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COMMENTS

THE UNIFORM CONTROLLED DANGEROUS SUBSTANCES ACT: AN EXPOSITIVE REVIEW*

The problem of drug abuse exists in Louisiana and throughout the nation; it is prevalent in our universities and secondary schools and exists in the slums as well as in the suburbs. Knowing no sociological or economic boundaries, it is not confined to any one style of dress or to any race or class of people. It is limited to no age group,¹ and its scope has expanded from marijuana and opiate derivatives to include a wide range of drugs taken to achieve a myriad of symptoms. The drug market offers its patrons a choice between drugs that depress and those that stimulate; between those that offer euphoria and those offering hallucinogenic visions of another world; and between those that promise relatively safe escape and others offering escape coupled with a chance of death, addiction, or genetic and physical damage. One fact is certain: in Louisiana, the problem of drug abuse has reached a new high.²

* The student Board of Editors wishes it noted that the UCDSA was recently held unconstitutional by the Louisiana Supreme Court in *State v. Welknee* (see note 36 *infra*). Due to the narrow basis of that decision and the importance of this area, we feel that this Comment remains timely.

1. See the statements of (1) John E. Ingersoll, Director, Bureau of Narcotics and Dangerous Drugs, United States Department of Justice, *Hearings on S. 2637 Before the Subcom. To Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 218-49 (1969) (hereinafter cited as *Hearings on S. 2637*), which includes an analysis of the various aspects of drug abuse (for example, as to the occupation of violators of federal drug laws 30.5 per cent were skilled workers, 19.5 percent were students, 14 percent were unskilled, and 3 percent were professional); (2) John Mitchell, Attorney General of the United States, *Hearings on S. 2637*, at 211 states: "Our young people look to drugs for various reasons: for excitement, for experimentation, for physical escape. All sections of the country are affected: the suburbs and the inner cities, the colleges and the high school campuses"; (3) Dr. Stanley Yolles, Director of the National Institute of Mental Health, *Hearings on S. 2637*, at 265, states: "The widespread problem of drug abuse in the United States is no longer restricted to any one part of our population. It is found at all social and economic levels. It is no longer restricted to the young. It involves the junior executive and the housewife, the professional individual as well as the ne'er-do-well." See also the FBI Uniform Crime Reports showing total number of narcotic and marijuana arrests in the United States increased from 9,863 in 1958 to 162,177 in 1968. By age classification, the FBI reports shown that in 1958, 3.8 percent of the persons arrested for marijuana and narcotics violations were under 18; 14.7 percent were under 21; and 35.1 percent were under 25. In 1958, there were virtually no reported drug arrests of persons under 15, while in 1968, 3 percent of these arrested were children 15 years of age or younger."

2. This is illustrated by the fact that in the period between 1960 and 1969 the number of persons charged with drug law violations in Louisiana increased from 259 to 1,968. As a further index, marijuana possession viola-

In 1970 the Louisiana Legislature enacted the Uniform Controlled Dangerous Substances Act (hereinafter designated UCDSA),³ an act intended to replace most of the much amended and inconsistent prior law governing drug abuse. The purpose of this Comment will be to examine the new act, as well as the history of Louisiana legislation and jurisprudence on the subject, to point out changes brought about by its enactment, and to discuss problem areas and uncertainties in the new law.

History of Louisiana Legislation and Jurisprudence

The problems of drug abuse are not new;⁴ references to opium have been found dating back to 6000 B.C.,⁵ and a work on pharmacy written by a Chinese emperor discussed the effects of marijuana as early as 2734 B.C.⁶ The "extensive" use of narcotics was reported during colonial times,⁷ and morphine addiction was recognized as a problem after the Civil War, during which it was used extensively to relieve pain.⁸ In 1894, Louisiana for the first time legislatively recognized narcotic addiction in passing an act providing for the treatment and cure at public expense of morphine and cocaine addicts,⁹ which was followed in 1898 by an attempt to control cocaine by penal sanction.¹⁰

In 1918 Louisiana enacted its initial statutes regulating the

tions jumped from none in 1960 to over 1,800 in 1970 (60 out of 64 parishes reporting). See 1960 & 1969 LA. ATT'Y GEN. ANN. STAT. REP. On the federal level between the years 1960 and 1968 there was a 322 percent increase in the number of arrests relating to narcotic drugs, including marijuana. *Hearings on S. 2637*, at 219.

3. La. Acts 1970, No. 457, which repealed and re-enacted LA. R.S. 40:961-984 to contain LA. R.S. 40:961-990 (Supp. 1970).

4. A history of drug abuse can be found in *Hearings on H.R. 9312 Before a Subcom. on Education of the House Comm. on Education and Labor*, 91st Cong., 1st Sess., pt. 1, at 159 (1970). For the history on various drugs see the corresponding section in *Drugs and Youth: Proceedings of the Rutgers Symposium on Drug Abuse* (J. Wittenborn ed. 1969).

5. Berger & Potterfield, *Drug Abuse and Society*, in *DRUGS AND YOUTH* 37 (J. Whittenborn, H. Brill, J. Smith eds. 1969).

6. *Id.* at 37.

7. *Id.* at 38.

8. *Id.* at 16. Because of this use, its addictive effect became known as "soldiers' disease," the effects of which were reported as being most prevalent among the white southern male population.

9. La. Acts 1894, No. 157.

10. La. Acts 1898, No. 85. Violation of the statute was a misdemeanor punishable by a "fine of not more than one hundred dollars and not less than twenty-five dollars, and imprisonment not exceeding thirty days, or both . . ." This act was superseded by La. Acts 1908, No. 200, which made it unlawful to "sell, barter or exchange at retail, any cocaine, 'crown,' or concoction in which cocaine is the principal ingredient," except upon prescription. Violation of this statute was a misdemeanor and was punishable by a "fine not exceeding twenty-five dollars nor less than five dollars, or imprisonment not exceeding thirty days or both at the discretion of the Courts."

use of opium, morphine, codeine, heroin and their derivatives, as well as the possession of hypodermic syringes and needles.¹¹ The legislation made it unlawful to possess, sell, distribute or dispense the controlled substances, such actions being legislatively recognized as "dangerous to the public health and a menace to the public welfare." Manufacturers, merchants and physicians were required to acquire a certificate from the State Board of Health before handling the prohibited drugs, and violation of any provision was labeled a misdemeanor.¹²

Although marijuana's euphoric effects were widely known and its use prevalent on the continent at the turn of the twentieth century, the drug was not introduced into the United States until the nineteen-twenties.¹³ In 1924 the sale, transportation, delivery and possession of marijuana was made a misdemeanor in Louisiana.¹⁴ Although this prohibition was attacked as a violation of the fourteenth amendment, the court upheld the law as a proper exercise of the police powers of the state, noting that the plant was dangerous to the morals and health of the citizens of Louisiana.¹⁵

All previous Louisiana acts controlling narcotics and marijuana were superseded by Act 14 of 1934 (2d E.S.), a modification of the Uniform Narcotics Drug Act, the coverage of which was later expanded by the addition of four subparts of the narcotic

11. La. Acts 1918, No. 252.

12. This was amended by La. Acts 1928, No. 187, which stated that as a misdemeanor, a violation of the act would be punishable by a fine of not less than ten dollars nor more than five hundred dollars, or imprisonment for not less than sixty days nor more than six months, or both.

If, during a criminal proceeding, a judge found that the defendant was addicted to drugs, he could, at any time, direct a stay of the proceedings, suspend sentence, or withhold conviction and have him committed. After the defendant was released from treatment the judge had the option of discharging the defendant or ordering that he be returned to await further action of the court. Upon voluntary application for commitment by an addict, the statute allowed any public hospital, sanatorium or institution to accept the addict as a charity patient, without formal commitment.

13. Brill, *Recurrent Patterns in the History of Drugs of Dependence and Some Interpretations*, in *DRUGS AND YOUTH* 8 (J. Whittenborn, H. Brill, J. Smith eds. 1969). An exhaustive study of the legal history of marijuana can be found in Bonnie, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry Into the Legal History of American Marijuana Prohibition*, 56 *VA. L. REV.* 971 (1970).

14. La. Acts 1924, No. 41. Violation of this act was punishable as a misdemeanor by a fine of not less than fifty dollars nor more than one thousand dollars and imprisonment in the parish jail for not less than thirty days nor more than six months. The court was forbidden to suspend the sentence of any person convicted under the act. La. Acts 1932, No. 106, increased the maximum sentence to twelve months.

15. *State v. Bonoa*, 172 La. 955, 136 So. 15 (1931).

law. The object of the legislation was judicially interpreted as being "to regulate and control traffic in and use of substances or preparations that are extremely injurious to moral qualities and physical structure of human beings . . . and to make uniform the law relating to narcotic drugs."¹⁶ Providing for the regulation and control of narcotic drugs, defined to include marijuana,¹⁷ opium, morphine, codeine, heroin and cocaine, the 1934 act made it unlawful to "manufacture, possess, control, sell, prescribe, administer, dispense, or compound any narcotic drug,"¹⁸ the penalty for its violation being imprisonment at hard labor for not less than twenty months nor more than five years.

In 1948 the legislature amended the uniform law and made it a crime to be an addict, defining such a person as one "who habitually uses one or more of the narcotic drugs defined in this act to such an extent as to create a tolerance for such drug or drugs, and who does not have a medical need for the use of such drug or drugs."¹⁹ In spite of the United States Supreme Court's ruling in *Robinson v. State of California*,²⁰ which held unconstitutional a California statute making it an offense to be an addict, the Louisiana Supreme Court, in several instances, has held the Louisiana statute constitutional.²¹

16. *State v. Martin*, 193 La. 1036, 1040, 192 So. 694, 696 (1954).

17. Arguments that marijuana is not a narcotic drug have been rejected, the courts holding that it is a narcotic as a matter of law. *State v. Fink*, 225 La. 385, 231 So.2d 360 (1970). See also *Spence v. Sacks*, 173 Ohio 419, 183 N.E.2d 363 (1962).

18. Prior to the passage of the UCDSA the definition of narcotics was expanded to include isonipicaine (La. Acts 1944, No. 6), methadone, alpha-prodine, levorphanol, anileridine, levormethorphan, and phenamocine (La. Acts 1960, No. 488).

19. La. Acts 1948, No. 416. Upon conviction as a first offender for being an addict the court was given the power to suspend execution of sentence and to place the defendant on probation. As a condition of that probation the defendant was required to voluntarily enter a United States Public Health Hospital until he was cured. The addict was required to pay all costs of admission. For a second or subsequent offender the punishment prescribed under the act could not be suspended or probated. Note that this provision was impliedly repealed by the UCDSA.

20. 370 U.S. 660 (1962).

21. *State v. Bruno*, 253 La. 669, 219 So.2d 490 (1969); *State v. James*, 246 La. 1033, 169 So.2d 89 (1964); *State ex rel. Blouin v. Walker*, 244 La. 669, 154 So.2d 368 (1963). The distinction the Supreme Court of Louisiana made was that in *Robinson* the California court had interpreted the statute as punishing an illness which might have been contracted innocently or involuntarily, while it was found that the Louisiana law, as interpreted by Louisiana courts, did not penalize the status or condition of being an addict, but "rather the habitual use of narcotics, leading to such a status." Also, the court found that in Louisiana, unlike California, the intentional use of a narcotic drug was an essential element of the crime. Justice McCaleb dissented, arguing persuasively that the Louisiana statute prohibited not conduct but rather the status of being an addict, and was for this purpose

A provision making the possession of a hypodermic syringe illegal²² was declared unconstitutional in 1958 by the Louisiana Supreme Court as an unreasonable and improper use of the state police power in violation of the fourteenth amendment.²³ This decision was predicated upon the fact that the statute made possession unlawful regardless of the use for which the syringe was intended, thereby creating a conclusive presumption that any possession of a hypodermic syringe was for an illegal purpose.

After the Second World War there was a noticeable increase in the sale of heroin, and the incidence of addiction began to show a marked upturn.²⁴ In an unsuccessful effort to deter this illegal trade, Louisiana legislators in the fifties began to increase the penalties for narcotic violations. Legislative uncertainty as to what penalty to impose is evidenced by the fact that the penalties were amended five times in ten years.²⁵ Finally, in 1958, the

the same as the California law. Although it appears that the distinction made by the majority was dubious at best, this interpretation has been accepted in the Fifth Circuit in *Louisiana ex rel. Hayes v. Allgood*, 254 F. Supp. 913 (E.D. La. 1966), *aff'd*, 373 F.2d 741 (5th Cir. 1967).

22. La. Acts 1948, no. 416.

23. *State v. Birdsell*, 235 La. 396, 104 So.2d 148 (1958).

24. Brill, *Recurrent Patterns in the History of Drugs of Dependence and Some Interpretations*, in *DRUGS AND YOUTH* 8, 18 (J. Whittenborn, H. Brill, J. Smith eds. 1969).

25. La. Acts 1951(E.S.), No. 30 increased the penalties for violation of the narcotics law to imprisonment at hard labor for not less than ten years nor more than fifteen years. Where the defendant was convicted of selling, giving, or delivering any narcotic to a person under 21 years, the penalty was imprisonment at hard labor for not less than twenty years or more than thirty years. By Act 429 of 1952 the legislature provided for increased penalties for second, third, and fourth offenders, and provided for one-half the applicable penalty for an attempted violation of the act. For a fourth or subsequent conviction a defendant could be sentenced to life imprisonment at hard labor. For any conviction under the act the sentence could not be suspended or probated, nor could the person convicted be eligible for parole. In what would appear to be an unusual move the legislature by Act 682 of 1954 reduced the penalty for violation of the act to imprisonment at hard labor for not less than two years nor more than fifteen years. The penalty for selling, giving, or delivering any narcotic to a person under 21 was set as imprisonment at hard labor for not less than ten years nor more than thirty years. Also, the provisions of the 1951 act relating to second and subsequent convictions were dropped; instead the legislature provided that punishment could not be suspended or probated, nor could any defendant be eligible for parol. By Act 84 of 1956, the legislature reversed itself and drastically increased penalties for violation of the act and, for the first time, made a distinction in the types of conduct punishable under the act. For selling, giving, administering, or delivering a drug to a minor by a person over 21, the punishment was set as imprisonment at hard labor for not less than thirty years nor more than ninety-nine years. If the defendant were under 21, the penalty was imprisonment at hard labor for not less than five nor more than fifteen years. The penalty for manufacturing, possessing, or controlling a narcotic drug was punishable by imprisonment at hard labor for not less than five years nor more than

legislature provided for imposition of the ultimate penalty, death, on a defendant over twenty-one who was convicted of selling, giving, administering or delivering any narcotic drug to a person under twenty-one.²⁶

The previous narcotic law originally consisted of one part, the Uniform Act of 1934; however, since 1934 four subparts have been added to it.²⁷ In 1950 the legislature added "Subpart C" to control benzedrine within the boundaries of any penal farm or penitentiary operated by the state.²⁸ Because abuse of drugs developed for medicinal purposes increased after the Second World War, in 1952 the "Barbiturate and Central Nervous System Stimulant Law" was added as "Subpart D" to the narcotic law.²⁹ This act covered barbiturates, all hypnotic or somnifacient drugs, amphetamine and desoxyephedrine, making it unlawful "to deliver or cause to be delivered any barbiturate, or central nervous system stimulant" except in enumerated circumstances, or to have actual or constructive possession of such a drug, except as obtained by prescription. Violation of any section of the subpart was made punishable by a fine of not more than one thousand dollars or imprisonment in parish jail for not more than two years, or both. During the sixties the use of hallucinogenic substances increased, most notably LSD,³⁰ in response to which the

fifteen years. In all cases the defendant was deprived of the benefits of parole, probation, and suspension of sentence.

26. The jury could return two verdicts: (1) "Guilty as charged" in which case the penalty would be death, or (2) "Guilty with remission of the extreme penalty" in which case the penalty would be imprisonment at hard labor for not less than thirty years nor more than ninety-nine years, without benefit of parole, probation, or suspension of sentence. Act 80 of 1962 again amended the penalty section by dividing the offense of manufacturing, possessing, or controlling a narcotic drug into those committed by persons over 21 and those by persons under 21. If the defendant were over 21, the punishment was imprisonment at hard labor for not less than five years nor more than fifteen years. The benefits of parole, probation or suspension of sentence were denied, except in the case of a first offender. If the person convicted were under 21, he could be imprisoned with or without hard labor for not more than ten years. The provisions extending to him the benefits of parole, probation, and suspension of sentence were unintentionally omitted. This was corrected in 1963. As mentioned previously, Subpart B containing forfeiture provisions was added in 1948.

27. For a discussion of Subpart B, see note 123 *infra* and accompanying text.

28. La. Acts 1950 (2d E.S.) No. 20.

29. La. Acts 1952, No. 296.

30. Brill, *Recurrent Patterns in the History of Drugs of Dependence and Some Interpretations*, in *DRUGS AND YOUTH* 8, 20 (J. Whittenborn, H. Brill, J. Smith, eds. 1969). The history of LSD and other hallucinogenic substances will be found in D. LOURIA, *THE DRUG SCENE* (1968); R. COLES, *DRUGS AND YOUTH* (1970).

legislature in 1966 re-enacted several sections of Subpart D and added hallucinogenic drugs to the proscribed list,³¹ renaming it "The Louisiana Barbiturate, Central Nervous System Stimulant and Hallucinogenic Drug Law." Included in addition to those drugs listed in the 1952 act were lysergic acid diethylamide (LSD), dimethyltryptamine, mescaline, peyote, psioiybin and psilocin. Penalties remained the same in the 1952 act. Finally, Subpart E, which formed the Louisiana Narcotic and Rehabilitation Commission,³² was added in 1968. By the terms of the act the duties of the commission were to "survey and analyze the problems of drug addiction and to formulate programs to deal with it."³³

The 1970 Controlled Dangerous Substances Act

The Louisiana legislature, by Act 457 of 1970, repealed Subpart A of the narcotic law and enacted the Uniform Controlled Dangerous Substances Act (UCDSA). It is submitted that its passage can be attributed to a recognition by the legislature that the prior law had failed miserably, and also to a desire to enact a uniform law which would be similar to the federal legislation. This act greatly expanded the coverage of the previous law and provided for the control of narcotic and central nervous system drugs, hallucinogenics, and their immediate precursors.³⁴ However, since several conflicts exist between the new act and the prior narcotic law, notice should be taken of these areas before discussing the act itself.

Conflicting Legislation

Both the UCDSA and Act 488 of 1970—amending the Bar-

31. La. Acts 1966, No. 503, incorporated into the revised statutes as LA. R.S. 40:1031-1033 (Supp. 1970).

32. La. Acts 1968, No. 575, incorporated into the revised statutes as LA. R.S. 40:1051-1056 (Supp. 1970).

33. *Id.* 40:1052.

34. In addition the commission was authorized to carry on experimental clinics for the treatment of drug addiction which included the use of methadone as a substitute for narcotic drugs. The commission was also charged with dissemination of educational material on the drug problem. The act also formed the Louisiana Narcotics Rehabilitation Advisory Council to advise the commission on the prevention and control of drug addiction. LA. R.S. 40:961(25) (1970) defines "immediate precursor" as "a substance which the State Board of Health has found to be and by regulations designates as being the principal compound commonly used or produced primarily for use, and which is an immediate chemical intermediary used or likely to be used in the manufacture of a controlled or dangerous substance, the control of which is necessary to prevent, curtail, or limit such manufacture."

biturate, Central Nervous System Stimulate and Hallucinogenic Drug Law—were enacted in the same legislative session. Act 488 drastically increased the penalties for possession of hallucinogenic drugs from a maximum penalty of one thousand dollars and/or imprisonment in the parish jail for not more than two years,³⁵ to imprisonment at hard labor for not less than five years nor more than fifteen without benefit of probation, suspension of sentence, or parole for persons over twenty-one; and imprisonment with or without hard labor for not more than ten years for persons under the age of twenty-one.³⁶ Clearly this is in direct conflict³⁷ with the UCDSA penalty provisions which limit the penalty for the *same offense* to imprisonment with or without hard labor for not more than five years and/or a fine of not more than \$5,000.³⁸

While it is a recognized principle that repeal by implication

35. La. Acts 1964, No. 430, § 1.

36. La. Acts 1970, No. 488, § 1. Note should be taken that the constitutionality of the UCDSA in regulating the use of barbiturates, amphetamines, and hallucinogens was tested in the recent case of *State v. Welknee*, Louisiana Supreme Court Docket No. 51,715. In that case the defendant was charged with possession of amphetamines under La. R.S. 40:971 (UCDSA) as enacted by Act 457 of 1970. The defendants contended that the UCDSA was unconstitutional as applied to amphetamines because the title was not sufficiently indicative of its object. The supreme court stated:

"The substance of the contention that the title of the Act limited its body is essentially this: The former Sub-Part A [of the Uniform Narcotic Act] regulated hard drugs and marijuana only. Sub-Part A expressly did not apply to amphetamines, barbiturates, and hallucinogens: These were regulated by Sub-Part D. Therefore the new statute [UCDSA]—entitled as amending Sub-Part A only—exceeds the scope of its title, insofar as attempting to regulate amphetamines, barbiturates and hallucinogens, in addition to the hard drugs and marijuana covered by the prior Sub-Part A, the only section of Part X [Uniform Narcotic Act] now amended and re-enacted." *Id.*

It was thereupon held that the UCDSA was unconstitutional in this respect, but this holding was limited to the one year period between the 1970 legislative session (in which the UCDSA was enacted) and the 1971 legislative session (at which time it was amended) which "attempted to cure the deficiencies of the title here discussed." *Id.* Additionally, the court held that, although defendants could not be charged with possession of the three substances under the UCDSA, nonetheless, they could be charged under the other, prior prohibitive statutes (*e.g.*, La. R.S. 40:1046 (Supp. 1971)). Finally, it will be seen that the court was not faced with, and consequently did not decide, the substantive issues of statutory conflict, ambiguity, and constitutionality discussed in this paper. It is felt, therefore, that the examination of those issues contained herein is still germane and relevant to an understanding of the UCDSA.

37. "Where two criminal statutes are repugnant as to the punishment that may be inflicted, they cannot stand together." *State v. McClellan*, 155 La. 37, 39, 98 So. 748, 749 (1923); *State v. Hickman*, 127 La. 442, 53 So. 680 (1910); *State v. Callahan*, 109 La. 946, 33 So. 931 (1903).

38. La. R.S. 40:971 (Supp. 1970).

is not favored,³⁹ especially as between acts passed at the same legislative session,⁴⁰ nonetheless, if the two provisions are irreconcilable, only one will be given effect.⁴¹ In determining which is to be the controlling provision, great consideration must be given to the "last expression of legislative will."⁴² Under this doctrine, the act which was passed upon last by the legislature will be considered controlling. This rule was recognized in *State v. St. Julian* as follows:

"It is apparent that where acts are in direct conflict the arbitrary rule, that the statute last in order of position will prevail, must be applied. This rule is recognized by the above quoted article of the LSA-Civil Code (art. 23) with reference to laws where the former law is irreconcilable. There is no other reasonable rule that could be applied to conflicting statutes passed at the same session of the legislature than to hold that the later expression of legislative will must govern."⁴³

In applying the "last expression of legislative will," the courts have adopted the following definition by the Attorney General:

"In determining what the last expression of legislative will was as to the acts in question, it is obvious that the act numbers will not control, nor do we believe that the time of signing by the Governor controls. Instead, it is our view that the last expression of legislative will means the last action of the legislature itself in passing upon the various bills. . . . Inasmuch as it is presumed that the legislature promptly forwarded to the Governor as soon as possible bills which

39. See *Fakier v. Picou*, 246 La. 639, 166 So.2d 257 (1964); *Johnston v. Sewerage Dist. No. 2 of Caddo Parish*, 239 La. 840, 120 So.2d 262 (1960); *Legros v. Conner*, 212 So.2d 177 (La. App. 3d Cir. 1968); *James v. Orange Savings & Loan Ass'n*, 195 So.2d 183 (La. App. 1st Cir. 1967); *Pelloat v. Greater New Orleans Expressway Comm'n*, 175 So.2d 656 (La. App. 1st Cir. 1965).

40. *Chappuis v. Reggie*, 222 La. 35, 43, 62 So.2d 92, 95 (1952): "Where it is possible to do so, it is the duty of the courts in the construction of statutes to harmonize and reconcile laws. . . . These laws are particularly applicable to statutes passed at the same time, or at the same session of the Legislature, since it is not presumed that the same body of men would pass conflicting and incongruous acts." See also *City of New Orleans v. Board of Supervisors of Elections for Parish of Orleans*, 216 La. 116, 43 So.2d 237 (1949); *State v. Shushan*, 206 La. 415, 19 So.2d 185 (1944).

41. *City of New Orleans v. The Mechanics' & Traders' Bank*, 15 La. Ann. 107 (1860).

42. *State ex rel. Saint v. Toups*, 95 So.2d 55, 62 (La. App. 1st Cir. 1957).

43. 221 La. 1018, 1025, 61 So.2d 464, 466 (1952).

had been passed by the legislature, we have adopted, so far as time is concerned, the time these various bills were received by the Governor, and used that time as a guide for the last expression of legislative will, with regard to these acts."⁴⁴

Act 488 (Barbiturate) was received by the Governor's office at 3:50 P.M., July 8, 1970, while the UCDSA was received at 10:35 A.M., July 9, 1970. Thus, it will be seen that the Uniform Controlled Dangerous Substances Act constitutes the "last expression of legislative will," and as such its penalty provisions should control.

A second problem of statutory conflict is raised by the fact that the UCDSA specifically repealed only R.S. 40:961-84⁴⁵ of the prior legislation. In doing so it retained R.S. 40:1001-56 (Subparts B, C, D and E) of the prior Uniform Drug Act. Included in those Subparts were provisions for the regulation of barbiturates, central nervous system drugs, hallucinogenics and benzedrine. As the penalty provisions in these Subparts cannot be reconciled with the UCDSA,⁴⁶ the question is presented as to which should control.

In a similar situation, the supreme court stated, in *State v. Standard Oil Co.*, that "prior laws are repealed by subsequent laws only in case of positive enactment or clear repugnance."⁴⁷ Additionally, it is settled that when an act is intended to cover the entire subject matter of the legislation,⁴⁸ it will supersede

44. 1956 LA. ATTY. GEN. ANN. REP. 121, quoted in *State ex rel. Saint v. Toups*, 95 So.2d 55, 62 (La. App. 1st Cir. 1957), wherein the following language is found at 61: "Both opinions are clear and logical and we hereby adopt the opinion of August 9, 1956, in its entirety. . . ." Act 421 of 1970 was received at 8:30 p.m., July 9, 1971 and thus will also be superseded by Act 457 (UCDSA) insofar as any conflicts exist between them.

45. La. Acts 1970, No. 457, § 2. It should be noted, however, that the UCDSA also contains the following general repealer clause: ". . . all laws or parts of laws in conflict herewith . . . are hereby repealed."

46. For instance, under LA. R.S. 40:1046 (1950) the penalty for possession of barbiturates is a fine of not more than one thousand dollars and/or imprisonment without hard labor for two years, while under the UCDSA it is imprisonment with or without hard labor for not more than five years, and/or a fine of five thousand dollars. LA. R.S. 40:971(C) (Supp. 1970).

47. 188 La. 978, 1054, 178 So. 601, 626 (1938). See *State ex rel. Hyams' Heirs v. Grace*, 173 La. 215, 136 So. 569 (1931); *City of New Orleans v. New Orleans Jockey Club*, 129 La. 64, 55 So. 711 (1911).

48. *Johnson v. Sewerage Dist. No. 2 of Caddo Parish*, 239 La. 840, 120 So.2d 262 (1960); *State v. St. Julian*, 221 La. 1018, 61 So.2d 464 (1952); *State v. Tate*, 185 La. 1006, 171 So. 108 (1936); *City of Monroe v. Ouachita Parish School Bd.*, 172 La. 861, 135 So. 657 (1931); *Knight v. Webster Parish School Bd.*, 164 La. 482, 114 So. 104 (1927); *State v. Henderson*, 120 La. 535, 45 So.

all conflicting legislation. As it is obvious that the UCDSA was passed to effectuate complete control over the area of drug abuse and to make its provisions uniform with those of other states so situated,⁴⁹ it seems that the provisions of the UCDSA should be construed so as to repeal by implication those sections of the prior act which are in direct conflict.⁵⁰

There remains the problem involved in deciding the validity of those unrepealed sections of the prior acts which are not in direct, irreconcilable conflict with the UCDSA. For example, nothing was mentioned in the UCDSA concerning the Louisiana Narcotics and Rehabilitation Commission which was created in Subpart E of the prior act. In this respect, the Supreme Court of Louisiana has stated: "The general rule is that when later acts do not specifically repeal earlier statutes on the same subject matter, they have the effect of superseding such laws *only insofar as the provisions of the earlier acts are in conflict with the later expression of legislative will.*" (Emphasis added.)⁵¹ It is submitted, therefore, that those provisions of the unrepealed prior act which cover matters not provided for in the new act will be considered valid.

Finally, in both the old and new laws, provisions exist for the seizure and forfeiture of vessels, vehicles and aircraft illegally used.⁵² However, the old law provided that such seizure would not affect the rights of any mortgage holder or holders of a vendor's privilege on the property seized, while the new law contains no such exemption. In this situation, under the rule of statutory construction that repeals by implication are not favored,⁵³ mortgage protection should be continued; conversely, under the rule that the later enactment governs, the rights of privilege holders would be extinguished.⁵⁴ The courts have not yet ruled upon this question.

430 (1908); *Pelloat v. Greater New Orleans Expressway Comm'n*, 175 So.2d 656 (La. App. 1st Cir. 1965); *National Car Rental Sys., Inc. v. City of New Orleans*, 160 So.2d 601 (La. App. 4th Cir. 1964).

49. LA. R.S. 40:989 (Supp. 1970).

50. LA. R.S. 40:1051-1056 (Supp. 1968).

51. *Gorham v. Mathieson Alkali Works*, 210 La. 462, 27 So.2d 229, 304 (1946).

52. LA. R.S. 40:1001 (1950); LA. R.S. 40:983(4) (Supp. 1970).

53. See text accompanying note 41 *supra*.

54. The attorney general's office agrees with this latter interpretation. An opinion issued to Sheriff J. R. Oakes, Claiborne Parish, September 29, 1970, contains the following language: "Your specific question appears to be answered by Section 983 of Title 40, as amended by Act 457 of 1970, which in Sub-Paragraph (d) provides that when the property is forfeited

Structure of the Law

The controlled substances are divided into five separate groups, or schedules,⁵⁵ on the basis of their potential for abuse, accepted medical use, safe use under medical supervision, and whether their abuse may lead to physical or psychological dependence.⁵⁶ Penalties for violation of the act are based on the schedule in which the drug is found and the type of violation incurred (i.e., possession, manufacture, distribution, etc.). Schedule I includes drugs with a high potential for abuse, having no accepted medical use, and regarded as being unsafe even under medical supervision.⁵⁷ Included in this group of 81 substances are heroin and such hallucinogenic drugs as LSD, marijuana, mescaline and peyote. Schedule II drugs also have a high potential for abuse, but have recognized medical use, although with severe restrictions. Abuse of these are said to lead to severe "psychic or physical dependence or disorders."⁵⁸ Included in this schedule of 22 drugs are opium, cocaine and methadone. Schedule III includes stimulants, amphetamine, phenmetrazine, methamphetamine, methylphenidate, and depressants, including barbiturates and their derivatives.⁵⁹ Also included in this schedule are preparations containing a specified amount of a narcotic drug, characterized as having a potential for abuse lower than those in the previous schedules and having an approved medical use, and whose abuse "may lead to moderate or low physical depen-

the law enforcement agency making the seizure may retain the property for official use in addition to other dispositions. There would appear to be no right that the lienholder would have in view of the forfeiture of the vehicle. (See *United States v. One 1941 4-door Buick Sedan*, 64 F. Supp. 905.)"

55. As originally enacted the UCDSA divided controlled substances into only four schedules. For a discussion on the effects of a large number of drugs covered by UCDSA see *Hearings on HR 9312 Before the Sub-comm. on Education of the House Comm. on Education and Labor*, 91st Cong., 1st Sess, pt. 1, at 126 (1970). See also J. Williams, *NARCOTICS AND HALLUCINOGENICS—A HANDBOOK* (1967), which should be read with great caution in light of recent medical knowledge of the effects of drugs, in particular marijuana.

56. As originally enacted, the UCDSA left somewhat open the question of whether or not the state itself, and more particularly state medical institutions, were to be considered "persons" under the purview of the act. This question seems to have been affirmatively answered by a 1971 amendment to the definition of person found in La. R.S. 40:961(21) (Supp. 1972) to re-define it as follows: "Person includes any institution whether public or private, and hospitals or clinics operated by the state or any of its political subdivisions; and any corporation, association, partnership or one or more individuals." La. Acts 1971, No. 59, § 2.

57. La. R.S. 40:963(b) (Supp. 1970), *as amended*, La. Acts 1971, No. 59, § 5.

58. *Id.* 40:963(a)(2)(C).

59. *Id.* 40:963(b).

dence or high psychological dependence." Schedule IV includes those drugs with a relatively low potential for abuse, accepted medical use, and limited physical or psychological dependence⁶⁰ relative to the drugs in Schedule III, and includes barbital and phenobarbital. Schedule V consists of various preparations containing narcotic drugs which are considered as being less dangerous than those in prior schedules.

Based on stated criteria, the State Board of Health is given the power to add, delete, or reschedule a substance covered by the act, or designate such as an immediate precursor of a controlled substance. The act also empowers the board to regulate and control the manufacture, distribution, and dispensing of the controlled substances, and it stipulates stringent requirements for licensing. It authorizes the issuance of search warrants and administrative inspection warrants, and confers jurisdiction on the district court to enjoin violation of the act. Employees of the State Board of Health are authorized to carry firearms and to make arrests and seizures of property pursuant to the act.⁶¹

With respect to the board, one problem arises under section 962 (as amended) which states in part: "The State Board of Health shall add, delete, or reschedule a substance as a controlled dangerous substance when it is found that such substance has a potential for abuse. In making such a determination the State Board of Health shall consider the following: . . ."⁶² As this grant of power is reaffirmed in other sections of the act,⁶³ there seems to be little doubt that the legislature intended to delegate the power of effectively amending the statute to the board, to be exercised upon its own authority and inclination. However,

60. *Id.*

61. See LA. R.S. 40:962, 978, 985 (Supp. 1970).

62. *Id.* 40:962(a), as amended, La. Acts 1971, No. 59, § 3. As originally enacted, the term "determination" in the last above quoted sentence was nonexistent, in the place of which was the term "recommendation." Under those circumstances the question arose as to whether the legislature had intended to empower the State Board of Health to amend the statute, or merely empower it to recommend legislative changes. It is submitted, however, that even as thus previously drafted, the legislative will could have been ascertained by reference to other sections of the statute. See note 63 *infra*.

63. For example, LA. R.S. 40:962(b) (Supp. 1970) states in part: "If the State Board of Health designates a substance as an immediate precursor . . ." Additionally, *id.* 40:985 reads as follows: "All determinations, findings and conclusions of the State Board of Health under this Subpart shall be final and conclusive of the matters involved, except that any person aggrieved by such decision may obtain review of the decision in the appropriate state district, or appellate court." (Emphasis added.)

accepting that the legislature intended to do so, there remains the question as to the constitutionality of such a delegation. The Louisiana Constitution provides that "the legislative power of the State shall be vested in a Legislature."⁶⁴ As a general rule, this power of legislation cannot be conferred on other persons, departments of government, or the electorate.⁶⁵ However, the legislature has the power to delegate to administrative boards and agencies the power and authority to determine the facts upon which laws are to be applied and enforced.⁶⁶

In the area of criminal law, the general rule is that the legislature cannot delegate the authority to create or define acts constituting criminal offenses.⁶⁷ This interpretation, however, is subject to several notable exceptions. For instance, the State Highway Department has been granted the authority to establish and regulate speed limits;⁶⁸ the power of the state to delegate authority to control, by criminal sanctions, all aspects of animal diseases to the State Livestock Board⁶⁹ has also been upheld.⁷⁰ Generally in situations such as these there must exist a practical need for such delegation coupled with a specific

64. LA. CONST. art. III, § 1.

65. *Fernandez v. Alford*, 203 La. 111, 13 So.2d 483 (1943); *State v. Watkins*, 176 La. 837, 147 So. 8 (1933); *Shreveport v. Malone*, 176 La. 848, 147 So. 12 (1933); *State v. Washburn*, 177 La. 27, 147 So. 489 (1933); *State ex rel. Higgins v. Aicklen*, 167 La. 456, 119 So. 425 (1929); *City of Shreveport v. Price*, 142 La. 936, 77 So. 883 (1918).

66. *Schwegmann Bros. Giant Supermarkets v. McCrory*, 237 La. 768, 112 So.2d 606 (1959), *appeal dismissed*, 361 U.S. 114 (1959); *State v. Morrow*, 231 La. 572, 92 So.2d 70 (1956); *O'Meara v. Union Oil Co. of Calif.*, 212 La. 745, 33 So.2d 506 (1948); *State v. Guidry*, 142 La. 422, 76 So. 843 (1917); *Pettit v. Penn*, 180 So.2d 66 (La. App. 2d Cir. 1965), *cert. denied*, 248 La. 696, 181 So.2d 397 (1966); *State ex rel. Soulet v. City of New Orleans*, 94 So.2d 108 (La. App. Or. Cir. 1957); *Parker v. Board of Barber Exam'rs*, 84 So.2d 80 (La. App. 1st Cir. 1955).

67. *State v. Whitlock*, 193 La. 1044, 192 So. 697 (1939); *State v. Maitrejean*, 193 La. 824, 192 So. 361 (1939); *State v. Staub*, 182 La. 1040, 163 So. 766 (1935).

68. A somewhat more strained analogy is found in the general delegation of police power to municipalities. *See City of Lake Charles v. Wallace*, 247 La. 285, 170 So.2d 654 (1965); *City of Alexandria v. Alexandria Fire Fighters Ass'n*, 220 La. 754, 57 So.2d 673 (1952); *Fernandez v. Alford*, 203 La. 111, 13 So.2d 485 (1943); *State v. Maitrejean*, 193 La. 824, 192 So. 361 (1939); *Town of Ponchatoula v. Bates*, 173 La. 824, 138 So. 851 (1932); *State v. Westmoreland*, 133 La. 1015, 63 So. 502 (1913); *City of Baton Rouge v. Butler*, 118 La. 73, 42 So. 650 (1907); *City of Lake Charles v. Roy*, 115 La. 939, 40 So. 362 (1906).

69. LA. R.S. 3:2095, 2096 (1950).

70. *Francis v. Louisiana Livestock Sanitary Bd.*, 184 So.2d 247 (La. App. 1st Cir. 1966), *cert. denied*, 249 La. 435, 184 So.2d 439 (1966).

declaration of the legislature and specific identifiable standards for the exercise thereof.⁷¹

Under the UCDSA the authority of the State Board of Health cannot be exercised in adding, deleting, or rescheduling a drug unless it shall have first considered certain specified aspects of the drug in question, including its potential for abuse, history, risk to public health, *etc.*⁷² Thus it would appear that specific identifiable standards for the assertion of its power have been established. However, the statute merely requires that the State Board of Health "consider" those aspects, while not establishing the minimum required standards in each category. Under the powers thus delegated, the board could classify cigarettes under Schedule IV and thereby impose a penalty of imprisonment with or without hard labor for not more than five years and/or a fine of \$5000 for mere possession thereof.⁷³ Clearly there exists a question as to whether a grant of power to effectuate amendments to a criminal statute in this manner is an unconstitutional delegation of the legislative power conferred upon the legislature by article III, section 1 of the Louisiana Constitution.⁷⁴

71. *Pearce v. Sharbino*, 254 La. 143, 223 So.2d 126 (1969); *Louisiana State Bd. of Embalmers v. Britton*, 244 La. 756, 154 So.2d 389 (1963); *City of Shreveport v. Provenza*, 231 La. 514, 91 So.2d 777 (1956); *Francis v. Louisiana State Livestock Sanitary Bd.*, 184 So.2d 247 (La. App. 1st Cir. 1966), *cert. denied*, 249 La. 453, 187 So.2d 439 (1966). For an interesting case concerning a grant of power by the legislature to Governor Huey Long allowing him to reduce a petroleum refining occupational tax "in his discretion" see *State v. Grosjean*, 182 La. 298, 161 So. 871 (1935).

72. LA. R.S. 40:962 (Supp. 1970) reads in part: "In making such a recommendation, the State Board of Health shall consider the following:

- "(1) Its actual or relative potential for abuse;
- "(2) Scientific evidence of its pharmacological effect, if known;
- "(3) State of current scientific knowledge regarding the substance;
- "(4) Its history and current pattern of abuse;
- "(5) The scope, duration and significance of abuse;
- "(6) What, if any, risk there is to be public health;
- "(7) Its psychic or physiological dependence liability, and
- "(8) Whether the substance is an immediate precursor of a substance already controlled by this section."

73. LA. R.S. 40:963 (Supp. 1970) reads in part: "(d) Schedule IV. In determining that a substance comes within this schedule, the State Board of Health shall find: (1) A low potential for abuse relative to the substances listed in Schedule III; and (2) Current accepted medical use in the United States; and (3) Limited physical dependence and/or psychological dependence liability relative to the substances listed in Schedule III." For example, since cigarettes meet the minimum standards, and the State Board of Health would only be required to "consider" the aspects suggested (rather than insure that certain specific minimum standards are breached), the board would not be restricted from scheduling such a substance as a Schedule IV substance.

74. Even if such a delegation of power is allowed, there still remains the problem of the manner of promulgation of such changes as might be

Penalties and Prohibited Acts

The harsh, unrealistic penalty provisions of the prior law had little if any effect in controlling the increase in drug abuse in the state.⁷⁵ Prosecutors were hesitant to prosecute drug offenders and judges and juries were not disposed to convict. Additionally, long prison sentences for violators thwarted any meaningful attempt at rehabilitation, while, at the same time, this failed to provide a successful "fear factor" deterrent to the young and curious.

In an attempt to remedy these drawbacks, the new law has completely restructured the penal provisions. Previous acts did not make a distinction between possession and sale until 1956 when separate penalties were enacted for both offenses;⁷⁶ however, the UCDSA treats possession as a category separate from all other offenses. Penalties for production, manufacture, distribution and dispensing of controlled dangerous substances are divided into two categories: For those narcotic drugs found in Schedules I and II the maximum penalty is imprisonment at hard labor for not more than thirty years and a fine of not more than fifteen thousand dollars, or both; for all other substances in Schedules I, II, III, and IV (including the hallucinogenic drugs LSD, peyote, mescaline, etc.) maximum penalties are imprisonment at hard labor for not more than ten years and/or a fine of not more than fifteen thousand dollars, or both. A violation involving a Schedule V drug carries a sentence of imprisonment with or without hard labor for not more than five years or a fine of not more than five thousand dollars, or both.⁷⁷ It should be noted that the crime of "distribution" covered by this section is not limited to sale, but is broad enough to cover a drug given as a gift. Additionally, this paragraph provides for possession with intent to sell and distribute.⁷⁸

effected by the State Board of Health, as there are no provisions for such in the UCDSA other than the general authorization to promulgate rules and regulations contained in LA. R.S. 40:964 (Supp. 1970). Presumably, such promulgation would be done according to LA. R.S. 40:11 (1950) dealing with the "Sanitary Code" of the State Board of Health. *See American Bakeries Co. v. Louisiana State Bd. of Health*, 186 La. 433, 172 So. 518 (1937).

75. *See* note 2 *supra*.

76. La. Acts 1956, No. 84. Interestingly, although the prior act did not define the term "delivery," nonetheless the crime of delivery was held not to be unconstitutionally vague. *State v. White*, 254 La. 389, 223 So.2d 843 (1969); *State v. Richard*, 245 La. 465, 158 So. 828 (1963).

77. LA. R.S. 40:971 (Supp. 1970).

78. As originally enacted, section 971 dealing with "Prohibited Acts" included a specific prohibition against possession of a controlled dangerous

The act also makes it illegal to "knowingly or intentionally . . . possess a controlled dangerous substance" except pursuant to a prescription,⁷⁹ the penalty for which is imprisonment with or without hard labor for not more than five years or a fine of not more than five thousand dollars, or both. Thus, the maximum penalty for simple possession of heroin is the same as that for unlawful possession of a narcotic cough medicine. Inasmuch as this wide discretion in sentencing does not adequately reflect the seriousness of the offense (as reflected by the differing dangerous propensities of the drugs involved) and presents an obvious temptation for prejudicial application, it is submitted that a differential sentencing schedule should be adopted, placing a lower maximum sentence on those substances with a lesser potential for harm and abuse.

Due to the widespread use of marijuana and the recent controversy surrounding it, the act incorporates a provision providing for special penalties for its possession.⁸⁰ A first offender con-

substance in the course of business "as a sales representative of a manufacturer or distributor of dangerous substances. . . ."

Obviously, this provision was enacted in an attempt to halt the sales technique of "sampling" whereby drug company salesmen carried samples of drugs on their rounds which were to be given, without prior specific request or order, to such licensed customers as physicians and dentists. This provision was deleted by La. Acts 1971, No. 52, § 10, but there still remains the question of whether or not the general prohibition against possession without specific authorization as contained in LA. R.S. 40:971(c) (Supp. 1970) would continue to disallow such practices.

79. LA. R.S. 40:971(c) (Supp. 1970). It is settled law in Louisiana that guilty knowledge is an essential ingredient of the crime of possession. *State v. Smith*, 257 La. 896, 244 So.2d 824 (1971); *State v. Smith*, 257 La. 1109, 245 So.2d 327 (1971); *State v. Kreller*, 255 La. 982, 233 So.2d 906 (1970); *State v. O'Brien*, 255 La. 704, 232 So.2d 484 (1970); *State v. McIlvaine*, 245 La. 649, 160 So.2d 566 (1964); *State v. Richard*, 245 La. 465, 158 So.2d 828 (1963); *State v. Johnson*, 228 La. 317, 82 So.2d 24 (1955); *State v. Nicolosi*, 228 La. 65, 81 So.2d 771 (1955).

However, note should be taken of a recent case in which at least three members of the supreme court (and this writer) felt that the general instruction concerning guilty knowledge given to the jury in a narcotics possession case resulted in making "mere possession a crime." *State v. Barnes*, 257 La. 1017, 245 So.2d 159, 165 (1971).

80. LA. R.S. 40:971(d) (Supp. 1970). Under Louisiana law, mere possession of an illegal drug, regardless of the quantity, suffices for the crime of possession. However, "[i]n several states, the possession required by section 2 of the Uniform Narcotic Drug Act, La. R.S. 40:962 (1950) in this state, has been interpreted to exclude minute portions of a substance of a drug not sufficient for illegal use, such as here. See Annotations, *Narcotic Possession—What Constitutes* A.L.R.2d 810. Section 7 (1963)." *State v. Barnes*, 257 La. 1017, 1049 n.2, 245 So. 159, 170 n.2 (1971) (Tate, Justice dissenting). (Emphasis added.) It is submitted that pragmatic as well as moral considerations demand that such an interpretation be effected in Louisiana in order that situations do not occur in which (as in the cited case) the defendant (a 17 year old boy) is convicted of possession of "0.000171375 ounces" of marijuana. *Id.* at 170.

victed of possession of marijuana (a misdemeanor) can be fined not more than five hundred dollars and/or imprisoned in the parish jail for not more than one year. However, under the rule of *Duncan v. Louisiana*,⁸¹ since the maximum penalty is greater than six months imprisonment, a jury trial is necessary.⁸² For a second conviction for possession of marijuana, the defendant can be sentenced to imprisonment with or without hard labor for not more than five years and/or fined not more than five thousand dollars. Thereafter, for a third or subsequent conviction, the defendant could be imprisoned with or without hard labor for not more than twenty years, and would not be eligible for parole, probation, or suspension of sentence.⁸³ Such a provision is incomprehensible in light of the fact that, although the legislature recognized that the problem of marijuana use was a lesser evil so as to justify special provision to deal with it, a defendant convicted for a third or fourth time for the possession of heroin is not subject to the same disabilities. To assume that one convicted of possessing heroin is more deserving of the rehabilitative devices of parole, probation, and suspension of sentence is a logical inconsistency. Finally, notice should be taken that second and subsequent convictions for possession of marijuana are relative felonies and carry all the disabilities associated with such offenses. The prior law did not provide increased penalties for subsequent offenses. However, under the new act a defendant convicted of a subsequent offense "shall" be sentenced to a fine or imprisonment twice that of the original offense.⁸⁴ An offense under the act is considered a subsequent of-

81. 391 U.S. 145 (1968).

82. As originally drafted by the Louisiana Commission on Law Enforcement, the act provided for a maximum punishment of six months and/or five hundred dollars, but this was thereafter amended. It is suspected that the primary motivation in doing so was fear among its sponsors that a lesser punishment would not pass. However, it would appear that the advantages of avoiding jury trials for these lesser offenses outweigh any argument in favor of increased penalties. Primarily, it would seem improper to sentence a first offender to a term longer than six months, and secondarily, trial expense and time could be greatly lessened by a sentence which would not constitutionally require a jury trial.

83. The denial of parole, probation and suspension of sentences in narcotics cases was challenged as unconstitutional on the basis of cruel and unusual punishment before the passage of the UCDSA and was, at that time, held constitutional. *State v. White*, 254 La. 839, 223 So.2d 843 (1969); *State v. Green*, 244 La. 80, 150 So.2d 571 (1963); *State v. Bellam*, 225 La. 445, 73 So.2d 311 (1954); *State v. Thomas*, 224 La. 431, 69 So.2d 738 (1954).

84. La. R.S. 40:977 (1970).

fense if the defendant had at any time been convicted of any violation under the act.⁸⁵

Under the provisions of the previous Uniform Law, an attempted violation of the act was not specifically covered except where an attempt was made to obtain a drug by fraud or deceit.⁸⁶ However, under the jurisprudence a verdict of attempted possession or attempted sale was held to be responsive to an indictment charging possession or sale because, under R.S. 14:27, an attempt is considered as a lesser but included grade of the crime.⁸⁷ The new law specifically includes an attempted violation and adds conspiracy as an offense covered by the act,⁸⁸ the maximum fine or sentence for which cannot exceed more than one-half of the punishment prescribed for that completed offense. It would seem to follow that an attempt would be considered a violation for purposes of the increased penalties provided for a conviction as a second offender.

Delivery to Juveniles; Conditional Discharge for First Offenders

Prior statutes made the offense of selling or giving a controlled substance by an adult to one under 21 punishable by death upon a verdict of guilty, or upon a verdict of "guilty with remission of the extreme penalty," punishable by imprisonment at hard labor for not less than thirty years nor more than ninety-nine years.⁸⁹ Thus, a college senior over 21 unfortunate enough to be dating a sophomore under 21 could have found himself on death row for giving his date a marijuana cigarette which she had requested. The present act is more realistic in that now, in order for a defendant 18 or over to be subject to increased penalties, he must sell or give a controlled substance to a person who is under 18 years of age and who is at least three years his junior. In such a case the defendant can be sentenced to not

85. As the provisions of the section are mandatory, a second offender convicted for sale of heroin can conceivably be sentenced to a maximum sentence of imprisonment at hard labor for sixty years. Under UCDSA § 977(a) it is stated that the "double up" provisions apply to "any offense." Additionally, § 997(b) specifically mentions offenses relating to marijuana violations. However, it is submitted that the provisions of § 977 do not take precedence over the separate subsequent offender provisions for marijuana possessors contained in § 971(d).

86. LA. R.S. 40:978(a) (1950).

87. *State v. Johnson*, 228 La. 317, 82 So.2d 24 (1955); *State v. Nicolosi*, 228 La. 65, 81 So.2d 771 (1955); *State v. Broadnax*, 216 La. 1003, 45 So.2d 604 (1950).

88. LA. R.S. 40:974 (Supp. 1970).

89. LA. R.S. 40:981(1) (1950).

more than twice the imprisonment or fine for the sale of narcotics in the applicable schedule.⁹⁰

A major criticism of the old law was that, upon conviction, a first offender who may have experimented with drugs on a lark or out of curiosity would be subject to all the disabilities inherent in a felony conviction. In an attempt to remedy this, the legislature has provided for the conditional discharge of a first offender found guilty of *possession* of *any* controlled substance.⁹¹ Under this section, upon conviction, the judge, with the consent of the defendant, can place the defendant on probation without first entering a judgment of guilt. If the defendant successfully fulfills the terms of his parole, the charges are dismissed without adjudication of guilt. The defendant will not be considered as having been convicted except for purposes of charging subsequent offenses. It is important to note that this section applies only to possession, and does not limit the benefits of its provisions to any particular schedule of drugs.

*Parole, Probation, and Suspension of Sentence;
Possession by Fraud and Deceit*

There were no limitations on parole, probation, or suspension of sentence in Louisiana for a drug violation until 1924, when the legislature made the sale and possession of marijuana illegal⁹² and provided that the court could not suspend the sentence of a person convicted under the act. Although this act was superseded by the Uniform Act of 1934 which placed no limitations on parole, probation, or suspension of sentence,⁹³ the legislature in 1948 (when it was made an offense to be an addict) decreed that subsequent offenders could not receive the benefits of suspended sentences or probation.⁹⁴ Finally, in 1956 the legislature denied the benefits of parole, probation, and suspension of sentence to any person convicted under the act except for the offense of being an addict.⁹⁵ This situation existed until 1962 when the legislature provided that a defendant over 21, convicted as a first offender for the offense of manufacture, possession, or control of a drug, could be eligible for probation, parole, and suspension

90. La. R.S. 40:976 (Supp. 1970).

91. *Id.* 40:977.1.

92. La. Acts 1924, No. 41.

93. La. Acts 1934(2d E.S.), No. 14.

94. La. Acts 1948, No. 416, § 20.

95. La. Acts 1956, No. 84, § 1.

of sentence,⁹⁶ and later, in 1963, it extended this privilege to persons under 21.⁹⁷ Thus, at the time of the passage of the present act, parole, probation, and suspension of sentence were denied to all persons convicted under the act except for the first offenders convicted for manufacture, possession, or control of a drug.

The provisions of the prior law denying such benefits have been attacked upon the constitutional grounds of cruel and unusual punishment⁹⁸ and denial of equal protection,⁹⁹ but in all cases have been upheld. Additionally, the court has held that the prohibition against parole, probation, and suspension of sentence applies to an attempt to commit a crime, for, under the general attempt article (R.S. 14:27), an attempt is to be punished in the "same manner" as the crime itself.¹⁰⁰

Recognizing the undesirability and inappropriateness in light of contemporary conditions of the prohibitions against parole, probation, and suspension of sentence and their devastating effect on any attempt at rehabilitation, the legislature in the new act has, with one exception, placed no limitations on these benefits. As mentioned previously, for the third offense of possession of marijuana a defendant is denied the benefits of these rehabilitative devices.¹⁰¹ Additionally, the UCDSA provides that for a second or subsequent conviction for production, manufacturing, and distributing, or possessing with intent to produce, manufacture, distribute, or dispense, the court has the discretion of imposing "twice the special parole term otherwise authorized."¹⁰² When a first offender charged with possession violates the terms of his probation, "the court may enter an adjudication of guilt and reimpose upon such person the sentence of the court as originally imposed."¹⁰³

The prior law made it an offense to obtain, attempt to obtain,

96. La. Acts 1962, No. 81, § 1.

97. La. Acts 1963, No. 60, § 1.

98. *State v. White*, 254 La. 389, 223 So.2d 843 (1969); *State v. Green*, 244 La. 80, 150 So.2d 571 (1963); *State v. Bellam*, 225 La. 445, 73 So.2d 311 (1954); *State v. Thomas*, 224 La. 431, 69 So.2d 738 (1953).

99. *State v. White*, 254 La. 389, 223 So.2d 843 (1969); *State v. Thomas*, 224 La. 431, 69 So.2d 738 (1953).

100. *State v. Glantz*, 254 La. 306, 223 So.2d 813 (1969).

101. See note 85 *supra* and accompanying text.

102. LA. R.S. 40:977(b) (Supp. 1970).

103. *Id.* 40:977.1. In a provision new to Louisiana narcotics law, the legislature provided that upon violation of a special parole term, said parole may be revoked and the original term of imprisonment increased by a period equivalent to that of the special parole term. *Id.* 40:971(e).

or to procure the administration of a narcotic drug by fraud, deceit, misrepresentation or subterfuge,¹⁰⁴ and this section was considered as creating a crime distinct and separate from the provision of the Criminal Code making it unlawful to attempt to commit an offense.¹⁰⁵ Thus, a defendant charged under this section would be subjected to the full penalties of the law and would not of right be entitled to have this maximum sentence halved under the terms of the general attempt article of the Criminal Code.¹⁰⁶ The UCDSA provides that a person intentionally and knowingly using misrepresentation, fraud, forgery, deception, or subterfuge to obtain a controlled substance upon conviction shall be imprisoned with or without hard labor for not more than five years, or fined not more than five thousand dollars, or both.¹⁰⁷ Although not specifically providing against an attempt to so obtain a drug, the UCDSA, under its general attempt article found in section 974, has provided that such an attempt is punishable by fine or imprisonment not to exceed one-half of the punishment prescribed for the offense.¹⁰⁸ Barring application of the "same evidence" rule it would appear that, on obtaining a controlled substance by fraud or deceit, a person could be prosecuted for that offense as well as for simple possession.¹⁰⁹

104. LA. R.S. 40:978 (1950).

105. *State v. Broadnax*, 216 La. 1003, 45 So.2d 604 (1950).

106. LA. R.S. 14:27 (1950) provides in part: "Whoever attempts to commit any crime shall be punished as follows:

"(1) If the offense so attempted is punishable by death or life imprisonment he shall be imprisoned at hard labor for not more than twenty years;

.....

"(3) In all other cases he shall be fined or imprisoned, or both, in the same manner as for the offense attempted; but such fine or imprisonment shall not exceed one-half of the largest fine, or one-half of the longest term of imprisonment prescribed for the offense so attempted or both.

107. LA. R.S. 40:973 (Supp. 1970).

108. *Id.* at 40:974. Thus an attempted violation of the act would seem punishable by imprisonment with or without hard labor for not more than two and one-half years, or by a fine of not more than twenty-five hundred dollars, or both.

109. There seems to be no problem involved in this section with the possibility of double jeopardy in convicting first for possession and later for obtaining possession by fraud because the evidence necessary to prove the former must be expanded to prove the latter; however, contrast should be made with attempted prosecutions for breaking and entering and later for burglary, in which the "same evidence" test would apply. However, problems of "collateral estoppel" arise when the first prosecution (possession) results in acquittal. In such a case, the defendant will have been acquitted of one of the essential elements of the second crime (obtaining possession by fraud), and unless the prosecutor offered additional evidence he would be estopped from prosecution.

On the other hand, if the defendant is first convicted of obtaining possession by fraud, the "same evidence" test will intervene to prohibit a sub-

Civil Actions

A perplexing question arises under section 972 of the UCDSA, which declares certain conduct illegal and provides two separate penalty provisions, the first of which is a "civil fine" of not more than fifteen thousand dollars, and the second, imprisonment for not more than six months, or payment of a fine or not more than five hundred dollars, or both. Included among the illegal acts are distribution, obliteration, and altering required symbols, and refusal to keep or furnish required records.¹¹⁰

sequent prosecution for mere possession. Again this is so because one of the essential elements of the crime of obtaining possession by fraud is the actual possession of the fraudulently obtained goods. Thus the "same evidence" necessary to convict for fraud would have to be used in a prosecution for possession.

A final possibility occurs in first an acquittal for obtaining possession by fraud, and later a prosecution for possession. In such a case the application of the doctrine of "collateral estoppel" will be predicated upon a "reasonable speculation" as to which of the two grounds provided the basis for the defendant's acquittal. If he were acquitted because the state did not prove that he had actual possession, the doctrine of "collateral estoppel" will apply. If, on the other hand, it is determined that the defendant was acquitted solely because the state could not prove that his possession was obtained by fraud, there seemingly could be a subsequent prosecution for possession. See text accompanying note 113 *infra* for a discussion of the "same evidence" test in a similar situation. See also LA. CODE CRIM. P. art. 596; *State v. Roberts*, 152 La. 283, 93 So. 95 (1922).

As a final note, if the prosecution for both of these crimes arises out of a single occurrence, prosecution for both may, in the future, be barred if Louisiana adopts the "single transaction" test. See *Waller v. Florida*, 397 U.S. 387 (1970); LA. CODE CRIM. P. art. 596, comments.

110. LA. R.S. 40:972 (Supp. 1970) reads in part: "(1) Who is subject to the requirements of this Subpart to distribute or dispense a controlled dangerous substance in violation of this Subpart;

"(2) Who is a licensee to manufacture, distribute, or dispense a controlled dangerous substance to another licensee or other authorized person not authorized by his license;

"(3) To omit, remove, alter, or obliterate a symbol required by the Louisiana Controlled Dangerous Substance Law; or

"(4) To refuse or fail to make, keep or furnish any record, notification, order form, statement, invoice, or information required under this Subpart; or

"(5) To refuse entry into any premises for inspection as authorized by this Subpart;

"(6) To keep or maintain any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or any place whatever, which is frequented by persons using controlled dangerous substances in violation of this Subpart for the purpose of using such substances, or which is used for the keeping or selling of the same in violation of this Subpart.

"(b) Any person who violates this section shall, upon conviction be punishable by a civil fine of not more than fifteen thousand dollars. Such proceeding shall be independent of, and not in lieu of, criminal proceedings or other proceedings under this Subpart or any other law of this state. If the violation is prosecuted by an information or indictment which alleges that the violation was committed knowingly, or intentionally, such person, upon conviction shall be punishable by imprisonment for not more than six months, or to payment of a fine of five hundred dollars or both."

The very term "civil fine" seems, under our law, to be self-contradictory and its validity has not yet been tested.¹¹¹ However, it is important to note that if this section is held to be valid, it will provide an extremely strong device to be used at the discretion of the prosecutor. As mentioned, included among the listed offenses is that of distribution and dispensing controlled dangerous substances, the penalty for which is \$500 and/or 6 months, and a civil fine of not more than \$15,000. However, under section 971 the same offense is punishable by a fine of \$15,000 and/or imprisonment with or without hard labor for not more than ten years if it is non-narcotic.¹¹² Thus it may be readily seen that

111. As is obvious from a reading of § 972(b) (note 110 *supra*) many different interpretations are possible; however, three of these should suffice to illustrate the complexity of the problem. The first interpretation will be depicted by the following scenario:

Defendant A, after being arrested for altering a symbol (presumably on a drug container or drug itself) required by the Louisiana UCDSA, is prosecuted under an indictment which alleges that the violation was committed knowingly. Upon conviction, he is given a criminal punishment of six months and a five hundred dollar fine. Thereafter, the state, under this statute, will be allowed to enter suit, in civil court, against the defendant to receive judgment for the civil fine. At this proceeding (which shall be completely civil in nature and procedure), the burden of proof (as established by the statute) will be proof of the prior conviction of the defendant. Once the state has proved this prior conviction (by a preponderance of the evidence) the defendant will be held liable for a judgment to be paid to the state of not more than fifteen thousand dollars.

Under this interpretation, it will be seen that the legislature has created for this section both a criminal sanction and a civil cause of action complete with its own burden of proof. In this situation, the court would allow introduction of the record of the prior conviction for its substantive value in proving the facts asserted therein. By so doing, the court will have fulfilled the obvious legislative mandate of allowing hearsay (the record itself) and opinion (the conviction itself) testimony in this instance. The power of the legislature to alter the rules of evidence is exemplified in LA. R.S. 13:3714 (Supp. 1966) which allows the introduction of hospital records as prima facie proof of their contents. Again under this interpretation, in order to facilitate an understanding of the language of § 972(b), the two sentences dealing with civil fines should be read after, rather than prior to, that dealing with the criminal sanction. In this case, the language would read as follows: "If the violation is prosecuted by an information or indictment which alleges that the violation was committed knowingly or intentionally, such person, upon conviction, shall be punishable by imprisonment for not more than six months, or to payment of a fine of not more than five hundred dollars, or both. Any person who violates this section shall, upon conviction be punishable by a civil fine of not more than fifteen thousands dollars."

Under a second interpretation, relying on the language "such proceedings will be independent of, and not in lieu of criminal proceedings," there would be no necessity for a prior criminal trial. In this case, a complete civil trial would be held and the state would be forced to prove beyond a reasonable doubt that the defendant committed the offense. This would be so because of the language "shall, upon conviction be punishable by a civil fine." (Emphasis added.)

Finally, the entire section, or parts thereof, could be interpreted as being unconstitutionally vague. See text accompanying note 115 *infra*, for authority in a similar situation.

112. LA. R.S. 40:971(b)(1) and (2) (Supp. 1970).

there exist different penalties for the same crime. It is submitted that, in any situation in which a person is arrested for distribution of a controlled dangerous substance, he may be tried at the district attorney's discretion under either R.S. 40:971 (felony and relative felony penalties) or R.S. 40:972 (misdemeanor penalties), but may be prosecuted only once.¹¹³

With respect to the prohibited acts themselves, there is a constitutional problem with Clause Six which prohibits the maintenance of any place whatsoever which is "frequented by persons using controlled dangerous substances in violation of this Subpart for the purpose of using such substances, or which is used for the keeping or selling of same. . . ."¹¹⁴ To meet basic constitutional standards, criminal laws must be sufficiently specific and accurate so any reader having ordinary intelligence will be clearly apprised as to whether or not his conduct will be denounced as an offense.¹¹⁵ This requirement is predicated upon a trilogy of Louisiana constitutional provisions including article I, section 10; article I, section 2; and article I, section 9¹¹⁶ and the sixth and

113. The test of double jeopardy is whether the evidence necessary to support a second indictment would have been sufficient to procure a legal conviction on the first indictment. Here the exact evidence would have to be presented in both. Thus the defendant may be prosecuted only once. See *State v. Andrus*, 250 La. 765, 199 So.2d 867 (1967); *State v. Richardson*, 220 La. 338, 56 So.2d 568 (1952); *State v. Schneller*, 199 La. 811, 7 So.2d 66 (1942); *State v. Foster*, 156 La. 891, 101 So. 225 (1924). Cf. LA. R.S. 14:4 (1950) which reads in part: "Prosecution may proceed under either provision, in the discretion of the district attorney, whenever the offender's conduct is"

"(2) Criminal according to an article of the Code or Section of this Chapter of the Revised Statutes and also according to some other provision of the Revised Statutes, or some constitutional provision."

114. LA. R.S. 40:972(a)(6) (Supp. 1970). The 1934 Uniform Law designated as a common nuisance "any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or any place whatever, which is resorted to by narcotic drug addicts for the purpose of using narcotic drugs or which if used for the illegal keeping or selling of the same. . . ." LA. R.S. 40:974 (1950). There are no cases interpreting this section, but apparently from the language of the statute, a nuisance exists only if: (1) the place is frequented by addicts as a place to use narcotics, or (2) if drugs are kept or sold there. Contrast this with the new law which is not limited to addicts, but includes any person unlawfully using drugs.

115. See *State v. Williams*, 248 La. 890, 182 So.2d 526 (1966); *State v. Cloud*, 248 La. 125, 176 So.2d 620 (1965); *State v. Wiener*, 245 La. 889, 161 So.2d 755 (1964); *State v. Hertzog*, 241 La. 783, 131 So.2d 788 (1961); *State v. Robertson*, 241 La. 249, 128 So.2d 646 (1961); *State v. Murtes*, 232 La. 486, 94 So.2d 446 (1957); *City of Shreveport v. Brewer*, 225 La. 93, 72 So. 308 (1954); *State v. Penniman*, 224 La. 95, 68 So.2d 770 (1953); *State v. Truby*, 211 La. 178, 29 So.2d 758 (1947).

116. LA. CONST. art. 1, § 10 provides: "In all criminal prosecutions, the accused shall be informed of the cause and nature of the accusation against him. . . ." *Id.* § 2: "No person shall be deprived of liberty or property except by due process of law." *Id.* § 9: "The accused . . . shall have the right to defend himself. . . ."

fourteenth amendments to the United States Constitution.¹¹⁷ The ambiguity of Clause Six arises from the fact that possession and use of controlled dangerous substances are in themselves criminal acts. The keeper of the premises, therefore, is required to foresee whether or not persons in his establishment are guilty of the crimes of possession or use. As he has no power to do so conclusively (since this is a task of the courts, not private individuals) he is effectively relegated to a position of having to guess whether or not his own conduct is criminal. Simply stated, his conduct is not criminal unless theirs is; since he has no power to make such a determination, he cannot discover whether or not his conduct is illegal. The vagueness of the statute is self-evident.¹¹⁸

Within the definition of "distribution of a controlled dangerous substance"¹¹⁹ is included both sale and giving of the substance to another.¹²⁰ With respect to social practices of today, this definition may cause some difficulties because it does not specifically differentiate between possession and distribution. For instance, if a person bought a "lid" of marijuana and shared it with his roommate, would he thereby be guilty of distribution? Would the result be different if both roommates put up the money? What if only one made the pickup of the drugs? Or would the question of distribution resolve itself to who was holding the "joint" when they were "busted"? As can be seen, the problem of distribution cannot easily be settled by a decision of who was giving what to whom, but rather can often involve elements of financial and moral responsibility. Surely if two roommates purchased illicit drugs for their own use, it would be ludicrous to suggest that one was "dispensing" the drug to the other merely because he had possession at the time.¹²¹

117. U.S. CONST. amend. VI: ". . . and to be informed of the nature and cause of the accusation . . ." *Id.* amend. XIV: "Nor shall any state deprive any person of life, liberty, or property, without due process of law . . ."

118. Comparison should be made between this statute and a similar one which prohibits the letting of a disorderly place. In order to be convicted of the latter, it is necessary that the owner have actual knowledge of the illicit activity. LA. R.S. 14:105 (Supp. 1970) reads in part: "Letting a disorderly place is the granting of the right to use any premises *knowing* that they are to be used as a disorderly place . . ." (Emphasis added.) *See State v. Rose*, 147 La. 243, 84 So. 643 (1920).

119. Distribution is prohibited by LA. R.S. 40:971, 40:972 (Supp. 1970).

120. *See id.*, which reads: "'Distribute' means to deliver a controlled dangerous substance . . ."

121. A possible solution to a situation such as this may be found in a recent case in which the non-possessing partner was convicted of "constructive possession" and the issue of internal dispensing ignored. Justice

Forfeiture

Although the prior Uniform Law provided that all illegally possessed narcotics were forfeited to the state,¹²² this coverage was found to be too narrow, and therefore Subpart B was added in 1948. It provided for the forfeiture of conveyances¹²³ used in violation of the narcotic law, but exempted common carriers and conveyances in possession of a third party in violation of the criminal laws of the United States or of any state, and was not to be applied to the detriment of mortgage holders.¹²⁴ Thus, although the act protected the owner of a stolen conveyance from forfeiture, it did not protect the owner who loaned his car to one convicted subsequently of violating the narcotic law while in possession of the borrowed car.

Under the UCDSA those items subject to forfeiture include controlled dangerous substances which have been produced, manufactured, distributed, dispensed, or acquired in violation of the law; material and equipment used or intended for use as a container for illegal substances; and all printed, written, filmed or taped material used or intended to be used to violate the act.¹²⁵ Finally, the act calls for the forfeiture of all conveyances including aircraft, vehicles, or vessels which are used or intended to be used to transport illegal substances. As did prior law, the UCDSA excludes common carriers and conveyances unlawfully in the possession of another person; however, as amended, the UCDSA protects the owner from seizure due to offenses committed in his automobile without his knowledge or consent.¹²⁶

Tate, speaking for the majority, stated: "A person may be in constructive possession of a drug even though it is not in his physical custody, if it is subject to his dominion and control. Also a person may be deemed to be in joint possession of a drug which is in the physical custody of a companion, if he willfully and knowingly shares with the other the right to control of it." *State v. Smith*, 257 La. 1109, 245 So.2d 327 (1971). It is submitted that such reasoning offers a rational and justified solution.

122. La. Acts 1934(2d E.S.) No. 14.

123. La. Acts 1948, No. 443.

124. As previously discussed, this provision should still be considered valid. See text accompanying note 52 *supra*. In this respect, the procedural aspect of forfeiture designed in La. R.S. 40:1002 (Supp. 1951) and not reproduced in the UCDSA should also be considered valid.

125. La. R.S. 40:983 (Supp. 1970).

126. La. Acts 1971, No. 59, § 13(b) provides: "No conveyance shall be forfeited under the provisions of this section by reason of any act or omission upon proof by the owner thereof that such act or omission had been committed or omitted by any person other than such owner *without the consent of the owner.*" (New language in italics.) As opposed to this, the prior enactment of 1970 concluded "while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws"

Seizure of property under this section can be executed as an incident to a lawful arrest and search, or under forfeiture in a prior criminal proceeding. All Schedule I substances illegally possessed in the state are deemed contraband and upon seizure are summarily forfeited to the state; plants producing substances found in Schedules I and II may be seized and summarily forfeited to the state if the person occupying the premises does not possess proper registration papers.

Treatment, Education and Research

Prior to the 1948 amendment of the Uniform Act which outlawed drug addiction, the state provided for mandatory or voluntary commitments of addicts by a district judge to be treated at public expense.¹²⁷ Although the UCDSA has no specific provisions for the commitment of addicts, they may nonetheless be committed under the general provisions of the parole and probation articles. The Louisiana Narcotics and Rehabilitation Commission¹²⁸ was created as Subpart E of the Uniform Act in 1968 and empowered to carry on experimental pilot programs for the treatment and rehabilitation of addicts, but, as of this writing, no such programs have been reported.¹²⁹

Additionally, the UCDSA authorized the State Board of Health to carry out educational programs concerning drug abuse and to encourage research on the use and abuse of dangerous substances. In cooperation with the Louisiana Narcotics Rehabilitation Commission, the board can authorize the use of controlled dangerous substances for research into their effects.¹³⁰

127. In 1894 the state provided for persons addicted to narcotics to be treated at the expense of the city or parish in which they resided. La. Acts 1894, No. 157. This was followed by Act 252 of 1918 providing for the mandatory commitment of addicts by district judges, and was considered effective even after the passage of the Uniform Act in 1934. For a discussion of the 1948 act, see 1934-36 ATT'Y GEN. ANN. REP. 642; 1936-38 LA. ATT'Y GEN. ANN. REP. 366. See also *Reporters' Notes*, 23 LA. STAT. ANN. 40:981, at 424 (West 1950).

128. A discussion of this commission will be found in 18 LA. BAR. J. 23 (1970).

129. LA. R.S. 40:1051-56 (Supp. 1968). It is submitted that the lack of educational programs concerning drug abuse is lamentable inasmuch as it is felt that the final (and quite possibly the only) solution to the problem of drug abuse will be one in which the drug addict makes a voluntary effort to overcome his problem, based on adequate knowledge of the dangers it presents to his health and life.

130. LA. R.S. 40:968 (Supp. 1970). In La. Acts 1971, No. 59, § 6, now LA. R.S. 40:964 (Supp. 1971) the legislature provided that fees collected for licensing and registration by the State Board of Health would be deposited in a separate fund to be used for education and research.

Burden of Proof: Liabilities

As in the previous law, in any complaint, information or indictment, it is not necessary for the state to negate any exemption or exception,¹³¹ and such exemption must be proved by the person claiming its benefit. However, this is considered a rule of procedure and does not shift the burden of proof; the state must still prove guilt beyond a reasonable doubt.¹³² Additionally, in the absence of a proper registration form, a person in possession of a controlled substance is presumed not to be the holder of such a form and "the burden of proof is on him to rebut such presumption."¹³³ Finally, although the act also states that it imposes no liability on law enforcement officers engaged in the enforcement of any law or ordinance concerning a controlled dangerous substance,¹³⁴ this section should not be read to exclude liability imposed on officers from provisions outside the act, such as civil actions for false arrest and violations of the civil rights statutes.

Exclusions

Most notably, the UCDSA does not make the condition of being an addict an offense nor does it prohibit the possession of a hypodermic syringe or needle. In the last decade there has been much written in favor of classifying drug addiction, like alcoholism, as an illness instead of treating it as a criminal offense.¹³⁵ Apparently, Louisiana has recognized this condition as being an illness, inasmuch as the UCDSA has repealed the former provision which defined addiction itself as a crime.¹³⁶ The previous law making it a crime to possess a hypodermic syringe was declared unconstitutional as an unreasonable exercise of the state police power,¹³⁷ and, although the decision stated that Louisiana could properly make the use of the syringe in administering illegal drugs a criminal offense, the legislature chose not to do so.

Finally, the prior law provided that no defendant could be

131. LA. R.S. 40:979 (1950).

132. *State v. Jourdain*, 225 La. 1030, 74 So.2d 203 (1954).

133. LA. R.S. 40:984(b) (Supp. 1970).

134. *Id.* 40:984(c).

135. For an example see Comment, 13 *LOYOLA L. REV.* 99 (1967); T. BROWN, *THE ENIGMA OF DRUG ADDICTION* (1961).

136. See text accompanying note 19 *supra*.

137. See text accompanying note 22 *supra*.

tried in Louisiana if he had been convicted or acquitted in a federal prosecution, provided that the crime for which he was tried was also a crime in Louisiana.¹³⁸ This provision is not included in the present law, and as the decisions of the Supreme Court stand now, a defendant can be tried by both state and federal authorities for the same offense.¹³⁹

Conclusion

The UCDSA of 1970 is an earnest, well-designed effort to face the drug problem both realistically and effectively. Despite a number of inconsistencies or ambiguities, it represents an ambitious attempt at reasoned and comprehensive control of the field. Some of its features, such as the conditional discharge provisions, civil court actions and fines, and the reduction of possession penalties, await evaluation after a period of experience in their application, but they do represent an intelligent and creative effort to control drug abuse more successfully than has been the case in the past.

Specifically, the authors applaud the fact that the present bill does not outlaw as a crime the vice (or disease) of drug addiction as the previous act did.¹⁴⁰ Secondly, the enactment of a "conditional discharge of first offender"¹⁴¹ provision provides a well-reasoned device to permit the judiciary ample leeway to effectively temper the law when appropriate. Third, the more complete coverage of dangerous substances in the UCDSA effectively "plugs" most of the "loopholes" of the prior law. Fourth, the penalty provisions represent a distinctly more realistic and humane approach to the problem of drug abuse; however, in establishing only one penalty for possession of all scheduled drugs, the legislature has established a system both too rigid and too severe for the offenses included. Under the present system, the penalty for illegally possessing cough medicine (a Schedule V drug) is the same as that for possession of heroin (Schedule I).¹⁴²

Finally, it is felt that the greatest achievement of the UCDSA

138. LA. R.S. 40:982 (1950).

139. However, notice should be taken of the holding in *Waller v. Florida*, 397 U.S. 387 (1970) prohibiting consecutive municipal and state prosecutions for the same offense. It is possible that this decision will be extended to prosecutions by the state and federal government in the future.

140. LA. R.S. 40:961 (Supp. 1970).

141. LA. R.S. 40:977.1 (Supp. 1970).

142. *Id.* 40:971(c).

is its contribution to a lessening of the social costs of Louisiana drug legislation. Often the benefits of prohibitive laws are exposed without regard to their attendant costs to society.¹⁴³ For example, with respect to marijuana prohibitions this problem becomes especially acute. As has been noted,

- (1) Marijuana prohibition "criminalizes" an ever increasing number of our population, many of whom are young and developing and have no prior criminal record.
- (2) Many people view the present marijuana laws as irrational and unjust, and in so doing develop a generalized disrespect for the law as a whole.
- (3) Harsh marijuana laws furnish a protected market for organized crime.
- (4) Enforcement of such laws may divert needed police manpower and financial resources from other more vital areas of crime.¹⁴⁴

It has been stated: "Whether or not costs of our drug laws do outweigh the benefits we receive from them, it is important to remember that we do in fact pay a price for these benefits. And to the extent that it is possible to do so, we should be quite sure that we know what the price is and that the benefits are worth the price before we pay it."¹⁴⁵ It should be recognized that

143. Kaplan, *What the Legislator Should Consider*, in *DRUGS AND YOUTH* 250 (J. Whittenborn, H. Brill, J. Smith eds. 1969): "Although most people do not think of it this way, the passage of a law or group of laws is very much like a purchase by society of a package of social effects. In this view, any social action should be judged by the same kinds of criteria which would determine the initiation by the defense department of a new weapons system or the decision by a manufacturer to put out a new product line. The crucial question which should be asked in all of these cases, is 'what are you paying total costs, financial and other, for the product, and what are you getting for your outlay?' In all these situations a choice may involve a very difficult calculus. First, often the costs, especially the social costs, are difficult to measure with precision. And second, the advantages of the action—what you are buying for your costs—are usually not known except by means of more or less intelligent guesses. The important thing to note, however, is that each social action which is worth talking about, including the drug laws, has its costs. While in some cases the disadvantages of alternative policies or the benefits of a given course of action make these costs bearable—and indeed, often cheap—we should never lose sight of the cost of a policy in determining its overall wisdom."

144. Rosenthal, *Two Problems and a Lesson for the Draftsman of Drug Crimes Legislation*, 24 S.W.L.J. 407, 416-17 (1970).

145. *Id.* at 417.

drug legislation is not an "all or nothing" situation. There exist alternative methods for reducing the social costs besides legalization. Examples of such compromise solutions included in the UCDSA are conditional discharge provisions, civil court actions and fines, reduction of possession penalties and emphasis on the apprehension of traffickers.

Vance R. Andrus and Charles R. Moore

DOUBLE JEOPARDY— DEFINING THE SAME OFFENSE

The ancient laws provided that the state could not twice put a person in jeopardy for the same offense. There was limited expression of this principle in the *Digest* of Justinian, and the proscription was firmly entrenched in English common law by the seventeenth century.¹ A prohibition was incorporated into the fifth amendment of the United States Constitution which provides in part, "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . ."² This guarantee has recently been applied to state proceedings via the due process clause of the fourteenth amendment in *Benton v. Maryland*. The *Benton* ruling, however, merely affirmed a maxim already accepted in all state constitutions and statutes.⁴

The purpose of this Comment is to examine the various standards used in determining when a second jeopardy exists and to evaluate their effectiveness in terms of the principles underlying the double jeopardy clause. Particular attention will be

1. Comment, 75 YALE L.J. 262 n.1 (1965): "Actually the double jeopardy principle existed in the days of the Greeks and Romans Canon law contained a similar principle. There is evidence that a plea similar to double jeopardy may have appeared in English law as early as the fourteenth century, but the earliest conclusive evidence of the principle appears in writings of Hale (seventeenth century), and Coke (seventeenth century), and later in Blackstone (eighteenth century)."

2. U.S. CONST. amend. V.

3. 395 U.S. 784 (1969).

4. See, e.g., LA. CONST. art. I, § 9: ". . . nor shall any person be twice put in jeopardy of life or liberty for the same offense, except on his own application for a new trial, or where there is a mistrial, or a motion in arrest of judgment is sustained." See also Comment, 21 LA. L. REV. 615 (1961): "The maxim 'nor shall any person be twice put in jeopardy of life or liberty for the same offense' is incorporated into Article I, § 9, of the Louisiana Constitution. Although the phraseology may differ, this maxim is accepted in all federal and state courts."