COMMENTS

MARIHUANA: THE LEGISLATIVE CAULDRON, A POT FULL OF TROUBLE

Background[1]

About five thousand years ago, somewhere on the rugged slopes of central Asia, the ancient Chinese discovered the properties of an unusual plant—Cannabis sativa.[2] This sturdy, flowering herb, used so often in making rope, contained a resin which when ingested brought on strange results. Like the "Lotos Eaters,"[3] its users experienced flights of fantasy and euphoric delusions; they became greatly relaxed and their inhibitions were lowered. The hedonistic enjoyment that the plant induced led the more "moral" of the community to christen the herb "Liberator of Sin."[4] The stories of the power of the Cannabis slowly spread across the continent into India, where the drug was quickly adopted into the religious and cultural life of the community.[5] From India its use became prevalent in the Near East, Africa, and then in Central and South America where it received the name by which we know it—marihuana.[6]

It is difficult to establish precisely how the drug came into the United States. It is generally assumed that the practice of smoking the drug was imported from Mexico through the southwestern states of Arizona, New Mexico, and Texas.[7] From the lower classes in these

1 For an interesting treatment of the history of marihuana use *see*, N. Taylor, *The Pleasant Assassin: The Story of Marihuana*, in THE MARIHUANA PAPERS 31 (Solomon ed. 1966).

2 Although most languages had provided terms for the plant, it was officially designated *Cannabis sativa* by Linnaeus in 1753. *Id.* at 32.

3 Alfred Lord Tennyson, *The Lotos-Eaters*, THE ATLANTIC BOOK OF BRITISH AND AMERICAN POETRY (Edith Sitwell ed. 1958).

4 Taylor, *supra* note 1, at 35.

5 *See* G.M. Carstairs, *Bhang and Alcohol: Cultural Factors in the Choice of Intoxicants*, 15 Q.J. STUDIES ON ALCOHOL 220 (1954).

> The use of the drug remains deeply incorporated in the Indian cultural life. It is found in three forms, often depending upon the class by which it is being used: *charas, bhang*, and *ganja*. Regardless of hemp's nativity, it is the history of India that reveals the real story of the plant. The kaleidoscopic facets of its culture, use, and abuse, together with a close intertwining of religion and philosophy, are recorded in everything from the Vedas to a modern bazaar. In India the culture of hemp became almost a science and its use very close to epicurean.

Taylor, *supra* note 1, at 36.

6 A.R. Lindesmith, *The Marihuana Problem: Myth or Reality*, in THE MARIHUANA PAPERS 48, 51 (Solomon ed. 1966).

7 H.S. Becker, *Marihuana: A Sociological Overview*, in THE MARIHUANA PAPERS 65, 94 (Solomon ed. 1966).

states the use spread to the ghettos of New Orleans and then to the larger cities of the East. The Cannabis, or hemp, plant grows wild and can be cultivated in most areas with a temperate or tropical climate. While it is often mixed with liquids or in solid foods, usage in this country is primarily confined to smoking the crushed, dried leaves.[8] The practice remained relatively obscure, however, until about 1930 when it suddenly became the focal point of attack by the press and various governmental agencies.[9] By 1937 when the federal Marihuana Tax Act was passed, the public had been well exposed to the exaggerated horrors of the drug. It had been connected with the commission of crimes of violence and sex; reports were common that hundreds of school children were becoming addicted to it by the urgings of an organized group of dispensers and that it was causally linked with juvenile delinquency; it was generally believed that physical and mental deterioration was a direct result of the prolonged habit of smoking marihuana.[10]

Scientific studies on the subject were scarce, however, and the stringent requirements of state laws made it difficult for investigators to obtain permission to perform their work.[11] It is apparent that the fear which engendered the strict legislation of the thirties was based on misunderstandings and moral indignation rather than on any firm scientific knowledge.

Physiologically, marihuana has been classified as a relatively harmless intoxicant.[12] It is accepted now that the main pharmacological agent is tetrahydrocannabinol, a mild hallucinogen which is always contained in the unpollinated flowers of the female plant.[13] Although

---

8 Fort, *Social and Legal Responses to Pleasure-Giving Drugs*, in THE UTOPIATES 212 (Blum ed. 1964).

9 Winick, *Marihuana Use By Young People*, in DRUG ADDICTION IN YOUTH 20 (Harms ed. 1965).

10 *See, e.g.*, ROWELL & ROWELL, ON THE TRAIL OF MARIJUANA, THE WEED OF MADNESS (1939).

> We know that marijuana—1. Destroys will power, making a jellyfish of the user. He cannot say no. 2. Eliminates the line between right and wrong, and substitutes one's own warped desires or the base suggestions of others as the standard of right. 3. Above all, causes crime; fills the victim with an irresistible urge to violence. 4. Incites to revolting immoralities, including rape and murder. 5. Causes many accidents both industrial and automobile. 6. Ruins careers forever. 7. Causes insanity as its specialty. 8. Either in self-defense or as a means of revenue, users make smokers of others, thus perpetuating the evil. *Id.* at 33.

11 *See* Zinberg and Weil, *The Effects of Marijuana on Human Beings*, N.Y. Times, May 11, 1969, § 6 (Magazine), 28, 94.

12 Weil, Zinberg and Nelson, *Clinical and Psychological Effects of Marihuana in Man*, 162 SCIENCE 1234 (1968) (hereinafter cited as Weil). *See also* Grinspoon, *Marihuana*, SCIENTIFIC AM., Dec. 1969, 17 at 20.

13 GOODMAN & GILMAN, THE PHARMACOLOGICAL BASIS OF THERAPEUTICS 300 (3d ed. 1965).

the medical effects of the drug have been emphasized and exaggerated in the past, a recent study[14] has found that the physical reactions of the body to the drug are relatively miniscule.

> Our results were clear-cut, marihuana caused a moderate increase in heart rate, but not enough to make the subject conscious of a rapid pulse, and it reddened the whites of the eyes. It had no effect on pupil size, blood sugar, or respiratory rate.[15]

The external reactions of the user will often bear a striking resemblance to those accompanying the use of alcohol. Reactions which are alien to the user cannot be induced through the smoking of marihuana.[16] As with alcohol, the external symptoms reflect the basic personality of the user.

In the course of discussions on the subject, many analogies are drawn between marihuana and alcohol and between marihuana and other drugs. These analogies can be at once helpful and confusing. There is one basic distinction that should be borne in mind. Although marihuana has long been legally classified as a narcotic, it is generally accepted today that the drug is non-addictive.[17] The continuous use of alcohol or the opiate derivatives will cause the user's system to adjust itself chemically to their presence. This adjustment leads to a condition known as tolerance, after which the absence of these chemicals will effect a malfunctioning and will cause the user to "withdraw."[18] Tetrahydrocannabinol produces no such adjustment. Although the regular user of marihuana may form a psychological dependence because of his increasing desire to attain the state of relaxation which the drug induces,[19] he will not become addicted to it and can cease using it at his convenience.[20]

The recent *Weil* study, concerning the short-term effects of the drug, has concluded that it imposes little harm on the user's functional ability.[21] "From our own study and from other studies in

---

14 Weil, *supra* note 12.

15 Zinberg and Weil, *supra* note 11, at 89.

16 *See* Becker, *supra* note 7; TASK FORCE REPORT: NARCOTICS AND DRUG ABUSE, THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 13 (1967) (hereinafter cited TASK FORCE REPORT).

17 WHITE HOUSE CONFERENCE ON NARCOTICS AND DRUG ABUSE 286 (1963).

18 *See* EDWIN SCHUR, NARCOTICS ADDICTION IN BRITAIN AND AMERICA: THE IMPACT OF PUBLIC POLICY (1960).

19 *See* 32 U.N. BULL. ON NARCOTICS 722 (1965); *see also* Comment, *Marijuana Laws: A Need For Reform*, 22 ARK. L. REV. 359 (1968).

20 MAYOR'S COMMITTEE ON MARIJUANA, THE MARIJUANA PROBLEM IN THE CITY OF NEW YORK (1944). Portions of this most comprehensive and authoritative report are printed in THE MARIHUANA PAPERS (Solomon ed. 1966) (hereinafter this study will be cited as the LaGuardia Report).

21 Weil, *supra* note 12.

progress it would seem—in short-term usage only—that the usual doses of marihuana do not impair a user's ability to carry out successfully a wide range of tasks of ordinary complexity."[22]

Another study, comparing the effects of marihuana and alcohol, discovered great discrepancies between the effects of these drugs. The tests involved simulated driving performance for experienced marihuana smokers. It was found that those using marihuana incurred significant errors in only the speedometer tests, while the same subjects, intoxicated from alcohol, accumulated significantly more accelerator, brake, signal, speedometer, and total errors than under the normal conditions.[23]

The psychological effects of the drug cannot be as clearly measured. The subjective experiences of the user will vary from euphoric to traumatic, according to his personality,[24] and often according to the extent of dosage.[25] The use, however, has generally been associated with a quiet, contemplative mood. As Dr. Allentuck describes the subjects he had observed in the *LaGuardia* study:

> [There is] a sense of well-being and contentment, cheerfulness and gaiety, talkativeness, bursts of singing and dancing, day dreaming, a pleasant drowsiness, joking . . . . The drowsiness, day dreaming and unawareness of surroundings were present when the subject was left alone . . . . But except for those who were allowed to pass the time undisturbed, the pleasurable effects were interrupted from time to time by disagreeable sensations . . . . A pronounced state of anxiety reaching a panic stage, associated with fear of death or of insanity, was observed only in those subjects experiencing the relatively few psychotic episodes and here the anxiety state led to pleas for escape and not to acts of aggression. Even in the psychotic states there were no uncontrollable outbursts of rage or acts of violence.[26]

This tranquil attitude, found to accompany the use of the drug, is not only an interesting scientific phenomenon but is of great social import. This has been the main retort of the proponents of the drug to the scare stories concerning the connection of the drug with crimes of sex and violence.[27] It is now generally accepted that no causal relationship exists between marihuana and non-use crimes.[28]

---

22 Zinberg and Weil, *supra* note 11, at 89.

23 Crancer, Dille, Delay, Wallace, Haykin, *Comparison of the Effects of Marihuana and Alcohol on Simulated Driving Performance*, 164 SCIENCE 851 (1969).

24 *See* Becker, *supra* note 7.

25 *See* Taylor, *supra* note 1.

26 LaGuardia Report, *supra* note 20, at 318.

27 Lindesmith, *supra* note 6, at 49-50.

28 *See* W. Bromberg, *Marihuana: A Psychiatric Study*, 4 J.A.M.A. 113 (1939); TASK FORCE REPORT, *supra* note 16, at 13.

There is not, however, universal acceptance of the innocent character of the drug.[29] Various studies from the Middle East, the Near East, and in the United States indicate that the mental effects can be seriously detrimental.[30] They have concluded that the "[e]motional balance is disturbed by the waves of euphoria interspersed with phases of anxiety; paranoid episodes are frequent—giving rise to disturbances of conduct; volition and initiative are impaired; sensation is changed and distorted; and even the so-called 'American-type' marihuana can produce full-fledged hallucinations and delusions."[31] Cases have been reported in which the subjects experience recurrences of the drug effects days, and, in some instances, weeks after the original use.[32] Observations have also been made as to the occurrence of psychopathology after exposure to marihuana[33] and serious illness after intravenous injections.[34]

In 1968, the Committee on Problems of Drug Dependence of the National Research Council and the Committee on Alcoholism and Drug Dependence of the American Medical Association Council on Mental Health issued a joint statement on the harmfulness of marihuana.[35] The report was based on an appraisal of all existing information by committee members, all of whom had had wide experience in working with the drug problem. Among the points that were discussed, it was stressed that:

> 1. Cannabis is a dangerous drug and is a public health concern. Practically all societies in which it has been extensively used have found it necessary to impose legal and social sanctions on users and distributors. Although not addictive, it is a powerful psychoactive agent and where chronic heavy use occurs it often has a marked effect in reducing the social productivity of the user.
> 2. Legalization of marihuana would probably create a serious abuse problem in the United States. Currently used hemp products are of low potency, but if controls were eliminated, more potent (and dangerous) preparations would probably dominate the legal market.[36]

---

29 *See* Letters, W. Keup, 163 SCIENCE 1144 (1969) for a reply to the Weil study.

30 Miller, *Marihuana: The Law and Its Enforcement,* 3 SUFFOLK L. REV. 81, 82, n.2 (1968).

31 *Id.* at 83; Grinspoon, *supra* note 12, at 23.

32 Keeler, *Spontaneous Recurrence of Marihuana Effects,* 125 AM. J. PSYCHIATRY No. 3, 384 (1968).

33 Talbott and Teague, *Marihuana Psychosis: Acute Toxic Psychosis Associated with The Use of Cannabis Derivatives,* 210 J.A.M.A. 299 (1969).

34 King and Cowen, *Effects of Intravenous Injections of Marihuana,* 210 J.A.M.A. 724 (1969).

35 204 J.A.M.A. 1181.

36 *Id.; see also* Editorial, *Marihuana Thing,* 204 J.A.M.A. 1187 (1968).

The one conclusion that can be drawn from all the various studies and reports is that the short term effects of the drug are basically innocuous to the individual user. The area that remains clouded, however, is that in which the long term psychiatric results are involved. No studies have, as yet, delved into this area. It is apparent that this is where society's true interest must rest and the realm in which the debate over the true harmfulness of the drug must rage.[37]

Present Legislation

The gross exaggeration and misunderstanding of the evils of marihuana that were so prevalent during the Thirties led Congress to pass the Marihuana Tax Act of 1937.[38] This bill was passed at the urging of Henry J. Asslinger, head of the Federal Bureau of Narcotics. After a brief hearing, the bill was adopted by Congress on the ground that marihuana was a highly dangerous drug, inciting its users to commit crimes of violence and often leading to insanity.[39] As a result of these misunderstandings, Congress provided severe penalties—up to five years for any violation—which became increasingly more severe. By 1968 the maximum penalty had been raised to forty years, with no probation for second offenders, and a minimum sentence of five years was mandatory.[40]

The imposition of state control flowered basically from the same seeds sown in the federal publicity campaign.[41] Until 1930, only sixteen states had imposed laws concerning the use and possession of marihuana.[42] However, with the passage of the federal statute, state legislatures began to follow the lead of the federal government and imposed their own prohibitions. In almost all cases, control of the drug has followed an unaltered direction of increasingly harsh penalties.[43] Although the punitive sanctions vary, all but three of the states have adopted the Uniform Narcotic Control Act.[44] The penalties typically range from one to fifteen years imprisonment and fines of $1000 to

37 Zinberg and Weil, *supra* note 11, at 94.

38 50 Stat. 551, 26 U.S.C. § 4741 (1964).

39 *See Hearings on H.R. 6906 Before a Subcommittee of the Committee on Finance of the U.S. Senate*, 75th Cong., 1st Sess. (1937); *see also* Comment, *supra* note 19, at 362.

40 It must be noted that the enforcement of this act has been declared unconstitutional in *Leary v. United States*, 395 U.S. 6 (1969), as a violation of the right against self-incrimination. The Court concluded the opinion, however, by stating "nothing in what we hold today implies any constitutional disability in Congress to deal with marijuana traffic by other means." *Id.* at 54.

41 Lindesmith, *supra* note 6, at 53-58.

42 Becker, *supra* note 7, at 94.

43 Comment, *supra* note 19, at 362.

44 9 UNIFORM LAWS ANN.

$10,000 for first offense.[45] New Jersey adopted the Uniform Act in 1933. As amended in 1966, the act provides that a violation of any provision which includes possession and sale of marihuana will be a high misdemeanor.[46] The punishment ranges from two to fifteen years for a first offense to ten years to life imprisonment for a third offense.[47] There is no distinction made in the statute between marihuana and other drugs classified as narcotics. In most of the states, marihuana, morphine, heroin, and cocaine are treated in exactly the same manner in terms of punishment, although these substances have very different effects upon the human body and are used by very different types of individuals.

The conclusion is inescapable that these unimaginative and ineffective laws were drawn under misconceptions as to the dangers of marihuana and its addictive qualities. These sanctions have been evidently founded on the premise that marihuana is virtually as dangerous as the opiate derivatives and the more powerful hallucinogens.

Constitutional Attacks[48]

Whether one is a protagonist of the drug or wholly opposed to its use, it must be generally accepted that the laws which attempt to deal with marihuana are at best adequate. Although it appears unlikely that these laws will be successfully attacked through the judicial process, an outline of the various avenues of assault may be helpful in understanding the position of those who have attempted this means. It should be noted in reviewing these arguments that what is being discussed is the *use* of the drug and not its *abuse*. The proponents of the drug are basically urging that the individual should be at liberty to intoxicate himself with marihuana to the same extent that he would be free to use alcohol. When such an individual abuses this right—by driving while intoxicated or making himself a public nuisance—he should be reprimanded to the same extent as he would had he been under the influence of alcohol.

45 *See generally* W. ELDRIDGE, NARCOTICS AND THE LAW (2d ed. 1967) for a comparison of the various state laws.

46 N.J. REV. STAT. 24:18-1 *et seq.* (1937).

47 N.J. STAT. ANN. 24:18-47(c) (supp. 1969-70). N.J. Stat. Ann. 2A:170-8 (Supp. 1969-70), however, provides that use and intoxication are violations of the Disorderly Persons' Act. Most marihuana prosecutions in New Jersey are proceeded on under this act, notwithstanding the fact that a violation of N.J. Stat. Ann. 24:18-47 is involved.

48 For a comprehensive treatment of the constitutional attack on this legislation *see generally* Comment, *Marijuana and the Law: The Constitutional Challenges to the Marijuana Laws in Light of the Social Aspects of Marijuana Use*, 13 VILL. L. REV. 851 (1968); *see also* Osteri and Silverglate, *The Pursuit of Pleasure: Constitutional Dimensions of the Marihuana Problem*, 3 SUFFOLK L. REV. 55 (1968).

Governmental Prohibition as an Invasion of Privacy

The constitutional attack upon this legislation will be many pronged. However, at the foundation of the case is the basic philosophy that a man should be free to direct his own course of conduct when no other party is injured. As it is an entirely private matter, the state should have no right to interfere.[49]

Although no explicit recognition of a right to privacy can be found in the federal constitution, the Supreme Court has interpreted this right as being essential to the several guarantees of the Bill of Rights. In *Griswold v. Connecticut*,[50] the Court struck down as unconstitutional a Connecticut statute which made it unlawful for any person to use "any drug, medicinal article or instrument for the purpose of preventing conception."[51] Speaking for the majority, Mr. Justice Douglas stated that the "guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[52] The Court found that the marital privacy is within such a penumbra and as such would present a bar to criminal prosecution under the statute.

It must be understood that this sheltered area of privacy is distinct from the classic protection of the fourth and fifth amendments. The latter are guarantees of security from unlawful activities on the part of government agents; they provide protection from unsavory means of enforcing legislation that is otherwise lawful. The zone of privacy as found in *Griswold*, on the other hand, is a realm into which the state has no authority to delve without a compelling reason regardless of the means employed.[53]

In the past, substantive zones of privacy have been related to express constitutional rights such as the freedom of speech[54] and the freedom of belief.[55] In *Griswold*, the Court apparently recognized the existence of privacy without any complex association to one, specific right. The personal choice whether to use marihuana may be within

---

49 *See generally* Weiss and Wizner, *Pot, Prayer, Politics, and Privacy: The Right to Cut Your Own Throat in Your Own Way*, 54 IA. L. REV. 709 (1969).

50 Griswold v. Connecticut, 381 U.S. 479 (1965).

51 CONN. GEN. STAT. ANN. § 53-32.

52 381 U.S. at 484.

53 *See* Comment, *supra* note 48, at 862. This confusion can be observed in the lower court opinion in *Commonwealth v. Leis*, (Nos. 28841-2, 28844-5, 28864-5 Suffolk Superior Ct., Mass., Dec. 1967).

54 Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963).

55 West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

this same area of privacy. Since the individual is merely indulging in a relaxing form of intoxication with no apparent injury, the state has no right to thrust its sanctions on the individual's right to choose.

Once the court reaches this conclusion, the government would be required to show that the community interests which the regulation purports to protect outweigh the interest of the individual in enjoying his constitutional freedom. In balancing the present interests "unless the state were able to show some more weighty societal interest in imposing the harsh penalties currently attached to private use of marihuana, a court could find that the individual's liberty to enjoy the drug's euphoric qualities is superior to society's interest in suppressing this type of private conduct."[56]

In *Commonwealth v. Leis*,[57] a constitutional attack was made upon the Massachusetts narcotics law by a number of defendants being prosecuted for possession of marihuana. This case involves one of the most exhaustive judicial inquiries into the nature of marihuana yet made. However, both the trial court and the state's highest court failed to accept any of the grounds for dismissal urged by the petitioners. It was argued that the law constituted an invasion of the privacy of the petitioners. The Court summarily dismissed this contention.

> The defendants insist that the right to smoke marihuana is guaranteed by the Constitutions of the Commonwealth and the United States and must be balanced against the interests of the State in prohibiting its use. No such right exists. It is not specifically preserved by either Constitution. The right to smoke marihuana is not "fundamental to the American scheme of justice . . . necessary to an Anglo-American regime of ordered liberty." [citations omitted] It is not within a "zone of privacy" formed by the "penumbras" of the First, Third, Fourth, and Fifth Amendments and the Ninth Amendment of the Constitution of the United States. [citations omitted] The defendants have no right, fundamental or otherwise, to become intoxicated by means of the smoking of marihuana. [citations omitted][58]

In light of the doubts that continue to surround the labeling of marihuana as a safe intoxicant and the strong presumption of reasonableness surrounding legislative acts, it appears unlikely that the "freedom of privacy" argument will find any great judicial support; and the attitude founded in *Leis* will continue to be expressed.

---

56 Comment, *supra* note 19, at 373.

57 — Mass. —, 243 N.E.2d 898 (1969).

58 *Id.* at —, 243 N.E.2d at 903-04.

Substantive Due Process

Governmental prohibition of use and possession of marihuana has also been assailed by means of the concept of substantive due process.[59] In *Robinson v. California*[60] the Supreme Court held that criminal prosecution for narcotic addiction is repugnant to the Constitution. The legislation struck down in this case and in subsequent cases involving statutes against chronic alcoholism[61] and vagrancy[62] has been spoken of in terms of "status crimes."[63] The basic principle involved in this concept is that there are certain conditions that the state cannot penalize without violating the social conscience of the community. The question which is raised is not whether the punishment is too grave but whether standards of decency will allow *any* punishment to be imposed.[64]

Although this argument has found success in attacking the status crimes discussed, the Court quickly distinguished such from crimes of action. In *Powell v. Texas*[65] the conviction of a chronic alcoholic for being drunk while in public was upheld. In distinguishing *Robinson* the Court stated:

> The State of Texas thus has not sought to punish a mere status . . . . Rather, it has imposed upon appellant a criminal sanction for public behavior which may create substantive health and safety hazards, both for the appellant and for members of the general public, and which offends the moral and esthetic sensibilities of a large segment of the community.[66]

It is difficult to imagine a court applying this argument to strike down a conviction involving marihuana. Even if use and possession were considered as factors of the "status" crimes, with marihuana there is no analogous "status" which is being prosecuted. As noted above,[67] although marihuana is classified as a narcotic, it possesses no addictive qualities. It would thus contain no basis upon which to construct a "status."

---

59 Comment, *supra* note 48, at 866-67. For an overall discussion of the concept of substantive due process *see* Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071 (1964).

60 370 U.S. 660 (1962).

61 Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1966).

62 Fenster v. Leary, 20 N.Y.2d 309, 229 N.E.2d 426, 282 N.Y.S.2d 739 (1967).

63 *See* Comment, *supra* note 48.

64 *See* Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635 (1966).

65 392 U.S. 514 (1968).

66 *Id.* at 532.

67 *Supra* in text.

Excessive Punishment

Related to the substantive due process argument is another theory based on the eighth amendment. While the conflict rages over absolute prohibition and complete liberalization, the one area in which is found the most agreement concerns the insensibility of the punishment authorized by the statutes. Although the thrust of a *Robinson* based attack may fall short of barring governmental proscription, it may have enough force to shatter the penalties which have proved to be the most intolerable function of the legislation.[68]

The applicability of this eighth amendment approach was intimated in Justice Douglas' concurring opinion in *Robinson*, in which he noted that "punishment out of all proportion to the offense may bring it within the ban against 'cruel and inhuman punishment.' "[69] This constitutional ban does not merely concern excessive punishment[70] but is also seen as demanding a punishment appropriate for the crime.

> The primary purpose of [the eighth amendment] has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes; the nature of the conduct made criminal is ordinarily relevant only to the fitness of the punishment imposed.[71]

The social objectives which are sought to be achieved by the imposition of criminal sanctions are complex and often intertwined. Among them are rehabilitation, retribution, deterrence, condemnation.[72] Every criminal sentence will have at its foundation a various blending of these purposes. The nature of marihuana possession and use offenses and attitudes toward them weaken the foundations and distort many of the classic purposes.

The concept of rehabilitation is based primarily on the state's desire to adjust what is considered to be deviant moral and social values into those which are more consistent with the norms that society fosters. However, marihuana use is an activity in which no victims are injured. Also, the "deviant" attitudes involved are often accompanied by a sincere belief that the activity should be strictly a matter of personal choice. In such cases the traditional rehabilitory methods founded on

---

68 *See* Comment, *supra* note 48 at 869.

69 370 U.S. at 676.

70 *See* Weems v. United States, 217 U.S. 349 (1910). In this case the Court first employed the ban, in striking down a twelve year hard labor sentence which had been imposed for falsifying public records.

71 392 U.S. at 531-32.

72 *See generally* Note, 69 YALE L.J. 1453 (1960).

incarceration will be entirely inadequate. A true adjustment can only be achieved by education through an intellectual process rather than through meaningless penal sanctions.

Retribution plays, at most, a limited role in this prohibition. Violations cause no harm to individuals other than the violator. Therefore, little emotional desire is aroused in the community to balance the scales by punishing the offender. Since the retributional desire is negligible, it would be difficult to justify the severe penalties on this ground.

Deterrence is often to be considered the main objective to be achieved through the imposition of harsh penalties. The increasing state and federal penalties over the years is evidence of the legislative attempts to halt the use of the drug. Statistics on marihuana violations and estimates on marihuana usage, however, seem to refute the existence of any added deterrent effect from an increase in the penalties. The lack of effectiveness of the methods employed must indicate a loss of importance in the relationship between the objective and the means of attaining it. The attempts to deter the use of the drug might be more effectively channeled into educational endeavors similar to those which must be used in rehabilitation.

Perhaps the most significant goal in punishing the use and possession of marihuana is community condemnation.[73] Criminal sanctions are also imposed for the purpose of emphasizing the respect which certain norms of the community deserve. Thus society has determined that the smoking of marihuana is an undesirable and immoral activity. In order to accentuate this envisioned evil, stern penal codes were established. It is obvious that initially the passage of the marihuana laws was based on an abhorrence for this hedonistic activity rather than from scientific evidence of the harms produced.[74] Although such social reaffirmation of values is seen as a necessity for the maintenance of the fabric of the community, the results of this as the basis for punishment must be carefully weighed. It has been noted that the present marihuana laws, instead of solidifying a traditional moral value, are dividing society itself and tending to destroy one of our most basic norms—respect for the law.

In evaluating the question of whether the punishment is appropriate for the crime, the court must be willing to enter into a consideration of all the relevant scientific evidence which is available.

---

[73] Comment, *supra* note 48, at 871.

[74] *See* Murphy, *The Cannabis Habit: A Review Of Recent Psychiatric Literature*, 15 U.N. BULL. ON NARCOTICS 3, 21 (1963).

Without this it would be impossible to balance the evil and the penalty. However, courts have shown a great reluctance in entering into such an investigation.[75] In the single instance where the court did involve itself in intensive investigation, it was concluded that even on the basis of the limited scientific evidence available, there was sufficient harm to justify the penalties.[76]

Equal Protection

The fourteenth amendment to the Constitution provides in part that "[n]o State shall . . . deny to any person within its jurisdiction equal protection of the laws." Thus, it has been held that a statute must cover all persons whose inclusion is necessary, logically, scientifically, or by reason of common sense, to effectuate the legitimate objectives of the statute.[77]

One of the foremost cases in which this clause was applied was *Skinner v. Oklahoma.*[78] In that case the Supreme Court held unconstitutional a state law which required sterilization of all persons convicted two or more times of a crime involving moral turpitude. Chicken theft was included as such a crime while embezzlement was not. The Court reasoned that "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense . . . it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatments."[79]

This rationale was employed by the defense in *Commonwealth v. Leis.* It was contended that the legislature was acting outside its power in proscribing behavior of one class of people (those who choose to enjoy a mild state of intoxication with marihuana) and merely regulating the similar activity of another class (those seeking a mild state of intoxication from alcohol). The Court did not accept this argument; it found that:

> [t]here are at least two distinctions between alcohol and the "mind-altering" intoxicants that are defined by the law as narcotic drugs.

75 *See* Leary v. U.S., 383 F.2d 851 (5th Cir. 1967), *rev'd,* 395 U.S. 6 (1969); concurring opinion of Justice Kirk in *Commonwealth v. Leis,* — Mass. —, —, 243 N.E.2d 898, 906 (1969).

76 Nos. 28841-2, 18844-5, 28864-5 (Suffolk Superior Ct., Mass.). It should be noted that on appeal it was held that the defendants had had no standing to raise this issue since they had not yet been tried on the indictment. — Mass. at —, 243 N.E.2d at 906. *See also* State v. Mpetas, 79 N.J. Super. 202, 191 A.2d 186 (App. Div. 1963) in which it was held that a sentence of three to five years in a State prison for unlawful possession of the drug did not constitute cruel and unusual punishment and was not excessive.

77 McLaughlin v. Florida, 379 U.S. 184 (1964).

78 316 U.S. 535 (1942).

79 *Id.* at 541.

> First, alcohol is susceptible to a less restrictive alternative means of control. There are recognized, accurate means of determining its use and its abuse. Second, the effects of alcohol upon the user are known. We think that the Legislature is warranted in treating this known intoxicant differently from marihuana, LSD, or heroin, the effects of which are largely still unknown and subject to extensive dispute. The Legislature is free to recognize degrees of harm and may confine its restrictions to instances where it determines the need for them is clearest. [citations omitted][80]

This argument was also raised in *People v. Aquiar*.[81] In answering this assault, the California Supreme Court held that "in light of present medical attitudes toward marihuana, we cannot say that the proscription against the possession of marihuana is palpably arbitrary and erroneous beyond rational doubt."[82]

Although it may be argued that *Skinner* requires that the state show more than just some reason for the discrimination between what are basically similar offenses,[83] it is unlikely that a defendant will find protection in the fourteenth amendment guarantee. So long as doubts remain as to the actual effects of marihuana, the courts will be able to find some possible justification for the legislative classification and will therefore affirm it.

Freedom of Religion

A more novel and perhaps more far reaching attack on the constitutionality of absolute marihuana prohibition rests on the first amendment guarantee that "Congress shall make no laws respecting an establishment of religion, or prohibiting free exercise thereof."

This argument was successfully employed in a case involving another hallucinogenic drug. In *People v. Woody*,[84] defendants, a group of Navajo Indians, were convicted of violating a section of the health code.[85] They were all members of the Native American Church, a sect the theology of which combines certain Christian teachings with a liturgy that is devoted to the use of the drug peyote. The followers believe that the drug embodies, in itself, the Holy Spirit and that those who partake enter into a direct contact with God. Peyote is a hallucenogenic substance contained in buttonshaped growths of a cactus plant;

80 — Mass. at —, 243 N.E.2d at 905.

81 257 Cal. App. 2d 597, 65 Cal. Rptr. 171 (1968).

82 *Id.* at 605, 65 Cal. Rptr. at 176.

83 *See* Boyko and Rotberg, *Constitutional Objections to California's Marijuana Statute*, 14 U.C.L.A. L. REV. 773 (1967).

84 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

85 CAL. HEALTH & SAFETY CODE § 11500; for the position of the State in this matter *see* 39:276 OP. ATT'Y GEN. 62-93 (May, 18, 1962).

it is composed basically of mescaline.[86] The use of the drug is prohibited under California law. The California Supreme Court found that since the Indians were using the drug in a sincere act of religious faith, any attempt to impose restrictions would be an infringement of their constitutional rights. The court carefully examined the meaning of peyote to the sect and pointed out that "although peyote serves as a sacramental symbol similar to bread and wine in certain churches, it is much more than a sacrament. Peyote constitutes in itself an object of worship; prayers are directed to it much as prayers are directed to the Holy Ghost."[87] In reversing the conviction, the court concluded that "[t]o forbid the use of peyote is to remove the theological heart of Peyotism."[88] Unlike other cases in which the courts have upheld governmental restraints on religious practices,[89] the Court found that the use of peyote was not merely an ancilliary aid in the religious experience, but was the *sine qua non* of its existence.[90]

It is reasonable to assume that if the Indian religion had centered about marihuana rather than peyote, the court would have achieved the same result. However, in a normal instance of a conviction, the apparent requirements of this defense would impose a sturdy barrier. It may be argued that the protection of the first amendment should extend to all those who employ marihuana in an attempt to achieve a "religious experience."[91] However, it is doubtful that the courts will be willing to accept a "religious" experience as protected unless it is within some historical setting of a formalized religion.[92] This attitude of care in defining "religion" is found in the approach taken by the court in *Woody*. The court went to great length to point out the tra-

---

86 PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 213, 215 (1967).

87 61 Cal. 2d at 721, 394 P.2d at 817, 40 Cal. Rptr. at 73.

88 *Id.* at 722, 394 P.2d at 818, 40 Cal. Rptr. at 74.

89 See *Braunfeld v. Brown*, 366 U.S. 599 (1961) and *McGowan v. Maryland*, 366 U.S. 420 (1961) which dealt with Sunday closing laws; *Davis v. Beason*, 133 U.S. 333 (1890) and *Reynolds v. United States*, 98 U.S. 145 (1878) which dealt with polygamy.

90 61 Cal. 2d at 725, 394 P.2d at 819-20, 40 Cal. Rptr. at 76.

91 Watts, *Psychedelics and Religious Experience*, 56 CALIF. L. REV. 74 (1968).

92 *See* D. A. Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development: Part I. The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381.

> Thus far courts have recognized exemptions from regulations relating to psychological purposes only when the behavior was limited to well defined ceremonial occasions. By limiting exemptions to these occasions, the favored behavior had no impact in subtracting from the purposes of the regulation . . . or it was directly related to the worship of God and strictly limited in intensity, time, and place by a theological system of discipline. . . . Thus, the indiscriminate use of hallucinogenic agents, in accordance with some private religious mystique, would have extremely difficult sledding in the courts.

Id. at 1427-28.

dition involved in the Native American Church and the solemnity attached to its ceremonies. In light of the casual and sporadic use which marihuana is subjected to by a great majority of its adherents, it would be difficult to imagine a court willing to draw the analogy. But even if the courts interpret such activities as within the realm of protected religious experience, they are apt to view such claims with great scrutiny. It is likely that they will be especially stringent in requiring proof of a defendant's sincerity.

In a case decided the same day as *Woody*,[93] the court emphasized the necessity that for one to be subject to the protection he must show that his asserted belief was real. The petitioner had claimed to be a "self-styled peyote preacher" acting as the spiritual leader of a group of individuals, and that his group would use peyote entirely for spiritual purposes. In light of the holding in *Woody*, the court remanded the case.

> Unlike the situation in *Woody* however, the defendant here has not proved that his asserted belief was an honest and bona fide one. A factual question remains as to whether defendant actually engaged in good faith in the practice of a religion. As we said in *Woody* "the trier of fact need inquire only into the question of whether the defendant's belief in Peyotism is honest and in good faith . . . or whether he seeks to wear the mantle of religious immunity merely as a cloak for illegal activities."[94]

This avenue of attack was utilized by Dr. Timothy Leary in defense of his conviction under the Marihuana Tax Act. He argued that the laws prohibiting the use, possession, and free trading of the drug are laws that abridge religious freedom.[95] Central to this contention is the assertion that marihuana plays an integral role in the exercise of his religion and that its use should be protected as within the free exercise of his religion.[96] The Court of Appeals did not accept this argument and quickly dismissed the analogy drawn to the peyote cases.[97] The court initially found that there was no evidence that the use of marihuana was a formal requisite to the practice of Hinduism—the religion which Dr. Leary professed.[98]

Certiorari was granted by the Supreme Court.[99] However, since the court found that the requirements of registration were a violation

---

93 *In re* Grady, 61 Cal. 2d 887, 394 P.2d 728, 39 Cal. Rptr. 912 (1964).

94 *Id.* at 888, 394 P.2d at 729, 39 Cal. Rptr. at 913.

95 383 F.2d 851.

96 Chayet, *Legal Aspects of Drug Abuse*, 3 SUFFOLK L. REV. 1, 15 (1968).

97 383 F.2d at 861.

98 *Id.* at 860.

99 Leary v. United States, 392 U.S. 903 (1969).

of the fifth amendment guarantees against self-incrimination and the presumption of illegal importation was abhorrent to our system of justice, there was no need for our highest court to answer directly the other questions involved.[100]

Conclusion

In *Brave New World,* Aldous Huxley gave us a glimpse of future society. Perpetuated through controlled eugenics, man could find solace from the mechanical regularity of his existence only through the use of drugs. *Soma* relieved his tension, eased his pain, and gave him pleasure. Man had become so dependent upon the drug that life without it was unbearable; but with it imagination was stifled and creativity crushed. The concept of such an existence is frightening and repulsive but is it merely a fantastic improbability?

Many objections have been posited in opposition to the use of marihuana. A great majority of them are based on the same bad science and misunderstanding that gave rise to the extant legislation. There is no evidence whatsoever that marihuana induces criminal behavior; the present understanding indicates the contrary. Nor is there a causal relation between the use of marihuana and the use of "hard" narcotics.[101] Both of these relationships stem not from an inherent quality of the intoxicant but, rather, from the external forces that have been imposed by society. As a consequence of the drug subculture created by community condemnation, the youthful marihuana user will come into contact with pushers and confirmed criminals. Because of legal classification, the same person selling marihuana will be pushing heroin. The adolescent, having recently discovered that marihuana is not as evil as the adult society wanted him to believe it was, finds himself curious as to the effects of other drugs.

It is altogether too simple to state that marihuana causes deviant behavior. The forces at work are too complex and interrelated to allow us to dismiss the experience with such brevity.

However, legitimate objections to the drug have been expressed.[102]

---

100 Leary v. United States, 395 U.S. 6 (1969).

101 EDWIN SCHUR, NARCOTICS ADDICTION IN BRITAIN AND AMERICA: THE IMPACT OF PUBLIC POLICY 30 (1960). This work presents an interesting comparison between the treatment of the drug problem in England, where it is considered a medical concern, and in the United States, where it is predominantly a criminal matter.

102 It must be noted that serious opinions have been expressed as to the wisdom of adding another, even harmless, intoxicant to our social problems. *See* Lang, *The President's Crime Commission Task Force Report on Narcotics and Drug Abuse: A Critique of the Apologia,* 43 NOTRE DAME LAWYER 847 (1968).

Merely because over a long period of time a tradition has been established

Foremost among these is the fact that we just do not know enough about the drug to permit its widespread use. Although it appears that the individual's use of the intoxicant should be a private matter, the potential does exist for a societal harm. As long as this possibility does exist, society must have the ability to protect its interest through some form of control.

This control cannot be arbitrary. In order to be effective there must exist, in the minds of all in society as well as in fact, a meaningful relationship between the control and the potential harm. All scientific, social, and psychological evidence available must be taken into consideration before action is taken. Although the courts are reluctant, and rightfully so, to go into such prolonged investigation, the legislature cannot be. They must *anxiously* enter into an inquiry not merely with lengthy and wasteful legislative hearings, but by means of commissions with the expertise and financial strength to attain results.

Such action cannot be long put off. A generation has grown familiar with the extensive use of the drug and with the absurdly severe penalties which are attached. Its future attitude toward the drug and toward law in general is a matter of speculation. However, the results of inaction could be disastrous and certainly not worth the gamble.

John J. Hughes

---

whereby consumption of a toxic substance has been sanctioned in varying degrees on a mass level does not logically lead to the conclusion that society should release another toxic substance for mass consumption.

Id. at 854. Goddard, *Should It Be Legalized? Soon We Will Know*, LIFE, Oct. 31, 1969, at 34. *See also* Tauro, *Marijuana and Relevant Problems—1969*, 7 AM. CRIM. L.Q. 174 (1969).