



## CRIMINATION OF CRIMINAL ACTS OF KHAMAR AND DRUGS IN ISLAMIC CRIMINAL LAW COMPARED TO INDONESIAN POSITIVE CRIMINAL LAW

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### Abstract

*Narcotics and dangerous drugs may be as old as humans. Increasingly, drug users are increasingly widespread in various parts of the world, including Indonesia. The types of drugs are getting more and more sophisticated. In this latest century, it seems that no country is free from the problem of drugs. The term drugs in the context of Islamic law, is not mentioned directly in the Qur'an or in the Sunnah. In the Koran only mentions the term khamr. The purpose of this study is to analyze the comparison of punishment for perpetrators of the crime of alcohol and drugs in Islamic criminal law compared to positive Indonesian criminal law with normative legal research methods. The criminal difference for the perpetrators of the crime of khamr in Islamic criminal law compared to positive Indonesian criminal law is that in Islamic law, the punishment imposed is only in the form of caning, while in positive Indonesian criminal law, the sentence imposed can be in the form of imprisonment or a related fine. with liquor which is classified as a "crime" and imprisonment or a fine related to liquor which is classified as an "offence". Sanctions for perpetrators of drug abuse in the perspective of Islamic criminal law, have similarities with the legal sanctions for criminal acts of drug abuse in the perspective of the criminal law of the Republic of Indonesia, namely both are the authority of the government/judges to determine the punishment.*

**Keywords:** *Narcotics, Alcohol, Criminal Law*

### 1. INTRODUCTION

Narcotics and dangerous drugs may be as old as humans. Increasingly, drug users are increasingly widespread in various parts of the world, including Indonesia. The types of drugs are getting more and more sophisticated. In this latest century, it seems that no country is free from the problem of drugs.<sup>1</sup> The narcotics problem is a national problem and has even become an international problem, because narcotics have brought disasters everywhere, including in Indonesia. In general, what is meant by narcotics is a type of substance which when used (inserted in the body) will have an effect on the body of the user. The influence is in the form of: calming, stimulating and causing delusions (hallucinations).<sup>2</sup> Narcotics are substances or drugs derived from plants or non-plants, both synthetic and semi-synthetic, which can cause a decrease or change in consciousness, loss of taste, reduce to eliminate pain, and can cause dependence, which are divided into groups as attached in the this law.<sup>3</sup>

Narcotics are substances or drugs that are very useful and necessary for the treatment of certain diseases. However, if it is misused or used not in accordance with treatment standards, it can have very detrimental consequences for individuals or society, especially

<sup>1</sup> M. Arief Hakim, *Bahaya Narkoba-Alkohol*, Nuansa, Majalengka, 2004, hlm. 15.

<sup>2</sup> B. Bosu, *Sendi-sendi Kriminologi*, Usaha Nasional, Surabaya, 1982, hlm. 68.

<sup>3</sup> Pasal 1 angka 1 Undang-Undang Nomor 35 Tahun 2009 tentang Narkotika.

the younger generation.<sup>4</sup> Therefore, acts of abuse of narcotics or narcotics used are not in accordance with the standard of treatment that causes detrimental effects to individuals or the community, especially the younger generation, must be subject to sanctions in accordance with applicable laws.

Based on positive law, the law on narcotics is regulated in Law Number 35 of 2009 concerning Narcotics, which was promulgated on October 12, 2009. With the enactment of this law, then based on the provisions of Article 153 of Law Number 35 of 2009 concerning Narcotics, it is stated that:

1. Law Number 22 of 1997 concerning Narcotics (State Gazette of the Republic of Indonesia of 1997 Number 67, Supplement to the State Gazette of the Republic of Indonesia Number 3698); and
2. Attachments regarding the types of Psychotropics Group I and Group II as contained in the Attachment of Law Number 5 of 1997 concerning Psychotropics (State Gazette of the Republic of Indonesia of 1997 Number 10, Supplement to the State Gazette of the Republic of Indonesia Number 3671) which have been transferred to Narcotics Category I according to This law is revoked and declared null and void.

Article 5 of Law Number 35 of 2009 concerning Narcotics states that "Regulation of Narcotics in this Law includes all forms of activities and/or actions related to Narcotics and Narcotics Precursors." Based on Article 6 of Law Number 35 of 2009 concerning Narcotics, it is stated that "Narcotics as referred to in Article 5 are classified into Narcotics Group I, Narcotics Group II, and Narcotics Group III."

The problem of abuse and dependence on narcotics and dangerous drugs has broad and complex dimensions, both from a medical and psychosocial point of view (economic, political, social, cultural, criminal, mass riots, and so on). The impacts that often occur include damaging family relationships, drastically reducing learning abilities and work productivity, difficulty in distinguishing between good and bad deeds, changes in behavior to anti-social behavior, health problems (physical and mental), increasing the number of traffic accidents, violence and other crimes.<sup>5</sup> Drug abuse is a type of crime. Based on Article 1 point 15 of Law Number 35 of 2009 concerning Narcotics, what is meant by abusers are people who use Narcotics without rights or against the law.

Drugs in the context of Islamic law are included in the problem of 'ijtihad, because drugs are not mentioned directly in the Qur'an and Sunnah, and were not known at the time of the Prophet Muhammad. Islamic criminal law is a science that deals with syara' prohibitions which are threatened by Allah SWT with had or ta'zir punishments obtained or extracted from the Qur'an and Hadith, or commonly called fiqh jinayah.<sup>6</sup>

The term drugs in the context of Islamic law, is not mentioned directly in the Qur'an or in the Sunnah. In the Koran only mentions the term khamr. But because in the theory of

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<sup>4</sup> Penjelasan atas Undang-Undang Nomor 35 Tahun 2009 tentang Narkotika.

<sup>5</sup> Mardani, *Penyalahgunaan Narkoba dalam Perspektif Hukum Islam dan Hukum Pidana Nasional*, PT RajaGrafindo Persada, Jakarta, 2008, hlm. 3.

<sup>6</sup> *Ibid.*, hlm. 8-9.



Usul Fiqh, if a law has not been determined its legal status, it can be resolved through the qiyas method (legal analogy).<sup>7</sup> From this, it is known that drugs in the Qur'an and in the Sunnah are analogous to khamr.

In Islam, in addition to stipulating the law for drinking alcohol (intoxicating drinks), the punishment for someone who consumes it is also stipulated. The punishment for drinking alcohol was put forward by Hamka Haq, namely "The punishment for drinking alcohol is a punishment of 40 lashes to 80 lashes." Regarding the conditions for the punishment to be carried out on a Muslim, mature, mature, able to distinguish what is right and what is bad, and know that it is forbidden to drink alcohol (alcohol) to be healthy and not sick. This illustrates that the act of drinking alcohol is not only punished for the sins committed or committed, but in the world also gets punishment for consuming intoxicating drinks. Based on the information above, a conclusion can be drawn that alcoholic beverages (khamr) which can intoxicate and eliminate consciousness, whether they contain alcohol or non-alcoholic, and whatever type, name, and form, a little or a lot of its use is determined by law to be haraam. The legal basis for this determination is the Qur'an and the Sunnah of the Prophet Muhammad (hadith) as well as Ijma and Qiyas. The verses of the Qur'an and the hadith, it appears that the stages in determining a prohibition are not felt by some Arab Muslims who are Muslim to avoid drinking khamr or intoxicating drinks.<sup>8</sup>

Based on the description above, the comparison of the crime of alcohol and narcotics in terms of positive criminal law and Islamic criminal law, became the basis of the author's interest in obtaining scientific answers that were systematically arranged with certain methods in the form of a study with the title, "The Crime of Alcohol and Drugs in Islamic Criminal Law Compared to Positive Indonesian Criminal Law".

## 2. IMPLEMENTATION METHOD

Based on the background of the problem above, the purpose of this study is to analyze the comparison of punishment for perpetrators of criminal acts of alcohol and drugs in Islamic criminal law compared to positive Indonesian criminal law by using normative legal research methods using secondary data.

## 3. RESULTS AND DISCUSSION

Khamar (liquor) etymologically means to cover. Therefore, in Arabic, the term khimar is used to refer to the veil that is expertly used by women because the veil covers the head and hair. Something that can cover one's conscious thinking is called khamr. Khamar in terms of national law is liquor or beverages containing alcohol. Alcoholic beverages are drinks containing ethanol which are processed from agricultural products containing carbohydrates by means of fermentation and distillation, or fermentation without distillation, or those processed by mixing concentrate with ethanol or by dilution of drinks containing

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<sup>7</sup> *Ibid.*, hlm. 73.

<sup>8</sup> Zainuddin Ali, *Hukum Islam: Pengantar Ilmu Hukum Islam di Indonesia*, Sinar Grafika, Jakarta, 2010, hlm. 63.

ethanol. Liquor based on alcohol content is divided into three parts.<sup>9</sup> Based on the two definitions above, it is known that anything that intoxicates and destroys the mind belongs to the category of khamr, whether made from dates, wine and others, including drugs.<sup>10</sup>

Khamar or better known as liquor is forbidden by Allah SWT in several verses of the Qur'an. There are four verses of the Qur'an that were revealed at different times and with different legal content. From those that are just satire about the harm to those that are totally forbidden. According to the majority of scholars, people who are caught drinking alcohol must be punished. And the punishment for drinking alcohol is hudud law, so it can't be replaced in another way, considering that hudud law all provisions come directly from Allah SWT. In this case, the provision from Allah for people who drink wine, drunk or not drunk is lashing, as the words of the Prophet Muhammad: "Those who drink alcohol then lash" (HR. Muttafaun'alah).<sup>11</sup>

Alcoholic drinks according to the language of the Qur'an are drinks made from seeds or fruits which are processed in such a way that they can reach intoxicating levels of drinks. There are jurists who give the meaning of khamr, which is an intoxicating liquid, which is made from fruits such as grapes, dates derived from grains such as wheat and derived from sweets such as honey, or the result of something raw, both given the classical name. or modern names circulating in today's society. This understanding is based on the hadith of the Prophet Muhammad which means: From Ibn Umar ra. That the Messenger of Allah (saw) said: verily, wine is made khamr, and honey is made khamr and from sahib (dried wine) khamr is made and from wheat is made khamr and I forbid you from anything that intoxicates.<sup>12</sup>

Criminal acts regarding alcoholic beverages or liquor are regulated in the Criminal Code, contained in Article 300 paragraph (1) to paragraph (4), Article 492 paragraph (1) and Article 536 to Article 539 of the Criminal Code, as follows :

1. Article 300 paragraph (1) of the Criminal Code states: Threatened with a maximum imprisonment of one year or a maximum fine of four thousand five hundred rupiah:
  - a. Anyone who knowingly sells or gives an intoxicating drink to someone who is already visibly drunk;
  - b. Any person who intentionally intoxicates a child who is not yet sixteen years of age;
  - c. Whoever by force or threat of violence forces a person to drink intoxicating drinks.
2. Article 300 paragraph (2) to paragraph (4) of the Criminal Code states: If the act results in serious injury, the guilty person is threatened with a maximum imprisonment of seven years. If the act results in death, the guilty person is threatened with a maximum imprisonment of nine years. If the guilty person

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<sup>9</sup> Mardani, *Op. Cit.*, hlm. 74-75.

<sup>10</sup> *Ibid.*, hlm. 76.

<sup>11</sup> Ahmad Sarwat, *Seri Fiqih Kehidupan (16): Jinayat*, DU Publishing, Jakarta, 2011, hlm. 130-131.

<sup>12</sup> Zainuddin Ali, *Hukum Pidana Islam*, Sinar Grafika, Jakarta, 2007, hlm. 78-79.



commits the crime in carrying out his search, his right to carry out the search may be revoked.

3. Article 492 paragraph (1) of the Criminal Code states: Whoever in a drunken state in public obstructs traffic, or disturbs order, or threatens the safety of others, or does something that must be done carefully or by taking certain precautions beforehand so that do not endanger the life or health of others, shall be punished by a maximum imprisonment of six days or a maximum fine of three hundred and seventy five rupiahs.
4. Article 536 paragraph (1) states: Anyone who is clearly in a drunken state is on a public road, is threatened with a maximum fine of two hundred and twenty-five rupiahs.
5. Article 537 of the Criminal Code states: Whoever outside the army canteen sells or provides liquor or wine to members of the Armed Forces below the rank of lieutenant or to his wife, children or servants, is threatened with a maximum imprisonment of three weeks or a maximum fine of one thousand five hundred rupiah.
6. Article 538 of the Criminal Code states: A seller or his representative who sells liquor who in carrying out his work gives or sells liquor or wine to a child under the age of sixteen, is threatened with a maximum imprisonment of three weeks or a maximum fine of four thousand five hundred rupiah.
7. Article 539 of the Criminal Code states: Whoever on the occasion of holding a public party or public performance or holding a procession for the public, providing free liquor or wine and or promising as a gift, is threatened with a maximum imprisonment of twelve days or a maximum fine of three hundred and seventy five rupiahs.

The crime of intentionally selling or handing intoxicating drinks to someone who is in a drunken state and others by the legislators has been regulated in Article 300 of the Criminal Code.<sup>13</sup> The criminal provisions regulated in Article 300 of the Criminal Code is one of several criminal acts regulated in Chapter XIV of Book II of the Criminal Code which by their nature must be viewed as a crime that endangers life and health.<sup>14</sup> According to J.M. van Bemmelen, as quoted by Leden Marpaung, stated that the offense against decency does not only contain various sexual crimes, but also several offenses that have absolutely nothing to do with sexuality, including giving intoxicating drinks to people or children under the age of sixteen who are already visible. drunk.<sup>15</sup> From this, Van Bemmelen and van Hattum are of the opinion: The inclusion of the criminal acts referred to in the criminal provisions regulated by Articles 300, 301, 302, and Article 303 of the Criminal Code into the definition of a crime against decency as regulated in Chapter XIV of the Book to -II of the Criminal

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<sup>13</sup> P.A.F. Lamintang dan Theo Lamintang, *Delik-delik Khusus: Kejahatan Melanggar Norma Kesusilaan dan Norma Kepatutan*, Sinar Grafika, Jakarta, 2009, hlm. 236.

<sup>14</sup> *Ibid.*, hlm. 238.

<sup>15</sup> Leden Marpaung, *Kejahatan terhadap Kesusilaan dan Masalah Prevensinya*, Sinar Grafika, Jakarta, 2008, hlm. 31.



Code is due to the fact that legislators have experienced difficulties in intoxicating the crime in the sense of another crime.<sup>16</sup>

As the final part of the discussion regarding the comparison between the crime of khamr in Islamic criminal law compared to positive Indonesian criminal law, the following is given the "philosophy" of drinking tuak as part of liquor with quite interesting words, namely: A glass of blood-boosting wine. Two glasses, fluent speech. Three glasses, started laughing. Four glasses, looking for a fuss. Five glasses, heart smoldering. Six glasses, make things. Seven glasses, getting crazier. Eight glasses, make miserable. Nine glasses, go to jail, and ten glasses, go to hell, so please understand.<sup>17</sup> Some of the consequences caused by alcohol abuse are the decline and mental and moral destruction of the younger generation which leads to poverty, crime, failure and division in the household as well as damaging health and even causing death when mixing alcoholic beverages with other dangerous liquids. for the body.

Furthermore, the word narcotics comes from the Greek language, namely narke which means anesthetized so that you do not feel anything. Some people think that narcotics comes from the word narcissus which means a kind of plant that has flowers that can cause people to become unconscious.<sup>18</sup> Another opinion states that narcotics comes from the word narkon which comes from the Greek, which means frozen and stiff.<sup>19</sup> Meanwhile, according to Soerdjono Dirjosworo narcotics, are as follows: Substances that can cause certain effects for those who use them by inserting them into the body. The influence can be in the form of anesthesia, loss of pain, excitement and hallucinations or the emergence of delusions. These properties are known and found in the medical world aims to be used for treatment and human interests in the field of surgery, pain relief and others.<sup>20</sup>

The definition of drugs in the perspective of Islamic criminal law is any substance which, if consumed, will damage the body and mind, sometimes even making people crazy or drunk. It is prohibited by positive laws, popular ones such as marijuana, opium, morphine, heroin, cocaine, and kat. Meanwhile, the definition of drugs in the perspective of national criminal law are substances that can cause unconsciousness or anesthesia because these substances work to affect the central nervous system. In the definition of this drug, it includes types of opium, such as morphine, cocaine and heroin or substances made from opium such as meripidine and methanol.<sup>21</sup>

Based on the above description, it is known that what is meant by drugs in Islamic criminal law compared to positive Indonesian criminal law are the same as any substance which, if consumed, will damage the body and mind because it causes unconsciousness or

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<sup>16</sup> P.A.F. Lamintang dan Theo Lamintang, *Loc. Cit.*, hlm. 238.

<sup>17</sup> Tuak Takkasan, <http://tanobatak.wordpress.com/2007/08/10/tuak-takkasan/>, tanggal akses 25 Oktober 2021.

<sup>18</sup> Hari Sasangka, *Narkotika dan Psikitropika Dalam Hukum Pidana*, Mandar Maju, Bandung, 2003, hlm. 35.

<sup>19</sup> Ikin A. Ghani dan Abu Charuf, *Bahaya Penyalahgunaan Narkotika dan Penanggulangannya*, Yayasan Bina Taruna, Jakarta, 1985, hlm. 5.

<sup>20</sup> Soedjono Dirjosworo, *Hukum Narkotika Indonesia*, Citra Aditya Bhakti, Bandung, 1990, hlm. 3.

<sup>21</sup> Mardani, *Op. Cit.*, hlm. 170.



anesthesia and sometimes even makes people crazy or drunk due to These substances work to affect the central nervous system.

Any abuse of narcotics is a violation of criminal law as stipulated in Chapter XV of Law Number 35 of 2009 concerning Narcotics concerning the criminal provisions governing the imposition of criminal sanctions on anyone who abuses the narcotics. The types of narcotics crimes regulated in Chapter XV of Law Number 35 of 2009 concerning Narcotics regarding criminal provisions, which consist of 48 articles (Article 111 to Article 148) do not mention the qualifications for the type of crime, namely whether it is a crime or not. violation. As is known, in the Criminal Code, crimes are specifically regulated in the second book, while violations are regulated in the third book.

The intensity of crime causes fear, anxiety and anxiety among the community, while one of the types of offenses that is felt the most worrying is narcotics abuse.<sup>22</sup> According to the Race Editor, in Indonesia, those who are proven to be victims of narcotics abuse can be sentenced to rehabilitation. When a person is caught using narcotics and it can be proven that he is a victim, not a dealer, the judge can impose a sentence on treatment and/or treatment in the form of rehabilitation, this is regulated in Article 103 and Article 127 paragraph (2) and paragraph (3) of the Law. Number 35 of 2009 concerning Narcotics. This article is also reinforced by the Circular Letter of the Supreme Court (SEMA) No. 27 of 2009. Therefore, it would be better if you find out that a family member is entangled in narcotics, immediately report it to the police to request rehabilitation. Don't wait to be caught by the police or wait for an overdose.<sup>23</sup>

Sanctions for narcotics users based on positive criminal law are as regulated in the criminal provisions of Law Number 35 of 2009 concerning Narcotics which generally refers to the type of crime as stipulated in Article 10 of the Criminal Code. The main penalties in Law Number 35 of 2009 concerning Narcotics, in the form of capital punishment, imprisonment, confinement, and fines, among others, are regulated in Articles 111 and 148 of Law Number 35 of 2009 concerning Narcotics.

Perpetrators of drug abuse (users, producers and dealers) in the perspective of fiqh jinayah are haram (forbidden). Likewise, drug abuse (users, producers, and dealers) in the perspective of criminal law is a prohibited act. Therefore, the legal status of drug abusers, both in the perspective of fiqh jinayah and in the perspective of criminal law, is an act that is prohibited and violates the law. and His Messenger (revelation) and has legal implications in the world and the hereafter, while in criminal law that prohibits it is the law of human products, and has legal implications in the world only, not in the hereafter.<sup>24</sup>

In the opinion of Hanafi and Malik, criminals who consume dangerous drugs to the extent that they cause disturbances of consciousness (drunk), in the opinion of Hanafi and Malik, will be sentenced to 80 lashes. According to Syafi'i, the sentence was only 40 times. However, there is a history that confirms that if the user after being subject to legal sanctions

<sup>22</sup> Muladi dan Barda Nawawi Arief, *Teori-teori dan Kebijakan Pidana*, Alumni, Bandung, 2005, hlm. 87.

<sup>23</sup> Redaksi RAS (Penyusun), *Tip Hukum Praktis: Menghadapi Kasus Pidana*, Raih Asa Sukses, Jakarta, 2010, hlm. 104.

<sup>24</sup> Mardani, *Op. Cit.*, hlm. 171.

still does and continues to do it several times (four times) the punishment is the death penalty.<sup>25</sup>

Sanctions for perpetrators of drug abuse in the perspective of Islamic criminal law, have similarities with the legal sanctions for drug abuse in the perspective of the criminal law of the Republic of Indonesia, namely that both are the authority of the government/judges to determine the punishment.<sup>26</sup>

The fatwa of the Indonesian Ulema Council (MUI) says that the sanctions for drug abusers are ta'zir. The consideration of this fatwa is that in order to prevent drug abuse which results in loss of life and property which greatly disturbs the mind, security and success of development, it is necessary to have efforts and actions in the form of:

1. Imposing severe/hard penalties on sellers/distributors/smugglers of drug substances up to the death penalty.
2. Imposing severe penalties on security officers and civil and military government officials who facilitate, pass, let alone protect drug sources/sellers/retailers/traffickers so that they are not misused.
3. Issue tougher regulations and tougher sanctions on those who have legality to sell drugs so that they are not abused.
4. Carry out preventive efforts by making laws regarding the use and abuse of drugs.<sup>27</sup>

Sanctions in positive criminal law and sanctions in Islamic criminal law are certainly different and cannot be compared logically. Because in positive criminal law, the law is made by humans while Islamic criminal law is a law that comes from the Qur'an, Sunnah (hadith), ijma' kiyas.

#### 4. CONCLUSION

The comparison between the crime of khamr in Islamic criminal law compared to positive Indonesian criminal law is that they both have the same concept even though with different editorials, namely in Islamic law, something that can cover one's awareness of thinking is called khamr while in terms of positive Indonesian criminal law, liquor or beverages containing alcohol are beverages containing ethanol which are processed from agricultural products containing carbohydrates by means of fermentation and distillation, or fermentation without distillation, or those processed by mixing concentrate with ethanol or by dilution of beverages containing ethanol. Or in other words, anything that intoxicates and destroys the mind belongs to the category of khamr, whether made from dates, wine and others, including drugs. The criminal difference for the perpetrators of the criminal act of khamr in Islamic criminal law compared to positive Indonesian criminal law is that in Islamic law, the punishment imposed is only in the form of caning, while in positive Indonesian criminal law, the sentence imposed can be in the form of imprisonment or a related fine. with liquor which is classified as a "crime" and imprisonment or a fine related to liquor which is classified as an "offence". Comparison

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<sup>25</sup> Zainuddin Ali, *Hukum Pidana Islam*, Op. Cit., hlm. 101.

<sup>26</sup> Mardani, *Op. Cit.*, hlm. 174.

<sup>27</sup> *Ibid.*, hlm. 130-131.





between drug crimes in Islamic criminal law compared to positive Indonesian criminal law, namely drugs in Islamic criminal law compared to positive Indonesian criminal law are the same as any substance which, if consumed, will damage the body and mind because it causes unconsciousness or anesthesia, sometimes even make people crazy or drunk because these substances work to affect the central nervous system. The legal status of drug abusers, both in the perspective of jinayah fiqh and in the perspective of criminal law, is an act that is prohibited and violates the law, the difference is in the fiqh of jinayah which forbids Allah SWT. and His Messenger (revelation) and has legal implications in the world and the hereafter, while in criminal law that prohibits it is the law of human products, and has legal implications in the world only, not in the hereafter. Sanctions for perpetrators of drug abuse in the perspective of Islamic criminal law, have similarities with the legal sanctions for drug abuse in the perspective of the criminal law of the Republic of Indonesia, namely that both are the authority of the government/judges to determine the punishment. Therefore, every Indonesian citizen should not violate criminal law, especially committing criminal acts in the field of narcotics and liquor because apart from being threatened with criminal sanctions, there are also health threats for the perpetrators.

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