

Troy Duster

# THE LEGISLATION OF MORALITY

Law, Drugs,  
and Moral Judgment

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TROY DUSTER

*The Legislation*  
*of* MORALITY

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*Law, Drugs, and Moral*  
*Judgment*

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## *The Legislation of Morality*

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*To Alfreda Marguerita  
and Ellen Marie*

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# Preface and acknowledgments

SOME THIRTY YEARS AGO, SVEND RANULF BRILLIANTLY developed the thesis that the middle-classes have a near monopoly on moral indignation. Max Weber and Max Scheler had earlier offered similar propositions, but Ranulf was the first to systematically turn full attention to the thesis and develop it both theoretically and empirically. In his work, Ranulf traced the sources of the "disinterested tendency" of the middle-class to share in the punishment of the "immoral." The following passage is excerpted from his analysis of the ideological foundations of the Calvinistic middle-classes. Witness traces and themes in ideas held by members of the contemporary middle-class:

Calvin condemned indiscriminate almsgiving . . . and urged that the ecclesiastical authorities should regularly visit every family to ascertain whether its members were idle, or drunken, or otherwise undesirable. . . . In the plan of the reorganization of the poor of Zurich, which was drafted by Zwingli in 1525, all mendicancy was strictly forbidden; no inhabitant was able to be entitled for relief who wore ornaments or luxurious clothes, who failed to attend church, or who played cards or was otherwise disreputable. . . . The Puritans of the seventeenth century were equally severe: That the greatest of evils is idleness, that the poor are victims, not of circumstances, but of their own "idle, irregular, and wicked courses," that the truest charity is not to enervate them by relief, but so to reform their characters so that relief is unnecessary.\*

Ranulf went on to show how Calvinism has always found the bulk of its adherents among the middle-classes.

While Weber demonstrated that the geographical expansion of Protestantism in the sixteenth century corresponded with the geographic-developmental expansion of capitalism, Ranulf's thesis was about the middle-class and its version of the world, not about Calvinism *per se*. Accordingly, he looked at the Catholic and Jewish

\* Svend Ranulf, *Moral Indignation and Middle Class Psychology*, New York: Schocken Books, 1964, p. 14.

bourgeoisie, and found them equally zealous in their attempts to bind other members of the community in a "moral" straight-jacket.

Before the Reformation, there was a small merchant and trade class in Western Europe. It was from this small but increasingly influential stratum that laws and punishments emanated to punish "crimes" that up until that time no one had thought of as criminal. Gambling and the purchase and indulgence in "wasteful luxuries" were among them. Moreover, up until this period, an important element in punishment was whether the aggrieved party would himself pursue the case. Gradually, the middle-classes succeeded in establishing the principle that the general and anonymous community had its own interests in the prosecution of criminals. Obtaining a confession from the accused became crucial, "an endeavor which led to the inquisitorial trial and to the rack," the relevance of which I hope to draw for problems discussed in this book. My purpose is to take the exemplary case of addiction to drugs and show the social conditions under which the accusatory finger is dipped in moralistic indignation, and the dramatic social difference it makes whether that finger is pointed by or at the middle-class.

In this particular work I have benefited from the advice, support, and counsel of many. However, I would like to begin by acknowledging early and long range intellectual debts. W. S. Robinson and Harold Garfinkel, from quite different perspectives, contributed inestimably to my earliest experiences in trying to proceed with the research and analysis of social issues. Each conveyed a picture of the tenuousness of social order and the extraordinary yet sometimes subtle barriers to knowing.

Raymond Mack has always provided me with support and stimulation, as teacher and colleague, and has been the strongest of consciences for lucidity. For many reasons I am grateful to Aaron Cicourel. His criticism, diligent and determined, has been a considerable contribution to this work, even though I have been unable to incorporate some of his critique that I honor.

Among those who helped me to clarify some ideas on broader issues touched upon in the book were Egon Bittner, Gerard Brandmeyer, Thelton Henderson, John Kitsuse, Peter McHugh, Terry Lunsford,

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Berkeley  
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T. D.



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# *The legislation of morality*

## *Introduction*

THERE WAS ONCE A TIME WHEN ANYONE COULD GO TO his corner druggist and buy grams of morphine or heroin for just a few pennies. There was no need to have a prescription from a physician. The middle and upper classes purchased more than the lower and working classes, and there was no moral stigma attached to such narcotics use. The year was 1900, and the country was the United States.

Suddenly, there came the enlightenment of the twentieth century, full with moral insight and moral indignation, a smattering of knowledge of physiology, and the force of law. By 1920, the purchase of narcotics was not only criminal (that happened overnight in 1914), but some men had become assured that the purchase was immoral.

An important contemporary shibboleth is "You can't legislate morality." Its importance is not determined by the frequency of its use, but by the intensity of belief that Americans seem to invest in it and by the firmness with which they reject legal attempts to resolve certain moral issues. This single phrase is called forth to squelch arguments about issues from civil rights to temperance. The failure of Prohibition is usually cited dramatically as the final demonstration of the point. Its simplicity is matched by its deceptiveness; it is a short and concise statement containing only two elements. The first element is "legislate," whose meaning is quite clear. A bill passes in a legislative body and becomes a statute. The second part is "morality," and that is much less clear. Many things will be said later about the meaning of morality, but here we may sacrifice elaborated precision for quick agreement by asserting that morality refers to the strong feelings which people have about *right* and *wrong*. If we put these two together we can rephrase: "Passing a law can not change the strong feelings that people have about right and wrong."

The rephrasing is instructive because it frees the mind from the thought-channeling properties of the cliché. With the newly formed construction of the old idea, we find glaring problems that reveal inconsistency and confusion. For example, the moral middle classes will assert at one point that the legislation of morality is impossible, then turn around and take a passionate stand against the legalization of prostitution on the grounds that positive state sanction would undermine the moral structure of society. The belief is firm that the statutes greatly affect the way in which people will feel morally about prostitution. However, if one is capable of opposing, say, racial discrimination and extramarital sex on moral grounds, support of laws prohibiting both would be consistent and logical. Yet some will obviously support one kind of "moral" legislation and not another.

The relationship between law and morality is both complicated and subtle. This is true even in a situation where a society is very homogeneous and where one might find a large degree of consensus about moral behavior. Those who argue that law is simply the empirical operation of morality are tempted to use homogeneous situations as examples. In discussing this relationship, Selznick asserts that laws are

secondary in nature.<sup>1</sup> They are secondary in the sense that they obtain their legitimacy in terms of some other more primary reference point.

The distinctively legal emerges with the development of secondary rules, that is, rules of authoritative determination. These rules, selectively applied, "raise up" the primary norms and give them a legal status. . . . The appeal from an *asserted* rule, however coercively enforced, to a justified rule is the elementary legal act. This presumes at least a dim awareness that some reason lies behind the impulse to conform, a reason founded not in conscience, habit, or fear alone, but in the decision to uphold an authoritative order. The rule of legal recognition may be quite blunt and crude: the law is what the king or priest says it is. But this initial reference of a primary norm to a ground of obligation breeds the complex elaboration of authoritative rules that marks a developed legal order.<sup>2</sup>

The most primary of reference points is, of course, the moral order. One can explain why he does something for just so long, before he is driven to a position where he simply must assert that it is "right" or "wrong." With narcotics usage and addiction, the issue in contemporary times is typically raised in the form of a moral directive, irrespective of the physiological and physical aspects of addiction. The laws concerning narcotics usage may now be said to be a secondary set held up against the existing primary or moral view of drugs. However, the drug laws have been on the books for half a century, during which time, as we shall see, this country has undergone a remarkable transformation in its moral interpretation of narcotics usage. Clearly, if we want to understand the ongoing relationship between the law and morality, we are misled by assuming one has some fixed relationship to the other. To put it another way, if a set of laws remains unchanged while the moral order undergoes a drastic transformation, it follows that the relationship of law to morality must be a changing thing, and cannot be static. If narcotics law was simply the empirical element of narcotics morality, a change in the moral judgment of narcotics use should be accompanied by its counterpart in the law, and vice versa. As Selznick points out:

In recent years, the great social effects of legal change have been too obvious to ignore. The question is no longer *whether* law is a significant vehicle of social change but rather *how* it so functions and what special problems arise.<sup>3</sup>

Selznick goes on to suggest explorations into substantive problems of "change." The connection of law to change is clearly demonstrable. If a society undergoes rapid technological development, new social relationships will emerge, and so too, will a set of laws to handle them. The gradual disintegration of the old caste relationships in India has been and will be largely attributable to the development of new occupations which contain no traditional forms regulating how one caste should respond to another.

The relationship of law to morality is not quite so clear. It is more specific, but more abstract. The sociological study of the narcotics problem is critical to discussion of this relationship, because it provides a specific empirical case where one can observe historically the interplay between the two essential components. More than any other form of deviance, the history of drug use contains an abundance of material on both questions of legislation and morality, and of the relationship between them.

### *Background and Setting*

Despite the public clamor of the 1960s about LSD and marijuana, the drug that has most dominated and colored the American conception of narcotics is opium. Among the most effective of painkillers, opium has been known and used in some form for thousands of years. Until the middle of the nineteenth century, opium was taken orally, either smoked or ingested. The Far East monopolized both production and consumption until the hypodermic needle was discovered as an extremely effective way of injecting the drug instantly into the bloodstream. It was soon to become a widely used analgesic. The first hypodermic injections of morphine, an opium derivative used to relieve pain, occurred in this country in 1856.<sup>4</sup>

Medical journals were enthusiastic in endorsing the new therapeutic usages that were possible, and morphine was the suggested remedy for an endless variety of physical sufferings. It was during the Civil War, however, that morphine injection really spread extensively. Then wholesale usage and addiction became sufficiently pronounced so that

one could speak of an American problem for the first time.<sup>5</sup> Soldiers were given morphine to deaden the pain from all kinds of battle injuries and illnesses. After the war, ex-soldiers by the thousands continued using the drug, and recommending it to friends and relatives.

Within a decade, medical companies began to include morphine in a vast number of medications that were sold directly to consumers as household remedies. This was the period before governmental regulation, and the layman was subjected to a barrage of newspaper and billboard advertisements claiming cures for everything from the common cold to cholera. "Soothing Syrups" with morphine often contained no mention of their contents, and many men moved along the path to the purer morphine through this route.

It is not surprising that many persons became dependent on these preparations and later turned to the active drug itself when accidentally or otherwise they learned of its presence in the "medicine" they had been taking. . . . The peak of the patent medicine industry was reached just prior to the passage of the Pure Food and Drug Act in 1906.<sup>6</sup>

It must be remembered that there were no state or federal laws concerning the sale and distribution of medicinal narcotic drugs during this period under discussion, and pharmacists sold morphine simply when it was requested by a customer. There is no way to accurately assess the extent of addiction at that time, nor is there now, for that matter. However, there are some informed estimates by scholars who have studied many facets of the period. Among the better guesses many will settle for is that from 2 to 4 per cent of the population was addicted in 1895.<sup>7</sup> Studies of pharmaceutical dispensaries, druggists, and physicians' records were carried out in the 1880s and 1890s which relate to this problem. The widespread use of morphine was demonstrated by Hartwell's survey of Massachusetts druggists in 1888,<sup>8</sup> Hull's study of Iowa druggists in 1885,<sup>9</sup> Earle's work in Chicago in 1880,<sup>10</sup> and Grinnell's survey of Vermont in 1900.<sup>11</sup> The methodological techniques of investigation do not meet present-day standards, but even if certain systematic biases are assumed, the 3 per cent figure is an acceptable guess of the extent of addiction.

The large numbers of addicts alarmed a growing number of medical men. The American press, which had been so vocal in its denunciation



of the sensational but far less common opium smoking in opium dens in the 1860s and 1870s, was strangely if typically silent on morphine medication and its addicting effects. Just as the present-day press adroitly avoids making news of very newsworthy government proceedings on false advertising (an issue in which there may also be some question of the accomplice), newspapers of that time did not want to alienate the advertisers, because they were a major source of revenue. Nonetheless, the knowledge of the addicting qualities of morphine became more and more common among a sizable minority of physicians.

It was in this setting, in 1898, that a German pharmacological researcher named Dreser produced a new substance from a morphine base, diacetylmorphin, otherwise known as heroin. The medical community was enthusiastic in its reception of the new drug. It had three times the strength of morphine, and it was believed to be free from addicting qualities. The most respectable medical journals of Germany and the United States carried articles and reports lauding heroin as a cure for morphine addiction.<sup>12</sup>

Within five short years, the first definitive serious warnings about the addicting qualities of heroin appeared in an American medical journal.<sup>13</sup> The marvelous success of heroin as a painkiller and sedative, however, made the drug popular with both physician and patient. It should be remembered that one did not need a prescription to buy it. The news of the new warnings traveled slowly, and heroin joined morphine as one of the most frequently used pain remedies for the ailing and suffering.

From 1865 to 1900, then, addiction to narcotics was relatively widespread. This is documented in an early survey of material by Terry and Pellens, a treatise which remains the classic work on late nineteenth- and early twentieth-century problems of addiction.<sup>14</sup> In proportion to the population, addiction was probably eight times more prevalent then than now, despite the large increase in the general population.

It is remarkable, therefore, that addiction is regarded today as a problem of far greater moral, legal, and social significance than it was then. As we shall see directly, the problem at the turn of the century was conceived in very different terms, treated in a vastly different manner, and located in opposite places in the social order.

The first task is to illustrate how dramatic and complete was the