV. 577 (1954); von Mehren, *The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction*, 67 HARV. L. REV. 929 (1954).

<sup>13</sup> A pocket-part envelope is, however, provided, and supplements may perhaps be expected.

<sup>14</sup> 75 Stat. 762, 46 U.S.C. §§ 813a, 814-15, 817, 819, 841a (Supp. III, 1961); see Dodds, *Legality of Shipper Tying Arrangements in Ocean Commerce*, 23 U. PITT. L. REV. 933 (1962).

<sup>15</sup> FULDA, *COMPETITION IN THE REGULATED INDUSTRIES: TRANSPORTATION* 334-36 (1961) [hereinafter cited as FULDA].

<sup>16</sup> Cf. Dodds, *supra* note 14, at 955-56. The privilege of buyer routing in nonconference vessels, however, does not seem to have been significantly impaired. 75 Stat. 762, 46 U.S.C. § 813a(3) (Supp. III, 1961).

<sup>17</sup> *Federal Maritime Bd. v. Isbrandtsen Co.*, 356 U.S. 481 (1958); Auerbach, *The Isbrandtsen Case and Its Aftermath* (pts. 1-2), 1959 WISC. L. REV. 223, 369.

<sup>18</sup> STAFF OF SUBCOMM. NO. 5, HOUSE COMM. ON THE JUDICIARY, 87TH CONG., 2D SESS., REPORT PURSUANT TO H. RES. 56, AUTHORIZING THE COMMITTEE ON THE JUDICIARY TO CONDUCT STUDIES AND INVESTIGATIONS RELATING TO CERTAIN MATTERS WITHIN ITS JURISDICTION ON THE OCEAN FREIGHT INDUSTRY (Comm. Print 1962); Walden, *The Dual-Rate Moratorium—End of the Isbrandtsen Odyssey*, 10 J. PUB. L. 78 (1961); Comment, 58 COLUM. L. REV. 1069 (1958).

<sup>19</sup> Isbrandtsen Company has been merged with American Export Lines and has become

Even more important is the basic struggle of inter-modal, especially railroad-motor, rate competition, which was growing in intensity as the book was published.<sup>20</sup> Professor Fulda was able to present an excellent historical review of the events leading to the 1958 passage of section 15(a)(3) of the Interstate Commerce Act,<sup>21</sup> which established a new rule of rate making prohibiting the involuntary maintenance of umbrella rates, subject to the general strictures of the National Transportation Policy;<sup>22</sup> and to discuss the early decisions arising under that section.<sup>23</sup> As it happens, however, more important cases were just short of decision at that time.<sup>24</sup> These cases, which may shortly be decided by the Supreme Court,<sup>25</sup> squarely raise the issue whether rates compensatory by some definitions can be ordered cancelled because of their competitive effect upon other modes of transportation. This is at the heart of the present rail-motor battle, exacerbated by recent technological improvements in railroading such as piggybacking and centralized traffic control; and by the growing influence of the Department of Commerce<sup>26</sup> and its more realistic view of such formerly sacrosanct shibboleths as "overall structure of rates," "area and commodity patterns," and similar concepts<sup>27</sup> which, if uncritically applied, prevent full utilization of low cost transport facilities.

It is here that Professor Fulda uses a descriptive approach that does not fully clarify the complex nature of these problems or expose the false puzzles that abound. Today's disputes concern the continued validity of rate classification and rate pattern concepts, and the exact definition of "below cost" pricing. On the first matter very little relevant information is presented here to criticize trucker allegations of selective rate cutting by railroads. These charges, that railroads are destroying "the" historic pattern, assume a pattern still exists, when in fact it was eroded out of all recognition years ago—in great part by the truckers themselves.<sup>28</sup>

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a subsidized operation, having agreed not to undercut conference rates wherever relevant. *N.Y. Times*, March 12, 1962, p. 54, col. 2; May 2, 1962, p. 74, cols. 7-8. Jakob Isbrandtsen, however, thereby acquired 26% of the stock, and apparently control, of American Export Lines. *Ibid.* Further, recent industry reports tell of the growing strength of independents and their willingness to offer price competition, *N.Y. Times*, Oct. 14, 1962, § 5, p. 15; thus, some battles may yet occur.

<sup>20</sup> See Doyle Report *passim*.

<sup>21</sup> FULDA 342-60.

<sup>22</sup> 54 Stat. 899 (1940), Historical Note before 49 U.S.C.A. § 1 (1959).

<sup>23</sup> Principally, Paint and Related Articles in Official Territory, 308 I.C.C. 439 (1959).

<sup>24</sup> Atlantic Coast Line R.R. v. United States, 209 F. Supp. 157 (S.D. Fla. 1962); St. Louis-S.F. Ry. v. United States, 207 F. Supp. 293 (E.D. Mo. 1962); Missouri Pac. R.R. v. United States, 203 F. Supp. 629 (E.D. Mo. 1962); New York, N.H. & H.R.R. v. United States, 199 F. Supp. 635 (D. Conn. 1961). See also New York Cent. R.R. v. United States, 207 F. Supp. 483 (S.D.N.Y. 1962).

<sup>25</sup> Appeal was filed in the first of these cases, *New York, N.H. & H.R.R.*, 31 U.S.L. WEEK 3018 (U.S. July 3, 1962).

<sup>26</sup> Going back at least to the "Cabinet Report," PRESIDENTIAL ADVISORY COMM. ON TRANSPORTATION POLICY AND ORGANIZATION, REVISION OF FEDERAL TRANSPORTATION POLICY (1955). See also U.S. DEP'T OF COMMERCE, FEDERAL TRANSPORTATION POLICY AND PROGRAM (1960); Doyle Report; Message from the President of the United States Relative to the Transportation System of Our Nation, April 5, 1962, in H.R. DOC. No. 384, 87th Cong., 2d Sess. (1962); Magnuson, *The Motor Carrier Act of 1935: A Legislator Looks at the Law*, 31 GEO. WASH. L. REV. 37 (1962).

<sup>27</sup> See Doyle Report 407-44.

<sup>28</sup> See, e.g., I *Ilcarings on S. 1197 Before the Senate Committee on the Judiciary*, 87th Cong., 1st Sess. 120-21, 163 (1961) (testimony of Morris Forgash).

A policy supporting a non-cost-related rate structure, in which high value freight subsidizes bulk commodities, may yet be justified. It seems unrealistic, however, to use this vague hope as an argument against today's low rate push by railroads, in view of the prevalence of private, unregulated carriage, the revenue-increasing effect of additional railroad freight volume, cost reductions effected by technological improvements, and the like.<sup>29</sup> Similarly, when "below full cost" arguments are made against railroad rate reductions, it is not enough to explain the relevance of "out of pocket" and "fully distributed" costs to the cost structure of different modes, a job which Professor Fulda does lucidly and well. What should then follow is an analysis of these terms, as is essayed by Judge Hincks in the *New York, N.H. & H.R.R.*<sup>30</sup> case; terms which to the ICC turn out to have rather Pickwickian meanings<sup>31</sup> that make suspect some of the arguments against "below cost" unfair competition.

This should not be viewed as a recommendation that lawyers worry about policy problems and thus disqualify themselves from becoming better practitioners, but as a suggestion that some acquaintance with these accounting and economic concepts is needed in order to appreciate fully the legal issues being fought out at present. It is to these matters that Professor Fulda's book could have devoted a bit more attention; but this is a small cavil in view of the overall excellence of this pathbreaking yet detailed synthesis of a far too little known area of the law.

*Richard M. Buxbaum\**

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**NARCOTICS AND THE LAW.** By William Butler Eldridge. New York: New York University Press. 1962. Pp. xiv, 204. \$5.00.

*Narcotics and the Law* represents a milestone not only in the field of narcotics addiction but also in objective efforts to assess the foundation upon which social and legal policies, in general, are based.

This book briefly traces the history of narcotic use and narcotic laws in the United States, a history which is marked particularly by passage of the Harrison

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<sup>29</sup> Compare *id.* at 37-39 (testimony of Frederick G. Freund).

<sup>30</sup> *New York, N.H. & H.R.R. v. United States*, 199 F. Supp. 635, 647-48 (D. Conn. 1961).

<sup>31</sup> As to marginal costs see MEYER, PECK, STENASON & ZWICK, *op. cit. supra* note 5, at 275: [S]everal . . . objections can be made to the I.C.C. procedures. To begin, the whole analysis is conducted on a much too aggregative basis. Specifically, total operating expense is a composite sum of many different categories of costs. It includes all the labor, fuel, and miscellaneous variable costs associated with the operation of trains, yards, and stations; it also encompasses marketing, advertising, selling, and promotion expenses under the catch-all heading of traffic expenses; even supervisory and legal expenses are included; furthermore, the major portion of capital consumption costs is found in the maintenance-of-way and structure and maintenance-of-equipment accounts. In short, railroad operating expenses include virtually all important railroad costs except property taxes and interest payments. Aggregation of such a diversity of cost categories in one single figure must inevitably hide important details.

See also Doyle Report 410. As Judge Hincks concludes, "For accounting purposes the cars are regarded as bearing a proportionate share of total costs—in other words, the marginal cost of added shipments is in reality average cost of all shipments." *New York, N.H. & H.R.R. v. United States*, *supra* note 30, at 648.

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Act in 1914.<sup>1</sup> The author describes the latter as a bill which "set out to control the non-medical use of narcotics and evolved into the prohibition of non-medical uses and the control of medical uses."<sup>2</sup> The Harrison Act evolved out of a significant shift in public attitudes in the early 1900's due to a great increase in the use of opium and an increasing association of that use with criminality. For the past fifty years the official or public policy in the United States has been to apply criminal sanctions to all narcotic offenders. This policy has been extended and intensified in recent years by both the federal government and many states, with marked increase in the severity of penalties, accompanied by claims that this is both effective and the only possible approach.

The legal profession's formal interest in narcotic laws dates back to 1932 when the American Bar Association approved a Uniform Narcotic Drug Act. In 1951 the American Bar Association Commission on Organized Crime studied and disapproved the mandatory minimum sentences and penalties of the first Boggs' Act.<sup>3</sup> This led to the formation of a Standing Committee on Narcotics and Alcohol in the ABA Section of Criminal Law in 1953, which in turn led to the formation of a Joint Committee of the ABA and the American Medical Association. After long study of the proposals made by the joint committee of the ABA and the AMA, the American Bar Foundation set out to resolve the question of the effectiveness of present narcotic policies. This book, the culmination of that study, represents an effort to provide a balanced judgment on the true extent of the narcotics problem while attempting to avoid the standard preconceptions, assumptions, myths, and inaccuracies.

The American Bar Foundation project was designed to evaluate the effectiveness of current legislation by correlating statutory enactments with changes in the complexion of the narcotics problem. This was done by library research, correspondence with key agencies and officials, direct interviews, and examination of reports and statistics. Seven states and the District of Columbia were selected: New York, Illinois, California, and Michigan because they were the areas with the most severe narcotics problems; New Jersey, Ohio, and Missouri because of claims that increased penalties there had drastically reduced the narcotics problem; and the District of Columbia because it represented federal administration. All of these states prohibit the same types of activity, prescribe the same types of public safeguards, and regulate the medical profession in a similar manner. Much of the variation in the state laws stems from the different treatment given to penalty clauses by state legislatures. In all of these jurisdictions the possession of narcotic drugs, except as otherwise provided, is uniformly prohibited. The major variation on this general theme occurs in New York where the quantity possessed determines whether the individual will be charged with a misdemeanor, a felony, or a more serious felony based upon a presumption of intent to sell, with penalties identical to those for actual sale. Although this statute is noteworthy for attempting to differentiate those who are predominantly addicts from those who are predominantly peddlers, significant enforcement problems do arise, particularly the tendency of peddlers to carry a quantity slightly less than the felony minimum. To assess the full significance of this statute, detailed figures of arrests and convictions on a charge-by-charge basis

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<sup>1</sup> 38 Stat. 785 (1914), as amended, INT. REV. CODE OF 1954, §§ 4701-36.

<sup>2</sup> ELDRIDGE, *NARCOTICS AND THE LAW* 9 (1962).

<sup>3</sup> 65 Stat. 767 (1951), as amended, 21 U.S.C. § 174 (1958).



would be necessary but, like many other types of data in this field, are not available.

The courts have construed the prohibitions against sales of narcotics by unauthorized individuals to include every transaction in which illegal drugs are involved, including "gifts," offers or agreements to sell, or delivery to someone who has agreed to purchase.

As part of the legislative efforts to curb the illicit traffic in narcotics, controls have also been imposed on the legitimate use by physicians. Generally, the doctor is permitted to prescribe drugs in the course of his ordinary professional practice. Of the states studied in this book, California and Illinois require triplicate forms for all narcotic prescriptions, which greatly simplifies state inspection of records and drastically reduces the problem of forged prescriptions. On this point the author rightly raises the question of the implications for normal medical practice of the overall decline in the prescribing of narcotics since triplicate forms were instituted, suggesting either that more discretion is being exercised or more likely, that narcotics are not being prescribed when they should be, in order to avoid the paper work. Enforcement agents in New Jersey and Ohio indicated that triplicate prescriptions were unnecessary since forgery could be effectively prevented by close co-operation between the concerned parties. California is unique in its legislative "prescription" for medical practice as concerns addicts. It requires doctors treating patients for addiction to register them with the state, place them in an approved institution for withdrawal, and sets a maximum dosage of narcotics which may be administered for withdrawal (and for no longer than thirty days). It is interesting to consider why the medical profession, which has successfully resisted legislative interferences which were more necessary in other problem areas, has so uncritically accepted such interferences concerning narcotic addiction. The author justifiably questions the ex officio practice of the Federal Bureau of Narcotics in attempting to formulate standards of medical practice, specifying treatment methods, and discouraging or investigating those who seek new answers to the problem.

Addiction itself is a criminal offense in the District of Columbia, Illinois, Michigan, and New Jersey.<sup>4</sup> The alleged advantages of statutes making addiction a crime include deterrence, persuading addicts to obtain treatment, and creating a bargaining tool to obtain informers. The author points out, however, that compulsory civil commitment laws would also accomplish the deterrence and treatment objectives.

Both the federal government and the state of New Jersey have statutes requiring registration of narcotic offenders, a requirement which the author describes as "thinly disguised additional punishment."<sup>5</sup> Other statutes which exist in the states under discussion include prohibitions against possessing hypodermic needles or similar paraphernalia, provision for forfeiture of vehicles used for transporting illegal drugs, and, in California and Illinois, a prohibition against selling a nonnarcotic substance under the guise that it is a narcotic (thus making it unnecessary to prove that a suspect sold an actual narcotic in order to prosecute

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<sup>4</sup> In *Robinson v. California*, 370 U.S. 660 (1962), the United States Supreme Court held unconstitutional the California statute making addiction a crime. Query the effect of the *Robinson* case on similar statutes.

<sup>5</sup> ELDRIDGE, *NARCOTICS AND THE LAW* 64 (1962).

him). With tongue in cheek, the author states his disbelief that such statutes were designed to protect the narcotic buyer from fraud.

In terms of sentencing, the reported data shows a unanimous trend toward increasing the severity of penalties, with maximum sentences up to forty years (or life), death penalties for selling to minors, and limitations on suspension of sentence, probation, or parole.

It is little wonder that after completing this excellent study of the "American system," Eldridge expresses astonishment that those charged with administering our narcotic laws did not, and do not, make adequate studies to determine the effectiveness of these laws in meeting the drug problem, particularly since so many unqualified claims have been made about the benefits of severe mandatory sentences. The statistics in general use are full of omissions, duplications, varying terminology, confusion, and inconsistency.

Although the Federal Bureau of Narcotics has been systematically collecting data for many years, there is a notable lack of uniform standards to guide the local and state agencies, since the Bureau has never provided instructions for standardized reporting. Federal cases are being reported as local cases, single cases are reported more than once, the subject matter of the reports changes from time to time, and no records are kept on the sentences actually imposed upon narcotics violators. The author was able to find through other sources that the mandatory sentence provisions of the 1956 Narcotic Control Act<sup>6</sup> have increased the average length of sentences in the federal district courts by more than two years. There are interesting discrepancies in the average sentences given in different circuits, ranging from 48.6 months to 122.6 months.<sup>7</sup> Similarly, the narcotics violators receiving probation in different circuits range from 5.3 to 29.5 per cent.

Because so much of the heavy penalty philosophy is buttressed by quotations from statistics furnished by the Federal Bureau of Narcotics, it is of value to analyze in detail other examples given by Eldridge of the misuse of statistics. In 1958 the Federal Bureau of Narcotics published a booklet of graphs purporting to show the beneficial results of the 1956 Narcotic Control Act's mandatory penalties against peddlers.<sup>8</sup> The Bureau used as the measure of results a decrease in the number of new addicts reported in 1958 as compared with 1956. However, if one uses the more precise and meaningful figure of how many arrests were made for narcotics violations in the same states, we see, instead of "amazing improvements," that no state except Michigan has shown a decrease in arrests comparable to the reported decline in addiction; in New York, which has half or more of our country's known addicts, there was actually a significant increase in narcotics arrests during this two year period. When one looks back further there are indications that some states were showing a decrease *before* the 1956 act. As the author states, "the most obvious answer to the questions posed by these figures is that the statistics are so unreliable, the criteria so ephemeral, and

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<sup>6</sup> 70 Stat. 567 (1956) (codified in scattered sections of 8, 18, 21, 26 U.S.C.).

<sup>7</sup> ELDRIDGE, *NARCOTICS AND THE LAW* 71 (1962). Since the imposition of heavy sentences is regarded as the ultimate weapon in the narcotics war, it is noteworthy that the First Circuit, which has shown a lenient sentencing philosophy, has had a marked reduction in total narcotics arrests and convictions while the Seventh Circuit, with a severe sentencing philosophy, has had an increase in narcotics arrests and convictions.

<sup>8</sup> *Id.* at 73.

the selection so subject to conscious or unconscious bias, that they cannot be taken as answering anything."<sup>9</sup>

The statistics on the total number of addicts in this country is a choice example of the deficiencies in reporting, compiling, and analyzing data. Of all states, California in recent years has been making the most assiduous effort to compile accurate and complete information on this problem, and their figures presently indicate approximately 15,000 addicts<sup>10</sup> as compared with the Federal Bureau's estimate of 7,000.<sup>11</sup> Between 1953 and 1960, 62,036 persons were reported to the Bureau as new addicts;<sup>12</sup> yet the Bureau states that the total addict population of the United States is 44,842.<sup>13</sup> In 1957 the Bureau reported the addict population to be 44,146,<sup>14</sup> but since then 18,429 new addicts have been reported<sup>15</sup> with the official figure increasing only to 44,842,<sup>16</sup> with 18,000 "disappearing."

As a representative example of the author's state by state analysis of the "American system" we can take Michigan, where the penalty for a first selling offense is a minimum of twenty years without possible suspension or probation. Definite evidence is presented that such legislation has failed, since only 30 out of 1005 charged with peddling narcotics between 1952 and 1960 were convicted on that charge.<sup>17</sup> After this same eight years of severe mandatory penalty the available statistics indicate that Michigan still had four times as many addicts as Ohio and twice as many as New Jersey, states with comparable populations.<sup>18</sup> Among the reasons suggested for this is that judges (and juries) feel that the law is too harsh and inflexible and thus will not convict the person of sale. Instead the deception is used of accepting pleas of lesser offenses. Senator Thomas Dodd this year surveyed federal judges and found that seventy-five per cent were critical of the mandatory penalty legislation.<sup>19</sup>

An encouraging sidelight is the discussion of the forty-five per cent "cure" of 344 paroled addicts in New York who received intensive, flexible parole supervision over a three year period (and at a cost of \$250/year as compared with \$1900 for institutional care plus additional savings of welfare costs for their dependents). As to cost it is pointed out that a 1959 reduction of narcotics offenses in Ohio was mainly due to the potential offenders being kept in prison at an approximate cost of almost \$900,000 for incarceration alone. Here Eldridge makes a major point: "When costs run into such amounts, legislatures should be

<sup>9</sup> *Id.* at 74.

<sup>10</sup> Computed from STATE OF CALIF., BUREAU OF CRIMINAL STATISTICS, DEP'T OF JUSTICE, NARCOTICS ARRESTS AND DISPOSITION IN CALIFORNIA IN 1961 (1962), and STATE OF CALIF., BUREAU OF CRIMINAL STATISTICS, DEP'T OF JUSTICE, NARCOTIC ARRESTS AND THEIR DISPOSITIONS IN CALIFORNIA IN 1960 (1961).

<sup>11</sup> U.S. BUREAU OF NARCOTICS, TREASURY DEP'T, TRAFFIC IN OPIUM AND OTHER DANGEROUS DRUGS 62 (1960).

<sup>12</sup> ELDRIDGE, NARCOTICS AND THE LAW 77 (1962).

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> *Id.* at 88.

<sup>18</sup> *Id.* at 89.

<sup>19</sup> Statement by Senator Dodd, White House Conference on Narcotic and Drug Abuse, Sept., 1962.

willing to devote a relatively small sum of money to the continuing study of the causes and possible prevention of criminal activity."<sup>20</sup>

The statistics from Ohio do indicate a decline in narcotics activity, although there is no proof or disproof of the Federal Bureau of Narcotics claims of an eighty per cent decline in the number of addicts due to the 1955 stiff penalties.<sup>21</sup> The danger of oversimplified generalizations about cause and effect are brought out when the author discusses the many factors involved in evaluating the "Ohio system": careful preparation by police of cases against offenders (part of which involves holding suspects for seventy-two hours for questioning, removing the requirement of warrants, and the use of a large number of informers); addicts moving to other states; incarceration (as mentioned above); accepting pleas to lesser offenses; "cures"; and greater caution by the addict to avoid being caught.

This comprehensive and brilliant evaluation of the overall "American system" concludes as follows: "The material is not presently available . . . to those persons and organizations who have made unqualified pronouncements about the success or failure of preventive methods . . . . [T]here has never been a clear picture of narcotics traffic and use in this country; . . . the extent [of changes in habits and practices] . . . is not known; . . . there is no clear understanding of the reasons. . . ."<sup>22</sup>

In addition to this masterful analysis of the punitive approach, the book nicely covers the public image and myths about the addict, correctly showing most of them to be based on misinformation, generalization from nontypical occurrences, and oversimplification. The effects of narcotics on the body, on morality, on sexual behavior, and on crime are covered, as is the complicated subject of relapse rate. It is pointed out that there are few permanent physical effects, sexual drives are usually depressed (not stimulated), and some (not all) addicts were involved in criminal behavior prior to their use of drugs.

This major contribution to the literature on narcotic addiction also evaluates other suggested approaches to narcotics control: clinics for legally dispensing drugs, the British "system," isolation of addicts, and institutionalization. Space does not permit detailed discussion of these important and frequently misunderstood approaches. I would only add that rehabilitation-oriented institutional treatment can play a more important role than Eldridge states, in controlling addiction, when combined with long-term intensive outpatient supervision, nalorphine (Nalline) testing, Narcotics Anonymous chapters, vocational training, and psychiatric help. Such a program is now in part available to some of California's addicts and should be broadened and extended.

Finally, we have Eldridge's conclusions and recommendations: the evidence does not prove the claims made for the effectiveness of the American system of uncompromisingly severe penalties; those attacking the problem should not be denied the means found effective with other types of antisocial behavior; co-operation in the areas of legislation, law enforcement, and medicine is necessary; medical participation in treatment and research is essential; addicts should be given the same opportunities as other offenders for flexibility of sentencing,

<sup>20</sup> ELDRIDGE, *NARCOTICS AND THE LAW* 100 (1962).

<sup>21</sup> *Id.* at 97.

<sup>22</sup> *Id.* at 103.

probation, and parole; and we must accumulate definitive information and statistics on every aspect of narcotics use and traffic. We will then have a firm foundation upon which to base our social and legal policies. To accomplish this the author suggests assigning such responsibility to a national agency and requiring detailed, uniform reporting from involved agencies everywhere in the United States. The cost to society of all these suggested improvements would be only a small fraction of the costs of the present system. The appendices to the book list the various state penalties, the Uniform Narcotics Drug Act, and the Federal Bureau of Narcotics Report Form.

As I have pointed out elsewhere, we can not hope to understand the complex problem of narcotic addiction apart from the total context of drug use and abuse and the society in which it occurs. Our probable 100,000 narcotic users must therefore be seen in the light of the tens of thousands of users of marihuana, barbiturates (and other sedatives), stimulants, tranquilizers, and our seventy-five million users of alcohol, including six million alcoholics. Drug use and abuse serves as a barometer of human society. Solution requires eliminating the breeding grounds (poverty, segregation, slums, etc.); treating those already using or addicted; doing away with the sources of supply in Mexico, Thailand, etc.; and apprehending the wholesalers and distributors of illegal drugs by improved planning, co-operation and co-ordination of the multitudinous law enforcement agencies working on this problem.

In its scholarship, comprehensiveness, and objective fact finding, this book is a model and should be read by every lawyer, doctor, policeman, and citizen concerned about narcotics addiction. It is indeed a credit to the American Bar Foundation's interest in the administration of justice.

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