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THE BACKGROUND OF THE HARRISON NARCOTICS ACT

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When Howard S. Becker wrote concerning the history of the Marijuana Tax Act, he implied that it rather than the Harrison Narcotics Act^{1/} would be the best illustration of his theory of statutes being due to the labors of moral entrepreneurs. He seemed to feel that there was widespread feeling about the dangers of opium, and the job of selling a Federal Statute could not have been very difficult. With regard to marijuana, however, he alleged public apathy, indifference, and weak enforcement which required the work of an entrepreneur to overcome.^{2/} I found these assumptions to be questionable. The Uniform Narcotic Drug Act was published in 1931, and all forty-eight states had enacted legislation before the Marijuana Tax Act was enacted.^{3/} The Uniform Act includes marijuana in its definition of a narcotic. This hardly indicates an atmosphere of apathy and indifference. Further, I was familiar with military cases during World War II which argued that marijuana was indeed a narcotic and, hence, subject to the restrictions placed on narcotics.^{4/} These bits of information led me to suspect that marijuana was indeed regarded seriously in the 1930's. Donald Dickson's critique^{5/} of Becker's theory further convinced me that the history of the passage of the Marijuana Tax Act did not say all that Becker thought that it did. It was extremely ironic for me, therefore, to find in the passage of the Harrison Act an excellent example of moral

entrepreneurs at work. I will narrate the history of the passage of the Harrison Act in chronological order from the original documents so that the reader may draw his own conclusions. It is a tale which I have found fascinating.

When Admiral Dewey sailed into Manila Bay on May 1, 1898, just two weeks after the declaration of war against Spain, he gave the United States a large stake in the Orient, and as a small by-product, an interest in what was regarded as a peculiarly Oriental evil, opium. From 1898-1901 the Philippines were under military government, the military abrogated the Spanish opium laws and substituted nothing for them. The Spanish laws set up government opium farms and allowed all people to buy opium freely though only Chinese could smoke it in opium dens. During the period of military government opium was freely imported upon payment of the tariff, just as it was in the United States. In 1901 a Civil Commission was established to govern the Philippines. Since the Philippine government was expected to be self-sustaining, the government in 1903 proposed to return to the Spanish regulations regarding opium in order to bring in some revenue. The missionaries protested vehemently against "legalizing" opium, and the civil Governor of the Philippines, William Howard Taft appointed a commission to travel around the Orient to determine what kind of

opium law would be best for the Islands.^{6/} The commission was composed of Major Edward C. Carter, surgeon and chairman; Dr. Jose Albert, a physician, and Rev. Charles H. Brent, Episcopal Missionary Bishop of the Philippine Islands.^{7/}

Charles H. Brent was to become a leading figure in our story. He was born on April 9, 1862 at Newcastle, Ontario. He graduated Trinity College, Toronto with honors in classics in 1884 and was ordained in 1887. Shortly after his ordination, he moved to Boston and spent ten years serving a church in a sordid neighborhood. During this period, he gained fame for his speaking and writing. In 1901 he was elected first missionary Bishop of the Philippines and he spent eighteen years in that post. We can only speculate whether he gained any experience with opium addiction during his work in Boston.

The Philippine Commission travelled throughout the Orient from August, 1903 to January, 1904. The Commission members talked largely to Caucasian missionaries and doctors in their visits, and obtained copies of all relevant local legislation. They met daily upon their return to Manila and had completed their report by March, 1904; they couldn't get it typed, however, until June, 1904. The report is almost 300 pages long. It labelled opium use "...one of the gravest, if not the gravest moral problems of the Orient."^{8/} (emphasis supplied) It spoke movingly of "the social order (being) robbed of powers" and "the spectacle of abused powers."^{9/}

The report contained observations of the effects of opium: the craving, the tendency to increase dosage and the deterioration of the individual. It contained testimony that use of opium led to crime. The Commission was most impressed with the legislative approach the Japanese took on Formosa, and they recommended it for the Philippines. This called for a government monopoly gradually phasing opium out and leading to ultimate exclusion of opium for non-medicinal purposes for the Philippines.^{10/}

The report gave heart to all of the missionary groups who were seeking to get the United States to exert its influence to force Great Britain to release China from the grip of opium. In November, 1904, the International Reform Bureau and other reformist groups including the WCTU, presented this request personally to Secretary of State Hay at a hearing held at the State Department.^{11/}

On January 20, 1905, William H. Taft, now Secretary of War forwarded a copy of the Philippine Report to Representative Payne, Chairman of the House Ways and Means Committee. Taft advised that this was an unofficial copy given him by Bishop Brent on a "recent visit" to Washington, and that the official copy would be forwarded when it arrived.^{12/}

The Congress reacted swiftly. The Philippine Island Drug Act^{13/} approved March 3, 1905 authorized the Philippine Commission to prohibit importation or sale or restrict or

otherwise suppress opium immediately. It further provided that no opium could be imported into the Philippines after March 1, 1908 except by the government for medical purposes.^{14/} It is well that Bishop Brent had carried the report personally to Taft. The official report did not arrive at the War Department until August, 1905. The Department had it printed for general distribution, and the printing was not completed until March, 1906 at which time it was officially forwarded to the Congress,^{15/} one year after Congress had passed the requested enabling legislation.

At this juncture, the conditions were politically ideal for a moral crusade against opium in the Far East. The United States had a duty to protect its little brown brothers in the Philippines, the first Hague Peace Conference of 1899 had recently been completed, and Teddy Roosevelt had won new diplomatic honors and the Nobel Peace Prize for settling the Russo-Japanese war. The Congress could satisfy the missionaries by helping free the "Chinaman" from opium, and at the same time enhance the prestige and trading position of the United States among the grateful Orientals. It must surely have appeared to be an all profit, no risk scheme. The perfect moral crusade because it was aimed at the other fellow.

The report of the Philippine Commission received wide circulation in the Orient and elsewhere. It reportedly

encouraged the Chinese government to attempt to ban opium, and it was credited with having influenced the House of Commons to condemn the opium trade between India and China in 1906.^{16/}

With all forces poised in this manner, Bishop Brent wrote a letter to President Roosevelt. Bishop Brent alluded to the United States historical attitude against opium in the Far East, and to the duty of dealing with the opium problem in our possessions. He stated,

"....The sole hope for the Chinese is in concerted action. As a side issue, but as a consideration that would in my mind enhance the value of the movement, it would tend to unify in some measure nations that are oriental either by nature or through the possession of dependencies in the Orient. Nothing tends to promote peace more than a common aim."^{17/}

This letter was in tune with the prevailing spirit of the times, and it struck a responsive chord in President Roosevelt. Roosevelt referred the letter to Secretary of War Taft who "heartily endorsed it." It was then forwarded to Secretary of State Root who had previously, as Secretary of War, opposed use of opium by inhabitants of the Philippines. Root reacted immediately and sent out letters to all interested countries to suggest a conference on the opium problem in the Far East.^{18/} The United States initially suggested an international conference empowered to enact a convention prohibiting traffic in opium, but Britain deferred and suggested instead that a commission be formed to investigate the opium problem.

before any convention be considered.^{19/} Such fact finding commissions had been proposed by the Hague Conference of 1899, and the United States seemed eager to try the machinery. After eighteen months of correspondence, all concerned nations agreed to meet at Shanghai on 1 February, 1909 for an International Opium Conference.

The British dragged their feet throughout this international drama and with good reason. They did not wish to be cast as the international villain because of the Indian opium trade with China. The British probably would not have agreed to the conference if they had not formed, in 1907, a treaty with China to slowly eliminate the opium trade.^{20/}

Having obtained international agreement for a conference, President Roosevelt now asked Congress for funds to set up an American Opium Commission to prepare for the conference. In language typical of his enthusiasm, President Roosevelt "heartily recommended" that Congress supply the necessary funds, and stated,

"....The aim of this international project, placing as it does, consideration of human welfare above all others, is a fine example of what is best in modern civilization and international good will and cooperation. Such an undertaking can not but appeal most strongly to the American people,..."^{21/}

Secretary of State Root echoed the President's statements and added a new note. He suggested for the first

time that the United States might have a domestic opium problem. He argued that a possible benefit of the conference might be guidance on how the United States could deal with its drug problem.^{22/} The American Opium Commission was authorized by statute on May 27, 1908. When its members were appointed, Root instructed them to study the opium situation in the United States; a decision that would have far reaching consequences.^{23/} The three men appointed to the Commission were: Bishop Brent, Dr. Charles D. Tenney (Chinese Secretary to the American Legation at Peking) and Dr. Hamilton Wright.^{24/} Bishop Brent journeyed to Washington, accepted his commission, and returned to the Philippines. Dr. Tenney remained in China. Thus, Dr. Wright was left to prepare the American portion of the conference alone.^{25/} The information he discovered led him to conclude that "the opium question was no longer a question concerning Oriental peoples." In light of this information all participants to the conference were instructed to be prepared to discuss the opium situation at home as well as in their Far Eastern possessions.^{26/}

Hamilton Kenp Wright received his medical degree from McGill University with honors in 1895. He then studied tropical diseases in China and Japan for a year. He returned to do three years of research in Europe. In 1899, he went to Malaya and remained there until 1903 significantly advancing medical research on beriberi. He had left Malaya to do research at

John Hopkins before the Philippine Commission visited Malaya in December, 1903, but it seems probable that he had met the peripatetic Bishop Brent in the Orient.

In preparing for the Shanghai Conference, the State Department requested the Congress to prohibit the importation of opium for non-medical purposes so the United States would not be derided at the Conference.^{27/} Congress responded with the passage of the Import Act of 1909. The State Department had drafted the bill, and the Congress passed it quickly after checking with two large lobbyists. The only change made was to put the act under the supervision of the Secretary of the Treasury. State had suggested that the Secretary of Agriculture supervise it since he was responsible for the Food and Drug Act.^{28/} This was the beginning of the split in United States drug laws. The Import act represented the first time the State Department used its international initiative to force domestic legislation, though it certainly was not to be the last.^{29/}

The Shanghai Conference agreed to a series of resolutions to the effect that non-medical use of opium should be prohibited; that the manufacture, sale and distribution of opium should be controlled; and that each country should allow the exportation of the drug only in accord with the import laws of the receiving country. Several of the resolutions recommended specific aid for China. In all, the

resolutions of the Shanghai Conference were a strong anti-opium statement.^{30/} Far more important than the resolutions of the Conference, however, was Hamilton Wright's report on the Conference and the opium problem within the United States. He stated that between 1860 and 1909 the United States had increased its importations of opium 351 per cent while its population had increased only 133 per cent in the same period.^{31/} He found that the United States was importing four times the "medicinal" opium that it "needed."^{32/} He found that five European countries which had laws regulating opium imported 50,000 pounds for a combined population of 164,000,000 while the United States imported 400,000 pounds for a population of 90,000,000.^{33/}

It is illustrative to examine one of Wright's statistics. Wright concluded that 150,000 Americans were "victims" of the smoking opium habit. His method was as follows: he took an estimate of the percentage of Chinese in China who smoked opium. He then applied that percentage to the number of Chinese in America and got the number of Chinese smokers in America. He then multiplied the number of Chinese smokers by the estimated amount each smoked and arrived at the amount of smoking opium used by Chinese in America. He deducted this amount from the quantity of legally imported smoking opium, and concluded that the remainder of legally imported smoking opium and whatever was smuggled

was smoked by non-Chinese. He then estimated that each American would smoke a lesser amount than each Chinese. He divided the estimated amount of unaccounted for smoking opium by the estimated per capita consumption and came up with the figure of "at least 150,000."^{34/} This does not even amount to the science of a wild guess. However, no one questioned the bases of Wright's figures. His conclusions were easy to state and startling. They lived a life of their own apart from their bases. Wright's modest hope that his statistics would be "...more effective than pages of opinion"^{35/} was more than fulfilled. Wright conservatively concluded that the United States "...may be accused, on some basis of fact, of being an opium-consuming country." ^{36/}

Wright also examined current State laws controlling opium, and concluded that the State laws were ineffective because of lack of Federal control of interstate commerce.^{37/} He proposed the Federal statutory scheme which was ultimately enacted. He premised it on the commerce power to support State legislation. He made access by State enforcement officials to Federal records central to his scheme. He stressed that the tax must be kept low because revenues from opium were obstructing prohibitory legislation in the Far East. Further, he maintained that the United States, as the international leader in the fight against opium, could not be seen to profit from it.^{38/}

With the benefit of hindsight, we can see that Dr. Wright's report said all that was going to be said preparatory to the passage of drug legislation in the United States. Those who have thought it strange that our Federal drug laws are tax statutes should contemplate the fact that those statutes were drafted by a doctor and sponsored by the State Department!

With the completion of the Shanghai Conference, the United States had two legislative aims: to get Congress to fund further international activity and to obtain passage of the suggested legislation. When Wright's report was sent to the Congress, Secretary of State Knox gave a limited endorsement to the recommended statutes and argued strongly for funding to prepare for an International Opium Conference which would transform the resolutions of the Shanghai Conference into a binding convention. He argued that the United States was duty bound to carry out the work it had begun. He also argued that the United States prohibited the importation of opium, and hence needed a binding international convention to assist in enforcement of that statute.^{39/} You will recall that the United States passed the statute prohibiting importation under the pressure of having called the Shanghai Conference. More of this circular game later.

The United States had proposed an International Opium Conference to the interested nations on September 1, 1909

and desired an early meeting date but Britain delayed the conference first until September, 1910 and then further by demanding morphine and cocaine be included as topics for discussion. A suggestion by the Italian government that marijuana be included on the conference agenda was not similarly honored.^{40/} The Conference eventually simply suggested that marijuana be studied. We may surmise that this tactic by Britain was simply another step in the overall strategy of being sure the Conference did not focus solely on the Indian-Chinese opium trade. Morphine had been discovered by a German in 1805, and its use was felt to be widespread in that country. Cocaine was known to be widely used in South America which was regarded to be in the United States' sphere of influence. The British gambit thus served to generalize the conference and put other nations on the defensive as well. The Conference finally met at The Hague on December 1, 1911 and issued its protocol on January 23, 1912.

With the dissolution of the American Opium Commission following the Shanghai Conference, Dr. Wright was placed on retainer by the State Department to prepare for the expected International Opium Conference. In the circular letter the United States used to propose the International Conference the State Department had listed national laws to control the production, manufacture and distribution

of opium as a prime topic for discussion.^{41/} With arrangements for the International Conference well underway, the State Department now turned with greater purpose to the task of getting national drug legislation through Congress. In January, 1911 President Taft sent a message to Congress forwarding with his approval the legislative recommendations of Secretary of State Knox. The matter was referred to the Senate Committee on Foreign Relations! Secretary Knox's letter was probably drafted by Dr. Wright. It summarized the history of American involvement in the opium trade, and repeated the statistical conclusions of Wright's earlier report. The letter stressed the need for Federal legislation to control interstate traffic in the drugs and thus make State laws effective. It classified the provision that all state and local enforcement agencies should have access to the Federal files as "most important," and it stressed that the tax would be kept low "for it would be a most unwise procedure for the Government to attempt to raise a revenue from the traffic in these drugs." Presumably, Dr. Wright was convinced opium was not banned in Asia because the governments concerned could not afford to give up the revenue they derived from opium. Secretary Knox concluded that the object of the legislation was:

"...to bring the entire business aboveboard and compel every transaction in the drugs from the moment of importation or manufacture to be conducted in the light of day. It is felt that if this object is achieved the good sense of the American people will see to it that the illicit traffic, which is now widespread, shall come to an end." 42/

This letter by Secretary Knox contained a fuller explanation of the series of anti-drug laws than the committee reports were subsequently to produce. The laws once enacted, operated exactly as their author intended. If there was any deception regarding the intent and purpose of the legislation, it did not stem from its author and sponsor.

The American delegates to the International Opium Conference at The Hague were Bishop Brent, Dr. Wright and Henry J. Finger. Bishop Brent was elected President of the Conference. The Conference produced a detailed convention the effect of which was designed, in the words of the preface, to effect "the progressive suppression of the abuse of opium, morphine, cocaine and derivative drugs..." 43/ (emphases supplied) The Convention speaks throughout in terms of prohibition of unauthorized use of the subject drugs. Since the Harrison Narcotics Act was passed to comply with this Convention, the requirements of the Convention reveal the purpose of the statute.

The International Conference determined that since opium, etc., constituted a world-wide problem, thirty-four nations should sign the Convention before any nation ratified

it and was bound by it.^{44/} The failure to obtain the necessary signatures within a year necessitated a second international conference at The Hague, and ultimately the decision to allow ratification though some of the required signatures were not obtained. Thus though the Convention was signed at The Hague in January, 1912, the United States did not ratify it until October, 1913--nearly two years later. Ultimately, adherence to the drug convention was required by the peace treaties following World War I.

Dr. Wright's report of the International Opium Conference, delivered in the Spring of 1912, stressed the necessity for domestic legislation. He argued that the American delegation at the Conference had been embarrassed by the Congressional inaction. He accused, "The one nation which has not been vitally affected by the international movement initiated by the United States is the United States itself,..." He certified that the legislative package which he had first submitted in 1910 had been adjusted to accord to the International Convention by a joint committee of State and Treasury, and he dredged up one further shameful statistic. The United States had collected nearly \$27,000,000 in customs duty on smoking opium in the years 1860-1909.^{45/}

President Taft and Secretary Knox again urged passage of the legislation when they forwarded Wright's report to the Congress. The Secretary of State alluded to the thorough investigation of drug abuse in the United States made by his Department, and assured the Congress that the proposed legislation would "correct this condition."^{46/}

The Congress had been appropriating funds regularly since 1909 to support the Government's international battle against opium. The first appropriation listed "suppression of the opium evil" as the ultimate object of the United States. All subsequent appropriations more humbly stated the objective of the United States as "to mitigate if not entirely stamp out the opium evil."^{47/} The Congress had not balked very much at these appropriations, but the efforts to obtain funds for the second conference at The Hague ran into difficulties.

A number of messages stressing that the prestige of the United States was at stake were forwarded to the Congress.^{48/} Finally President Woodrow Wilson reduced the amount requested and "strongly urged" its appropriation.^{49/}

President Wilson also urged that there be, "no delay in the enactment of the desired legislation, and the consequent mitigation if not suppression of the vice

which has caused such world-wide misery and degradation."^{50/}

The Sixty-third Congress did indeed move the requested legislation. The House of Representatives passed the central statute, the bill that was to be called the Harrison Narcotic Act, without amendment. The House report, written by Representative Harrison for the Committee on Ways and Means listed the international obligations of the United States to enact the legislation, and then reached into Dr. Wright's original report on drug use within the United States. The report repeated Wright's statistical conclusions. It found a "desperate need" for Federal legislation to aid "directly and indirectly the States more effectively to enforce their police laws designed to restrict narcotics to legitimate medical channels."^{51/} The report cited the object of the statute as confining narcotics to "legitimate medical channels" and found "the exertion of the Federal taxing power" the best means to accomplish that end.^{52/} The report removed the cautious undertones from Dr. Wright's statement of three years before and made the ringing statement, "We are an opium-consuming nation today."^{53/}

In the Senate, the Committee on Finance adopted the House report, and suggested several amendments including extension of the act to cover hypodermic needles and

syringes.^{54/} The amendment concerning hypodermic needles was ultimately defeated, but it produced a comment from Sen. Williams which sheds light on the effect which the registration provisions of the act were expected to produce. Sen. Williams stated:

"...I suppose you have all seen--I have--the drug fiend sitting around with his hypodermic syringe and now and then poking it up his sleeve and giving himself a dose..."

"It will act as a deterrent to have this man register his name and place of business and conform to the requirements of the act. There is no great hardship at all involved in it, and to that extent it is a deterrent of the opiate and 'dope' habit."^{55/}

Thus mere registration, the mere surfacing of the traffic, was regarded as a deterrent to it.

The Senate did approve various amendments, the House objected, and the bill went to conference. It finally passed both houses and was signed by the President on December 21, 1914.

The Act is a taxing statute in form, but as we have seen its avowed intent was the suppression not the taxing of the illicit narcotics trade. In fact, Dr. Wright insisted that the tax be kept so low as to only reimburse the government for the expenses of enforcement. It was regarded as morally wrong for the United States to obtain revenue from opium.^{56/}

The reason for the tax form in what was clearly not a revenue statute was one of Constitutional law. The Supreme Court had not yet developed the commerce clause of the Constitution sufficiently to allow the Congress to directly regulate matters felt to be within the "police powers" of the States. The House Report on a companion bill to the Harrison Narcotic Act makes this point explicitly.^{57/} Other Congressional hearings contemporaneous with the Harrison Act made it clear that the Congress was well aware that the tax power was a useful Constitutional cloak for regulatory action.^{58/} The ultimate wisdom of drafting the act as a tax law was proven in 1919 when the Supreme Court, by a 5-4 margin, approved the act as a lawful exercise of the tax power.^{59/}

There was absolutely no deception involved in the drafting of the Harrison Narcotics Act as a tax statute. The sponsors of the bill were at all times quite explicit in their statements of the purpose and expected effect of the act. The use of the tax format was simply an example of the kind of fiction the case law uses to grow. What was at stake was extension of the regulatory power of the Congress. All concerned recognized this. The tax format merely allowed the process of extension to take place without a sudden wrench from the past. The process may be described as giving an old term a

new meaning and then applying it as if nothing has changed. Eventually, either the new meaning becomes the only meaning of the old term or it becomes so well established that the use of the old term is no longer required as a shield. It is a process quite familiar and not at all shocking to lawyers though it may be to others.^{60/}

I believe the foregoing account shows that the Harrison Narcotics Act was largely the result of the remarkable work of two moral entrepreneurs, Bishop Brent and Dr. Wright. The drive which culminated in the Harrison Narcotics Act began when the United States sought to deal with the opium trade in the Far East on behalf of China and the Philippines. This initial objective was politically ideal. The Congress could give support to the moral crusade of the pesky missionary societies at very little cost. The only foreseeable results appeared to be the embarrassment of Great Britain and enhanced United States prestige and trade with China. In addition, it gave an opportunity to the political idealists who wanted to remake the world and secure peace by international agreements. This altogether delightful process of reforming the other fellow gradually shifted. In order to prepare for the Shanghai Conference the opium trade in the United States was "studied." A statute

was passed to prepare for a Conference; a convention signed to support the statute; further statutes required by the Convention. In an ever ascending spiral the moral entrepreneurs argued alternately, "we have to continue because we started the international movement and our prestige is at stake" and "we must pass statutes to conform to the international movement because we are its leaders."

Those who have dismissed the Harrison Narcotics Act as the result of the International Opium Convention have not done justice to this remarkable story.

Dr. Hamilton Wright went to France in 1915 to do civilian relief work. He was injured in an auto accident there and died subsequently in Washington. His wife remained active in the international movement against opium.

Bishop Brent served General Pershing as the senior chaplain for the American Expeditionary Force, and after the war, became Bishop of Western New York. He remained active in the international movement against opium. A speech he delivered to the Opium Advisory Committee of the League of Nations in 1923 exemplifies the fervor with which he approached his task. The conclusion of that speech makes a fitting

conclusion for this paper. In responding to arguments that complete prohibition of the opium trade would be costly, the Bishop declared:

"There is such a thing as a penalty for right action--a penalty which reached its classic height in a certain crucifixion, under whose stern beneficence the nations stand today in this our valley of decision.... The time has come for action on one of the great moral questions of our time..."61/