



1968

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Recommended Citation

Mark S. Dichter, *Marijuana and the Law: The Constitutional Challenges to Marijuana Laws in Light of the Social Aspects of Marijuana Use*, 13 Vill. L. Rev. 851 (1968).

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MARIJUANA AND THE LAW: THE CONSTITUTIONAL CHALLENGES TO MARIJUANA LAWS IN LIGHT OF THE SOCIAL ASPECTS OF MARIJUANA USE

In order to effectively evaluate the various constitutional challenges which can be raised with respect to the federal and state laws prohibiting the use and possession of marijuana,¹ it is important to understand the nature of this drug, its historical and present usage, and the present laws which are used to control it. No attempt will be made in this Comment to resolve the current extensive debate over the harms and desirable uses of marijuana except as is necessary in relation to the constitutional challenges.

I. GENERAL BACKGROUND

A. Biological and Pharmacological Description of Marijuana

In the United States the word "marijuana" is used to refer to the preparation made from the flowering tops of the female hemp plant, *cannabis sativa*.² The hemp or cannabis grows wild and can be grown in almost any climate and most soils.³ While marijuana is sometimes eaten or mixed with liquids, usage in this country is for the most part confined to smoking dried, pulverized leaves in the form of cigarettes.⁴ The chemical responsible for the euphoric, intoxicating effects of marijuana is presently thought to be tetrahydrocannabinol.⁵

The physiological effects of the smoking of marijuana are most authoritatively described in the standard pharmacological text, *The Pharmacological Basis of Therapeutics*:⁶

The subjective effects of the drug are exquisitely dependent not only on the personality of the user but also on the dose, the route of administration, and the specific circumstances in which the drug is used. The most common reaction is a development of a dreamy state of altered consciousness in which ideas seem disconnected, uncontrollable, and freely flowing. Ideas come in disrupted sequences, things long forgotten are remembered, and others well known cannot be recalled. Perception is disturbed, minutes seem to be hours, and seconds seem

1. See pp. 857-58 *infra* for a description of the federal and state laws prohibiting the use and possession of marijuana.

Since both "marijuana" and "marihuana" are acceptable spellings of the word, for consistency the spelling "marijuana" will be used throughout this Comment except for direct quotations.

2. Winick, *Marihuana Use by Young People*, in *DRUG ADDICTION IN YOUTH 20* (E. Harms ed. 1965); *PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 213* (1967) [hereinafter cited as *PRESIDENT'S COMM'N*]. See generally D. MAURER & V. VOCEL, *NARCOTICS AND NARCOTIC ADDICTION* (3d ed. 1967).

3. Fort, *Social and Legal Responses to Pleasure-Giving Drugs*, in *THE UTOPIAS 212-13* (R. Blum ed. 1964).

4. Winick, *supra* note 2, at 21.

5. Fort, *supra* note 3, at 213; Murphy, *The Cannabis Habit: A Review of Recent Psychiatric Literature*, 15 *U.N. BULL. ON NARCOTICS* 3 (1963).

6. L. GOODMAN & A. GILMAN, *THE PHARMACOLOGICAL BASIS OF THERAPEUTICS* (3d ed. 1965).

to be minutes; space may be broadened, and near objects may appear far distant. When larger doses are used, extremely vivid hallucinations may be experienced; these are often pleasant, but their coloring, sexual or otherwise, is more related to the user's personality than to specific drug effects. There are often marked alterations of mood; most characteristically there is a feeling of extreme well-being, exaltation, excitement, and inner joyousness (described as being "high"). Uncontrollable laughter and hilarity at minimal stimuli are common. This is often followed by a moody reverie, but occasionally the depressed mood may be the initial and predominant reaction. With the larger doses, panic states and fear of death have been observed; the body image may seem distorted; the head often feels swollen and the extremities seem heavy. Illusions are not uncommon, and the feeling of being a dual personality may occur. Even with the smaller doses, behavior is impulsive and random ideas are quickly translated into speech; violent or aggressive behavior, however, is infrequent. When the subject is alone, he is inclined to be quiet and drowsy; when in company, garrulousness and hilarity are the usual picture. Given the properly predisposed personality and high enough dosage, the clinical picture may be that of a toxic psychosis.⁷

B. Psychological Effects

The only authoritative and comprehensive study on marijuana in the United States scientifically describing its psychological effects is the "La Guardia Report,"⁸ based on a controlled study of regular marijuana users in New York City in 1944. One of the major conclusions of the La Guardia Report was that the psychological effects of moderate marijuana smoking and moderate alcohol consumption are quite similar.⁹ Physiologically, the effects of marijuana and alcohol are also quite similar, as the La Guardia Report concluded:

[N]either the ingestion of marijuana nor the smoking of marijuana cigarettes affects the basic outlook of the individual except in a very few instances and to a very slight degree. . . . In other words reactions which are natively alien to the individual cannot be induced by the ingestion or smoking of the drug.¹⁰

As with alcohol, the external symptoms vary with the personality of the user.¹¹

7. *Id.* at 300.

8. MAYOR'S COMMITTEE ON MARIJUANA, *THE MARIJUANA PROBLEM IN THE CITY OF NEW YORK* (1944). This report, better known as the "La Guardia Report," is presently out of print but significant portions of it are reprinted in *THE MARIJUANA PAPERS* 233-360 (D. Solomon ed. 1966). References will be to that source [hereinafter cited as *La Guardia Report*, *THE MARIJUANA PAPERS*].

9. *La Guardia Report*, *THE MARIJUANA PAPERS*, *supra* note 8, at 282-83; see R. Blum, *Mind-Altering Drugs and Dangerous Behavior: Dangerous Drugs*, in *PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: NARCOTICS AND DRUG ABUSE* 22 (1967); Murphy, *supra* note 5, at 21.

With larger doses of marijuana the similarity to the effects of alcohol consumption differ. See L. GOODMAN & A. GILMAN, *supra* note 6, at 300.

10. *La Guardia Report*, *THE MARIJUANA PAPERS*, *supra* note 8, at 334.

11. ARTHUR D. LITTLE, INC., *DRUG ABUSE AND LAW ENFORCEMENT* 14 (submitted to the President's Commission on Law Enforcement and Administration of

Other effects of marijuana use, however, are not similar to alcohol. The long-term psychological effects of marijuana use, unlike those of alcohol, are not neurosis or psychotic illness.¹² Also, for most people the use of marijuana does not result in socially aggressive activity, which frequently does result from the use of alcohol.¹³

There do not appear to be any long-term effects from the use of marijuana except perhaps a form of generalized fatigue.¹⁴ The major distinction between marijuana and "hard narcotics" is that marijuana is not addictive, but like tobacco, is capable of inducing habitual use.¹⁵ In fact, it appears easier to stop smoking marijuana than it does to stop smoking tobacco.¹⁶ Being nonaddictive, marijuana use does not result in physical dependence¹⁷ or tolerance.¹⁸ In fact, the experienced marijuana user frequently uses less marijuana to achieve a desired euphoric state than does the novice.¹⁹

C. History of Usage in the United States

Prior to the passage of the Marihuana Tax Act²⁰ in 1937 marijuana was used only to a negligible extent by the medical profession²¹ as a treatment for coughing, tuberculosis, rheumatism, asthma, and venereal disease.²² The 1937 Act and subsequent regulations have eliminated almost all medical use of marijuana.²³

At the time of the passage of the Marihuana Tax Act, marijuana was used almost exclusively by lower classes and minority groups.²⁴ In various

Justice 1967). See also Becker, *Marihuana: A Sociological Overview*, in *THE MARIJUANA PAPERS* 36-37 (D. Solomon ed. 1966).

12. Murphy, *supra* note 5, at 19. Approximately 20 percent of the people in state mental hospitals are there because of alcoholic brain disease. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: DRUNKENNESS 121 (1967).

13. Murphy, *supra* note 5, at 16.

14. Fort, *supra* note 3, at 213; Winick, *supra* note 2, at 23; cf. ARTHUR D. LITTLE, INC., *supra* note 11, at 15-16.

15. WHITE HOUSE CONFERENCE ON NARCOTIC AND DRUG ABUSE 277 (1963) [hereinafter cited as WHITE HOUSE CONFERENCE]. See also *La Guardia Report*, *THE MARIJUANA PAPERS*, *supra* note 8, at 345-47.

16. Pescor, *The Problem of Drug Addiction*, 43 J. CRIM. L. 473 (1952).

17. Fort, *supra* note 3, at 207; Winick, *supra* note 2, at 23; WHITE HOUSE CONFERENCE, *supra* note 15, at 286.

Marijuana may, however, be one of a variety of drugs used in the "multi-habituation" pattern, where a person takes many different drugs and appears dependent, but not on any one of them. R. Blum, *supra* note 9, at 24.

18. See authorities cited note 17 *supra*. Tolerance has been defined as:

[A] fundamental survival mechanism which permits body cells to be exposed continuously to toxic substances without evoking possibly dangerous responses. This is manifested by the phenomenon that successive doses of the same amount of drugs produce lesser effects and that, conversely, larger and larger doses are necessary to achieve the effects of the first dose.

WHITE HOUSE CONFERENCE, *supra* note 15, at 277.

19. ARTHUR D. LITTLE, INC., *supra* note 11, at 15.

20. INT. REV. CODE OF 1954, §§ 4741-46, 4751-57.

21. S. REP. NO. 900, 75th Cong., 1st Sess. 2 (1937).

22. A. LINDESMITH, *THE ADDICT AND THE LAW* 225 (1965).

23. Winick, *supra* note 2, at 21.

24. *La Guardia Report*, *THE MARIJUANA PAPERS*, *supra* note 8, at 259; cf. A. LINDESMITH, *supra* note 22, at 226.

forms marijuana has been used by man as a euphorant for almost 5000 years.²⁵

II. CURRENT USAGE AND PROBLEMS

A. Extent of Usage

While there does not appear to be any reliable evidence as to the exact extent of marijuana usage today,²⁶ there does appear to be general agreement that usage in the United States is increasing and spreading across a broader base of the population.²⁷ It is difficult to correlate extent of usage with marijuana arrests for many reasons. First, arrests are often more closely related to increases in police activity rather than an actual increase in the usage,²⁸ and these arrests tend to be concentrated among the lower class groups.²⁹ Secondly, because the marijuana user is under less compulsion to buy the drug than a heroin addict he can buy larger quantities at lower prices, need not engage in criminal activity to support his habit, and is less likely to come in contact with organized crime.³⁰

Present surveys indicate that as much as 20 percent of the students at some colleges have some experience with marijuana,³¹ and a total of between two and four million Americans have tried the drug.³² Although these figures are subject to considerable skepticism,³³ there does appear to be general agreement that only a small percentage of the students ever use marijuana more than a few times³⁴ — the common usage being a form of experimentation. The consensus of opinion among writers in the area indicates that present usage of marijuana has shifted from minority groups such as Negroes, Puerto Ricans, Mexicans, urban poor, and jazz musicians to college students, young professionals, and artists throughout the country, predominantly in the 18- to 30-year-old age group.³⁵

Because of the economics of marijuana traffic — relatively large bulk and low profits — the distribution is almost entirely in the hands of amateurs, with almost no participation by organized crime.³⁶ The cost of marijuana varies with the quantity, proximity to the Mexican border, and season of the year. A pound sells for \$85 to \$125 while individual cigarettes cost about 50 cents apiece.³⁷

25. A. LINDESMITH, *supra* note 22, at 225.

26. Winick, *supra* note 2, at 19; PRESIDENT'S COMM'N, *supra* note 2, at 213.

27. R. Blum, *supra* note 9, at 24; PRESIDENT'S COMM'N, *supra* note 2, at 213; ARTHUR D. LITTLE, INC., *supra* note 11, at 6.

28. Winick, *supra* note 2, at 19.

29. R. Blum, *supra* note 9, at 24.

30. Winick, *supra* note 2, at 19.

31. N.Y. Times, Jan. 8, 1968, at 22, col. 3; ARTHUR D. LITTLE, INC., *supra* note 11, at 16.

32. N.Y. Times, Jan. 8, 1968, at 22, col. 3; *cf.* Fort, *Social Problems of Drug Use and Drug Policies*, 56 CALIF. L. REV. 17, 22 n.29 (1968).

33. PRESIDENT'S COMM'N, *supra* note 2, at 213.

34. R. Blum, *supra* note 9, at 24; ARTHUR D. LITTLE, INC., *supra* note 11, at 16.

35. N.Y. Times, Jan. 8, 1968, at 22, col. 3; R. Blum, *supra* note 9, at 24; ARTHUR D. LITTLE, INC., *supra* note 11, at 6; NEWSWEEK, July 24, 1967, at 46; TIME, July 7, 1967, at 19.

36. ARTHUR D. LITTLE, INC., *supra* note 11, at 17, G-2; N.Y. Times, Jan. 8, 1968, at 22, col. 1; N.Y. Times, Jan. 12, 1968, at 30, col. 2.

37. ARTHUR D. LITTLE, INC., *supra* note 11, at G-2.

B. Sociological Harms

One of the major sociological harms attributed to marijuana is that marijuana is a "stepping stone" to "hard narcotics," primarily heroin.³⁸ While law enforcement agencies frequently speak in terms of the percentage of heroin addicts who first smoked marijuana, the more relevant statistic in determining the extent of progression from marijuana to "hard narcotics" is what percentage of persons who smoke marijuana eventually go on to use heroin. This figure is in fact quite low.³⁹ When this progression from marijuana to "hard narcotics" does occur it does not stem from anything intrinsic to marijuana, but is due to particular social aspects of its use.⁴⁰ In America today the social and legal stigmas attached to both heroin and marijuana throw the users together and the marijuana users may develop favorable attitudes toward heroin use. Thus, the person who becomes a regular marijuana smoker can be on his way to heroin addiction.⁴¹ Sociologists have shown that concomitant with learning to enjoy marijuana, the user learns new attitudes toward the use of drugs, adopts the unconventional views of the deviate group of users, and alienates himself from his older, more conventional associates and their morality.⁴² It is obvious that this process would leave a person more disposed to experiment with heroin. Thus, instead of helping to lessen the real problem — heroin use — the present laws and social attitudes are two of the primary factors contributing to the progression from marijuana to heroin.

A second social harm frequently attributed to marijuana is the relationship between marijuana use and other crimes. It is alleged that marijuana use leads to the commission of violent crimes while under the influence of marijuana and the general criminal personality of the marijuana user leads to nonviolent crimes such as property crimes.⁴³ Both parts of this claim lack any substantiating evidence. The La Guardia Report found that "[m]arijuana is not the determining factor in the commission of major crimes."⁴⁴ Subsequent studies have in fact shown a negative correlation between crime and the use of marijuana.⁴⁵ Arrest statistics indicating that marijuana users have criminal records and that the first offense of many criminals is marijuana possession or use, reflect at most the personality and environmental characteristics which may lead to marijuana

38. R. Blum, *supra* note 9, at 24; BUREAU OF NARCOTIC ENFORCEMENT, *THE NARCOTIC PROBLEM* 12 (1965); H. ANSLINGER & W. TOMPKINS, *THE TRAFFIC IN NARCOTICS* 20 (1953).

39. Winick, *supra* note 2, at 13, 28-30; Chein & Rosenfeld, *Juvenile Narcotics Use*, 22 *LAW & CONTEMP. PROB.* 52 (1957).

40. R. Blum, *supra* note 9, at 53; PRESIDENT'S COMM'N, *supra* note 2, at 225.

41. See E. SCHUR, *CRIMES WITHOUT VICTIMS: DEVIANT BEHAVIOR AND PUBLIC POLICY* 175 (1965); Fort, *Heroin Addiction Among Young Men*, in *NARCOTIC ADDICTION* 78-79 (J. O'Donnell & J. Ball eds. 1966).

42. Becker, *supra* note 11, at 46-54.

43. See S. REP. NO. 900, 75th Cong., 1st Sess. (1937); H.R. REP. NO. 792, 75th Cong., 1st Sess. (1937).

44. *La Guardia Report, THE MARIJUANA PAPERS*, *supra* note 8, at 260.

45. McGlothlin, *Cannabis: A Reference*, in *THE MARIJUANA PAPERS* 401, 412 (D. Solomon ed. 1966); Murphy, *supra* note 5, at 6.

smoking; but marijuana smoking has not been established as a source of other antisocial acts which sometimes appear on the user's police record.⁴⁶

Since marijuana use is nonaddictive and the cost of supporting a marijuana "habit" is relatively low, there is no need for a marijuana user to commit property crimes to support his "habit" as is the case with the heroin addict.⁴⁷ Any connection that exists between marijuana users and the criminal society is primarily a result of the laws making marijuana use and possession illegal, thus requiring the marijuana user to associate with criminals who supply and sell marijuana.⁴⁸ Those marijuana users who are convicted of marijuana use and serve time in penal institutions naturally come into close contact with other criminals, which may contribute to the possibility of future criminal activity.

In order to effectively evaluate both of the sociological harms attributed to marijuana use, we must consider the effect that *permitting* the use of marijuana would have on the acknowledged evils — crime and heroin addiction. The crucial questions then become whether permitting the use of marijuana will increase the number of people who become heroin addicts or who commit other crimes. While any attempt to answer these questions would involve conjecture, the preceding discussion raises strong arguments in favor of the conclusion that permitting the use of marijuana would not aggravate the real problems — heroin addiction and other crime — and actually might help reduce them.

Another major objection to legalizing the use of marijuana is the possible harm of marijuana use to the user himself. To evaluate this contention we must compare the effects of marijuana with other mild intoxicants, the use of which are currently permitted — alcohol and tobacco. As discussed earlier, the reasons for smoking marijuana and its immediate psychological effects are quite similar to those for consuming alcohol.⁴⁹ Smoking marijuana produces relatively harmless physical effects, although immoderate use of the more concentrated products of the hemp plant does produce some deleterious effects. These effects, however, are not conspicuous among marijuana users in the United States because of the relatively small quantity of the drug they ingest through smoking and the poor quality of marijuana ordinarily available in this country.⁵⁰ Chronic alcoholism, on the other hand, frequently results in psychotic conditions and diseases.⁵¹ The smoking of tobacco is more habit-forming than smoking marijuana and creates a much greater risk of physical harm.⁵²

46. E. SCHUR, *supra* note 41, at 125.

47. Winick, *supra* note 2, at 19.

48. See Clausen, *Social and Psychological Factors in Narcotics Addiction*, 22 LAW & CONTEMP. PROB. 34, 41 (1957); Finestone, *Narcotics and Criminality*, 22 LAW & CONTEMP. PROB. 69, 72 (1957).

49. See p. 852 *supra*.

50. A. LINDESMITH, *supra* note 22, at 223. See also ARTHUR D. LITTLE, INC., *supra* note 11, at 15-16.

51. A. LINDESMITH, *supra* note 22, at 223.

52. A causative relationship has been found to exist between the use of nicotine and hundreds of thousands of deaths and disabilities each year in the United States

The question remains, as will be discussed below, whether the fact that marijuana is potentially harmful to its user, even if proven, would alone be sufficient to justify the prohibition of its use and or possession. Another question relating to the comparison between marijuana and other intoxicants is whether the use of marijuana must be permitted if it is proven that the use of alcohol or tobacco is potentially more harmful to the user than marijuana use.

III. PRESENT CONTROLS OVER THE USE AND POSSESSION OF MARIJUANA

Control of marijuana is not related to abuse as is the case with alcohol.⁵³ Federal and state laws prohibit possession of marijuana and make violation a felony.⁵⁴ In addition, all states also prohibit the use of marijuana, but this crime frequently carries a lesser penalty.⁵⁵

A. Federal Laws

The basic federal law prohibiting possession of marijuana is the Marihuana Tax Act of 1937.⁵⁶ The Tax Act itself does not prohibit marijuana possession. However, proof of possession of marijuana without the tax stamps attached is sufficient evidence upon which to predicate a conviction of a violation of the Act.⁵⁷ The importation of marijuana is also prohibited by the Export-Import Act,⁵⁸ and possession of marijuana raises a presumption of illegal importation.⁵⁹ Thus, under federal law, possession of marijuana can be prosecuted either under the Export-Import Act, which provides a minimum mandatory 5-year prison sentence, or under the Marihuana Tax Act which does not carry with it the implications of illegal importation and provides a nonmandatory 2- to 10-year prison sentence for the first offense. Since the possession of marijuana is punishable under either statute, choice of charge rests with the Federal Bureau of Narcotics, the agency of the Treasury Department responsible for enforcing the federal marijuana laws.

B. State Laws

Every state prohibits the possession of marijuana without medical prescription. The Uniform Narcotic Drug Act⁶⁰ has been enacted in all

from lung cancer, heart disease, hypertension, emphysema, and bronchitis. See UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, PUBLIC HEALTH SERVICE, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL (1964).

53. For example, typical state laws punish driving of a vehicle or being found in any public place under the influence of an intoxicating liquor.

54. See W. ELDRIDGE, NARCOTICS AND THE LAW (2d ed. 1967) for a comparison of the various state laws prohibiting the possession of marijuana.

55. *Id.*

56. INT. REV. CODE OF 1954, §§ 4741-46, 4751-57.

57. INT. REV. CODE OF 1954, §§ 4753-55.

58. 21 U.S.C. § 176a (1964).

59. *Id.*

60. The Uniform Narcotic Drug Act is reprinted in W. ELDRIDGE, *supra* note 54, at 161-75.

states except California and Pennsylvania,⁶¹ and both of these states have statutes similar to the Uniform Narcotic Drug Act.⁶² The Uniform Narcotic Drug Act prohibits, *inter alia*, the manufacture, possession, or sale of any narcotic drug, with certain exceptions.⁶³ As defined in the Act narcotic drugs include marijuana.⁶⁴

IV. CONSTITUTIONAL CHALLENGES TO THE MARIJUANA LAWS

The constitutional arguments against the marijuana laws can be grouped into two general categories. The first is comprised of challenges to the right of the government to regulate the use of marijuana at all. The constitutional bases for such a challenge are the rights of privacy, fundamental peripheral rights, and substantive due process. In addition, the first amendment free exercise of religion guarantee could provide a constitutional protection for those who use marijuana in connection with their religious practice.

The second general category includes arguments against the manner in which marijuana is presently controlled and the severity of the penalties associated with these laws. Under this category, equal protection and due process arguments can be raised in regard to the classification of marijuana with "hard narcotics" and the difference between the legal treatment of marijuana and other intoxicants such as alcohol and tobacco. In this category we can also include the arguments under the eighth amendment's prohibition of cruel and unusual punishment with respect to the excessiveness of the punishment for the violation of the marijuana laws. A final challenge to the marijuana laws relates to the federal laws which provide that anyone dealing in marijuana must register, obtain special forms from the government to accompany all transfers, and file a special tax return. The privilege against self-incrimination, provided for by the fifth amendment, may provide a significant constitutional challenge to these provisions.

A. The Right of the Government to Regulate the Use of Marijuana

1. Freedom of Religion

The guarantee of the right of free exercise of religion provided for by the first amendment of the Constitution⁶⁵ would, of course, only preclude the prohibition of the use of marijuana for religious purposes; however, conceivably, the protection could extend to all those claiming to use

61. *Id.* at 45.

62. *Id.*

63. UNIFORM NARCOTIC DRUG ACT § 2.

64. UNIFORM NARCOTIC DRUG ACT § 1 (14).

65. The first amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"

marijuana in an attempt to achieve a "religious experience."⁶⁶ The application of the free exercise guarantee presents many intricate problems including the determination of what in fact constitutes a religion and the balancing of the state's interest against the importance of the practice to the religion and the extent to which the government regulation interferes with the religion. It would be impossible in a comment of this nature to fully develop all of the complex issues raised by the application of the freedom of religion clause to the use of marijuana.⁶⁷ The basic issues, however, will be presented and discussed in light of the recent cases which have attempted to decide these issues.

In 1964 these issues were, for the first time, fully discussed with respect to the use of peyote⁶⁸ in *People v. Woody*.⁶⁹ The Supreme Court of California held that a California statute prohibiting the possession of peyote was unconstitutional as applied to members of the Native American Church, a religious organization of American Indians.⁷⁰ In attempting to balance the importance of a particular practice to the religion against the importance of the state's interest and against the impact of a religious exemption on that interest, the court found that peyote plays a central role in the ceremony and practice of the Native American Church and that to apply the statute to members of that sect would be to "remove the theological heart" of their religion.⁷¹ However, the court made it clear that the religious practice must be in good faith and that this is a question of fact which must be determined by the trial court.⁷² Therefore, the court remanded a case the same day in which the free exercise of religion guarantee was raised by one who was not a member of the Native American Church.⁷³

Once it is established that marijuana use is in fact protected by the first amendment, then, as with any invasion of a first amendment right, the state must show a *compelling*, not merely a *reasonable*, interest in abridging this right.⁷⁴ In stating this basic principle the Supreme Court asserted, "[i]t is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive con-

66. See Giannella, *Religious Liberty, Non-Establishment, and Doctrinal Development, Part I. The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1423-31 (1967); Watts, *Psychedelics and Religious Experience*, 56 CALIF. L. REV. 74 (1968).

67. For a fuller discussion of the applicability of the freedom of religion guarantee to the use of marijuana see Finer, *Psychedelics and Religious Freedom*, 19 HASTINGS L.J. 667 (1968); Comment, *Free Exercise: Religion Goes to "Pot,"* 56 CALIF. L. REV. 100 (1968).

68. Peyote is the hallucinogenic substance obtained from the button-shaped growth of a cactus plant found growing wild in the arid regions of Mexico. PRESIDENT'S COMM'N, *supra* note 2, at 215. See also Note, *Hallucinogens*, 68 COLUM. L. REV. 521, 524-25 (1968).

69. 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964), noted in 17 STAN. L. REV. 494 (1965) and 6 WM. & MARY L. REV. 233 (1965).

70. 61 Cal. 2d at 727-28, 394 P.2d at 821-22, 40 Cal. Rptr. at 77-78.

71. *Id.* at 726-27, 394 P.2d at 820-21, 40 Cal. Rptr. at 76-77.

72. *Id.* at 727, 394 P.2d at 821, 40 Cal. Rptr. at 77.

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

74. See *Sherbert v. Verner*, 374 U.S. 398 (1963); *NAACP v. Button*, 371 U.S. 415, 438 (1963). See also *Marsh v. Alabama*, 326 U.S. 501, 509 (1946); *Thomas v. Collins*, 323 U.S. 516, 538 (1945); *Bridges v. California*, 314 U.S. 252, 261 (1941).

stitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'"⁷⁵ The requisites for establishing a compelling state interest will be discussed below with respect to the other constitutional challenges which also require this showing of a compelling state interest.⁷⁶

Apparently ignoring the compelling interest test, as it was applied in *Woody*, the North Carolina supreme court, in *State v. Bullard*,⁷⁷ held that the first amendment did not protect the use of drugs which produced hallucinatory symptoms when the use would constitute a threat to public safety, morals, peace, and order.⁷⁸ Distinguishing between the right of freedom of religious *belief* and the right to *act* pursuant to that belief, the North Carolina court held that regardless of the defendant's sincerity in his religious belief, the first amendment did not protect the use of peyote and marijuana in connection with his religion, even if the use of these drugs was necessary to the religion.⁷⁹ In affirming the conviction of Dr. Timothy Leary for possession of marijuana, the Fifth Circuit applied the compelling interest test but found that the government did in fact have a compelling interest in prohibiting the use of marijuana even for religious purposes.⁸⁰ Dr. Leary was sentenced to 30 years in prison and fined \$40,000 for having in his possession less than one-half of an ounce of marijuana.⁸¹ The court attempted to distinguish the *Woody* case on the question of whether the drug was essential to the religion.⁸² In a footnote the court in *Leary* also drew a distinction between "the use of peyote in the limited bona fide religious ceremonies of the relatively small, unknown Native American Church" and "the private and personal use of marihuana by any person who claims he is using it as a religious practice."⁸³

The constitutional distinction between the use of a drug as part of a ceremony of a recognized organized church and the use of a drug to achieve personal religious experience is highly questionable in light of the United States Supreme Court's holding that belonging to an organized church or belief in a supreme being is not necessarily a prerequisite to the application of a guarantee of freedom of religion.⁸⁴ The basic issue of whether the use of psychedelic drugs belongs within the protection of freedom of

75. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

76. See pp. 867-68 *infra*.

77. 267 N.C. 599, 148 S.E.2d 565 (1966), noted in 28 OHIO ST. L.J. 369 (1967) and 19 U. FLA. L. REV. 377 (1966).

78. 267 N.C. at 603, 148 S.E.2d at 568-69.

79. *Id.* at 604, 148 S.E.2d at 569.

80. *Leary v. United States*, 383 F.2d 851 (5th Cir. 1967), cert. granted, 88 S. Ct. 2058 (1968) (No. 1365, 1967 Term; renumbered No. 65, 1968 Term).

81. 383 F.2d at 854. Dr. Leary was convicted of transportation, facilitation of transportation, and concealment of marijuana after importation, in violation of 21 U.S.C. § 176a, and of transportation and concealment of marijuana by defendants as transferees required to pay the transfer tax imposed by the Internal Revenue Code, in violation of 26 U.S.C. § 4744(a)(2).

82. 383 F.2d at 861.

83. *Id.* at 861 n.11.

84. *United States v. Seeger*, 380 U.S. 163 (1965). See also *United States v. MacIntosh*, 283 U.S. 605 (1931); *United States v. Stolberg*, 346 F.2d 363 (7th Cir. 1965).

religion is one of the most complicated and controversial issues surrounding the free exercise clause. Professor Donald Giannella, in his extensive article on the religious liberty guarantee,⁸⁵ has asserted that the use of psychedelic drugs is not deserving of status as a free exercise claim under the first amendment, at least not for claimants who practice what he terms "modern nontheistic religions."⁸⁶ Professor Joel J. Finer, attorney for Dr. Leary, has presented extensive argument in an attempt to refute the position taken by Professor Giannella.⁸⁷ The one point that is clear from this debate is that the application of the free exercise guarantee of the first amendment to the use of psychedelic drugs presents an extremely complex philosophical question which eventually will have to be resolved by the United States Supreme Court.⁸⁸

2. *The Right of Privacy*

The right of privacy is not expressly mentioned in the Constitution or Bill of Rights, but Mr. Justice Douglas, writing for the majority in *Griswold v. Connecticut*,⁸⁹ reasoned that the right of privacy is found by looking to the "specific guarantees in the Bill of Rights hav[ing] penumbras, formed by emanations from those guarantees that help give them life and substance."⁹⁰ The Court in *Griswold* held that the marital relationship lies within the zone of privacy created by several fundamental constitutional guarantees and this right of privacy presents a substantive bar to a criminal statute which prohibits the use of birth control devices.⁹¹

While *Griswold* was the first Supreme Court case to deal with the substantive right of privacy, earlier Supreme Court cases have recognized the existence of this right.⁹² Mr. Justice Brandeis, in his famous dissent in *Olmstead v. United States*,⁹³ spoke historically of the right of privacy as "the right to be let alone":

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men.⁹⁴

85. Giannella, *supra* note 66.

86. *Id.* at 1426-27.

87. Finer, *supra* note 67.

88. In granting certiorari in *Leary v. United States* the Supreme Court specifically limited the scope of the appeal to the fifth amendment questions of self-incrimination and due process. 88 S. Ct. 2058 (1968).

89. 381 U.S. 479 (1965).

90. *Id.* at 484. Zones of privacy are created by the penumbras of the first, third, fourth, fifth, and ninth amendments. *Id.*

91. *Id.* at 485.

92. See *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); *Boyd v. United States*, 116 U.S. 616 (1886).

93. 277 U.S. at 471.

94. *Id.* at 478.

The zone of privacy discussed in *Griswold* is conceptually quite different from the traditional fourth and fifth amendment rights of privacy. In effect, the fourth and fifth amendments are guarantees of security — setting limits upon certain specified governmental activities rather than protecting any particular activities of the people. Under the fourth amendment the concern is with the means of enforcement, *e.g.*, searches, while the right of privacy recognized in *Griswold* precludes any enforcement, regardless of the means used.

In prior cases some justices have recognized substantive rights of privacy related to first amendment rights such as the freedoms of association,⁹⁵ speech,⁹⁶ and belief.⁹⁷ The Court in *Griswold* did not attempt to relate the zone of privacy to any of the accepted freedoms or rights but spoke of the privacy surrounding the “sacred precincts of marital bedrooms.”⁹⁸ While the zone of privacy surrounding the marital bedroom may be quite narrow, the *Griswold* case does recognize the existence of zones of privacy not related to any of the specific guarantees of the Bill of Rights.

Under the first amendment, the freedom of speech has been expanded beyond verbal expression⁹⁹ to include both graphical expression¹⁰⁰ and physical expression.¹⁰¹ There does not appear to be any reason why these forms of expression should not be surrounded by zones of privacy as is the freedom of association. Since the use of marijuana, even for the mere enjoyment of the experience, is a form of expression dealing solely with the mind, a strong argument can be made for bringing this extremely private form of expression within the ambit of the zone of privacy surrounding the freedom of expression.¹⁰²

The right of privacy was raised as a constitutional challenge to the Massachusetts marijuana laws in *Commonwealth v. Leis*;¹⁰³ however, the court dismissed the challenge, confusing somewhat the substantive right of privacy and the freedom from illegal searches. The argument was dismissed summarily, the court stating:

[T]he citizen's right to privacy is not to be protected by excluding otherwise criminal conduct from regulation so long as it is confined to the home, but rather by a strict adherence to the statutory and consti-

95. *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

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

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

98. 381 U.S. at 485.

99. *E.g.*, *Saia v. New York*, 334 U.S. 558 (1948); *Wollam v. City of Palm Springs*, 59 Cal. 2d 276, 379 P.2d 481, 29 Cal. Rptr. 1 (1963).

100. *E.g.*, *In re Klor*, 64 Cal. 2d 816, 415 P.2d 791, 51 Cal. Rptr. 903 (1966); *People v. Samuels*, 250 Cal. App. 2d 501, 58 Cal. Rptr. 439 (1967), *cert. denied*, 390 U.S. 1024 (1968).

101. *E.g.*, *DeJonge v. Oregon*, 299 U.S. 353 (1937).

102. See Comment, *The California Marijuana Possession Statute: An Infringement on the Right of Privacy or Other Peripheral Constitutional Rights?*, 19 HASTINGS L.J. 758 (1968).

103. Nos. 28841-2, 28844-5, 28864-5 (Suffolk Superior Ct., Mass., entered Dec. 1967) (findings, rulings and order on defendants' motions to dismiss).

tutional provisions relating to the power of the police to arrest and search and of the courts to issue warrants.¹⁰⁴

In addition to the argument that the right of privacy provides a direct substantive bar to marijuana statutes, the enforcement of these statutes also raises possible constitutional questions. Laws prohibiting the use and possession of marijuana, being "crimes without victims,"¹⁰⁵ require special police techniques for their enforcement. Justice Douglas recognized one aspect of this problem when he asked in *Griswold*:¹⁰⁶ "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?" With marijuana we are not primarily concerned with the "sacred precincts of marital bedrooms" but there are enforcement problems created by the fact that marijuana is rarely used in public.¹⁰⁷

The use of marijuana, by its very nature covert and personal, makes the discovery of information concerning these crimes very difficult. The scarcity of complaints to bring these offenses to the attention of authorities makes it necessary for the police to actively seek out offenses.¹⁰⁸ Among the medical and social agencies that deal with drug dependent persons, the code of good faith with their clients forbids giving any information to enforcement officials. In the subculture in which the use of marijuana takes place, people are reluctant to give information to law enforcement personnel because of a general distrust of the police and a strong feeling that the marijuana laws are unjustified.

Law enforcement officials are left in the position of having to seek out information necessary for effective enforcement by the use of undercover investigation and informants.¹⁰⁹ Both of these techniques present serious threats to the guarantee of a right of privacy. The enforcement of the marijuana laws frequently comes in direct conflict with the fourth amendment guarantee against unreasonable searches and seizures — a well-established area of privacy. Where the police are unable to obtain sufficient evidence to meet the constitutional standards for a reasonable search and seizure, the police often make exploratory searches and invalid arrests, knowing full well that the only possible sanction imposed against them will be the loss of a conviction as the result of the exclusionary rule.¹¹⁰ As a result, police make use of their authority to harass those they con-

104. *Id.* at 25.

105. For an excellent discussion of the use of term "crimes without victims" and its application to the marijuana laws see E. SCHUR, *supra*, note 41.

106. 381 U.S. at 485.

107. Becker, *supra* note 11, at 50-54.

108. J. SKOLNICK, COERCION TO VIRTUE: A SOCIOLOGICAL DISCUSSION OF THE ENFORCEMENT OF MORALS 65 (submitted to the President's Commission on Law Enforcement and Administration of Justice 1967).

109. *Id.* See generally H. ANSLINGER, THE PROTECTORS (1964).

110. J. Skolnick, *supra* note 108, at 59. See also Article, *Effects of Mapp v. Ohio on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COLUM. J.L. & SOCIAL PROB. 87 (1968).

sider to be petty offenders because they cannot gain sufficient evidence to convict them in court.¹¹¹

Enforcement of the marijuana laws also causes another serious problem, although perhaps not one of constitutional proportions. Enforcement of these laws is especially susceptible to discrimination against those in the lower socioeconomic classes. The same effect has been pointed out by authorities analyzing the enforcement of the prohibition laws.¹¹² The harsh penalties and minimum mandatory sentences associated with the marijuana laws also frequently result in their arbitrary enforcement,¹¹³ since the only alternatives open to the police, prosecutors, and the courts are to impose a sentence they feel unjustified or impose no punishment at all. Arbitrary enforcement also results from the lack of citizen complaints to direct the efforts of the law enforcement authorities. Without the complaints the police are not directed by the moral concern of the citizens, but by their own moral standards.¹¹⁴

3. *Fundamental Personal Rights*

The Supreme Court opinion in *Griswold v. Connecticut*¹¹⁵ is also authority for the existence of broad unnamed peripheral rights existing within the Bill of Rights.¹¹⁶ That fundamental constitutional rights not specifically mentioned in the Constitution do exist is not a new concept. Earlier Supreme Court cases recognized rights such as the freedom of inquiry,¹¹⁷ freedom of thought,¹¹⁸ and freedom to teach,¹¹⁹ and the *Griswold* Court designated these as "peripheral rights."¹²⁰ These rights were considered essential because "without those peripheral rights the specific rights would be less secure."¹²¹

Two California cases have followed the reasoning in *Griswold*; one held that the possession of obscene literature is protected by the first amendment under the freedom of expression,¹²² and the other upheld the right of a high school teacher to wear a beard without losing his job.¹²³ In both cases the court held that this conduct, while not speech, is expression falling within the periphery of the first amendment.¹²⁴ The United States Supreme Court in *Kent v. Dulles*¹²⁵ recognized the existence of

111. See authorities cited in note 110 *supra*.

112. See, e.g., E. SCHUR, *supra* note 41, at 55.

113. A. LINDESMITH, *supra* note 22, at 90.

114. J. SKOLNICK, *supra* note 108, at 65.

115. 381 U.S. 479 (1965).

116. *Id.* at 482-83.

117. *E.g.*, *Herbert v. Louisiana*, 272 U.S. 312 (1926).

118. See *Wieman v. Updegroft*, 344 U.S. 183 (1952).

119. *Id.* See also *Meyer v. Nebraska*, 262 U.S. 390 (1923).

120. 381 U.S. at 483.

121. *Id.* at 482-83.

122. *In re Klor*, 64 Cal. 2d 816, 415 P.2d 791, 51 Cal. Rptr. 903 (1966).

123. *Finot v. Pasadena City Bd. of Educ.*, 250 Cal. App. 2d 189, 58 Cal. Rptr. 520 (1967).

124. 64 Cal. 2d at 821, 415 P.2d at 794, 51 Cal. Rptr. at 906; 250 Cal. App. 2d at 199, 58 Cal. Rptr. at 527.

125. 357 U.S. 116 (1958).

these peripheral fundamental rights by holding that "the right of exit [travel from the country] is a personal right included within the word 'liberty' as used in the fifth amendment."¹²⁶ Under this reasoning, the Court held that passports could not be constitutionally withheld from citizens solely because there are communists.¹²⁷ In discussing the "liberty" of which a citizen cannot be deprived without due process under the fifth amendment, the Court in *Kent* stated that "[travel] may be as close to the heart of the individual as the choice of what he eats, or wears, or reads."¹²⁸ It would appear to follow logically that the choice of what the user smokes or ingests should also be brought within the scope of these fundamental peripheral rights.¹²⁹

The Supreme Court has also recognized the existence of fundamental peripheral rights within the fourteenth amendment's guarantee of liberty. In holding unconstitutional a Nebraska statute which prohibited the teaching of foreign languages to students below the eighth grade, the Court in *Meyer v. Nebraska*¹³⁰ stated:

[W]ithout doubt, [the liberty guaranteed by the fourteenth amendment] denoted not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.¹³¹

The Court made it clear that this list of personal rights was not meant to be all-inclusive and there was no requirement that the privilege claimed be "essential to the orderly pursuit of happiness."¹³²

The existence of fundamental personal rights was raised as a defense in the case of *Commonwealth v. Leis*.¹³³ Judge Tauro, in the *Leis* case, held with respect to the existence of a fundamental right of marijuana use:

[A]n examination of those cases cited by the defendants indicates that only those rights are to be considered as fundamental whose continuation is *essential* to ordered liberty. In other words, fundamental rights are those without which democratic society would cease to exist. Furthermore, those rights which are recognized as fundamental are also, in many instances, closely related to some commonly acknowledged moral or legal duty and not merely to a hedonistic seeking after pleasure.¹³⁴

126. *Id.* at 129.

127. *Id.* at 130.

128. *Id.* at 126.

129. See Comment, *The California Marijuana Possession Statute: An Infringement on the Right of Privacy or Other Peripheral Constitutional Rights?*, 19 HASTINGS L.J. 758, 769 (1968).

130. 262 U.S. 390 (1923).

131. *Id.* at 399.

132. *Id.*

133. Nos. 28841-2, 28844-5, 28864-5 (Suffolk Superior Ct., Mass., entered Dec. 1967) (findings, rulings and order on defendants' motions to dismiss).

134. *Id.* at 5-6.

It is difficult to see how the wearing of a beard or the possessing of obscene photographs are essential to ordered liberty or necessary to the existence of a democratic society; yet, the California supreme court held that both of these activities do fall within the zone of fundamental constitutional rights.¹³⁵ This would seem to indicate that a fundamental personal right need not be "essential to ordered liberty" in order to exist.

4. *Substantive Due Process*

A further possible bar to the government regulation of the use and possession of marijuana is a newly emerging concept of "substantive due process."¹³⁶ Under one possible interpretation of *Robinson v. California*,¹³⁷ which held that criminal punishment for narcotics addiction violates the eighth amendment, it can be argued that the eighth amendment bar against cruel and unusual punishment precludes any government regulation in this area.¹³⁸ The substantive due process concept is that there are types of conduct for which criminal sanctions cannot be imposed without violating standards of decency even though the state may have a legitimate interest in suppressing and correcting a socially harmful condition.¹³⁹ Under this concept the traditional eighth amendment standards concerning the extent or type of punishment imposed for the offense¹⁴⁰ is not applied, but the question is whether any criminal punishment at all can be applied to this offense. The requirement of substantive due process was used recently by New York and Massachusetts courts in holding unconstitutional those states' vagrancy statutes.¹⁴¹

The specific holding in *Robinson* would not, of course, be directly applicable to marijuana cases since *Robinson* was concerned with one who was *addicted* to the use of narcotics.¹⁴² *Robinson* and later cases holding unconstitutional laws against chronic alcoholism¹⁴³ and vagrancy¹⁴⁴ have spoken in terms of "status crimes." The United States Supreme Court, in

135. See p. 864 *supra*.

136. For an excellent discussion of the development of the concept of substantive due process and its application see Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071 (1964).

137. 370 U.S. 660 (1962).

138. See Packer, *supra* note 136, at 1071; Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 645-55 (1966).

139. See Note, *supra* note 138, at 655.

140. See, e.g., *Weems v. United States*, 217 U.S. 349 (1910).

141. *Alegata v. Commonwealth*, ____ Mass. ____, 231 N.E.2d 201 (1967); *Fenster v. Leary*, 20 N.Y.2d 309, 229 N.E.2d 426, 282 N.Y.S.2d 739 (1967). For a discussion of these cases with respect to the concept of substantive due process see 13 VILL. L. REV. 658 (1968).

142. The Supreme Court in *Robinson* held:

[A] state law which imprisons a person thus afflicted [with the illness of being a narcotic addict] as a criminal . . . inflicts cruel and unusual punishment in violation of the Fourteenth Amendment. . . . Even one day in prison would be cruel and unusual punishment for the "crime" of having a common cold.

370 U.S. at 667.

143. *Driver v. Hinnant*, 356 F.2d 761 (4th Cir. 1966); *Easter v. District of Columbia*, 361 F.2d 50 (D.C. Cir. 1966). But see *Powell v. Texas*, 88 S. Ct. 2145 (1968).

144. See cases cited note 141 *supra*.

Powell v. Texas,¹⁴⁵ upheld the conviction of a chronic alcoholic for being in public while drunk on a particular occasion.¹⁴⁶ In distinguishing *Robinson*, the Court stated:

The State of Texas thus has not sought to punish a mere status, as California did in *Robinson*; nor has it attempted to regulate appellant's behavior in the privacy of his own home. Rather, it has imposed upon appellant a criminal sanction for public behavior which may create substantial health and safety hazards, both for appellant and for members of the general public, and which offends the moral and esthetic sensibilities of a large segment of the community.¹⁴⁷

Even if *Robinson* were extended to include those acts necessarily incident to the status of being a narcotics addict such as use and possession, it still does not appear that this would present a bar to government prohibition of the use and possession of marijuana since, as discussed earlier, the use of marijuana does not involve a "status."¹⁴⁸

5. *State Interests vs. Fundamental Constitutional Rights*

Once it is established that the use of marijuana is protected by one of the fundamental constitutional rights — freedom of religion, right to privacy, or fundamental personal rights — the state is not necessarily precluded from prohibiting the use of marijuana. The state is required, however, to show a compelling interest in order to sustain an infringement on one of the fundamental constitutional rights.¹⁴⁹ In applying this principle in *Griswold v. Connecticut*,¹⁵⁰ the Court refused to follow the minimum rationality standard which it had previously applied in cases where *economic* interests were involved,¹⁵¹ distinguishing cases involving fundamental rights.¹⁵² Justice Goldberg, in his concurring opinion in *Griswold*, stressed that the state would have the burden of showing a compelling interest:

In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."¹⁵³

145. 88 S. Ct. 2145 (1968).

146. *Id.* at 2154.

147. *Id.*

148. *See* p. 853 *supra*.

149. *Sherbert v. Verner*, 374 U.S. 398 (1963); *Bates v. Little Rock*, 361 U.S. 516 (1960). *See also* *McLaughlin v. Florida*, 379 U.S. 184 (1964); *NAACP v. Button*, 371 U.S. 415 (1963).

150. 381 U.S. 479 (1965).

151. *E.g.*, *Lochner v. New York*, 198 U.S. 45 (1905). Under the minimum rationality test, where a statute does not invade a constitutionally protected right, a state need only show a reasonable relationship to its police power to justify the statute.

152. 381 U.S. at 482.

153. *Id.* at 497, *quoting* *Bates v. Little Rock*, 361 U.S. 516, 524 (1960).

In addition to requiring a state to show a compelling interest in order to invade a fundamental personal right, the Supreme Court has also required that the statute be drawn as narrowly as possible so as to minimize the infringement on the protected freedoms.¹⁵⁴ Closely related to this standard of "overbreadth" and the compelling interest test is the requirement that if a reasonable and adequate alternative exists which places less of a burden on the protected right than it must be followed.¹⁵⁵ Thus, in evaluating the constitutionality of a statute which prohibits the use and possession of marijuana, it first must be established that the use of marijuana is protected by a fundamental constitutional right. The state then must demonstrate a compelling interest in prohibiting the use and it must establish that its objectives could not be reasonably met without a complete prohibition or by an alternate means of control.

In order to find a compelling state interest the alleged social harms in the use of marijuana, discussed above,¹⁵⁶ must be evaluated. Because of a lack of scientific evidence concerning the effects of marijuana use,¹⁵⁷ it is quite difficult for a court to effectively evaluate these alleged harms. It is interesting to note at this point how the California supreme court in *People v. Woody*¹⁵⁸ applied these tests in declaring unconstitutional the California law prohibiting the use of peyote :

We have weighed the competing values represented in this case on the symbolic scale of constitutionality. On the one side we have placed the weight of freedom of religion as protected by the First Amendment; on the other, the weight of the state's "compelling interest." Since the use of peyote incorporates the essence of the religious expression, the first weight is heavy. Yet the use of peyote presents only slight danger to the state and to the enforcement of its laws; the second weight is relatively light. The scale tips in favor of the constitutional protection.¹⁵⁹

In those cases which have examined the state interest in prohibiting the use of marijuana, the courts, not having found a fundamental constitutional right protecting the use of marijuana, applied the reasonable relationship test.¹⁶⁰ Under this test, they held that the alleged harms of marijuana, though not supported by substantial evidence, were sufficient to meet the requirement of reasonable relationship to the legislative purpose.¹⁶¹

154. *Griswold v. Connecticut*, 381 U.S. at 485; *NAACP v. Alabama*, 377 U.S. 288, 307 (1964); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

155. *See Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951).

156. *See pp. 855-57 supra*.

157. *See p. 852 supra*.

158. 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

159. *Id.* at 727, 394 P.2d at 821, 40 Cal. Rptr. at 77.

160. *Leary v. United States*, 383 F.2d 851, 860-61 (5th Cir. 1967), *cert. granted*, 88 S. Ct. 2058 (1968) (No. 1365, 1967 Term; renumbered No. 65, 1968 Term); *People v. Aguiar*, ____ Cal. App. 2d ____, ____, 65 Cal. Rptr. 171, 175 (1968); *Commonwealth v. Leis*, Nos. 28841-2, 28844-5, 28864-5, at 6 (Suffolk Superior Ct., Mass., entered Dec. 1967) (findings, rulings and order on defendants' motions to dismiss).

161. *Leary v. United States*, 383 F.2d at 861 (5th Cir. 1967), *cert. granted*, 88 S. Ct. 2058 (1968) (No. 1365, 1967 Term; renumbered No. 65, 1968 Term); *People v. Aguiar*, ____ Cal. App. 2d ____, 65 Cal. Rptr. at 175-76 (1968); *Commonwealth v. Leis*, Nos. 28841-2, 28844-5, 28864-5, at 31 (Suffolk Superior Ct., Mass., entered Dec. 1967) (findings, rulings and order on defendants' motions to dismiss).

B. *The Methods Used to Control Marijuana*

1. *Unconstitutionally Excessive Punishments*

While the holding in *Robinson v. California*¹⁶² may not present a bar to any government prohibition of the use and possession of marijuana, it may provide a very effective challenge to the excessive penalties currently imposed for the use and possession of marijuana.¹⁶³ The application of the eighth amendment bar against excessive punishment can be seen most clearly in Justice Douglas' concurring opinion in *Robinson* where he stated that "punishment out of all proportion to the offense may bring it within the ban against 'cruel and unusual punishment.'"¹⁶⁴

Justice Marshall, writing for the Court in *Powell v. Texas*,¹⁶⁵ also recognized that the eighth amendment requires that the punishment fit the crime when he stated:

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."¹⁶⁶

The first United States Supreme Court case in which the eighth amendment prohibition against cruelly *excessive* punishments was sustained was *Weems v. United States*.¹⁶⁷ In that case a 12-year sentence of confinement at *cadena temporal*¹⁶⁸ under Philippine law for falsifying public records was held cruelly excessive.¹⁶⁹ This approach was supported by a comparison of Weems' sentence to those authorized in a number of American jurisdictions for crimes that the Court considered at least equally serious. It was said to be "a precept of justice that punishment for crime should be graduated and proportioned to offense."¹⁷⁰ While the *Weems* decision has been generally accepted by both federal and state courts as establishing the rule that excessiveness as well as certain modes of punishment are unconstitutionally cruel, the rule has seldom been used to hold harsh sentences invalid.¹⁷¹ The problem in applying the *Weems* principle

162. 370 U.S. 660 (1962).

163. Under federal law possession of marijuana can bring a minimum mandatory 5-year prison sentence. 21 U.S.C. § 176a (1964). The penalties for possession vary greatly from state to state with the first offense usually punishable by a minimum mandatory prison sentence of 2- to 5-years. For a complete summary of the penalties under state law see W. ELDRIDGE, *supra* note 54, at 177-225.

164. 370 U.S. at 676.

165. 88 S. Ct. 2145 (1968).

166. *Id.* at 2154 (emphasis added).

167. 217 U.S. 349 (1910).

168. "[T]hose sentenced to *cadena temporal* shall labor for the benefit of the State." *Id.* at 381.

169. *Id.* at 380-81.

170. *Id.* at 367.

171. For a representative list of sentences that have been sustained against claims of excessiveness and others that have been held cruel and unusual on such grounds see Note, 36 N.Y.U.L. REV. 846 (1961).

is establishing the standards for determining that a punishment is constitutionally excessive.

Possible considerations in determining unusually excessive punishments were suggested by Justice Goldberg in his dissent to a denial of certiorari in *Rudolph v. Alabama*¹⁷² when he asked: "Can the permissible aims of punishment (e.g., deterrence, isolation, rehabilitation) be achieved as effectively by punishing rape less severely than by death . . . ; if so, does the imposition of the death penalty for rape constitute 'unnecessary cruelty'?"¹⁷³

In order to follow the reasoning suggested by Mr. Justice Goldberg we must determine the state's objectives in imposing criminal sanctions. It has been suggested in an extensive note discussing criminal sentencing¹⁷⁴ that the objectives of criminal sanctions are:

[1] *rehabilitation* of the convicted offender into a noncriminal member of society; [2] *isolation* of the offender from society to prevent criminal conduct during the period of confinement; [3] *deterrence* of other members of the community who might have tendencies toward criminal conduct similar to those of the offender (secondary deterrence), and deterrence of the offender himself after release; [4] *community condemnation* or the reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves; and [5] *retribution* or the satisfaction of the community's emotional desire to punish the offender.¹⁷⁵

An evaluation of the state's interest in relation to the objectives of criminal punishment is quite similar to a discussion of "compelling state interest" found above.¹⁷⁶ Here, however, we can evaluate the state's interests in relation to each of the specific objectives. Since the crimes of use and possession of marijuana can be considered "crimes without victims" many of the traditional objectives of the criminal law do not apply in their usual sense. The concept of rehabilitation usually suggests the correction of the moral and or legal deficiencies considered responsible for one's criminal activities. Thus, the question of rehabilitation is intimately related to the individual's and society's moral attitude toward the smoking of marijuana; for the individual who believes that the right to use marijuana is one of his fundamental constitutional rights or that it is protected by the freedom of religion, any attempts at rehabilitation, in the commonly accepted sense, would be fruitless. Viewing rehabilitation in the broad sense of preventing recidivism, however, it could be argued that incarceration would serve the function of removing the marijuana user from the drug using subculture with the hope that he would not return to it after serving his sentence. This objective, however, based on the

172. 375 U.S. 889 (1963).

173. *Id.* at 891.

174. Note, 69 *YALE L.J.* 1453 (1960).

175. *Id.* at 1455.

176. *See* pp. 859-60, 867-68 *supra*.

tenuous possibility of rehabilitating through long periods of incarceration hardly seems to be a reasonable justification for these sentences.

The objective of isolation would not apply in its usual sense either, since there are no "victims" which we are concerned about protecting from the marijuana user and thus the use of marijuana presents little direct threat to society. Since marijuana users might introduce new people to the use of marijuana, isolation of users could help to reduce the number of people being introduced to marijuana. In order to justify the objective of isolation on this basis, however, the state would have to establish some significant relationship between current users and new users. Even if this could be established, there does not appear to be a sufficient state interest to justify the current penalties.

Deterrence is the usual objective associated with the marijuana laws. The increasing state and federal penalties over the years¹⁷⁷ are evidence of legislative attempts to increase the deterrence factor. Statistics on marijuana violations and estimates on marijuana usage,¹⁷⁸ however, seem to refute completely the existence of any added deterrent effect from the increase in the penalties. In an attempt to eliminate judicial leniency toward marijuana users, the federal law and many state laws impose minimum mandatory sentences for use and or possession of marijuana.¹⁷⁹ Recently, however, the minimum mandatory sentence feature of the federal law has been eliminated.¹⁸⁰ This, perhaps, is a legislative recognition of the ineffectiveness of such a penalty and the undesirable effect of precluding judicial discretion in cases where it would clearly be warranted.

Certainty of apprehension and imposition of penalties would appear to have a more forceful deterrent effect than the remote and uncertain possibility of receiving a maximum sentence. When penalties become severe and judicial discretion is removed, the only alternative for the police, the district attorney, and the court in cases where they feel the maximum sentence is not justified is to find the defendant not guilty or not to arrest or indict him at all. This may help to explain the lack of deterrent effect in the increased penalties for marijuana violations.

Perhaps one of the most significant, but unenunciated goals in punishing the use and possession of marijuana is community condemnation — the reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves. This concerns society's determination that the smoking of marijuana is an undesirable and perhaps evil activity. In fact, the very existence of the marijuana laws was more a result of the protestant ethic¹⁸¹ than a scientific determination of the harms stemming from marijuana use. Society has classified and condemned the use of marijuana as

177. See pp. 857-58 *supra*.

178. See p. 854 *supra*.

179. See W. ELDRIDGE, *supra* note 54, at 177-225.

180. Pub. L. No. 89-793, § 502, 80 Stat. 1449 (1966).

181. Murphy, *supra* note 5, at 21. See also Carstairs, *Bhang and Alcohol: Cultural Factors in the Choice of Intoxicants*, in *THE MARIJUANA PAPERS* 66 (D. Solomon ed. 1965); Gusfield, *On Legislating Morals*, 56 CALIF. L. REV. 54 (1968).

deviant behavior.¹⁸² One reason for the divergent treatment of alcohol and marijuana was the difference in society's attitudes toward these two intoxicants at the time the Marihuana Tax Act was passed in 1937;¹⁸³ marijuana use at that time was confined to minority groups and the lower classes, while the use of alcohol extended across the entire strata of society.¹⁸⁴ The present marijuana laws, combined with the increasing number of violations of these laws (*i.e.*, increase in marijuana use),¹⁸⁵ tend to destroy one of the most basic norms of society — respect for the law.

Professor Hall, in discussing criminal sentencing,¹⁸⁶ has suggested that crimes against the person are punished in such a manner as will most nearly satisfy the emotional reactions of the community to the crime — the retribution objective. Crimes solely against property involving more than a slight amount are punished in such a manner as will, primarily, guard against repetition by the defendant; crimes against property where personal injury is involved are also punished on an emotional basis. In crimes which do not involve the person or property, *i.e.*, "crimes without victims," such as the use and possession of marijuana, the deterrent element becomes far more important than retribution. The deterrence goal of the criminal law is, in fact, limited by the theory of retribution, for without such limitation life sentences would be imposed in cases where there was no possibility of reformation. Certainly then, the severe marijuana penalties cannot be justified on a basis of retribution where, as with other crimes which do not involve the person or property, marijuana use creates little emotional desire for punishment.

After evaluating the five objectives of criminal sanctions we find that the only two which have any significant relevance to the marijuana laws are deterrence and community condemnation. It appears difficult to justify severe penalties on a basis of a deterrent objective in the light of the empirical evidence refuting the deterrent effect.¹⁸⁷ Also, since we are weighing the state's interest in the achievement of these objectives to justify the punishment imposed, it is highly questionable whether the arbitrary mores of society are sufficient to justify the severe penalties.

Any judicial determination that the penalties for marijuana use or possession are constitutionally excessive must take into consideration all of the limited scientific evidence currently available on the harms in the use of marijuana. Courts have been highly reluctant to involve themselves in such investigation.¹⁸⁸ In the one court where an intensive investigation was conducted, the court concluded that even on the basis of the limited scientific evidence available, there was sufficient harm to justify the im-

182. Becker, *supra* note 11, at 46.

183. See Murphy, *supra* note 5, at 21.

184. *Id.*; see p. 853 *supra*.

185. See p. 854 *supra*.

186. Hall, *Reduction of Criminal Sentences on Appeal*, 37 COLUM. L. REV. 521 (1937).

187. See p. 871 *supra*.

188. *E.g.*, Leary v. United States, 383 F.2d 851 (5th Cir. 1967), *cert. granted*, 88 S. Ct. 2058 (1968) (No. 1365, 1967 Term; renumbered No. 65, 1968 Term); State v. Bullard, 267 N.C. 599, 148 S.E.2d 565 (1966).

position of these penalties.¹⁸⁹ However, it is questionable whether the severe penalties should remain until these harms can be substantiated in fact.

2. *Equal Protection*

As discussed above, there is a constitutional requirement that the state show a compelling interest in prohibiting the use of marijuana if a fundamental right to use marijuana is found to exist. Even if no fundamental right protecting the use of marijuana is found to exist, the state must still demonstrate a reasonable relationship between the prohibition of marijuana and a legitimate state interest under its police power. In addition, there is also the constitutional guarantee of equal protection, provided by the fourteenth amendment,¹⁹⁰ which requires that a criminal statute cover all persons whose inclusion is necessary, logically, scientifically, or by reason of common sense, to effectuate the legitimate objectives of the statute.¹⁹¹

In one of the leading cases applying the equal protection clause the United States Supreme Court in *Skinner v. Oklahoma*¹⁹² declared unconstitutional a state statute which required sterilization of persons convicted two or more times of a felony involving moral turpitude, since the statute included chicken stealing within the list of felonies involving moral turpitude while embezzlement was not included. 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 treatment."¹⁹³ This aspect of equal protection could provide an argument that the failure to include alcohol within the class of prohibited euphorics violates the fourteenth amendment. Under *Skinner* it would appear that the state has the burden of justifying the diverse treatment of alcohol and marijuana since even the limited scientific evidence available today seems to indicate the harms produced by marijuana and alcohol are quite similar.¹⁹⁴ This aspect of equal protection does not challenge the state's basic right to prohibit marijuana but only attacks the method of control — prohibiting marijuana while merely regulating alcohol.

189. *Commonwealth v. Leis*, Nos. 28841-2, 28844-5, 28864-5 (Suffolk Superior Ct., Mass., entered Dec. 1967) (findings, rulings and order on defendants' motions to dismiss).

The American Medical Association and the Committee on Problems of Drug Dependence of the National Research Council, National Academy of Sciences, in a recent statement on marijuana, concluded that the penalties for violations of the marijuana laws are often harsh and unrealistic. *Marihuana and Society*, 204 J.A.M.A. 1181 (1968).

190. The fourteenth amendment states in part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

191. See *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Skinner v. Oklahoma*, 316 U.S. 535 (1942). See generally Tussman & tenBroeck, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

192. 316 U.S. 535 (1942).

193. *Id.* at 541.

194. See p. 852 *supra*.

Another aspect of the equal protection guarantee was expressed by the Supreme Court in *McLaughlin v. Florida*.¹⁹⁵ In declaring unconstitutional a statutory prohibition of cohabitation between members of different races, the Court held that "courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose. . . ."¹⁹⁶ Under *McLaughlin* a court must look to the purpose of a criminal statute in order to ascertain whether the classification is reasonable in light of this purpose. The reasoning in *McLaughlin* raises the question of the constitutionality of grouping marijuana with "hard narcotics" as under the Uniform Narcotic Drug Act.¹⁹⁷ The reason usually given for including marijuana with the "hard narcotics" is that marijuana is closely related to the narcotic and crime problems.¹⁹⁸ Whether the actual relationship between marijuana and the narcotic and crime problems is sufficient to satisfy the equal protection requirements as enunciated in *McLaughlin* is highly questionable in light of the present knowledge of marijuana, limited as it may be.¹⁹⁹ In order to apply the *McLaughlin* test, a court would have to investigate fully the legislative purposes behind the marijuana laws and the current scientific and sociological information on marijuana — a task most courts have refused to undertake in the past.²⁰⁰

Judge Tauro, in *Commonwealth v. Leis*,²⁰¹ attempted to justify the diverse treatment of alcohol and marijuana by claiming that, on the basis of what he considered prevailing patterns of the use of the two drugs, it was fair to characterize marijuana as an intoxicant and alcohol merely as a potential intoxicant.²⁰² This conclusion does not appear to be completely justified in the light of the conclusions of the LaGuardia Report and of more recent surveys and studies of the use of marijuana which indicate that the patterns of use are similar.²⁰³ In answering the equal protection argument raised as a challenge to the California marijuana laws, the California supreme court in *People v. Aguiar*²⁰⁴ held that "in light of present medical attitudes towards marijuana, we cannot say that the proscription against the possession of marijuana is palpably arbitrary and erroneous beyond rational doubt."²⁰⁵ It could be argued, however, that *Skinner* requires

195. 379 U.S. 184 (1964).

196. *Id.* at 191.

197. Section 1 of the Act includes, in addition to marijuana, opium, heroin, and morphine. UNIFORM NARCOTICS DRUG ACT § 1.

198. *See* United States v. Eramdjian, 155 F. Supp. 914, 919 (S.D. Cal. 1957); *People v. Stark*, 157 Colo. 59, 64, 400 P.2d 923, 927 (1965).

199. *See* pp. 855-56 *supra*.

200. *See* United States v. Eramdjian, 155 F. Supp. 914 (S.D. Cal. 1957); *People v. Stark*, 157 Colo. 59, 400 P.2d 923 (1965). *But see* *People v. Woody*, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

201. Nos. 28841-2, 28844-5, 28864-5 (Suffolk Superior Ct., Mass., entered Dec. 1967) (findings, rulings and order on defendants' motions to dismiss).

202. *Id.* at 19.

203. *See* pp. 852-54 *supra*.

204. _____ Cal. App. 2d _____, 65 Cal. Rptr. 171 (1968).

205. *Id.* at _____, 65 Cal. Rptr. at 176.

that the state show more than just *some* reason for discriminating between what is "intrinsically the same quality of offense."²⁰⁶

3. *Federal Marijuana Laws and Self-incrimination*

Another constitutional challenge arises with respect to the manner in which marijuana possession is regulated under federal law — through registration and taxing statutes.²⁰⁷ Under the Marihuana Tax Act transferors and transferees of marijuana must register with the government, obtain order forms from the government, and pay a transfer tax.²⁰⁸ Recently, the Supreme Court in three separate cases reversed convictions of persons charged with violating the wagering tax²⁰⁹ and firearm registration provisions²¹⁰ of the Internal Revenue Code. The Court held: (1) that the requirement that gamblers register and pay the occupational tax created substantial risks of self-incrimination by significantly enhancing the likelihood of criminal prosecutions under federal and state laws and, consequently, the fifth amendment can provide a defense to a criminal charge of noncompliance with those requirements;²¹¹ (2) that the requirement that gamblers file special reports as a condition to payment of the tax leads to production of readily incriminating evidence, and, therefore, the fifth amendment precludes criminal conviction for failure to pay the tax;²¹² and (3) the fifth amendment can provide a defense to prosecutions either for failure to register or for possession of an unregistered firearm since the effect of such provisions is to require an admission of unlawful possession.²¹³

The application of the reasoning in these cases to the Marihuana Tax Act will be decided by the Supreme Court in the near future since the Court has granted certiorari in the case of *Leary v. United States*²¹⁴ and limited its consideration to the questions of:

[1] Whether the registration and tax provisions in 26 U.S.C. Sections 4741(a), 4742 and 4744(a), as applied to Petitioner, violate his privilege against self incrimination protected by the Fifth Amendment to the United States Constitution and his rights thereunder as amplified by this Court in three recently decided cases: *Marchetti v. United States*, 390 U.S. 39, 88 S. Ct. 697, 19 L.Ed.2d 889 (1968); *Grosso v. United States*, 390 U.S. 62, 88 S. Ct. 709, 19 L.Ed.2d 906 (1968); and *Haynes v. United States*, 390 U.S. 85, 88 S. Ct. 722, 19 L.Ed.2d 923 (1968).

206. See Boyko & Rotberg, *Constitutional Objections to California's Marijuana Possession Statute*, 14 U.C.L.A.L. Rev. 773 (1967).

207. 26 U.S.C. § 4741-62 (1964).

208. 26 U.S.C. § 4741-62 (1964).

209. INT. REV. CODE of 1954, §§ 4401-23.

210. INT. REV. CODE of 1954, § 5851.

211. *Marchetti v. United States*, 390 U.S. 39 (1968).

212. *Grosso v. United States*, 390 U.S. 62 (1968).

213. *Haynes v. United States*, 390 U.S. 85 (1968).

214. 383 F.2d 851 (5th Cir. 1967), *aff'd on rehearing*, 392 F.2d 220, *cert. granted*, 88 S. Ct. 2058 (1968) (No. 1365, 1967 Term; renumbered No. 65, 1968 Term).

[2] Whether Petitioner was denied due process under the Fifth Amendment by the application, under the circumstances of this case, of the provisions of 21 U.S.C. § 176a, providing that an inference may be drawn respecting the illegal origin and nature of marihuana solely from possession thereof.²¹⁵

Even if the Supreme Court finds that the fifth amendment provides a valid defense for prosecutions for violation of the federal marijuana laws, as the cases seem to indicate they should,²¹⁶ the federal government could easily regulate the possession of marijuana under the Federal Food, Drug and Cosmetic Act,²¹⁷ as it does LSD.²¹⁸ Congress enacted the Food, Drug and Cosmetic Act under the Commerce Clause²¹⁹ and the Supreme Court has upheld the constitutionality of the Act.²²⁰ In the 1965 amendments to the Act, Congress made criminal the sale or possession of certain dangerous drugs without regard to whether they have crossed state lines or international boundaries.²²¹ The power of the federal government to control LSD under this act, without the requirement of the drug crossing state

215. 88 S. Ct. 2058.

216. See 13 VILL. L. REV. 650, 655-56 (1968).

217. 21 U.S.C. § 331(q)(2) (Supp. II, 1967) prohibits:

(2) the sale, delivery, or other disposition of a drug in violation of Section 360a(b) of this title; (3) the possession of a drug in violation of Section 360a(c) of this title.

21 U.S.C. § 360a(b) (Supp. II, 1967) provides:

No person . . . shall sell, deliver, or otherwise dispose of any depressant or stimulant drug to any other person.

21 U.S.C. § 360a(c) (Supp. II, 1967) provides:

No person . . . shall possess any depressant or stimulant drug otherwise than (1) for the personal use of himself or a member of his household, or (2) for administration to an animal owned by him or a member of his household. In any criminal prosecution for possession of a depressant or stimulant drug in violation of this subsection (which is made a prohibited act by Section 331(q)(3) of this title), the United States shall have the burden of proof that the possession involved does not come within the exceptions contained in clauses (1) and (2) of the preceding sentence.

"Depressant or stimulant drug" is defined in § 321(v) as follows:

(1) any drug which contains any quantity of (A) barbituric acid or any of the salts of barbituric acid; or (B) any derivative of barbituric acid which has been designated by the Secretary under Section 352(d) of this title as habit forming;

(2) any drug which contains any quantity of (A) amphetamine or any of its optical isomers; (B) any salt of amphetamine or any salt of an optical isomer of amphetamine; or (C) any substance which the Secretary, after investigation, has found to be, and by regulation designated as, habit forming because of its stimulant effect on the central nervous system; or

(3) any drug which contains any quantity of a substance which the Secretary, after investigation, has found to have, and by regulation designates as having, a potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect; except that the Secretary shall not designate under this paragraph, or under clause (C) of subparagraph (2), any substance that is now included, or is hereafter included, within the classifications stated in Section 4731, and marihuana as defined in Section 4761 of Title 26.

218. By regulation, 21 C.F.R. § 166.3, the Federal Food and Drug Commission has designated all drugs containing any amount of LSD-25 as having a potential for abuse because of their hallucinogenic effect.

219. U.S. CONST. art. I, § 8, clause 3, provides in part: "[The Congress shall have power] To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes."

220. United States v. Walsh, 331 U.S. 432 (1947).

221. 21 U.S.C. § 360 (Supp. II, 1967).

lines was recently upheld by the Ninth Circuit.²²² While the Food, Drug and Cosmetic Act specifically does not cover marijuana,²²³ there is no reason why it could not be so extended, especially if the Supreme Court were to hold the Marihuana Tax Act unconstitutional or unenforceable.

V. CONCLUSION

Of all the potential constitutional challenges to the laws against the use and possession of marijuana, the freedom of religion argument would provide the greatest problem in its application and have the most far-reaching repercussions in other areas of the law. By deciding that the use of marijuana is protected by the freedom of religion, as urged in *Leary v. United States*,²²⁴ the Supreme Court would be expanding the present concept of religion. Even though the Court has already held that it is not necessary to belong to an organized church or believe in a supreme being to justify application of the guarantee of freedom of religion, including the use of psychedelic drugs within this first amendment guarantee would be a significant change from its traditional import. If the Court were to hold that the use of marijuana for religious purposes is protected by the first amendment, such a holding would not preclude any marijuana laws, but it would require that an exception be made for religious use. This would undoubtedly open the door to a flood of cases in which the freedom of religion protection would be advanced and would require courts to define the limits of legitimate religious use.

The right of privacy, as enunciated in *Griswold v. Connecticut*,²²⁵ does not appear to provide a strong argument for a substantive bar to all marijuana laws. However, the problems of the enforcement of these laws, as in all similar laws not involving victims, may be a strong argument for their limitation legislatively, if not judicially. Under the expanding concepts of the right of privacy, the considerations involved in the enforcement of the law may provide sufficient justification for holding these laws unconstitutional.

Closely related to the claims of freedom of religion and the right of privacy is the other constitutional concept enunciated in *Griswold* — fundamental personal rights. This expanding concept refutes the traditional notion that the Constitution does not protect one's right to participate in activities purely for their personal gratification or pleasure. Since the right of privacy and the fundamental personal rights have only been applied by the Supreme Court to those activities related to specific first amendment guarantees or considered "essential to the orderly pursuit of happiness" it does not seem likely that the Court will extend these protections to marijuana despite the strong arguments that can be made in favor of such an extension.

222. *Deyo v. United States*, No. 22,058 (9th Cir., filed June 5, 1968).

223. 21 U.S.C. § 321(v)(3)(c) (Supp. II, 1967).

224. 383 F.2d 851 (5th Cir. 1967), *aff'd on rehearing*, 392 F.2d 220, *cert. granted*, 88 S. Ct. 2058 (1968) (No. 1365, 1967 Term; renumbered No. 65, 1968 Term).

225. 381 U.S. 479 (1965).

The concept of substantive due process, particularly as enunciated in *Robinson v. California*,²²⁶ would not seem to present much of an obstacle to the prohibition of marijuana. The question presented by the substantive due process requirement — is this the type of conduct for which criminal sanctions can be imposed? — could easily be answered in the affirmative under our present standards of constitutionality and morality. The issue of substantive due process is only raised, however, if marijuana use is not protected by one of the fundamental constitutional rights discussed above.

Any of the constitutional objections to the marijuana laws requires the determination of the state's compelling interest as balanced against the constitutional protection. If any of these constitutional guarantees could be sustained, it appears that on the basis of the present scientific evidence the state would not be able to meet its burden of showing a compelling interest in outlawing the possession and use of marijuana. This would necessitate an evaluation by the courts of this scientific evidence, a most complex task which they have been unwilling to undertake in the past.²²⁷

Of all the constitutional objections to the marijuana laws the eighth amendment prohibition against cruel and unusual punishment may provide the greatest chance for success. In holding penalties for use and possession of marijuana constitutionally excessive in violation of the eighth amendment, the Court would not be precluding any prohibitions against the use and possession of marijuana, but merely declaring that present penalties are constitutionally excessive. While the courts have been reluctant to second-guess the legislatures in their determination of sentences, the failure of the legislatures to act in light of the scientific evidence surrounding the harms of the use of marijuana may provide sufficient justification for the courts to step in at this time. It should also provide a middle-of-the-road approach — not legalizing the use of marijuana but bringing the penalties more in line with those of similar crimes. The judicial declaration that the present penalties are constitutionally excessive may provide the needed impetus to the legislatures to completely reevaluate the present prohibitions against marijuana use and possession.

The equal protection guarantee would probably not be successful in barring marijuana laws since even under the tests presented in *Skinner v. Oklahoma*²²⁸ and *McLaughlin v. Florida*²²⁹ there are arguable justifications for distinguishing marijuana from alcohol and grouping it with the "hard narcotics."

Constitutionality is not the only question involved in a rational approach to drug control, as the Prohibition Era so vividly demonstrated. Among students and certain other groups, the marijuana laws are increasingly being regarded with a kind of disrespect that followed the

226. 370 U.S. 660 (1962).

227. See Oteri & Norris, *The Use of Evidence in a Constitutional Attack on a State Criminal Statute*, 29 CALIF. L. REV. 29 (1968).

228. 316 U.S. 535 (1942).

229. 379 U.S. 184 (1964).

prohibition of alcohol. In rationally examining the consequences of legal suppression as a method of drug control, we should consider (1) the consequences of unrestricted use or nonpunitive controls; (2) whether the laws are enforceable; (3) whether the prescribed punishment is commensurate with the offense — whether it is consistent with that imposed for other offenses; and (4) the value of deterrence versus the laws' unintended consequences. It is clear that the present methods of controlling marijuana require substantial revision and that further research into the effects of its use is necessary. The failure of legislatures to act in these respects may precipitate judicial action, particularly in light of the significant constitutional issues involved.

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