The Origins of Canadian Narcotics Legislation: The Process of Criminalization in Historical Context

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The year 1972 saw a federal Commission investigating the non-medical use of drugs recommend repeal of the offence of possession of marijuana\(^1\), an indication that state policy with respect to the social control of psychoactive substances was undergoing a thorough re-appraisal. It is not surprising, then, that the past decade should also have seen a considerable degree of academic interest in Canada's initial attempt to make criminal the citizen's desire to alter consciousness.

A comprehensive review of this admirable collection of research reveals that Canada ought not to take pride in these initial efforts. The initial statute has been explained with reference to its "racist and moralistic foundation", by the "galloping reformist zeal of Mackenzie King" and by the increasing affront of "cheap Oriental labour".\(^2\) The creation of law is viewed as the product of a process

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of social conflict; it is not suggested that the law was the reflection of an emerging consensus of opinion within the Canadian people.\(^3\)

What remains unclear, however, is the process of social conflict itself; there is disagreement with respect to the modes of conflict and the structures of power that created this legislation. Chambliss and Dolinski have both suggested that the changing nature of economic relationships was responsible for anti-opium legislation.\(^4\) Small, Solomon and Madison, and Green have urged rather that pluralist conflict gave rise to Canada's first prohibition of opiate use. These authors have implied that the interactions of various essentially unrelated interest groups produced the laws that would control the "non-medical" use of drugs. While critical of the premises of the anti-drug ideology of the day, these authors appear to imply that the social democratic tradition of pluralist conflict merely misfired in the instance of Canadian narcotics legislation. Small, Solomon and Madison, and Green, while they give us historical data on the process of criminalization, fail to inform us as to what the data say about such a process in theoretical context.

Chambliss and Dolinski make the bold claim that criminalization here was a consequence of purely materialist forces, thereby supporting a culturally materialist, or "Marxist"\(^5\) view of history. Small et al. stand implicitly in opposition, suggesting nothing more than that a plurality of interest groups unhappily shaped a statute of repressive character.

The present work seeks to expand, both empirically and theoretically, upon the historical context of the process of criminalization. The empirical data have revealed a theoretical tension — the pluralist conflict view of the process of law creation is challenged by a view that sees economic exploitation as the effective cause of criminalization. These two positions represent the poles of a highly simplified ideological discourse. The rich tradition

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3. All of the academic literature to date on the subject of Canadian narcotics legislation supports the conflict model of law creation. One might fairly say that the empirical evidence simply precludes any notion of the legislative emergence of an informed consensus of opinion.


5. The use of the term "Marxist" is problematic. Dialectical materialism, economic determinism, and state communism have all been graced with the label of Marxism, despite their significant theoretical differences. It may be that the term Marxist is simply too nebulous to be of explanatory utility.
of Marxian analytic thought demands interpretation in the context of twentieth century North America; implicit acceptance of a pluralist conflict model reveals the mighty but problematic Hegelian notion that a contradiction of ideas produces a social order in an evolutionary context.

It is suggested that materialist and ideational analyses of the process of criminalization are most appropriately viewed as complementary and not as competing constructions of social reality. As Robert Heilbroner has noted, it can be said that not only did Marx turn the Hegelian construct on its head, but so too, in retrospect, does Hegel dislocate the consistency of Marx.

In the context of the emergence of Canadian narcotics legislation it can be seen that while material life created contradictions that required political decisions, it was ideational life that attempted the resolution of capital's contradictions. It is to an empirical substantiation of this hypothesis that we now turn.

I. The Evolution of Narcotics Legislation

It is only since 1908 that the social control of altered states of consciousness has been, perhaps unwittingly, a state priority in Canada. The initial two-section statute prohibited the importation, manufacture, and sale of opium and established a penalty of not less than fifty dollars for contravention of the Act. A maximum penalty of three years imprisonment was also provided for. Sale of existing opium stocks was allowed for six months following the statute's enactment, apparently as a concession to the merchants of the industry.

The next twenty-one years would see the institutionalization of the ideology of criminalization, a development which has been the subject of much critical scrutiny. Melvyn Green has most recently said of these "formative years" that "The process of legislative revision eventually led to a moral redefinition of narcotic drug use.

8. 7-8 Edward VII, s.c. 1908, c. 50, s. 1.
9. Green argues that the work of the Senate prompted this concession, a concern for the "legitimate investments of opium manufacturers". M. Green, supra, note 2 at 47.
10. See note 2, supra. See most especially M. Green and Solomon and Madison, amplifications of the exploratory work begun by Shirley Small.
What was once viewed as a private indulgence came to be regarded almost universally as a public evil. Contrary to what might be expected, it was changes in the criminal law that brought about the transformation of public attitudes, and not the converse proposition.11

Green, though he surely appreciates the social contexts in which law arises, here presents what might be best characterized as a deceptively attractive hypothesis. While one cannot quarrel with the fact of moral re-definition of opiate use, one is hard pressed to find evidence to support the notion that it is the law that has transformed public attitudes. As William Chambliss has noted, "The law may be hallowed but it does not exist in a vacuum".12 The assertion that law can transform public attitudes is tantamount to a reification of law; it ignores the human medium through which law is both enacted and enforced.

The claim that law can create public attitudes is thus problematic: it too easily excuses human beings for their actions and implies the absence of an often cited dialectical relationship — social life as both a construction of reality, and as a reality in the process of construction.13 The assertion that law can transform public attitudes is more an attribution of blame than it is a description of events in historical context; there is a need to scratch this surface.

1. The Decision to Criminalize 1870-1908; The Social Control of Consumer Preference

In 1879 one had to pay the city of Vancouver $500 if one wanted to enter the business of dealing in opium.14 The profits were lucrative and the city felt that it had a right to a certain percentage of the annual take. Federal records indicate that tens of thousands of pounds of crude opium were imported annually into Canada from 1876 to 1908.15 This opium was principally destined for Caucasian pharmaceutical companies and Chinese opium factories in British Columbia. The Chinese opium factories produced smoking opium;

11. M. Green, note 2, supra, at 43.
13. This is a point that is made throughout Berger and Luckmann, note 6, supra. See especially p. 207-211.
14. See Trasov, note 2, supra, Green, note 2, supra.
15. Statement Showing the Quantity and Value of Opium Imported into Canada During the Fiscal Years 1867 to 1908 Inclusive, Public Archives of Canada, Department of Customs, C.M.G. 26, J-4, Vol. 30, Ottawa, 1908.
the pharmaceutical companies produced opiated tonics, elixirs, cough syrups, analgesics, and patent medicines.\textsuperscript{16} The Caucasian pharmaceutical companies did not pay the $500 licensing fee expected of opium merchants; they were naturally not perceived as such.\textsuperscript{17} The Caucasian intake for relief from pain was legally differentiated from the Chinese intake in pursuit of pleasure. The settings and circumstances in which one used opiates were of qualitative importance; the racial origin of the merchant was also naturally a variable of significance. Most important, though, was the international backdrop against which British Columbia opiate use was emerging.

In 1839 and in 1856 Britain had gone to war against China in order to preserve and expand British India trade in opium.\textsuperscript{18} As a consequence of the Chinese defeat in 1856, Britain ultimately managed to obtain from China the legalization of opium smoking and trading within Chinese boundaries in 1858;\textsuperscript{19} China, however, managed to obtain the right to impose taxes on opium imported from India. As Chambliss has noted, "Legalization (ironically) . . . planted the seed that would eventually destroy the profits and the British opium monopoly. For with legalization came (a) taxes and (b) the legal right of Chinese farmers to grow their own opium. Competition would shortly ruin the hard-won right to import opium from India into China."\textsuperscript{20}

The period of transition was, nevertheless, of some 50 years duration: it was not until the early twentieth century that the opium trade shifted from India to South China and the Golden Triangle. At the time of Canada’s first anti-opium legislation, British India’s profits from opium were still substantial, though competition from China was obviously increasing. By the 1880’s the Chinese province of Szechwan was harvesting an estimated ten thousand tons of raw opium annually.\textsuperscript{21}

\textsuperscript{16} See Solomon and Madison, note 2, \textit{supra} at 238. See also the Vancouver Province, selected advertisements, 1900-1907, Vancouver, B.C. for primary source data.
\textsuperscript{17} See the City of Vancouver by-laws, consolidated 1879.
\textsuperscript{18} For a good discussion of China’s development in the late nineteenth century see Jean Chesneaux \textit{et al.}, \textit{China From the Opium Wars to the 1911 Revolution} (New York: Pantheon Books, 1976).
\textsuperscript{20} Chambliss, note 4, \textit{supra}, at 120.
\textsuperscript{21} McCoy \textit{et al.}, note 11, \textit{supra}, at 64.
On the domestic front, the latter half of the 19th century saw substantial Chinese immigration into both California and British Columbia. The Chinese of 1870 British Columbia were welcome additions to the owners of West Coast industry in a time of labour shortage; the Chinese were industrious workers with few financial expectations.22 The Chinese opium habit was initially only of financial interest to the municipal, provincial, and federal governments; the new opium business amounted to one more means of raising government revenues.

As Solomon and Madison have pointed out, "The tolerant attitude towards the Chinese, and Chinese opium smoking lasted only as long as the labour shortage. The decline in railroad construction and the end of the gold rush reduced job opportunities, first in California during the 1870's and subsequently in British Columbia during the 1880's. The Chinese, once welcomed as a cheap source of labour, were now resented for this very reason. White labour could not compete with the Chinese workers, who were unmarried and lived frugally. It was not the white businessman who was blamed, but the Chinese labourers he hired, for they were willing to work for a salary a white man could not live on."23

Towards the end of the nineteenth century, then, the British in India were losing control of the lucrative opium trade; the Chinese of British Columbia were finding increasing hostility in the infant nation state of Canada. Chambliss has argued that, "As the opium trade became less profitable for Europeans (most importantly the British), anti-opium legislation began to appear in most Western countries. A series of International Opium Conferences . . . were the consequence of the changing economic realities which helped spread anti-opium sentiment and subsequent legislation."24

Chambliss has urged the radical hypothesis that criminalization of opium occurred as a consequence of its declining profitability in the West. By shutting down potential markets for expanding Chinese opium production, the West could help to minimize the economic gains that China could make as a consequence of its emerging

22. The Chinese made a good deal less than the whites in Canada but still some ten times what they could be making, had they remained in China. This differential is documented by the Report of the Royal Commission Appointed to Inquire Into The Methods By Which Oriental Labourers Have Been Induced To Come To Canada (Ottawa: Government Printing Bureau, 1908), at p. 70.
24. Chambliss, note 4, supra, at 192.
control of the opium market. The Canadian experience of criminalization can lend little support to the Chambliss hypothesis, though, as we shall see later, it does reveal that domestic economic concerns were an integral force in Canada's early efforts.

The year 1885 saw both declining employment opportunities on the West Coast and the appointment of a Federal Royal Commission on Chinese immigration.25 The Commission proposed a $50 tax on most Chinese entering the country;26 the proposal was enacted within the year.27 In 1901 the tax was increased to $100, in 1904 to $500.28 This can now be seen as a kind of interference with the labour pool of West Coast industry, necessitated by the clamouring of the economically vulnerable white working class.

The Chinese Immigration Act of 1900 had exempted Chinese merchants, Chinese men of science, and Chinese students from payment of the $100 entry tax; it was only the Chinese who would labour for West Coast industrialists who would be subject to such a penalty for admission.29 As the tax on Chinese labourers increased, there was a dramatic decline in Chinese immigration — and a dramatic increase in Japanese immigration. The voice of the white working class had temporarily stemmed the tide of Chinese immigration, but the owners of industry were now managing to acquire the alternative of cheap Japanese labour.30 Japanese admissions increased from none in 1904 to just under 2,000 in 1906 to over 7,500 in 1908.31

Mackenzie King, appointed in 1908 to inquire into the methods by which Oriental labourers had been induced to come to Canada, revealed a comprehensive understanding of the interactions of labour, government, and the owners of industry.32 The $500 entry

25. For a good description of the importance of the federal Commission see Green, Solomon and Madison, Cook, and Trasov, note 2, supra.
26. Chinese merchants, Chinese men of science and Chinese students would not be required to make such a payment for admission.
27. The Chinese Immigration Act, 1885, s.c. 1885, c.71, s.4.
28. The Chinese Immigration Act, s.c. 1904.
29. Section 6 (a) (b) and (c) of the 1900 Act set out the exemptions from entry tax in the case of Chinese immigrants.
30. Chinese immigration decreased from over 5,000 in 1903 and over 4,000 in 1904 to under 100 in 1905. Canada, The Canada Year Book, 1932, (Ottawa, 1932).
32. While King most often blurred the distinction between “moral” tones and physiological effects in consideration of various drugs, he is often revealed here as an astute practitioner of political economy.
tax, King observed, was having the effect of creating greater bargaining power for the Chinese immigrants already resident in Canada prior to 1904. The tax had effectively cut off Chinese immigration; the "coolie labourer", willing to work for substantially less than the white labourer, was always a highly useful energy source for Canadian corporations. By 1906 the average wage of the Chinese labourer had gone from $30 per month to $65 per month — an increase of over 100 percent in less than two years. The Chinese labourer, while still earning less than the white labourer, had at least marginally diminished the economic power of the owners of industry; there was an acknowledgment of utility.

King was also able to astutely forecast the ultimate irony that the $500 tax would impose. The Chinese labourer, King noted, could save a life's earnings in China after working in Canada for a few years. The newly affluent would then be able to afford to bring over friends and relatives or to return and sponsor the coming of other Chinese. From 1904 to 1913 Chinese immigration would grow from 77 annually to 7,445 annually.\(^3\) The $500 entry tax, designed as an appeasement for the fears of white workers, in fact created a labour monopoly of sorts for the Chinese workers already in British Columbia. This labour monopoly, King noted, when coupled with the value of Canadian currency in China, would allow Chinese immigration to continue strongly from 1908 onwards.\(^3\) In fact, it was not until 1923 that an exclusionary immigration policy was finally arrived at.\(^3\)

On the international front, the dawn of the twentieth century saw the Central Government of China beginning to sound the alarm on opium. The Imperial Decree of September, 1906, read, in translation:

Since the restrictions against the use of opium were removed, the poison of this drug has practically permeated the whole of China. The opium smoker wastes time and neglects his work, . . . and impoverishes his family, and the poverty and weakness which for the past few decades have been daily increasing amongst us are undoubtedly attributable to this cause . . . at a moment when we are striving to strengthen the Empire, it behooves us to admonish the people . . . It is hereby commanded that within a period of

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33. See note 30, supra.
ten years the evils arising from foreign and native opium be equally and completely eradicated.\textsuperscript{36}

Those who had the power of government were telling the people of China to relinquish the indulgence of opium, in order to effect what was perceived as a need for greater economic productivity.

The Manchu dynasty had launched a vast program of reform at the beginning of the twentieth century. As Chesneaux \textit{et al.} have noted, "Reform was intended to create a modern state by developing centralization, specialization and information."\textsuperscript{37} The Imperial Decree of January, 1901 announced, "The teachings handed down to us by our sacred ancestors are really the same as those upon which the wealth and power of European countries have been based, but China has hitherto failed to realize this and has been content to acquire the rudiments of European languages or technicalities, while changing nothing of her ancient habits of inefficiency. . .".\textsuperscript{38}

In 1906, an estimated 13 million opium smokers in a population of some 400 million people was seen as symptomatic of such inefficiency.\textsuperscript{39} Those in favour of expanding material production in China had the power of government; they had decreed that the social control of a consumer preference was a necessity. The use of a dream-inducing sedative was incompatible with the vision of an emerging industrial state.

Indeed the use of such a sedative could be seen as inimical to the interests of any who might aspire to power. Both the materialist revolutionary and the guardian of the status quo must ultimately prohibit such an alteration of consciousness.\textsuperscript{40}

On January 27, 1908, Britain and China entered into an agreement intended to bring about just such a prohibition — the world-wide cessation of the opium trade — an agreement that can

\textsuperscript{36} British Documents to the Shanghai Commission; Mackenzie King Papers, Public Archives of Canada, 1909 at c. 136-139.

\textsuperscript{37} "China from the Opium Wars to the 1911 Revolution", note 18, \textit{supra}, at 345.

\textsuperscript{38} \textit{Ibid}, at 380.


\textsuperscript{40} Those who are interested in the attainment of power must not weaken such resolve. In addition they must shun the possibility of the psychological ambivalence necessarily induced by a non-ordinary consciousness. As Harvard trained physician Andrew Weil has noted, "...when we enter nonordinary reality, our relationship to the pairs of opposites changes. Instead of trying to hold one and
now perhaps facetiously be cast as the 10 percent solution. The British would bind themselves to reducing opium exports from India at the rate of 10 percent per year, for a period of three years; China would in turn reduce production of its opium at a similar rate. The ultimate goal of the agreement, if the initial three year period should prove satisfactory, was to stamp out the “evil” of opium addiction within ten years.

Economic interests most obviously precluded the immediate cessation of the trade. Mackenzie King’s correspondence reveals Canadian doubts about the ultimate efficacy of the internationally sanctioned 10 percent solution. King wrote that, “Much has been said about the ten year period being too long. The conviction I reached while in Shanghai, was that if in ten years the traffic were wiped out it would be the most remarkable reform in the matter of time the world had ever known . . . As it is, it means almost an industrial revolution to effect the change desired in the period of ten years.”

The King Diaries further reveal King’s awareness of the economic interests that necessitated a gradual reduction of the international trade in opium. He noted that, “So far as the effect in India was concerned it meant of course, the loss of considerable revenue to the Indian Government, but what was the greater problem, it meant the loss of almost the entire revenue to some of the native states. The natives who had been accustomed to this export trade for years could not understand why it should be stopped. The moral aspect of it was not as apparent to them as to us.”

41. The 10 percent solution was, of course, anything but a solution. It merely documented the existence of a tension between the owners of the industry and the Chinese government — a tension that is still being played out today in somewhat altered form (different state, different sets of consumers).
43. King Diaries, Mission to the Orient, 1907-1909, Mackenzie King Papers, Public Archives of Canada, at 202-203.
The 10 percent solution, then, was necessitated by the fact that entire states in India and entire provinces in China derived almost all revenue from the production and marketing of opium; in an essentially monolithic economy the economic cessation of the trade could not be ignored.

The 10 percent solution, while motivated by a sincere desire to stamp out opium, had the ironic effect of putting yet more money into the pockets of owners of the industry. As the British Councillor Leech wrote from Peking in June of 1908:

From various quarters in China it is announced that the price of foreign opium is rising, and this increase is likely to continue in proportion to the reduction of production in China and of importation from abroad, except in the somewhat improbable contingency of the demand for the drug decreasing proportionately to the reduction of supply. There can be no doubt that foreign opium is superior both in quality and strength to the native product, consequently a great stimulus will be given to smuggling in a country where people attach more importance to quality than to price.\textsuperscript{44}

The 10 percent solution had given rise to the creation of false scarcity — a mechanism which would ensure British opium merchants a substantial and continuing return from a lucrative market.

Such long-term kindness was not to be visited upon the Chinese opium merchant in British Columbia, for though the 10 percent solution would boost the prices of B.C. opium, the social milieu in which Canadian legislation was to take place would ultimately preclude the possibility of such a lengthy concession. The literature to date on "the formative years" of Canadian narcotics legislation has suggested that the Anti-Asiatic Riot of 1907 indirectly gave rise to opiate criminalization in Canada; it is to a detailed consideration of this sequence of events that we now turn.\textsuperscript{45}

In July of 1907 over 1500 Japanese arrived in the province of British Columbia, more than double the number of such admissions in any of the previous six months.\textsuperscript{46} Mackenzie King would later learn that several emigration agencies in Vancouver had accepted

\textsuperscript{44} "British Documents to the Shanghai Commission", note 33, \textit{supra}, Letter from Peking, June, 1908.

\textsuperscript{45} Melvyn Green uses the term "formative years" to apply to the period 1870-1929. It is within this period that we see the ideology of criminalization of "drug" use. See Green, note 2, \textit{supra}.

\textsuperscript{46} \textit{Report of the Royal Commission}, note 19, \textit{supra}.
contracts to supply cheap Japanese labour for large Canadian corporations.\footnote{47} By late July both the provincial press and the Vancouver Trades and Labour Council were greatly agitated. The Vancouver Province featured daily articles on the Oriental “invasion”; the Vancouver Trades and Labour Council formed the Asiatic Exclusion League and began to hold public meetings.\footnote{48} Through the month of August provincial politicians took to the hustings in support of Anti-Asiatic sentiment. The Liberal member for Vancouver, R.G. McPherson, wrote to Laurier, “It is the last thing I want to be, but I can see without any difficulty the Province of British Columbia slipping into the hands of Asiatics and this part of Western Canada no longer a part and parcel of the Dominion.”\footnote{49}

It was in the context of this rampant paranoia that the Anti-Asiatic riot of September, 1907, was to take place. The Asiatic Exclusion League, inspired by the economic fears of the white workers, held a large protest rally at City Hall on the night of September 7th. A problem which was essentially of an economic origin was being translated into a problem of racial “domination”.

A crowd of 9,000 converged on City Hall; an immediate end to all immigration from Asia was demanded. The angry mob drifted from the meeting into the Chinese district and within a period of four hours the Chinese and Japanese quarters of Vancouver had sustained substantial property damage.\footnote{50}

The Deputy-Minister of Labour, Mackenzie King, was sent to Vancouver in October of 1907 to satisfy Japanese claims for losses incurred; settlement of Chinese claims was not considered a priority at the time.\footnote{51} King wrote to Laurier while in Vancouver, “The feeling in this city and in the other parts of the Province wherever I have been, is very generally strong anti-Japanese. I believe it is no

\footnote{47. Ibid.}  
\footnote{49. Letter to Laurier, quoted from Laurier papers in “White Canada Forever”, at 196, note 46, \textit{supra}.}  
\footnote{50. “White Canada Forever”, note 48, \textit{supra}, at 202.}  
\footnote{51. Ward, note 48, \textit{supra}, has argued that “While Laurier felt compelled to reimburse the Japanese for their losses, he felt no similar need to meet Chinese claims. Evidently China’s lack of international prestige, her less aggressive efforts to protect the welfare of her citizens overseas, and her more distant relations with Canada and the Empire led him to conclude that they could be treated with less respect and charity.” (at 211).}
longer merely a labour, but has become a race agitation...the fact that the Japanese have proven themselves the equal of the white man in so many ways has caused people of all classes to fear their competition. Nothing has surprised me more than to find, in conversation with persons who have every reason to wish for an increase in the available supply of labour a very decided opinion that other than Japanese labourers must be sought." King recognized, then, that the impetus for fears of racial domination had an economic origin.

In the spring of 1908 King returned to Vancouver to settle claims for Chinese losses, a settlement for which he had pushed some six months prior. He had been distressed by Laurier’s refusal to consider Chinese claims. ‘‘It looked as tho’ we were afraid of the power of the people (the Japanese) — that fear not justice was the motive’’, King stated. It was the Chinese, then, who were at the bottom of the social and economic pecking order of 1908 British Columbia; it was the rights of the Chinese that appeared as most vulnerable at this time.

In the course of settling claims from Chinese merchants, King received two requests for compensation from Vancouver opium manufacturers. The dialogue on May 27, 1908, between Lee Theung, manager of the Lee Yuen Opium Company, and Mackenzie King gives some insight into King’s concerns. ‘‘Question: Many white people buy it? Answer: Some. Q. How many? A. Some buy lots and some buy small. Q. Who are the best customers, white people or Chinese? A. White people. Q. Do you sell more opium to white people than you do to Chinese? A. Yes.’’

King’s general reaction to the opium business was documented in the next morning’s Vancouver Province. ‘‘Prosperous Chinese merchants startle King’’, said the newspaper of King’s first acquaintance with the Chinese opium industry. The day’s hearings would see a focus given to Commissioner King’s concerns. The Vancouver Province of May 29, 1908, reported a perceived

52. Letter to Laurier, Nov. 9, 1907, Laurier Papers, Public Archives of Canada, 131662-64.
53. King Diaries, October 12, 1907, King Papers, Public Archives of Canada, at C 2108.
need of a better licensing system for Chinese "druggists": "I will look into this drug business", said the Commissioner. "It is very important that if Chinese merchants are going to carry on such a business they should do so in a strictly legal way." 56

At this point, then, King had no intention of making opiate use illegal. On June 1, the Province reported, King received a deputation of local Chinese interested in anti-opium legislation. On June 3, King made the following statement to the assembled Commission, "My own opinion is that it should be made impossible to manufacture this drug in any part of the Dominion. We will get some good out of this riot yet." 57 In the course of three days government policy regarding psychoactive substances was effectively changed.

On July 3, 1908 King presented his "Report on the Need for the Suppression of the Opium Traffic in Canada", to Rodolphe Lemieux, the then Minister of Labour; three weeks later Canada would officially proscribe the importation, sale and manufacturing of opium. The report noted that opium smoking was increasing among young white men and women and that considerable profits were being made by the Chinese merchants. 58 Not surprisingly, the report also noted the support of many Chinese Canadians in efforts to suppress the trade. King led no precise evidence as to the physiological or psychological harm occasioned by opiate use but relied rather upon substantiated claims of "dire influence". 59 The crusade was a moral crusade, to King’s way of thinking. King appeared, though, quite unable to unravel the moral logic on which his desire for criminalization was premised.

The literature to date reveals confusion as to how to interpret all of this history — how to interpret the genesis of Canada’s first laws prohibiting psychoactive substances. Dolinski has suggested that, "... it was primarily the necessity to provide an ideological smokescreen to appease the white workers on the west coast that prompted this legislation." 60 Small, Solomon and Madison, and Green have argued rather that not only economic, but also political

56. Ibid, May 29, 1908.
57. Ibid, June 3, 1908.
59. King spoke of "ugly and horrible evidence" of dire influence — a "pretty and young" woman found in an opium den.
60. Dolinski, note 2, supra, at 41.
and cultural conflict gave rise to the 1908 statute: these authors have implicitly rejected a monolithic interpretation of law creation.

Our empirical consideration of the origins of Canadian narcotics legislation appears similarly to reject such a monolithic interpretation. As C. Wright Mills noted in 1959, "... we must always be historically specific and open to complexities. The simple Marxian view makes the big economic man the real holder of power; the simple liberal view makes the big political man the chief of the power system; and there are some who would view the warlords as virtual dictators. Each of these is an oversimplified view." Indeed, it is only when we examine the workings of Canadian industrialists, Canadian politicians and our domestic military — the R.C.M.P. — that a clear picture of the genesis and proliferation of "narcotics" legislation begins to emerge.

The owners of West Coast industry induced the opium smoking Chinese labourer to come to British Columbia to work for 10 times what could be attained for similar kinds of work in China. A particularly rapid climb in Oriental immigration in the summer of 1907 gave rise to an Anti-Asiatic riot in Vancouver that fall, a riot initiated by white workers. The Vancouver Trades and Labour Council, perceiving the Orientals as an economic threat, had called for the immediate exclusion of all Asiatics.

When Mackenzie King, then Canada's Deputy-Minister of Labour, came to Vancouver to settle Chinese claims arising out of the 1907 riot, he was "startled" by the massive nature of the Chinese opium industry. His initial response was to call for the licensing of these Chinese druggists. King was not about to criminalize the drug intake of a particular race; he had spoken out against unequal treatment of the Chinese. It was only when "the

62. It might be argued that the R.C.M.P. is simply an arm of the political power of the state. While this can be seen to be in large measure true, it can also be seen that the R.C.M.P. may have disagreements with Parliament that tend to reveal the force's own unique perspective. Consider, for example, the interaction of the R.C.M.P. and the present Liberal government.

More importantly, by viewing the R.C.M.P. as the "domestic military" here, we can see the particular interests of those who are actually charged with the duty of enforcing law. Narcotics legislation requires anticipatory policing; the strategy of control, as we shall see, is largely determined by the outcomes of such cat-and-mouse manoeuvring. A failed attempt at control brings a demand for greater severity of punishment and increased certainty of apprehension.
better class of Chinese”\textsuperscript{63} requested state intervention that King was moved to legislate. The support of these Chinese then elevated King to the status of “moral entrepreneur”; he moved swiftly and decisively against the use of opium. The clash of white and Chinese workers that was induced and nourished\textsuperscript{64} by West Coast industrialists had given rise to King’s 1908 Commission. When affluent and powerful Chinese Canadians spoke out against opiate use, King could see a means of “getting good out of this riot.” His demand for the exclusion of opium displayed an unarticulated kind of moral logic.

King could not be seen to be concerned about the mental and physical harm occasioned by opiate use: he led no useful evidence of such harm. Indeed, King’s understanding of psychoactive substances was essentially muddled. While travelling to India King wrote approvingly of the practice of eating opium: he was able to distinguish the eating of the drug from the smoking of it. King remarked that “. . . opium was used in India at certain seasons by the natives as a preventive against dysentery. It was taken in the form of pills — one might say for medicinal reasons — . . . in much the same manner that spirits would be taken by Englishmen . . . there was little smoking save in these (very northern) parts.”\textsuperscript{65}

This apparent lack of pharmacological understanding makes clear that Canada’s decision to make opiate use illegal was not substantially the product of an ethic of consumer protection. The legislation is better understood as reflecting a fear of socio-economic and socio-cultural assimilation, a fear that was exacerbated by the Chinese who were successfully making their way in the young nation of Canada. These Chinese were already well acculturated to the ideology of upward material mobility; they did not want anti-Chinese sentiments to grow in this plush new land. The practice of opium smoking could serve to differentiate, could

\textsuperscript{63} In a letter to Prime Minister Laurier, Chinese clergyman S. D. Chown responded to a request for information on the opium trade in B.C. Chown argued that “the better class of Chinese in Canada are strongly in favour of putting an end to it”. Personal Correspondence, Mackenzie King Papers, Public Archives of Canada, 7294-7297.

\textsuperscript{64} We must remember that, with the imposition of the $500 head tax, Chinese immigration dramatically declined. The industrialists’ replacement of cheap Chinese labour with cheap Japanese labour tended only to nourish anti-Asiatic sentiment. It was perhaps ironic that the frustrations of the white workers were directed at their lesser paid brethren, the Asiatic workers.

\textsuperscript{65} King Diaries, Mackenzie King Papers, note 43, supra, at 203.
provide a focus for a cultural backlash. Mackenzie King, it would seem, could not confront the reality of this paranoia — the reality of his and others' fears of cultural conflict and assimilation.

Dolinski's claim that the 1908 legislation was "prompted" by the need to appease white workers can now be seen as only partly true: there is a reluctance here to distinguish between intention and effect. While one can assemble evidence to demonstrate that the legislation was, in practice, aimed at the Chinese "coolie" opium smoker, one can find no evidence to suggest that this legislation was intended as an appeasement. It is fair to say that the legislation was ultimately economic in its origin. Had it not been for the greed of West Coast industrialists the Chinese opium smoker would not have come to Canada and competed in a tightening labour market. Had it not been for the lucrative profits to be enjoyed from the trade, the British would never have forced the habit on the Chinese in the mid-nineteenth century.

But it is not historically correct to assert that economic power alone gave rise to this legislation. It is only through regarding the more complex duality of economic and political power that we can understand the 1908 legislation. It is perhaps then the problematic nature of hierarchy, and not simply the problematic nature of economic hierarchy, that we need to be sensitive to here. As T. R. Bottomore has remarked, "This confrontation between the concepts of 'ruling class' and 'political elite' shows, I think, that, while on one level they may be totally opposed, as elements in wide-ranging theories which interpret political life . . . in very different ways, on another level they may be seen as complementary concepts, which refer to different types of political systems or to different aspects of the same political system."67

Our efforts to dissect theoretically are now empirically informed. We are cast back to our original contention. The material life of early twentieth century Canada produced contradictions that required an ideational resolution. The ideational resolution cannot be divorced from the hierarchy implicit in the materialism68 of the

66. In the Vancouver Province of 1907 and 1908 one finds much talk of the Chinese "coolie" labourer. Virtually every issue of the paper in this time period contains an article with expressions of anti-Asiatic sentiment. Most of this hostility is directed against the "Chinese coolie" labourer.
68. See Marxism For And Against, note 7, supra, at 82.
day and the material conditions cannot be meaningfully detached from an ideational superstructure.

The greed of West Coast industrialists inspired the Chinese opium smoker to come to Canada; the "competition" that his cheap labour presented to an established labour movement required political resolution. The government did not choose to regulate the labour/capital relationship but rather compensated the victims of trade unionist anger and quite inadvertently constructed a new criminal law.

In a theoretical context it is a scenario that provides powerful support for a materialist view of history. The scenario virtually confirms a vulgar kind of economic determinism: an economic base dominates and shapes the process of criminalization.

The *caveat* that can be introduced at this point, though, is one of overwhelming theoretical and empirical significance. There is an important definitional problem inherent in the term "economic". As Heilbroner has noted, "The intermingling of nonmaterial activities with material ones, the suffusion of ideational elements throughout the body of society, the inextricable unity of "social" and "economic" life, make it difficult to draw boundaries around the material sphere."\(^{69}\)

We return to our impasse. The notion of dialectical materialism and the notion of a conflicting plurality of interests are most appropriately viewed as complementary.

The mistake of much sociology of law has been to regard one analysis as *necessarily* a refutation of the other.\(^{70}\) While the ideological sentiments of these two positions may differ (the optimism of democratic pluralism and the pessimism of materialism) it appears that both are capable of enhancing our understanding of social life and hence of the process of criminalization.


The year 1908 saw other federal legislation regulating the marketing of psychoactive substances — the deceptively innocuous

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69. *Ibid*, p. 84.

70. This is a pitfall encountered by both pluralists and materialists.

Proprietary or Patent Medicine Act. This Act required, among other things, that pharmaceutical manufacturers label patent medicines that contained heroin and cannabis. Green has noted of the attached penalty provisions here that:

"... despite the fact that far more persons were at risk to drug addiction as a result of the indiscriminate marketing of opiate-containing patent medicines than opium smoking — the maximum first and subsequent offence penalties for manufacture, importation or sale of prohibited or unlabelled scheduled drugs were fines of fifty and one hundred dollars, respectively."

The relatively mild nature of the penalties accompanying the improper use of patent medicines has been explained both by the perception of a greater "moral degeneration occasioned by opium smoking, and more simply, by the racial nature of such use." It is perhaps fair to say that the moral degeneration complained of was to be found in the consciousness of the opium-smoking Chinese labourer of early twentieth century British Columbia.

This individual was not using opium as a means of relieving pain but rather as a pleasurable means of altering consciousness. The opium den functioned in much the same way as did the typically Caucasian saloon. The intake of the drug was perceived by both groups of experientially informed consumers as socially desirable behaviour. Nevertheless, the newly arrived mode of consciousness alteration was never compared with the prevalent use of alcohol — the existent mode of consciousness alteration.

The prohibitive 1908 legislation imposed a heavy burden on smokers of opium. The criminal status of the opium business increased the risk of the enterprise; the increased risk was passed on to the consumer in the form of increased prices. The law had created a false scarcity; the business of smuggling opium was becoming a highly lucrative enterprise.

71. The Proprietary or Patent Medicine Act, S.C. 1907-08, c. 56.
72. Green, note 2, supra, at 48.
73. Ibid. Green has suggested that these two explanations of statutory distinction are "alternative" explanations. In fact it may be more appropriate to view the explanations as complementary.
74. This is perhaps ironic, in light of the fact that most dismissals from the Vancouver police force came as a consequence of being drunk on duty (there were no indications of dismissal for opium use; there was no indication of police opium use). Board of Police Commissioners 1905-1911, Vancouver City Police, Vancouver City Archives, Vancouver, British Columbia.
In 1910, in response to charges that Chinese smugglers were working in collaboration with corrupt customs officials, the Federal Government established The Royal Commission to Investigate Alleged Chinese Frauds and Opium Smuggling on the Pacific Coast. The Commission’s conclusion essentially urged Draconian measures in an effort to rid Canada of opiate use. The smoking and possession of opium were judged to be in need of prohibition; police powers of search and seizure similarly required expansion.

Without possession being made illegal, then, prosecution of opium use was problematic. The domestic military — the police — required greater powers if they were to be at all successful in their cat-and-mouse harassment of the Chinese opium industry. To the dimensions of economic and political power could now be added the dimension of military power — the power of those whose duty it was to enforce the law. The domestic military would, with the creation of a drug enforcement branch of the R.C.M.P., ultimately exercise a leadership role in the growth of state powers relating to certain forms of drug use.

With the introduction of The Opium and Drug Act of 1911 Canada moved to make criminal the actual use of a psychoactive substance; the state policy of controlling the entrepreneurs of the opium industry had been subverted by customs officials — the state’s own agents. Drastic measures were thought necessary. As King noted, in moving second reading of the Bill, “The police have found that the present legislation is not drastic enough, or broad enough, to give them the powers of seizure and confiscation which they regard as necessary. One of the objects of the present Bill is to make more drastic the regulations in that regard.” The decision to make opiate use illegal was not, then, founded on the premise that use leads to crime but rather on the observation that the present

76. This analysis would tend to be consistent, then, with that of C. Wright Mills in The Power Elite, though a word of caution from Bottomore seems appropriate here. Bottomore argues that the concept of pluralistic elites, in eliminating the idea of a ruling class, “. . . also excludes that of classes in opposition and so . . . arrives at an extremely pessimistic account (North) American society”.
77. In 1920 the federal Department of Health was given the responsibility of supervising the enforcement of the Opium and Narcotic Drug Act. Later in that year the drug enforcement branch of the R.C.M.P. was created.
78. Dominion of Canada, House of Commons Debates, 1910-1911, Ottawa, King’s Printer, at 2519.
methods of control were inadequate. Indeed, section 4(2) of the 1911 Act went so far as to make it illegal to be in a "house, room or place" where opium was smoked.\(^7^9\)

In explaining the intent of the 1911 legislation to the House of Commons, King read out letters from many prominent Canadians, concerned generally about the non-medical use of psychoactive drugs, and most specifically about the practice of opium smoking. King read letters solicited from the police chiefs of Vancouver and Montreal. The Vancouver chief urged that possession of opium be made illegal, and that there be "close supervision of the waterfront of Vancouver to prevent smuggling . . ."\(^8^0\); the police chief of Montreal had requested that cocaine be added to the schedule of prohibited substances. The Montreal chief had claimed that "... according to the medical men the cocaine produces worse effects than opium."\(^8^1\) King also read approvingly the following lines from the Montreal Witness of November, 1910 "Alcoholism and morphine are nothing to cocaine. It is the agent for the seduction of our daughters and the demoralization of our young men."\(^8^2\)

It was in the context, then, of unknowing paranoia that opium and cocaine use were made illegal. Mackenzie King had become Canada's narcotics "expert"; his presence dominated the House of Commons Debates on the appropriateness of the 1911 legislation. Indeed King had rambled on in his introduction to the legislation to such an extent that a member of the opposition was moved to comment, "The minister seems to be giving himself unnecessary trouble in presenting (these) communications to us. I have not heard of anyone opposed to the Bill. The Minister of Labour will soon be as bad as the Minister of Agriculture in taking up the time of the House."\(^8^3\)

The House of 1911 was not, then, reluctant to endorse the principle of prohibiting cocaine and opium use. What was at issue was the manner in which this goal could be most appropriately effected. King wanted to give the Cabinet the power to add substances to the schedule of prohibited drugs: he did not want the

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79. An Act to prohibit the improper use of Opium and other Drugs, 1-2 George V. c. 17, s. 4(2).
80. See note 72, supra, at 2523.
81. Ibid, 2524.
82. Ibid, 2525.
83. Ibid, 2527.
subject of adding new drugs to be brought up for discussion in the House of Commons.

The Leader of the Opposition, Robert Borden, argued, "I would like to emphasize the point that the entire pharmacopoeia might be added by order in council to this schedule . . . I think that this is the first time that criminal legislation by order in council has ever been attempted."\(^84\) As a consequence of the urgings of Borden and others, King modified section 14 of the Act. While the section initially allowed the Governor-in-Council to "add to the schedule to this Act any substance, the addition of which is by him deemed necessary in the public interest", King ultimately proposed the more modest, "any alkaloids, derivatives or preparations of the drugs named in the said schedule."\(^85\)

What the Commons debate here brought to light was the nature of the term "drug". A member of the Opposition had noted, "We might pass this Act just as it is, and the Governor in Council will still be free to add tobacco to that schedule. The Governor in Council are taking a power without any limit."\(^86\) Another member actually invited King to include tobacco in the Schedule. King remarked that, "Cigarettes and tobacco have not yet been considered a drug, and it is advantageous to deal with only one class of subjects at this time."\(^87\) He also argued that, "... in naming the three drugs, cocaine, morphine and opium, parliament makes it plain that it is legislating against what are known as habit forming drugs."\(^88\) The exclusion of tobacco from such a categorization did not represent pharmacological reality, but it nicely represented the socio-political reality of the day. This was, unfortunately, a reality that Parliament was not inclined to explain.\(^89\)

The 1911 statute also did not require the intention of possession to be proven by the Crown: the accused was required to rebut a presumption of guilt if found in physical possession. King justified the shift of onus from the state to the individual with the premise that convictions might be made impossible otherwise. He argued

\(^84\) Ibid, 2534.
\(^85\) Ibid, 2532, and see The Opium and Drug Act, note 79, supra.
\(^86\) Ibid, 2540.
\(^87\) Ibid, 2540.
\(^88\) Ibid, 2549.
\(^89\) King's exclusion of tobacco from the category of drug begs pharmacological and political explanation; the House's lack of political pharmacological sophistication would seem to have precluded the necessity for such.
that, "As to the insertion of the world 'knowingly', I am informed that this is a favourite word with the legal profession, but its insertion here, I fear, would make it practically impossible to secure a conviction, and would have the effect of nullifying the legislation." King's hypothesis here, while in no manner supported by empirical evidence, nevertheless went unchallenged in Parliament: drastic measures were thought necessary to curtail the trade in "drugs". King, too, was highly respected as both a narcotics "expert" and a "moral reformer".

With the initial 1908 legislation, participation in the Shanghai Opium Commission, and presentation of the 1911 statute, Mackenzie King had achieved a position of prominence — he had become, in the words of Small and others, a successful moral entrepreneur. King's commitment to the view of non-medical drug use as morally degenerative is, however, somewhat suspect. There is little doubt that King was a committed entrepreneur: he successfully marketed two statutes that made certain drugs illegal. King's moral vision, however, seems to have sprung more from his instinct of political survival than from strong moral commitment. He wrote of the Indian opium trade while en route to the Shanghai Commission, "...I would learn the part that opium played in the life of the people. Some persons, for example, were of the opinion that opium was used by many of the Sikhs in the same way that he (Lord Morley) was using the cigar which he smoked; that it did not appear to harm them in that climate when used in moderation; that if taken from them it might lead to other drugs being used... (Lord Morley) would give me the names of one or two gentlemen to whom I could speak freely as to conditions in India; they would give me a true statement of conditions, not to be given, for example, to the people in North Waterloo, but which I might impart privately to Sir Wilfrid. I would be informed on the real conditions so that the Government of Canada might be made fully aware of them." King seemed to recognize that there was more than one side to this

90. House of Commons Debates, note 78, supra, at 2537.
91. Ibid, 2539-40. (Note the lengthy tribute to King's role as "moral reformer").
92. The term "moral entrepreneur" was first envisioned by Howard Becker in his well-known sociological treatise, Outsiders (infra, note 142). The moral entrepreneur can be described as an individual whose commitment to a "correct" mode of social behavior is highly intense. This commitment is successfully marketed when "communicated" to the people through the medium of law.
93. King Diaries, Mission to the Orient, 1907-09, Public Archives of Canada, at 85-86.
story of the morally degenerative effects of opium; the Canadian public could be told one point of view and the Cabinet quite another.

Some 12 years later there would again be a singularity of message delivered to the Canadian people. In the words of Judge Emily Murphy, “every drug-fiend is a liar . . . these ashy-faced, half-witted droolers; these unfortunate cringing creatures.”94 The next decade, however, would see little legislative initiative; it would not be until 1921 that the Government would be moved to substantially amend The Opium and Narcotic Drug Act of 1911. Legislative amendments in 1919 and 1920 established more strict controls on the legal trade in opium, but they were not primarily directed towards a more harsh treatment of non-medical use.95 As Green has said of these amendments, “Parliament . . . seemed concerned to restrict the easy dissemination of opiate-containing nostrums for reasons of public health security, and the major resistance came from those opposed to the “repressive and restrictive measures” drafted to improve regulation of the medical and pharmaceutical profession”.96 Indeed, the member for Muskoka, a medical doctor, urged that “. . . this Bill is going to work a great hardship to the people . . . the ordinary people still have some rights and . . . these rights ought to be preserved . . . (the Bill) proposes to debar ordinary people from buying, for instance, some tincture of opium to have convenient for medicinal purposes.”97 The member later asked more pointedly, “Has there been any demand from the public for these restrictive measures?”98 The Minister of Health, the Honourable N. W. Rowell, essentially replied in the negative when he said, “This Bill is rendered necessary only by virtue of the provisions of the International Opium Convention settled at the Hague and brought into force by the ratification of the Treaty of Peace.”99

The 1921 and 1922 amendments, and the 1923 consolidation of the Opium and Narcotic Drug Act has been characterized by Green

94. Emily Murphy, The Black Candle (Toronto: Thomas Allen, 1922), at 16.
96. Green, note 2, supra, at 52.
98. Ibid, 1748.
as reflecting a "get tough" approach.\footnote{100}{The Opium and Narcotic Drug Branch of the Department of Health, and its enforcement arm, the R.C.M.P., had embarked upon anti-"drug" work in 1920.\footnote{101}{As Solomon and Madison have remarked, "Given their clear mandate, apparent expertise and control over public information, these agencies became the most powerful, well-organized lobby for expansion of the drug laws."}} During the same period of time anti-Asiatic sentiment in British Columbia continued to swell; the image of the Chinese drug pedlar provoked considerable hostility.\footnote{102}{During the same period of time anti-Asiatic sentiment in British Columbia continued to swell; the image of the Chinese drug pedlar provoked considerable hostility.} With these two forces in action, the proliferation of prosecutorial powers became virtually inevitable.

Prior to passage of the 1921 statute, the Minister of Health had commented in the House, "... I think that dealers of these drugs generally have come to recognize the fact that the department means business. The mounted police have been co-operating with the department to the fullest possible extent... Many of the convictions secured during the year have been the result of the operations of the mounted police."\footnote{103}{See most especially Canada, House of Commons Debates, 1922, 3013-3019.} The 1921 amendments clearly displayed the fact that the department meant business; the maximum penalty of imprisonment for the importation, manufacture, and sale of narcotics was increased from one year to seven years.\footnote{104}{An Act to amend The Opium and Narcotic Drug Act, S.C. 1921, c. 42, s. l(e).} An individual simply found occupying the premises in which drugs were found was to be convicted of possession unless there was proof that "... the drug was there without his authority, knowledge or consent, or that he was lawfully entitled to the possession thereof"\footnote{105}{ibid, s. 1(d).}: supplying drugs to minors was made exclusively an indictable offence.

In May of 1922 the Minister of Health explained to the House of Commons the need for a substantial increase in budgetary funds

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\footnote{100}{Green, note 2, supra, at 56. Green describes only the 1921 amendments in this light. It might be more appropriate to view all legislative changes 1921-1923 as reflecting a "get tough" approach; the following text attempts to support this contention.}
\footnote{101}{The word 'drug' ought to be placed in quotations when used in the context of substance criminalization. To do otherwise is to leave the reader with the impression that nicotine, caffeine, and alcohol are not properly conceived of as drugs.}
\footnote{102}{Solomon and Madison, note 2, supra, at 258.}
\footnote{103}{See most especially Canada, House of Commons Debates, 1922, 3013-3019.}
\footnote{104}{House of Commons Debates, 1921, at 3131.}
\footnote{105}{An Act to amend The Opium and Narcotic Drug Act, S.C. 1921, c. 42, s. l(e).}
\footnote{106}{Ibid, s. 1(d).}
\end{footnotes}
allotted to *The Opium and Narcotic Drug Act*. The Honourable H. S. Beland stated that, "Though the quantity of narcotics entering into Canada through ordinary, permitted channels has immensely decreased during the last three years, I am sorry to convey to the committee the information that the illicit introduction of opium and its derivatives, such as morphine, heroin and cocaine has considerably increased." 107 The Minister's Report also noted that 634 of the 853 opium and narcotic convictions in the 1921-22 fiscal year were lodged against "Chinamen".

The 1922 amendments not surprisingly strengthened police powers of search and seizure and took direct aim at the image of the Chinese drug pedlar. Section 7 of the Act now enabled the police officer with "reasonable cause to suspect" to search, without warrant, any premises other than a dwelling house; section 5a(2) of the Act now allowed whipping, at the discretion of the judge; section 10B allowed for the deportation of aliens convicted of drug offences. 108

The House of Commons, in its discussion of the Bill, seemed primarily concerned with the issues of whipping and deportation. The House deferred to the "expertise" of the members from British Columbia in its debate. A member from the city of Vancouver actually introduced the possibility of whipping in the context of the debate. F.L. Ladner, Vancouver South, argued that, "The chief purpose of such an amendment will not be so much in its application as in its deterrent effect upon those men who contemplate engaging in this traffic, for when they know that the law contains a proviso of that kind the dread of being subjected to the lash will effectually deter them from incurring the risk." 109

There was, of course, no useful empirical evidence led to support this hypothesis of deterrent effect. An Ontario medical doctor who had been unwilling to support the legislative initiative of whipping in 1921 now found himself compelled. He argued, "I believe that the honourable gentlemen who represent British Columbia in this House are more familiar with this question than the rest of us, even those of us who are in the medical profession . . . While what the Minister says is true, that lashing should be kept for certain crimes of physical violence, I think perhaps moral violence as in this case is

One member of the House went so far in his support of whipping to assert that, "This crime, to my mind, is even more serious than the crime of robbery with violence. To hold a man up at the point of a gun and take his money away from him is serious of course, but it is not so serious as to give drugs to a minor and take away his future. . . . I would much rather have anyone hold me up, and shoot me for that matter, than sell me drugs and cause me to become a drug addict." This view of the drug as devil revealed that the honourable member had not been checking all his sources: the empirical reality of legalized opium in China of 1906 showed that only 20 million people in a country of 400 million in fact desired to use the substance; of these 20 million users the majority were judged by a British medical doctor to be using in moderation and to have suffered little detriment as a consequence of use.112

While this was only the judgment of a single medical doctor, it stood in striking contrast to viewpoints expressed within the House of Commons: the debate of the day was only partially informed. Indeed, we now see that in today's context, Dr. Andrew Weil has remarked that, "Dependence on opium if stable can be as consistent with social productivity as dependence on coffee or tobacco."113

The amendments passed by the House of 1922 would, however, pay no attention to such information; the minimum penalty for simply being in possession of a prohibited drug was now six months imprisonment and a $200 fine.114

The 1922 amendments, as noted before, also catered to the image of the noxious Chinese drug pedlar. H. H. Stevens of Vancouver noted, "...I think that the clause the minister is adding providing for the deportation of aliens will very, very materially strengthen the Bill and the arm of the law. I also agree with him in his estimate that a very large proportion of these . . . Chinese would be aliens, and therefore subject to deportation."115 The concern that some Chinese drug dealers might be naturalized Canadians, and hence not deportable, had been raised in the House; members had been

110. Ibid, 3016.
111. Ibid, 3018.
113. Weil, note 40, supra, at 91.
114. The Opium and Narcotic Drug Act, S.C. 1922, c. 36, s. 2(2).
assured that substantial deportation of Chinese could take place as a consequence of the legislation. It was not entirely coincidental, then, that the Chinese Immigration Act of the following year, 1923, constructed for the first time an exclusionary policy with respect to the influx of Chinese into Canada.

*The Opium and Narcotic Drug Act*, 1923 was both a consolidation and an amendment. Though the Health Minister explained that the Bill was "... mainly a consolidation of the different acts," there was in fact one important revision, at least in the contemporary context. Marijuana was added to the list of prohibited substances with the Health Minister's simple assertion, "There is a new drug in the schedule": there was no Commons discussion of the addition here.

Through the early twenties, then, the social construction of a criminal pathology had flourished. Drug use had been described by members of the House of Commons as "illicit desire... unscrupulous,... fiendish,... low beastly crime... and more definitively as a "living hell." The one treatise that documents the ideology of this period of time and no doubt served to shape some of the severity of state response is Emily Murphy's most illuminating *The Black Candle*. Emily Murphy was a police magistrate and judge of the juvenile court in Edmonton; she had been commissioned by Maclean's magazine in 1920 to write a series of articles on the problem of drug abuse; the series ultimately formed the basis of *The Black Candle*. As Green has perceptively noted of this effort, "... her style tended more to sensationalist rhetoric than impartial reportage, and, from an historical perspective, it is clear that her moral and racial biases compromised her research... The effects of the various drugs were not clearly distinguished, but it hardly mattered as Murphy was convinced that they all produced the same general sequelae: moral degeneration, crime, physical and mental deterioration and disease, intellectual

118. The specific reason for the inclusion of marijuana is not clearly discernable. The LeDain Commission has commented that "... a decision was made in 1923, without any apparent scientific basis nor even any real sense of social urgency". See note 1, *supra* at 230.
119. See *House of Commons Debates*, 1921, 3130; Debates, 1922, 3013-3019; *Debates*, 1923, 2114-2124.
120. See note 94, *supra*.
and spiritual wastage, and material loss through drug-induced negligence.’’ 121

It is instructive to look carefully at the moral logic that Emily Murphy employed. Her very first words in The Black Candle nicely set out her argument against drug use. Miss Murphy wrote, ‘‘An opium smoker questioned, ‘‘If I should gain heaven for a coin, why should you be envious? ’’ She responded, ‘‘His question is based on two lies. The smoker does not gain heaven, and we are not envious.’’ Murphy was not willing to accord to the drug user the validity of his or her perception. The user, whether imbibing to alleviate the effects of relative poverty, or existential angst, or simply partaking so as to enjoy a pleasurable alteration of consciousness, was in no event to be indulged, let alone tolerated. Murphy asserted that an opium dream ultimately became ‘‘...a terrible hell, a dwelling deadly cold, full of bloody eagles and pale adders.’’ Murphy was asking the Canadian public to believe that the consumers of smoking opium were in fact masochists — individuals who would repeatedly subject themselves to such torturous visions.

What is most interesting about Murphy’s work, however, are the distorted kernels of truth that can be found within it. Murphy argued that ‘‘...it would be well for the Government to consider whether or not (dealers in drugs) should be given the option of a fine. The profits from the traffic are so high that fines are not in any sense deterrent.’’ 122 Judge Murphy was quite correctly asserting that a fine could be considered by the narcotic entrepreneur as a kind of overhead: while the fine could cut into one’s profit margins, it was only an economic cost, to be balanced with the other economic costs of doing business. Murphy seemed unaware, however, of the human consequence of increasing the severity of penalties associated with non-medical drug use. The law would serve to socially construct a criminal pathology. The greater severity of punishment naturally led to increased business risks, risks that were passed on to the consumer in the form of higher prices. The heroin addict became quite literally an individual who had to steal to support a craving. The legal creation of false scarcity was socially responsible for the self-fulfilling assertion — the heroin addict as lowly predator.

121. Green, note 2, supra, at 53.
122. Murphy, note 94, supra. For a good indication of the severity of Murphy’s response, see 190-199.
Even the use of heroin itself can be seen to have arisen in part as a consequence of the imposition of criminal law. As Solomon and Madison have noted, “Although there was substantial profit to be made in the illicit distribution of smoking opium and morphine, the illicit heroin trade was more lucrative. Since heroin was three times as potent as morphine and more readily capable of being diluted, it provided far greater returns per unit of weight... enforcement... increased the illicit distributor’s costs of avoiding arrest and thus prompted the switch from morphine to heroin.”¹²³ The human cost of the escalation from smoking opium is well described by Dr. Andrew Weil. Weil remarks that, “Opium forms a relatively harmless habit in that a high percentage of users can smoke it for years without developing troublesome problems with tolerance. Dependence on opium if stable, can be as consistent with social productivity as dependence on coffee or tobacco. But when morphine, the active principle of opium is isolated and made available, problems do appear. In particular a significant percentage of users (though possibly still a minority) finds it impossible to achieve equilibrium with habitual use of morphine or with the still more potent derivative, heroin.”¹²⁴ The proliferation of heroin use in the United States and Canada can, then, profitably be seen as the result of a conscious decision made by the distributors of the drug industry — a decision necessitated by the risks of increasingly severe sanctions. Emily Murphy’s anti-drug ideology had failed to comprehend these unintentional consequences of repressive legislation — the complex relations between the intentions and effects of law.

In her discussion of the different drugs in vogue, Murphy is again revealed as being unable to look at a piece of information through more than a single lens. Murphy wrote of “Marihuana — A New Menace: It appears that in using this poison, the time-sense becomes impaired in such a way that time appears to pass slowly.”¹²⁵ While Murphy accurately cites a reported pharmacological effect of time distortion in the instance of cannabis use, she unnecessarily ascribes a negative value to this “altered” state of consciousness. As Andrew Weil has noted, “... the phrase disturbance of immediate memory bristles with negativity. Is it a negative description of a condition that might just as well be looked at positively? ... the

¹²³. Solomon and Madison, note 2, supra, at 254.
¹²⁴. Weil, note 40, supra, at 102.
¹²⁵. Murphy, note 94, supra, at 334.
ability to live entirely in the present, without paying attention to the immediate past or future, is precisely the goal of meditation and the exact aim of many religious disciplines. The rationale behind living in the present is stated in ancient Hindu writings and forms a prominent theme of Buddhist and Christian philosophy as well: to the extent that consciousness is diverted into the past and future — both of which are unreal — to that extent is it unavailable for use in the real here and now.Emily Murphy's deprecation of drug induced present-centered awareness can also be seen as extending beyond the boundaries of drug use itself. The culture itself was necessarily linear in its mode of thought; there was a socio-economic and socio-cultural abhorrence of present-centred awareness. There was the delay of gratification that was implicit in the Protestant work ethic, the need for self-control and restraint in the building of the young state of Canada.

The judiciary of this young state were inclined to go along with the visions of non-medical drug use proferred by Emily Murphy, the Department of Health, and the R.C.M.P. While very little case law is available for the period 1908 to 1929, what analysis there is tends to suggest that the judiciary strongly supported the use of repressive measures against drug use. In R. v. Venegratsky, a Crown Appeal from a six month term of imprisonment for trafficking, the Manitoba Court of Appeal increased the sentence length to three years with the advice that, 'The narcotic problem in Canada is a very acute one... The Government is evidently alarmed at the existing conditions and determined, if possible, to stamp out this illegal traffic. In an effort to effect such a laudable object it is entitled to every assistance the Court can legitimately give it.'

A Quebec court in a case of possession of opium, noted of The Opium and Narcotic Drug Act, "...there is no necessity of mens rea, as there is under the Criminal Code..." The court-justified the exclusion of mens rea with the statement that, "If such a defence could be admitted, it would be very easy to evade the law and as this law must be, in the public welfare and interest, strictly interpreted, I find the defendant guilty."
In *R. v. Gordon*131 a medical doctor who gave morphine tablets to a patient for long term self-administration was successfully prosecuted. The decision helped to transform the conception of drug use from a problem for medical pedagogy to an important police priority.

In *Ex parte Wakabayashi*132, a fundamental challenge to the constitutionality of *The Opium and Narcotic Drug Act* was rejected: the court would not accept the notion that the Act merely licensed the running of a particular business. Justice MacDonald of the B.C. Supreme Court argued that, "...I have no hesitation in holding that the Act in question is criminal and not licensing legislation... While such legislation constituted a new crime, it was remedial, in order, if possible, to destroy an existing evil. It was for the promotion of public order, safety and morals."133 These decisions, then, aptly represented judicial sentiments134: as was the case with Mackenzie King and Emily Murphy, the judiciary appeared unable to articulate the moral logic on which the repression of "drugs" was based.

The 1920's saw only two other amendments, the first most importantly directed at tightening state control over the medical profession's distribution of drugs. The 1925 amendment allowed the state to prosecute by indictment the medical profession's unlawful prescription135: the convicted physician, veterinary surgeon, or dentist would be subject to a mandatory three month term of imprisonment in such event. The doctor who believed in listening to his patient's expressed interests could lose his liberty for this act of heresy: the state was dictating a mode of "treatment" to its doctors.

The 1929 revision of the Act was essentially a technical revision, dominated by the need to tighten loopholes present in the 1923 Act. Definitional and procedural changes, and a greater control of the postal service, served to accomplish this loophole tightening136 the

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133. Ibid, 400-401.
134. For a good discussion of the technical changes imposed by case law 1908-1929, see Green, note 2, supra.
135. *An Act to amend the Opium and Narcotic Drug Act*, S.C. 1923, c.20, s.5.
136. To see this point most clearly compare the *Opium and Narcotic Drug Act*, R.S.C. 1927, c.144, with *An Act to amend and consolidate the Opium and Narcotic Drug Act*, S.C. 1929, c.49, 1929.
anti-drug philosophy remained unchanged. The 1929 Act did, however, contain the introduction of one rather remarkable prosecutorial weapon: section 22 required a superior court judge to grant an exclusive writ of assistance when requested. The writ of assistance, aptly described as "a blanket warrant authorizing the holder to search for controlled drugs anywhere and at any time", was established in *The Opium and Narcotic Drug Act*: a substantial and not demonstrably necessary invasion of civil liberty was effected here. The Health Minister, in introducing the Bill, had only mentioned in passing "Provision is being made for the issuing of writs of assistance to certain officers engaged in narcotic drug work, as is done under the customs act"; there was no debate of this issue in the House.

II. Conclusion

The past twenty years have seen a re-focusing of the academic lens with respect to the subject of criminality. As John Hagan has noted, the nineteen-sixties saw a shift in our paradigm of inquiry. Questions about the origins and psychological correlates of deviance were displaced by questions about the origins and development of the process of labeling deviance. The process of "criminalization" became a focus for intensive empirical and theoretical research.

Much of the work of this decade was impressive in its scope. Kai Erikson's study of the construction of deviance in the midst of seventeenth century New England Puritanism, Joseph Gusfield's thoughtful analysis of the American Temperance movement, and Howard Becker's insightful construction of marijuana use are perhaps the richest examples of this tradition.

In the nineteen-seventies the inquiry became more monolithic in its focus. The process of criminalization was often explained by the contradictions created from the labour/capital relationship. From

139. "Criminalization" here is used in a context that includes both pre-state designations of deviance and state labels of criminality.
Britain came *The New Criminology*\(^{143}\) and a host of sophisticated critical analyses of the process of criminal law. In the United States William Chambliss,\(^{144}\) Richard Quinney,\(^{145}\) and others broke with pluralist conflict explanations of crime and began to discover the insights of dialectical materialism.

This paper has attempted to demonstrate that the two forms of inquiry represented by these two decades can be viewed as complementary. In the context of the origins of Canadian narcotics legislation, it is suggested that a change in the labour/capital relationship in early twentieth century British Columbia required a political resolution. The opium smoking Chinese labourer had been induced to come to Canada by West Coast industrialists; his cheap labour was both resented and feared by established trade unionists.

The tendency of West Coast capital towards expansion through the medium of cheap labour had perhaps unforeseen consequences. Trade unionists developed Anti-Asiatic sentiment to the point of physical violence and property destruction. Such oppressive behavior required government intervention and hence political resolution.

The interchange of ideas that constructed Canadian narcotics legislation was not a happy reminder of an informed egalitarian expression of shared values. The interaction of powerful Chinese Canadians and the Canadian government forged this political resolution: the criminalization of opium was ultimately urged by both groups as a means of "getting good" out of Anti-Asiatic sentiment. With introduction into proscriptive law, certain forms of drug use quickly became intolerable to those whose duty it was to enforce such proscription. The police — the domestic military — urged control-oriented "reforms" in their cat-and-mouse manoeuvring with the drug industry.

It is a scenario that vividly asserts the validity of materialism as a world view. But it is also a scenario that confirms political life as the interchange of ideas. The contradictions of hierarchical relationships require political resolution. And political resolution seeks to re-shape or to stabilize the nature of specific power-based relationships.

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145. R. Quinney, note 70, *supra*. 
The emergence of Canadian narcotics legislation reveals a portrait of a reflexive process in historical context. As Berger and Luckmann have said, "...such intrinsically biological functions as orgasm and digestion [and drug use] are socially structured. Society also determines the manner in which the organism is used in activity; expressivity, gait and gesture are socially structured ... society sets limits to the organism as the organism sets limits to society." In the context of Canada's prohibition of "narcotics", state control has had the effect of inhibiting awareness of the pharmacological reality of psychoactive drug use: the Canadian citizenry has, however, not been entirely acquiescent; the reflexive relationship of the controllers and the controlled continues into 1983.

Those of us who seek the democratic spirit of egalitarianism cannot take cheer in the origins of Canadian narcotics legislation. The moral logic on which certain psychoactive substances were made illegal is never articulated: empirical study presents a picture of a problem created by economic greed, resolved by the holders of political power, and exacerbated by the perceived need to increasingly repress.

Though the portrait is one that lends strong support to a materialist view of criminalization, there is no power to predict the future; it is the necessary product of a socially and hence ideationally constructed reality. We are catapulted into the present, materially and ideationally, and hence come full circle.

146. Berger and Luckmann, note 6, supra, at 203, "[and drug use]" my own addition.
147. Andrew Weil has ironically argued that "...drugs are merely means to achieve states of nonordinary awareness and must not be confused with the experiences themselves. They have the capacity to trigger highs; they do not contain highs. Moreover, the experiences they trigger are essentially no different from experiences triggered by more natural means ... the real risk of using drugs as the primary method of altering consciousness is in their tendency to reinforce an illusory view of cause and effect that makes it ultimately harder to learn how to maintain highs without dependence on the material world" Weil, note 40, supra.