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On Legislating Morals: The Symbolic Process of Designating Deviance

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On Legislating Morals: The Symbolic Process of Designating Deviance*

by Joseph R. Gusfield**

It is by now a commonplace of the social sciences to say that one man's moral turpitude is another man's innocent pleasure. Although policing and judicial agencies of our society designate behavior as wrong, immoral, and illegal every day, we are well aware that such designation is by no means either inherent in human nature or common to all societies in all historical periods. Official and legal judgments of deviance show all the characteristics of cultural relativity. What is crime today may well have been goodness yesterday; what is applauded in New York City is decried on the prairies. Legislatures, police agencies, and courts all operate, however, by designating some behavior as deviant, immoral, and unsanctioned. In this Article we are concerned with how such designations or norms, arise, are maintained, and undergo change. Our effort is less to understand the actions of the deviant than to shed light on those who define his behavior as punishable and prohibited.

This Article focuses on one kind of deviance designation: "disinterested indignation"—hostility directed against a norm violator despite the absence of direct or personal damage to the norm upholder and designator. The norm upholder's righteous hostility leads him to define the deviant as immoral. Intense legal and public reactions to homosexuals, prostitutes, drug addicts, gamblers, and abortionists represent the outlawing of certain behavior despite the absence of a "victim" or damage to specific and direct interest of others. Political radicalism, murder, theft, and the list of usual crimes may all be interpreted as threats to the life and property of citizens. Designation of the acts mentioned above as "crimes" cannot be explained on the same basis.

I

RECENT PERSPECTIVES TOWARD DEVIANCE

Since definitions of sin and crime are variable, the quality and content of moral indignation and legal prohibition are never fixed. It need not follow from the appearance of a mode of behaving that it will be legally

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defined as deviant. Varying public reactions to certain behavior are thus objects of study, as essential for understanding the wrongdoer as are studies of his motivation, social background, and differential association.

Utilizing the insight of cultural relativism, recent sociological studies of deviant behavior have emphasized the conventional person's reaction to those designated as "outsiders." Howard S. Becker has redefined the study of deviance to focus on the interaction between those who commit untolerated acts and those who respond to such acts. Kai Erikson has expressed this perspective well:

From a sociological standpoint deviance can be defined as conduct which is generally thought to require the attention of social control agencies—that is, conduct about which "something should be done." Deviance is not a property inherent in certain forms of behavior; it is a property conferred upon these forms by the audiences which directly or indirectly witness them. The critical variable in the study of deviance, then, is the social audience rather than the individual actor.

In *The Division of Labor in Society* Emile Durkheim attempted to explore this issue through an analysis of criminal punishment. He held that hostile indignation was the community's response to a threat to the authority and sacredness of its norms. Immoral and criminal actions are attacks upon the legitimacy of social norms. If the society does not show its solidarity in defining behavior as immoral and intolerable, the disposition to respect its rules will be lessened. More recently, Erikson and Lewis Coser have suggested a similar view: Each time the community brings sanctions against a detail of behavior it sharpens the authority of the violated norm and redefines the boundaries within which the norm exercises special jurisdiction.

This Durkheimian theory unfortunately assumes as resolved precisely what is so often unresolved in contemporary societies. When Coser and Erikson speak of "the community," like Durkheim, they make a great leap beyond the complex of divergent and conflicting groups which make up modern communities and societies. To assume a common culture or a normative consensus in American society, as in most modern societies, is to ignore the deep and divisive role of class.

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3 E. DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 96-103 (G. Simpson transl. 1933).

ethnic, religious, status, and regional culture conflicts which often produce widely opposing definitions of goodness, truth, and moral virtue.  

While crimes of homicide and crimes against property may provoke a fairly common response, the forms of deviant behavior considered in this Article have represented areas of considerable community difference and conflict. “Business crimes” such as gambling, alcohol consumption, drug addiction, prostitution, and abortions involve willing clients rather than coerced victims and can be seen as “free markets” involving buyers and sellers. Designating such behavior as deviant and utilizing legal sanctions to prohibit and punish are acts of moral intervention.

Deviance designation in these areas has often fluctuated considerably. Becker has shown how moral crusades arise, leading to the designation as deviant of behavior which has until then been tolerated, if not applauded. Moral entrepreneurs have used the support of specific interests to maintain definitions and to prosecute those defined as immoral and illegal. The changing reactions of “the community” are therefore themselves objects of study. Why, for example, is the seller usually held more culpable than the buyer, as in the immunity to prosecution of clients in gambling, prostitution, and abortion cases? Why, however, is the client of the drug seller open to punishment? “Communal reaction” is too abstract a concept to provide much help in answering.

This Article first discusses the nature of deviance designation in law as a symbolic process, analyzing the symbolic character of different forms of nonconformity. This general analysis is then applied to two cases of deviance: Alcohol consumption and drug addiction. Finally, the Article draws from the analysis several conclusions about moral crusades and deviance designation.

II

INSTRUMENTAL AND SYMBOLIC FUNCTIONS OF LAW

The agents of government are the only persons in modern societies who can legitimately claim to represent the total society. In their actions specific and limited interests are disclaimed in preference to a public and total interest. The acts of government “commit a group to action or to

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6 See the discussion and documentation in R. Williams, American Society (1960), especially at 374. See Yinger, Contraculture and Subculture 25 AM. SOCIOLOGICAL REV. 625-35 (1960).

7 See H. Becker, supra note 1, at ch. 8.

The material of this section is more fully discussed in J. Gusfield, Symbolic Crusade: Status Politics and the American Temperance Movement (1963), especially at 166-88.

perform coordinated acts for its general welfare. The representational character of governmental officials and their acts make it possible for them not only to influence the allocation of resources but also to define the public norms of morality and designate those who violate them. In a pluralistic society these defining and designating acts can become political issues because they support or reject one or another of the competing and conflicting cultural groups in the society.

Analysis of the designation of public norms begins with a distinction between instrumental and symbolic functions of governmental acts. Acts of officials, legislative enactments, and court decisions clearly affect behavior in an instrumental manner; they directly influence the actions of people. The National Labor Relations Act and the Taft-Hartley Act, for example, have deeply affected the conditions of collective bargaining in the United States. Tariff legislation directly affects the prices of import commodities. The instrumental function of such law lies in its enforcement; unenforced it has little instrumental effect.

Symbolic aspects of law and government, however, do not depend for their effect on enforcement. They are symbolic in a sense close to that used in literary analysis. The symbolic act "invites consideration rather than overt action." Symbolic behavior has meaning beyond its immediate significance in its connotation for the audience that views it. The symbol "has acquired a meaning which is added to its immediate intrinsic significance." The use of the wine and wafer in the Mass or the importance of the national flag cannot be appreciated without knowing their symbolic meaning for the users. In analyzing law as symbolic we are oriented less to its behavioral consequences than to its meaning as an act or gesture important in itself, as a symbol.

A governmental agent's act may have symbolic import because it affects the designation of public norms. The courtroom decision or the legislative act often glorifies the values of one group and demeans those of another. Government actions can be seen as ceremonial and ritual performances, designating the content of public morality. Law is not only a means of social control but also symbolizes the public affirmation of social ideals and norms. The statement, promulgation, or announcement of law has a symbolic dimension unrelated to its function of influencing behavior through enforcement.

Students of government and law recognize that these two functions,

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8 Sutton, Representation and the Nature of Political Systems, 2 Comp. Studies in Soc'y & Hist. 1, 6 (1959). In this paper Sutton shows that in some primitive societies political officials function chiefly as representatives to other tribes rather than as law enforcers or policymakers.


instrumental and symbolic, may often be separated in more than the ana-
lytical sense. Many laws are honored as much in the breach as in the per-
formance.\cite{12} Proscribed behavior which nevertheless regularly occurs
in a socially organized manner and is unpunished has been described as a
“patterned evasion of norms.”\cite{13} The kinds of crimes discussed here quite
clearly fall into this category. Gambling, prostitution, abortion and public
drunkenness are all common modes of behavior although prohibited by
law. Such systematic evasion may mediate conflict between cultures; the
law can proclaim one set of norms as public morality and use another set
of norms in actually controlling behavior.

Even where patterned evasion of norms exists, however, the passage
of legislation, the acts of officials, and decisions of judges do have
significance as gestures of public affirmation. First, the affirmation
of a norm as the public norm prevents recognition of the norm viola-
tor's existence by the public. The existence of law quiets and comforts
those whose interests and sentiments it embodies.\cite{14} Second, public affirma-
tion of a moral norm directs the major institutions of the society to its sup-
port. Despite the fact of a patterned practice of abortion in the United
States, obtaining abortions does require access to subterranean social
structure and is not as easy as obtaining an appendectomy. Law has in-
stamental functions even where there is patterned evasion.

The third impact of public affirmation is the one that most interests us
here. Affirmation through law and governmental acts expresses the public
worth of one subculture’s norms relative to those of others, demonstrating
which cultures have legitimacy and public domination. Accordingly it en-
hances the social status of groups carrying the affirmed culture and de-
grades groups carrying that which is condemned as deviant. We have ar-
gued elsewhere, for example, that the significance of Prohibition in the
United States lay less in its enforcement than in the fact that it occurred.\cite{15}
Enforcement of Prohibition law apparently was often limited by the
unwillingness of “Dry” forces to utilize all their political strength for fear
of creating intensive opposition. The “Dry” forces gained great satisfac-
tion from the passage and maintenance of the legislation itself.\cite{13}

\begin{footnotes}
\item[12] Murray Edelman has shown this in his analysis of the discrepancy between legislative
action and administrative agency operation. M. Edelman, The Symbolic Uses of Politics
(1964).
\item[14] Murray Edelman refers to this as a process of political quiescence. M. Edelman, supra
note 12, at ch. 2. While Edelman’s symbolic analysis is close to mine, his emphasis is on the
reassurance function of symbols in relation to presumed instrumental effects. My analysis
stresses the conflict over symbols as a process of importance apart from instrumental effects.
\item[16] A. Sinclair, Prohibition, The Era of Excess, chs. 10, 13-14 (1964); Gusfield, Prohi-
bition: The Impact of Political Utopianism, in The 1920's Revisited (J. Braeman ed. to be
published by Ohio State University Press, Spring 1968).
\end{footnotes}
ON LEGISLATING MORALS

Whatever its instrumental effects, public designation of morality itself generates deep conflict. The designating gesture is a dramatic event, "since it invites one to consider the matter of motives in a perspective that, being developed in the analysis of drama, treats language and thought primarily as modes of action." Therefore, designation of behavior as violating public norms confers status and honor on those groups with conventional cultures and derogates those whose cultures are considered deviant. My analysis of the American temperance movement has shown how the issue of drinking and abstinence became a politically significant focus for the conflicts between Protestant and Catholic, rural and urban, native and immigrant, middle class and lower class in American society, as an abstinent Protestant middle class attempted to control the public affirmation of morality in drinking. Victory or defeat thus symbolized the status and power of the opposing cultures, indicating that legal affirmation or rejection can have symbolic as well as instrumental importance.

III

DEVIAN T NONCONFORMITY AND DESIGNATOR REACTION

In Durkheim's analysis of the indignant and hostile response to norm violation all proscribed actions are threats to the existence of the norm. If the instrumental and symbolic functions of governmental norms are distinguishable, however, Durkheim's assumption becomes questionable. Our analysis above of patterned evasion of norms has suggested that a law weak in its instrumental functions may nevertheless perform significant symbolic functions. Unlike human limbs, norms do not necessarily atrophy through disuse. Standards of charity, mercy and justice may be dishonored every day yet remain important statements of what is publicly approved as virtue. Human sexual behavior, for example, need not conform to socially sanctioned rules. Even though breached regularly, those rules remain as important affirmation of an acceptable code; their role as ideals is not threatened by daily behavior. Different forms of norm violation have different implications for the symbolic character of the norm itself, and the designators of deviant behavior therefore react differently to different norm-sustaining implications of an act. We can classify deviant behavior from this standpoint.

A. The Repentant Deviant

The reckless motorist often admits the legitimacy of traffic laws, even though he has broken them. The chronic alcoholic may well agree that

17 K. Burke, A Grammar of Motives xxii (1945). Burke's writings have been the strongest influence on the mode of analysis presented here. Two other writers, themselves influenced by Burke, whose writings have been influential are Erving Goffman and Hugh Duncan.

18 See J. Gubser, supra note 7, at ch. 5.

19 See text accompanying note 3 supra.
both he and his society would be better if he could stay sober. In both cases the norm they have violated is itself unquestioned. Their deviation is a moral lapse, a fall from a grace to which they aspire. The homosexual who seeks a psychiatrist to rid himself of his habit basically agrees with those who have designated him as a deviant. There is a consensus between the designator and the deviant; his repentance confirms the norm.

Repentance and redemption seem to go hand-in-hand in court and church. Sykes and Matza have described techniques of neutralization which juvenile delinquents often use with enforcement agencies. "The juvenile delinquent would appear to be at least partially committed to the dominant social order in that he frequently exhibits guilt or shame when he violates its proscriptions, accords approval to certain conforming figures, and distinguishes between appropriate and inappropriate targets for his deviance." A show of repentance is also used, say Sykes and Matza, to soften the indignation of law enforcement agents. A recent study of police behavior lends support to this. Juveniles apprehended by the police received more lenient treatment, including dismissal, if they appeared contrite and remorseful than if they did not. This difference in the posture of the deviant accounted for much of the differential treatment favoring middle-class youngsters as against lower-class delinquents.

B. The Sick Deviant

Open admission of repentance confirms the sinner's belief that he has sinned. His act does not threaten the validity of the norm. Similarly, acts perceived as those of sick and diseased people leave the norm intact; they neither attack nor defend it. The use of morphine by hospital patients in severe pain is not designated as deviant behavior. Public hostility and the apparatus of enforcement agencies are not mobilized against the morphine user, whose behavior appears not as a violation of the norm against drug use but as an uncontrolled act, not likely to recur.

While actions designated as resulting from sickness do not threaten the norm, significant consequences flow from such definition. Talcott Parsons has pointed out that designation of a person as ill changes the obligations which others have to the person and his obligations to them. Parsons describes the difference between sick and healthy persons as social objects. Because hostile sentiments are not legitimate ones toward

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22 This does not mean, of course, that the patient using morphine may not become an addict.
23 Parsons & Fox, Illness, Therapy and the Modern Urban American Family, 8 J. SOCIAL ISSUES, No. 4, at 31 (1952).
the sick person, he becomes an object of welfare in relation to deviance reaction to be helped rather than punished.

Deviance designations, as we shall show below, are not fixed but may shift forms over time. Defining behavior as sick undermines the authority of hostile actions based on other forms of deviance designation. Because "illness" in this context is a social rather than a medical fact, the effort to define behavior as a consequence of illness is itself a matter of conflict and a political issue.

C. The Enemy Deviant

Writing about a Boston slum in the 1930’s, William F. Whyte remarks:

The policeman is subject to sharply conflicting pressures. On one side are the “good people” of Eastern City, who have written their moral judgments into law and demand through their newspapers that the law be enforced. On the other side are the people of Cornerville, who have different standards and have built up an organization whose perpetuation depends upon freedom to violate the law.24

Whyte’s study points out the sharp discrepancies between middle-class and lower-class morality. In Cornerville gambling was seen as a "respectable" crime, as antitrust violations may be in other parts of the social structure. Conflict between social classes is only one of many kinds of cultural conflict—ethnic, religious, regional, status—which may be sources of moral difference in modern pluralistic societies.

In such cases, the validity of the public designation is itself at issue. The publicly defined deviant is neither repentant nor sick; he accepts his own behavior as proper and derogates the public norm as illegitimate. Such an attitude is particularly apparent in instances of “business crimes”—gambling, prostitution, drug use—where the very acceptance of such action as legitimate supports the presence of buyers on an economic market. Off-track betting, for example, is an area in which clashes of culture have been salient.

Designation of culturally legitimate behavior as deviant depends upon the superior power and organization of the designators. The concept of convention in this area, as Thrasymachus defined justice for Socrates, is the will of the stronger. If the deviant group is politically weak, then the designation is open to the changes and contingencies of political fortunes. It becomes an issue of political conflict, ranging group against group and culture against culture in the effort to determine whose morals deserve public affirmation.

Clearly, when the deviant is not only an “enemy” but his deviance reflects an aspect of group culture, the norm is most explicitly and strin-
gently attacked. When those once designated as deviant achieve political power, they may shift from disobedience to an effort to change the designation itself. In the civil rights movement, for example, behavior viewed as clearly deviant in an earlier segregationist society has now moved into the realm of the problematic and is subject to political processes of conflict and compromise.

When the deviant refuses to accept the public norm and the designator is more powerful than the deviant there may be domination without legitimacy. Anything increasing the deviant's power to organize and attack the norm threatens the social dominance symbolized in the norm. Under such conditions the designators' need to strengthen and enforce the norms is greatest. The struggle over the maintenance or change of the legal norm symbolizes the struggle over social power and status. The threat to the middle class of greater political power from Cornerville is not that the Cornerville resident will gamble more. He already does so to a high degree. The middle class rather fears that legal acceptance of gambling as a business would indicate that Boston is no longer dominated by the middle-class Yankee but is rather dominated by the lower-class immigrant, as many think has happened. Maintaining the norm of gambling as deviant behavior thus symbolizes maintenance of Yankee social and political superiority.

D. The Cynical Deviant

The cynical deviant—usually a professional criminal—engages in acts whose designation as deviant is supported by wide social consensus. The burglar, the hired murderer, the arsonist, the kidnapper all prey on victims. While they may use repentance or illness as strategies to manage the impressions of enforcers, their basic orientation is the self-seeking one of avoiding the rules. For this reason their behavior, although calling for social management, is not a great threat to the norms.

IV

DRINKING AS A FORM OF DEVIANCE

Analysis of efforts in the United States to define drinking as deviant illustrates the process by which designations shift. The embodiment in legislation of attitudes toward drinking shows how cultural conflicts find their expression in the symbolic functions of law. The period since 1800 has witnessed all types of nonconforming behavior and all the forms of reaction by conventional society.

A. The Repentant Drinker

Aside from some earlier scattered attempts, the movement to limit individual consumption of alcohol began in the early nineteenth century.25

25 The best single account of temperance activities before the Civil War is that of J.
The redefinition of the drinker as an object of social shame began at that
time and reached full development in the late 1820's and early 1830's. In
this period the conversion of drinking men to abstinence under the stimu-
lus of evangelical revivalism led to a wave of growth in temperance organ-
izations. As drinking men joined in taking the pledge, seeking to control
themselves and their neighbors, abstinence and sobriety became a norm of
conventional respectability.

By the 1870's, the heavy drinking which was acceptable behavior in
the late eighteenth and early nineteenth century was no longer counte-
nanced. Rural and smalltown America had redefined middle-class morals
to include the dry attitude of abstinence and sobriety. This norm had lit-
tle need for legal embodiment. Those who exhorted the drunkard to be
better and to do better assumed that he shared their own normative pat-
tern and that he could be brought into the fold by moral persuasion and
the techniques of religious revivalism. Fundamentally his error was the
sin of lapse from a felt standard of virtue.

Moral persuasion rests on a conviction of consensus between the devi-
ant and the designators. As long as the object of attack and conversion is
seen as an individual rather than as part of a group, his deviant act does
not appear as part of a shared culture. Only the norm of conventionality
is shared; drinker and chronic alcoholic are urged to repent. During the
Women's Anti-Whiskey Crusade of 1873-1874 in Ohio, church women
concentrated on the taverns. In many Ohio towns these respectable ladies
set up vigils in front of the tavern, hoping to reach the hearts of the sa-
oonkeepers, but also no doubt hoping that fear of being observed would
keep men away.

Moral persuasion, rather than legislation, has been one persistent
theme in the designation of the drinker as deviant and the alcoholic as even
further debased. Even in depictions of the misery and poverty of the chronic
alcoholic, the hallmark of the American Temperance Movement has
been moral condemnation rather than sympathy. Of course moral persua-
sion was most ineffective as a device to wipe out drinking and drunken-

KROUT, THE ORIGINS OF PROHIBITION (1925). In the main, colonial legislation was aimed at
controlling the inn through licensing systems. While drunkenness occurred and drinking was
frequent, the rigid nature of the colonial society, in both North and South, kept drinking
from becoming an important issue. See id. at chs. 1-2. See also A. EARLE, HOME LIFE IN COLO-
NIAL DAYS 161-64 (1926).

20 See J. GUSFIELD, supra note 7, at 44-51.
21 Id. at 69-86. In keeping with the evangelical motif in the Temperance movement the
Washingtonians, founded in 1848, appealed to drinkers and chronic alcoholics with the emo-
tional trappings and oratory of religious meetings, although without pastors. J. KROUT, supra
note 25, at ch. 9.
22 See the typical account by Mother Stewart, one of the leaders in the 1873-1874
See also 6 STANDARD ENCYCLOPEDIA OF THE ALCOHOL PROBLEM 2902-905 (1930).
ness. Heavy drinking persisted through the nineteenth century and organized attempts to convert the drunkard met much backsliding. Nevertheless, defections from the standard did not threaten the standard. The ideals of sober and abstaining people remained the definition of respectability, and sober, abstaining people were dominant at least in those parts of society where moral persuasion had some effectiveness. In the late nineteenth century those areas in which temperance sentiment was strongest were also those in which legislation was most easily enforceable.

B. The Enemy Drinker

The demand for laws to limit alcoholic consumption appears to arise when drinkers have social and political power as a group and, in their customary habits and beliefs, deny the validity of abstinence norms. The persistence of areas in which temperance norms were not recognized led to attempts to embody control in legal measures. The drinker as enemy seems to be the greatest stimulus to efforts to designate drinking as publicly defined deviance.

The American Temperance Movement in its early phase was largely committed to moral persuasion. Efforts to control the sale and use of alcohol through legislation do not appear until the 1840's. This legislative movement was closely related to the immigration of Irish Catholics and German Lutherans into the United States in this period. These nonevangelical groups made up a large proportion of the urban poor in the 1840's and 1850's. They accepted drinking far more readily than did either earlier Americans or American society by 1840. The tavern and beer parlor had a leading place in the leisure of Germans and Irish, which was intensified by the stark character of the developing American slum. There was no tradition of temperance norms to appeal effectively to a sense of sin. Although excessive drunkenness was scorned, neither abstinence nor constant sobriety were enjoined by the immigrant cultural codes.

Between these groups—the native American, middle-class, evangelical Protestant and the immigrant European Catholic or Lutheran of the urban lower class—there was little room for repentance. By the 1850's the issue

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30 Joseph Rowntree and Arthur Sherwell, using both systematic observation and analysis of federal tax payments, concluded that "local veto in America has only been found operative outside the larger towns and cities." J. Rowntree & A. Sherwell, The Temperance Problem and Social Reform 253 (9th ed. 1901) (emphasis omitted).

31 See J. Gusefied, supra note 7, at 52.

of drinking reflected a general clash over cultural values, and the temper-
ance movement found political allies among the nativist movements. The
force and power of the antialcohol movements, however, were limited
greatly by the political composition of the urban electorate, with its high
proportion of immigrants. Thus, the drive for legislation emerged with the
development of cultural groups least responsive to norms of abstinence and
sobriety. The very effort to make such informal norms into legal standards
polarized the opposing forces and accentuated the symbolic import of the
movement. Now that the issue had been joined, defeat or victory was a
clear-cut statement of public dominance.

The symbolic nature of the abstinence norm is illustrated by the para-
doxx that the strongest move to eradicate alcohol came as America shifted
from a heavy-drinking society, in which whiskey was the leading form of
alcohol, to a moderate one, in which beer was replacing whiskey. Prohib-
ition came as the culmination of the movement to reform the immigrant
cultures and at the height of the immigrant influx into the United States.

Following the Civil War, the movement against alcohol included both
moral persuasion and legislative goals. By the 1880's an appeal was made
to the urban, immigrant lower classes to repent and to imitate American
middle-class habits as a route to economic and social success. The norms
of abstinence were presented to the opponents of such norms as expedience
rather than as virtue, but this effort failed. The new, and larger, immigra-
tion of 1890-1915 increased still further the threat of the urban lower class
to the native American.

The symbolic effect of prohibition legislation must be kept analyti-
cally separate from its instrumental, enforcement side. While the urban
middle class did provide organizational leadership to the temperance
movement, the movement's legislative drives were politically strongest in
the rural United States. Here, where problems of drinking were most
under control, where the norm of sobriety was relatively intact, the appeal
of a struggle against foreign invasion was the most potent. In these areas,
passage of legislation was likely to make small difference in behavior. The
continuing polarization of political forces into those of cultural opposition
during the prohibition campaigns from 1906 to 1919 and during the
drive for Repeal from 1926 to 1933 greatly intensified the symbolic sig-
nificance of victory and defeat. Even if prohibition measures had limited

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33 See R. BILLINGTON, THE PROTESTANT CRUSADE, 1800-1860, at 323 (1938); J. Gusfield,
supra note 7, at 55-57.
34 William F. Whyte has shown this to be a major attitude of social workers and the set-
tlement house toward the slumdwellers he studied in the 1930's, W. Whyte, supra note 24, at
99. The rationale for adaptation lay in its effects in promoting social mobility.
35 Although a well-organized temperance movement existed among Catholics, it was
weakened by the Protestant drive for prohibition. See J. Bland, Hibernian Crusade (1951).
effect in the metropolis it was clear whose law was public and what way of life was being labelled with opprobrium.

After Repeal, as the Dry power in American politics subsided, the designation of the drinker as deviant receded also. The norm which received public affirmation had changed, changing the definition of the deviant. Abstinence itself was less acceptable. In the 1950's the temperance movement, faced with this change in public norms, even introduced a series of placards with the slogan, "It's Smart Not to Drink."

Change on the normative level, however, has not been accompanied by change in American drinking patterns. Since Prohibition, the consumption of alcohol has not returned to its pre-1915 high. Beer has continued to occupy a more important place as source of alcohol consumption. Americans appear to be less often "hard drinkers" than was true of the nineteenth century pattern. While there has been some increase in moderate drinking, the percentage of adult abstainers has remained approximately the same—about one third—for the past twenty years. Similarly, Dry sentiment has remained stable, as measured by local option results. In short, the argument over deviance designation has been largely one of normative dominance, not of instrumental social control. The process of deviance designation in drinking must be seen in terms of symbols of cultural dominance rather than as reflecting necessities of social control.

C. The Sick Drinker

For most of the nineteenth century, the chronic alcoholic as well as the less compulsive drinker was viewed as a sinner. Moral commands appealing to a shared norm or legal measure seeking to restrict availability were used in attempting to prevent or curtail alcoholism. Although the end of the century witnessed a distinct movement to reconsider drinking, the saloon, and alcoholism as natural manifestations of processes apart from ethical norms, this move was lost in the zeal of the prohibition drive.

It was not until after Repeal that chronic alcoholism became defined as illness in the United States. Although many actions were taken earlier to promote the welfare of drinkers and alcoholics through temperance measures, these rested on the moral supremacy of abstinence and the de-

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88 See J. Gusfield, supra note 7, at 135 & n.47.
87 See the analysis of American drinking in the post-Repeal era in Gusfield, supra note 16.
88 The Committee of Fifty, a group of prominent educators, scientists, and clergymen sponsored and directed several studies of drinking and the saloon. Their position as men unaffiliated with temperance organizations was intended to introduce unbiased investigation, often critical of temperance doctrine. For two of the leading volumes see J. Billing, C. Eliot, H. Farnam, J. Greene, & F. Peabody, The Liquor Problem (1905); R. Calkins, Substitutes for the Saloon (1901).
mand for repentance. There was sympathy for the drinker, but social salvation depended on a willingness to embrace the norm of his exhorters. Designating alcoholism as sickness, however, has a different bearing on the question of normative superiority. The behavior of the deviant becomes indifferent to the status of norms enforcing abstinence.

This realization apparently made supporters of temperance and prohibition hostile to efforts to redefine the deviant character of alcoholism. They deeply opposed the reports of the Committee of Fifty in the late century, which took a more naturalistic attitude toward the saloon and drinking than did the temperance movement. As temperance supporters feared, the view of alcoholism as illness led to the creation of new agencies concerned with drinking problems and excluded the temperance people from the process of defining deviance in drinking habits. Groups like the National Commission on Alcoholism and the Yale Center of Alcohol Studies, formed in the early forties, were manned by medical personnel, social workers, and social scientists, people alien to the spirit of the abstainer. Problems of drinking are thus removed from the church and placed in the hands of universities and medical clinics. The tendency to handle drinkers through protective and welfare agencies rather than through police or clergy has become more frequent.

"The bare statement that 'alcoholism is a disease' is most misleading since . . . it conceals what is essential—that a step in public policy is being recommended, not a scientific discovery announced." Seeley's remark is an apt one. Replacing the norm of sin and repentance by that of illness and therapy removes the onus of guilt and immorality from the act of drinking and the state of chronic alcoholism. The sinner becomes a patient, to be helped rather than exhorted. Not surprisingly, the temperance movement has found the work of the Yale center and often even the work of Alcoholics Anonymous to be a threat to its own movement. Giving limited cooperation to these organizations, the temperance movement has attempted to set up other organizations to provide scientific backing for its own attitude toward alcohol.

Redefinition of the alcoholic as sick thus brought into power both ideas that a step in public policy is being recommended, not a scientific discovery announced. Seeley, Alcoholism is a Disease: Implications for Social Policy, in Society, Culture and Drinking Patterns 586, 593 (D. Pittman & C. Snyder eds. 1962). For a description of the variety of definitions of alcoholism and drunkenness, as deviant and nondeviant, see Lerner, Alcohol, Values and Social Control, and Tongue, What the State Does About Alcohol and Alcoholism, both in id.

During the 1950's the Woman's Christian Temperance Union (WCTU) persistently avoided giving support to Alcoholics Anonymous. The Yale Center of Alcohol Studies was attacked and derogated in temperance literature. A counterorganization, with several prominent pro-Dry scientists, developed, held seminars, and issued statements in opposition to Yale Center publications.
and organizations antithetical to the temperance movement. The norm affirmed by law and government reflected values of groups other than temperance and prohibition supporters. The hostility of temperance people is readily understandable; their decreased political importance explains their present inability to make that hostility effective.

V

DRUG ADDICTION AND THE POLITICS OF DESIGNATION

The contingencies of the career of one moral crusade have been examined in the example of drinking. Drug addiction involves a clash between moral crusades, with sharply divergent designations of the problem involved in drug addiction. Each, as we will see, has an impact on the other, leading to more intensive needs for specifying moral norms in the forms of legal change.

Legal concern with drug use in the United States began with the passage in 1914 of the Harrison Act, which was primarily designed to limit movement of opium and other addictive drugs into the United States from the Far East. The Act became the basis for defining both drug use and sale as criminal and for increasingly severe punishment of drug use, especially use by low-income and low-status people. This tendency was reinforced by the attitude of the medical profession. Although courts had limited the right of physicians to administer drugs to addicts, the medical profession went even further in its reluctance to accept addiction as a medical problem. Doctors accepted the definition of the addict as a violator of law and morality who should be punished for his dereliction.

Creation of the Federal Narcotics Bureau in 1930 provided the moral entrepreneurship which led to defining both addict and user as criminal. The Bureau's role is illustrated by expansion of drugs to include marijuana, a tobacco whose presumed addictive powers are highly overstated.

42 38 Stat. 785.
44 United States v. Behrman, 258 U.S. 280 (1922); Jin Fuey Moy v. United States, 254 U.S. 189 (1920); Webb v. United States, 249 U.S. 96 (1919). In Linder v. United States, 268 U.S. 5 (1925), however, the Court held that a doctor could legally give to an addict "four small tablets of morphine or cocaine for relief of conditions incident to addiction." Id. at 18. Subsequent interpretations of Linder by courts and by the Federal Bureau of Narcotics have virtually negated the effect of the case. See A. Lindesmith, supra note 43, at 11-17.
46 For an account of this process of expansion, see H. Becker, supra note 1, at 135-46; A. Lindesmith, supra note 43, at 222-42. Unlike Becker and Lindesmith, Ausubel does impute addictive properties to marijuana but also sees these as less compulsive than those of the opiates. D. Ausubel, supra note 43, at 92-105.
"[The] Bureau of Narcotics furnished most of the enterprise that produced the Marihuana Tax Act."\(^{47}\) The Bureau has played an important role before and since in promoting legislation on both federal and state levels and in developing and supporting public opinion favorable to its own orientation to drug problems.

But such moral enterprise cannot be explained solely as the work of a government agency. It needs a constituency to support and press for the goals of the crusade to stamp out drug addiction. Narcotics was not brought dramatically to the public's attention until the 1930's.\(^{48}\) During the 1920's the prohibition organizations included drug use among other nonalcohol problems to which they gave attention, such as obscene literature, modern dancing, and jazz. After Repeal it came to be of considerable importance in the temperance movement, operating as a link between the concerns of the movement and those of other groups uninterested in alcohol issues. Its present acute place in American public attention, however, is a post-World War II phenomenon.

Punitive attitudes toward the drug addict, as distinct from the seller, are too strong to be accounted for adequately by the temperance movement. Heavy punishment and hostility have characterized legislation and enforcement, especially in the past decade.\(^{49}\) This severe treatment of the drug addict is explained both by the stereotype of the addict in one segment of public opinion and by the rise of a crusade to define the addict as a sick deviant, rather than as a criminal.

For the general public, drug addiction is seen largely as a problem confined to the urban, lower-class, adolescent or young adult, usually Negro or of immigrant origin. Middle-class, powerful, adult segments of the population are less likely to be the victims of drug addiction. Given this view of drug addiction, largely correct although with important qualifications,\(^{50}\) issues of drug addiction become entangled with society's orientation toward the disadvantaged and toward youth.

Two aspects of the drug addiction problem suggest that treatment of addicts is deeply influenced by basic social values and therefore has an important symbolic role. First, treatment of the addict as a criminal is not

\(^{47}\) H. BECKER, \textit{supra} note 1, at 138. The Marihuana Tax Act was passed in 1937. 50 Stat. 551.

\(^{48}\) See H. BECKER, \textit{supra} note 1, at 140-41.

\(^{49}\) Federal legislation in the 1950's provided for increasingly longer terms of imprisonment. The Boggs Act of 1951, 65 Stat. 767, made a minimum sentence of two years mandatory for a first drug offense. The Narcotic Drug Control Act of 1956, 70 Stat. 567-72, made the minimum sentence five years and withdrew the power of the judge to prescribe parole or probation.

\(^{50}\) The high proportion of slumdwellers and adolescents among addicts today is largely a post-World War II phenomenon. Clausen, \textit{supra} note 45, at 189-93. The high addiction rates among middle-aged physicians is a major qualification. See text accompanying note 57 \textit{infra}.\n
an effective use of law as an instrument of social control. The addict is not crazed by dope, out for "kicks," and senselessly preying on respectable people. Addiction is a physical compulsion, brought on by severe pains of withdrawal which are almost solely removable by administration of the drug. Whatever initially motivates drug use, continued use is not simply for "kicks." Moreover, drug use does not generate psychotic effects.\textsuperscript{51} Criminal acts like burglary and theft, often committed by addicts, might appear to be appropriate subjects of criminal sanctions. These acts, however, result not from drug use but from the addict's need to purchase drugs at high cost from illegal "pushers."\textsuperscript{52}

These facts underlie demands, especially among university circles and medical schools, to accept the British system of licensing addicts and providing regulation and sale through medical sources.\textsuperscript{53} This movement both stresses the instrumental inadequacy of present law and seeks to soften and eradicate hostile treatment of addicts. Seeking to redefine the addict as a sick person, the movement casts doubt on the appropriateness of criminal treatment of drug addiction.

A second aspect of the drug addiction problem which suggests that criminal sanctions are largely symbolic is the severity and hostility of the treatment of addicts. The length and mandatory character of criminal sentences testify to an excessive zeal toward drug clients, absent in the treatment of clients of gamblers, prostitutes, and abortionists. This growing legal severity is claimed to be justified by the intensive reprehensibility of the drug traffic\textsuperscript{54} and by a general stereotype of the addict as part of a lumpenproletariat, a class of ne'er-do-wells beyond the pale of respectable society. "The person is generally a criminal or on the road to criminality before he becomes addicted."\textsuperscript{55} The federal hospitals, practically the only

\textsuperscript{51} There is debate about this. Ausubel criticizes Lindesmith and sees withdrawal pains as only one element in the factors compelling use. D. Ausubel \textit{supra} note 43, at 25-30. He stresses the euphoric satisfactions sought by certain personality types. However, neither Ausubel nor Lindesmith sees drug use as developing psychotic effects or criminal "drives."

\textsuperscript{52} "[O]piate addiction does not lead to crime because of the kinds of effects it has on behavior or personality. Addicts seem mainly to break laws in order that they can thereby continue their addiction." D. Ausubel, \textit{supra} note 43, at 68.

\textsuperscript{53} This has been stressed, for example, in the writings of Lindesmith and Edwin Schur. See A. Lindesmith, \textit{supra} note 43, at 162-79; E. Schur, \textit{Narcotic Addiction in Britain and America} (1962). Even Ausubel, who disagrees with their theory of addiction and does not favor the British system, does argue for a noncriminal designation of the addict as sick. D. Ausubel, \textit{supra} note 43, at 76-77.

\textsuperscript{54} "The courts have held that a single offense which violates both federal and state criminal laws results in distinct offenses against two separate governments. In view of the viciousness of the illicit narcotic traffic, who would not want to see offenders subject to two long prison terms?" H. Anslinger \& W. Tompkins, \textit{The Traffic in Narcotics} 163 (1953). Anslinger, as U.S. Commissioner of Narcotics from 1930 to 1965, has been the leading force in developing and implementing the designation of addicts as criminals.

\textsuperscript{55} \textit{Id.} at 170.
source of treatment in America, perpetuate the definition of addiction as a crime.\(^{68}\)

The relationship of this hostility to the social class of the "typical" addict is evidenced in the differential treatment afforded physicians by American enforcement agencies. In both Europe and the United States physicians demonstrate higher rates of addiction than does the general population. The physician is usually not arrested, while the "street addict" is apt to be apprehended by the law. The physician is usually reported to the American Medical Association and the consequences are determined by his profession. "...\(\ldots\)e have one law for the slum-born or underprivileged addict, the socially handicapped addict, and another for the professional addict."\(^{57}\)

The continued use of heavy criminal sanctions to control drug addiction despite clear evidence that the addict is more appropriately treated as sick than as criminal indicates that drug laws are primarily symbolic rather than instrumental in their effect. The disproportionately severe treatment of addicts is further evidence that policymakers are more interested in expressing disapproval of drug use than in controlling it effectively. The stereotype of the drug addict suggests that this hostility is related to the view of the drug addict as representing a world outside conventional society.

As in the case of drinking, growing threats to the norm against drug use have inspired greater efforts on the part of the norm designators. As the movement to redefine the addict as sick has grown, supporters of the criminal definition have advocated increased legal severity.\(^{58}\) Classifying drug users as sick would mean that medical authorities rather than enforcement agencies would be responsible for them. Further, it might diminish the moral disapproval directed at drug use and its reputed euphoric affects by supporters of present legislation. Commenting on the clinic plan to permit medical dispensing of narcotics to licensed addicts, former United States Commissioner of Narcotics Harry J. Anslinger wrote: "This plan would elevate a most despicable trade to the avowed status of an honorable business, nay, to the status of practice of a time-honored profession; and drug addicts would multiply unrestrained, to the irrevocable

\(^{56}\) As a result of making drug addiction a crime "the federal drug addiction hospital has acquired an unmistakable prison atmosphere which not only subtly influences the attitudes of physicians and attendants toward the patients, but also focuses undue attention on the security and custodial aspects of treatment." D. Ausubel, supra note 43, at 77.


\(^{68}\) See A. Lindesmith, supra note 43, at viii.
impairment of the moral fiber and physical welfare of the American people.\textsuperscript{25}

Unlike the campaign over drinking, the drug addiction controversy does not directly involve the victim-clients.\textsuperscript{60} Instead, both the advocates of redefinition and supporters of the criminal label are largely drawn from nonusers. This fact emphasizes the symbolic aspect of drug addiction law. Two issues seem to be intertwined. One is the question of “tough” and “tender” attitudes toward nonconformity. Illness implies a social welfare problem and thus draws opposition from those whose cultural values oppose individualism in law and require adjustment to authority from subordinate classes. Secondly, the issues further involve the moral judgment of drugs. Those defining addiction as illness are likely to underplay the importance of euphoric-producing effects while advocates of addiction as criminality see this as central to the matter, fearing that legal use of drugs, even when restricted, would represent approval of indulgence, as has already occurred for cigarettes and whiskey.

This issue of drug addiction thus places different cultural groups in conflict, even though neither group may use drugs or be exposed to their use. Designating addicts as sick and diseased rather than as criminal would also shift control of the deviance designating process from police enforcement and social control agencies to the university circles and professional medical spheres where the illness label has its strongest backing. It must be emphasized again that the designation of addiction as “sick” is not a clearly scientific, medical conclusion opposed to an ignorant and biased conclusion that addiction is criminal. Both designations are matters of differing emphases and values. Therefore, deviance designation is a political and cultural process and not a scientific one.

VI

ALTERNATIVES AND DILEMNAS IN DEVIANCE DESIGNATION

Throughout this Article we have called attention to the fact that deviance designations have histories; they are changeable and subject to political reversals, the vagaries of public opinion, and the development of new social movements and moral crusades. Such changes have often been associated with the symbolic functions of law for the participating parties, whatever the effect of law in controlling deviant behavior.

\textsuperscript{50} H. ANSLINGER & W. TOMPKINS, supra note 54, at 186.

\textsuperscript{60} To some extent, the movement to redefine addicts has drawn strength from university professors and other conventional persons who have had occasional contact with drug users and developed personal attachments and sympathies. Some segments of the current attempt to legitimate marijuana use is also coming from users with high status, such as the poet Allen Ginsberg.
We have chiefly described situations in which the deviants were either defended by superior groups in the society, or, as in Repeal, constituted a large and powerful segment of the total society. Even where deviants are few and relatively powerless, however, they may attempt to protect their culture by influencing the process of designation. First, through corruption, deviants may influence the process of enforcement, either directly through bribery or indirectly through cultural affinities between the legally defined deviant and enforcing agents like police. Second, deviants may join some larger group or movement and attempt to redefine themselves as ill. This has been most evidenced among reformed, middle-class alcoholics, both in Alcoholics Anonymous and in alcoholism prevention agencies. Third, deviants may seek to redefine their behavior either as morally legitimate or, at least, as a private matter. Such a moral crusade is under way in the United States among homosexuals.61

This Article shows, both in the case of drinking and in that of drug use, that such redefining moral crusades tend to generate strong counter movements. The deviant as a cultural opponent is a more potent threat to the norm than is the repentant, or even the sick deviant. The threat to the legitimacy of the norm is a spur to the need for symbolic restatement in legal terms. In these instances of "crimes without victims" the legal norm does not enunciate a consensus within the community. On the contrary, it is when consensus is least attainable that the need for legal expression appears to be greatest.

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