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MARIJUANA—THE RIGHT TO TRUTH*

DR. NICHOLAS N. KITTRIE**

THE INTENSIFIED WAR ON MARIJUANA

I remember a few years back, when for the first time I taught the basic course in criminal law at the Law School, raising in class the question of criminality and the causes of crime. Some students suggested it was the social environment that breeds criminals, “the underprivileged deprivations and the social compulsion to imitate criminality in the peer group.” A few students suggested heredity as a cause: envy, greed, uncontrolled drives and innate aggressiveness. We had Marxists in the group. They pointed to capitalism’s insistence upon competition and material gains as accentuating the selfish streak in man, making him even more callous to his fellow man.

It was at that time that one of the women students, a young lady who had been holding her own in the predominantly male class, offered yet a different approach. “We often have crime,” she said, “because there are laws. If we had fewer laws, if we were less regulative and more tolerant—we would have less crime.”

At first blush the observation seemed almost irreverent and produced little response. But as the course in criminal law progressed through the semester, the participants were increasingly coming to realize that crime is not only a function of heredity and environment, but also a product of law-making. The more you regulate human conduct, the more fertile becomes the field for law breakers.

All this came to mind recently as I was reading about the nine cadets of the Coast Guard Academy, including four varsity athletes, who resigned after being charged with smoking marijuana in their rooms.¹ The cadets were given the choice of resigning or being dismissed. One academy officer noted that seven of the cadets were seniors and that the group included “some of our best students and

* Based on Paper Delivered at the Fourth Law-Psychiatry Institute of the William S. Hall Psychiatric Institute of the South Carolina Department of Mental Health and the School of Law of the University of South Carolina, March 13, 1970.

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1. The New York Times, March 25, 1970, at 50, col. 4.

athletes." Rear Admiral Arthur B. Engel, the superintendent, agreed: "They weren't bad kids," he stated. "This is just a sign of the times."

The story of nine cadets, whose whole life was disrupted for one deviant act in the privacy of their quarters, was difficult to digest. The charge suddenly seemed so remote and irrelevant; almost like an accusation of witchcraft. Slowly, as I was still staring at the paper, all these words were beginning to fall into some new order. If the kids are not bad, I thought, is it only the law that makes them criminals?

My concern about the marijuana laws kept growing as press coverage of marijuana use and abuse increased. One recent public drive against marijuana was disclosed in a news story dated March 10, 1970,² reporting a United States grant to the Mexican government in the amount of \$1 million for planes, helicopters, communications systems and equipment for the "remote sensing" of marijuana—all designed to assist the Mexican efforts at curbing the flow of marijuana across the United States border.

In the face of this escalated war on marijuana, with the typical American emphasis upon "hardware," I felt an urgent need to look at the historical, social and medical data underpinning this effort.

THE RIGHT TO MARIJUANA?

A few days later I participated in a symposium on marijuana sponsored by the School of Law of the University of South Carolina. My assigned topic was "Marijuana—The Right to Its Use." Billing my paper in this titillating manner was apparently designed to appeal to the audience's prurient interest in pot. It was intended also to suggest marijuana's affinity to a broader class of newly asserted legal rights to privacy: the right to use contraceptives, to have an abortion, to view pornography and to engage in consensual homosexuality.

It was only five years ago, that the United States Supreme Court gave recognition to the constitutional "right to privacy" in the *Griswold* case³—striking down the Connecticut statute punishing the prescription and use of contraceptives. (Similarly, a federal court recently struck down Wisconsin's prohibition of abortions as unconstitutional, on the ground that "a woman's right to refuse to

2. The Washington Post, March 10, 1970, § A, at 4, col. 6.

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

carry an embryo during the early months of pregnancy may not be invaded by the state.”)⁴ Yet the original credit for the privacy right must go to Justice Brandeis who described it at the turn of this century as the individual’s right to be let alone as long as he was posing no direct danger to the life, limbs or property of another human being.⁵

How far an individual may go in asserting his right to live and act differently from accepted social norms—is a most fascinating question in a democratic society. At a recent Washington, D.C. symposium on narcotics I heard one of my colleagues, Joseph S. Oteri of Boston, assert that constitutionally it was none of the state’s business what one does with his own body or health—as long as others don’t get hurt. I am certainly not willing to go that far. I have serious doubts about the claim that society has no right to intervene when one choses to immolate himself, starve himself or amputate his own limbs.

But I do not believe that a discussion of marijuana need to be that inextricably tied up with the more complex question of man’s entitlement to total liberty over the disposition of his body and personality. Instead, I believe that the social and legal status of marijuana can be resolved on a different level of discussion, where not constitutional theories, but plain facts are allowed to formulate conclusions. What I am suggesting is that a more rational resolution of the marijuana issue could take place if we merely stopped long enough for an honest appraisal of known facts, which have long gone unnoticed in the national political game surrounding marijuana.

I therefore prefer to discuss not man’s absolute right to seek artificial euphorias or to withdraw from society, but the more limited question of the citizens’ right to sensible, responsible, reasonable and truthful legislation.

THE INTRANSIGENT LAW

The state marijuana laws came into being in the early nineteen thirties. It was only in 1937 that the federal narcotics law was extended to include marijuana (which is known scientifically as *cannabis sativa* and colloquially as “weed,” “reefer,” “hay,” “Mary Jane” and

4. The Washington Post, March 7, 1970, § A, at 5, col. 1.

5. Warren and Brandeis, *The Right to Privacy*, 4 HARVARD L. REV. 193 (1890); *Olmstead v. United States*, 277 U.S. 438 (1928).

“pot”). Marijuana is now prohibited by both state and federal laws. A survey of current state laws, placed in the Congressional Record⁶ on January 20, 1970, by United States Senator Charles McC. Mathias, Republican of Maryland, testifies to the fundamental unreasonableness of our laws.

The analysis reports that 39 states draw no distinction in their laws between marijuana and the other “harder” addictive, and more dangerous narcotics. Consequently, such diverse states as Colorado, Florida, Georgia, Maryland, Ohio, Hawaii and South Carolina group marijuana and heroin in the same class and subject them to identical sanctions. Similarly, twenty states, as different as Arkansas, Minnesota, New Jersey and West Virginia, apply the same penalties to the experimental, one-time user and possessor of marijuana and any other drug, as to offenders charged with their sale and exploitation.

In Alabama, for example, a juvenile first charged with possession of marijuana is subject to imprisonment for 5 to 20 years and a 10 to 40 year sentence for subsequent offenses. A first marijuana offense in Maryland brings 2 to 5 years imprisonment and fine of not more than \$1,000; the second offense is punishable by 5 to 10 years and a \$2,000 fine, and subsequent convictions bring 10 to 20 years imprisonment and a \$3,000 fine.

Yet the commercial pusher and exploiter of harder narcotics, including heroin and cocaine, is subject to no stricter penalties in these states.

Although the penalties prescribed for the possession and sale of marijuana are unusually severe, most states leave it within the discretion of the courts to impose lesser sentences, especially for first offenses involving possession only. Forty-eight states thus allow suspended sentences and probation for first offenses of possessing marijuana.

The federal laws are similar to the states' statutes in that they make no distinction between marijuana and harder narcotics, providing punishments ranging from 2 to 10 years imprisonment for the first offense to 10 to 40 years in prison for third offenders. Moreover, federal laws provide mandatory minimum sentences for

6. 116 CONG. REC. §§ 240-245 (daily ed. Jan. 20, 1970).

violations and prohibit the mitigation of punishment through suspended sentences, probation or parole.⁷

THE RECENT NEWS OF MARIJUANA

It is implicit in this harsh federal and state regulation of marijuana that its use poses a serious danger to the public health and safety. Yet it has been repeatedly pointed out, and by authoritative sources, that the regulation of pot as a narcotic is sheer historical accident or error.

Dr. Stanley Yolles, former director of the National Institute of Mental Health, (N.I.M.H.), testified recently before the House subcommittee on Public Health and Welfare that to equate the risks of marijuana—to either the individual or to society—with the risks of hard narcotics “is neither medically nor legally defensible.”⁸ It has long been known that marijuana is not an addictive narcotic: it neither causes physical dependence nor does it develop a dosage tolerance requiring increased consumption in order to maintain its pleasurable effects. It is no more difficult to give up marijuana than to stop smoking. Yet marijuana’s listing as a narcotic under the law persists.

To the Congressional committee having a new look at the law, the chief of the N.I.M.H. presented a table listing fables and facts regarding marijuana. In response to the assertion that marijuana leads to increase in sexual activity the official answer is that this substance “has no aphrodisiac property.” Speaking to the fear that marijuana causes violence and crime, the answer is that “persons under the influence of marijuana tend to be passive.”⁹ (Indeed, marijuana has been found to calm mice that have been made aggressive by isolation, and it has been suggested that it might protect some people from psychosis and melancholia.)¹⁰ More emphatic yet has been the Medical Society of the County of New York which stated flatly that there is no evidence of the causal connection between marijuana use and crimes of violence in this country.¹¹

7. 26 U.S.C. § 7237.

8. Statement of S.F. Yolles, *Hearings on H.R. 11701 and H.R. 3743 before the Subcommittee on Public Health and Welfare of the House Interstate and Foreign Commerce Committee* [hereinafter cited as Yolles].

9. *Id.* at 19.

10. Grinspoon, *Marijuana*, 221 *SCIENTIFIC AMERICAN* 19, 24 (No. 6, Dec. 1969) [hereinafter cited as Grinspoon].

11. *NEW YORK MEDICINE*, May 5, 1966, at 3.

Others assert that sometimes a crime may be committed by a person while under the influence of marijuana. Any drug which relaxes one's day-to-day inhibitions may provide an outlet for the user's pent-up personality.¹² Yet with regard to marijuana this release of inhibition is reported to result in verbal rather than behavioral expressions.¹³

To the allegation that marijuana use is medically harmful, the answer is that the effects of long-term use are unknown; and to the warning that marijuana use may lead to heroin, the clear N.I.M.H. reply is that "we know of nothing in the nature of marijuana that predisposed to heroin abuse."¹⁴ Recent research by the Bureau of Motor Vehicles of the State of Washington, has demonstrated further that self control and coordination of drivers are much less affected by marijuana than by alcohol.¹⁵

Most dramatic have been the findings last year of a British government advisory committee on drugs which concluded that smoking marijuana appeared to be no more harmful—and in some ways, less harmful—than drinking liquor.¹⁶

After nearly two years of study, the 12-member group said flatly that "the long-term consumption of marijuana in moderate doses has no harmful effects."^{16.1} No evidence was found by the committee that marijuana makes the body crave even stronger drugs or that it causes violent crime or aggressive behavior. The evidence of a link with violent crime, the group concluded, "is far stronger with alcohol than with the smoking of *cannabis*."^{16.2}

THE IGNORED HISTORY

This recent news of marijuana is indeed not new. The fact is that we have been ignoring very similar information which has long been available. (For example, an intensive study conducted in the 1930's by a committee appointed by New York Mayor Fiorello La Guardia found no mental or physical decline in a group of chronic users who

12. Yolles, *supra* note 8, at 19.

13. Grinspoon, *supra* note 10, at 22.

14. Yolles, *supra* note 8, at 19.

15. Grinspoon, *supra* note 10, at 25.

16. The Washington Post, Jan. 8, 1969, § A, at 6, col. 5.

16.1. *Id.*

16.2. *Id.*

had averaged about seven marijuana cigarettes a day over a period of eight years.)¹⁷ The resultant American lapse into the dark ages of marijuana is one more proof of the proverb that those who ignore history are condemned to repeat it.

The recent re-issue in the United States of the 1893-94 Report of the Indian Hemp Drugs Commission provides a full documentation of our historical neglect.¹⁸ It demonstrates how thorough was the information available in 1894 regarding marijuana—the product of *cannabis sativa*, the Indian Hemp plant—and how carelessly the United States Congress acted some forty years later in making marijuana illegal.

One day in 1893 a member of the British Parliament rose to inquire whether the Secretary of State for India would instruct the Government of India to create a commission of experts to inquire into, and report on, the cultivation of, and trade in, all preparations of hemp drugs, “the effect of their consumption upon the social and moral condition of the people, and the desirability of prohibiting its growth and sale”¹⁹ The Secretary of State promptly complied. The resultant study and report were instrumental in the decision not to outlaw the drug.

To this day, the Indian Hemp Commission Report remains the most thorough collection of information on marijuana. The resolution setting up the Commission contained a broad mandate for fact finding not only regarding the effects of the drug, its cultivation and preparation but also several especially relevant issues for today’s setting: (1) the possibilities of controlling drug abuse by licensing, taxation or other non-criminal methods; (2) “the danger lest prohibition or restrictive measures . . . may give rise to serious discontent and be resented by the people . . .” and (3) “the probability or possibility that if the use of hemp drugs is prohibited, those who would otherwise continue to use them may be driven to have recourse to alcohol or to other stimulants or narcotics which may be more deleterious.”²⁰

17. Grinspoon, *supra* note 10, at 23.

18. MARIJUANA, REPORT OF THE INDIAN HEMP DRUGS COMMISSION, (The Jefferson Law Book Co., 1969).

19. 9 PARL. DEB., H.C. (4th Ser.) 822 (1893).

20. MARIJUANA, REPORT OF INDIAN HEMP DRUGS COMMISSION 3 (The Jefferson Law Book Co., 1969).

After receiving evidence from 1,193 witnesses, including 335 medical practitioners, and scrutinizing numerous courts and mental hospital records in British India, the Commission published its report with six accompanying volumes of appendices totalling 3,000 pages. These deal carefully and intelligently not only with the history and effects of marijuana but also with the social costs and likely side effects of its criminalization.

In the traditional fashion of British Royal Commissions, the hemp group set out to find detailed answers to many questions which remain relevant to this day. In a craftsman-like manner it sought to determine not only the immediate effects of marijuana use on the consumer (a. is it refreshing? b. does it produce intoxication? c. does it create an appetite? d. how long does the effect last?) but also the medical and social after-effects (a. does it impair the constitution in any way? b. does it cause dysentery, bronchitis, or asthma? c. does it impair the moral sense or induce laziness or habits of immorality or debauchery?). Seeking knowledge, the Commission overlooked little that might be of current interest. It inquired whether these drugs are useful as aphrodisiacs, whether they tend to produce impotence and whether they are used by criminals to fortify themselves to commit premeditated crimes.

The Hemp Commission not only solicited information about the alleged connection between marijuana use, crime and mental illness, but also attempted to determine whether there was any causal connection between the three. There was no denying that people who smoke marijuana might commit violent and aggressive acts or become insane—just as people who smoke cigarettes or drink alcohol may, and for that matter, even those who indulge in neither. Possibly, marijuana users may even be more prominently obvious in the ranks of crime or mental illness—but is this attributable to the consumption of “pot” or to some other innate personal or social characteristics of which drug consumption itself is a manifestation?

THE COST-BENEFIT ANALYSIS OF CRIMINALIZATION

Reaching the conclusion that the allegations of a connection between marijuana and crime were unsupported, the Commission noted that “preconceived notions based on rumor and tradition tend to

preserve the impression” of causality.²¹ The Commission concluded further—and no research to date had cast any doubt upon this conclusion—that the moderate use of marijuana usually relieves anxieties and produces no adverse effects upon the character of the consumer.

Excessive consumption, on the other hand, is likely both to indicate and to intensify moral weakness or depravity. But with respect to his conduct in society, however, even the excessive consumer of hemp drugs is ordinarily inoffensive. “His excesses may indeed bring him to degraded poverty which may lead him to dishonest practices . . . [b]ut for all practical purposes it may be laid down that there is little or no connection between the use of hemp drugs and crime.”²²

Similarly negative was the Commission’s conclusion regarding the relation between marijuana and mental illness. The acute toxic reaction of pot smoking is equivalent to the state of alcoholic intoxication, but it rarely leads to a lasting psychosis.

John Kaplan, professor of law at Stanford University, in a recent introduction to a new reprint of the Indian Hemp Drugs Commission report notes that the most important conclusions of the document relate to the adverse social effects that were likely to be produced by the outlawing of marijuana. The Commission was much concerned with the problems of enforcing marijuana prohibitions—“the fact that since there is no victim to complain about this type of offense, the police will necessarily have to proceed by using informers and invading the citizens’ privacy.”²³

The Commission worried also about the public resentment that inevitably was to result from an attempt to use criminal sanctions in order to enforce consensual moral offenses and also the adverse attitude towards law likely to be “caused by any law which turns a sizable percentage of the population into criminals—whether or not they are apprehended.”²⁴

The Commission found no evidence or hypothesis to support the suspicion that marijuana was a stepping stone to opiate use. On the

21. *Id.* at 263.

22. *Id.* at 264.

23. *Id.* at xiii (introduction).

24. *Id.*

other hand, it gave serious credence to another fear that if marijuana were to be made illegal, a substantial number of its users might turn to more harmful drugs. One of these drugs was considered to be alcohol.

THE 1937 NOBLE EXPERIMENT

The United States Congress in 1937 demonstrated most dramatically the difference in governmental processes between Britain and its new world descendant. In a total reversal of the impartiality of the Indian fact-finding process, the American Congress relied most heavily upon the self-serving testimony of the Bureau of Narcotics in order to extend the Bureau's then existing narcotic jurisdiction to include marijuana. The Hemp Commission Report was not once mentioned as a worthy resource for determining the effects of marijuana on a large population of users. The only reference to this most exhaustive document on the topic was its inclusion without comment in a long bibliography submitted to Congress by the Bureau of Narcotics.

Contrasted with the Hemp Drug Commission's 1,193 witnesses, the United States Congressional inquiry into the need to outlaw marijuana was much more limited. The committee hearings in the House of Representatives consumed parts of five days. Of the twelve witnesses heard, three represented the hemp seed industry. Four others represented the United States Treasury Department which was proposing the law. The United States Senate Committee required less than two hours for its decision. Of seven witnesses heard, five represented the hemp seed industry.

Henry Anslinger, Director of the Bureau of Narcotics, was the chief spokesman urging the passage of the new bill and even though only five years had passed since the repeal of prohibition, there was little concern for this new venturing into moral legislation.

Professor John Kaplan has ironically pointed out that the major concern of Congress was not to determine the justification for the proposed outlawing of marijuana, but rather how to do so while at the same time protecting the paint manufacturer who used the oil of the hemp plant, the producers of birdseed to use hemp seeds as prime ingredients and diverse other legitimate businessmen who required these products.²⁵

25. Statement of Ralph Lozier, General Counsel, National Institute of Oilseed Products, *Hearings on H.R. 6385, before the House Comm. on Ways and Means*, 75th Cong., 1st Sess., at 59 (1937).

Congress did have the benefit of testimony by Dr. William C. Woodward, Legislative Counsel of the American Medical Association, who asserted that there was no evidence to support the need for the proposed federal legislation and furthermore that the new law would likely prove even more unenforceable than the existing Harrison Narcotics Act.²⁶ But even this limited suggestion of dissent on the issue of marijuana criminalization was denounced as typical of the conservative American Medical Association's opposition to all new deal laws.

The major plea of the Bureau of Narcotics was that marijuana should be outlawed because of its two adverse effects: first, it induced its users to commit violent crimes, and second, it produced insanity. The Commissioner of Narcotics did however disavow the most common reason currently given for the prohibition of marijuana—that it provides a stepping stone for heroin or cocaine use and that its users graduate to harder narcotics.

Congressman Dingell: I am just wondering whether marijuana addict graduates into heroin, or opium, or a cocaine user.

Mr. Anslinger: No Sir, I have not heard of a case of that kind. I think it is an entirely different class. The Marijuana addict does not go in that direction.²⁷

To support the claim of marijuana's propensity to cause crime and insanity, Mr. Anslinger had no independent research findings or reports equivalent to the unbiased Indian Hemp Commission. Instead, he relied on history, diverse supporting newspaper editorials and several letters from law enforcement officials and others. The scientific reliability of the Anslinger testimony is typified by his assertion that "in Persia, a thousand years before Christ, there was a religious and military order . . . called the Assassins, and they derived their name from the drug called hashish which is now known . . . as marijuana . . . they were known for their acts of cruelty . . ."²⁸ The Government's chief witness was thus at least two thousand years off-base in his dating of the assassins—who came into being in 1090 A.D.

The overall tone of the Congressional inquiry is illustrated by several exchanges between witness Anslinger and his senatorial questioners.

26. *Id.* at 87-121.

27. *Id.* at 24.

28. Grinspoon, *supra* note 10, at 18.

Senator Davis: How many cigarettés would you have to smoke before you got this vicious mental attitude toward your neighbor?
Mr. Anslinger: I believe in some cases one cigarette might develop a homicidal mania, probably kill his brother Probably some people could smoke five before it takes effect, but the experts agree that the continued use leads to insanity. There are many cases of insanity.

Senator Davis (viewing a photograph of an alleged murder victim presented by Mr. Anslinger): Was there in this case a blood or skin disease caused by marijuana?

Mr. Anslinger: No. This is a photograph of the murdered man.

Senator: It shows the fury of the murderer.

Senator Brown: That is terrible.²⁹

Moreover, it was the position of the assistant general counsel of the Treasury Department, C. M. Hester, that as long as the marijuana law proclaimed to be a tax measure, its validity would be upheld by the courts without any other evidence: "if on the face of the bill it appears to be a revenue bill, the courts will not inquire into any other motives that the Congress may have" ³⁰

It was on this meager evidence that the 1937 marijuana act was ushered in. "[T]he Congressional Hearings, is valuable reading even for those relatively few in our society who are uninterested in the drug problem since the stark contrast between the way the American and British governments went about deciding whether to criminalize marijuana is an object lesson in the right way and the wrong way to approach just about any legislative problem."³¹

WHENCE TO?

The Marijuana Tax Act of 1937, by and large little modified, has had a life-span considerably longer than that of prohibition. Yet its popularity has not much improved with time. Dr. Yolles' recent testimony before the House Subcommittee on Public Health and Welfare claims that from collegiate studies and other sources it can be estimated that the number of people who have smoked marijuana at least once is somewhere between 8 and 12 million, and it may be closer to 20 million.³²

29. *Hearings on H.R. 6906, before the Subcommittee of the Senate Comm. on Finance, 75th Cong., 1st Sess., at 11, 14 (1937).*

30. *Id.*

31. *Supra* note 18, at vi (introduction).

32. Yolles, *supra* note 8, at 21.

Reportedly, about sixty five percent of those who have smoked marijuana are experimenting users who subsequently discontinue its use. Some twenty five percent become social users who smoke marijuana on occasion, usually in group settings. Only ten percent are classified as chronic users who devote significant time to obtaining and using the drug.³³

The use of marijuana is most common in depressed urban areas, on one hand, and in academic and artistic communities, on the other. Recent reports of widespread use on campuses claim that twenty percent or more of the college population has been exposed to it. Relatively inexpensive, compared with heroin, marijuana is easily accessible to large numbers of grownups and youths. The Chicago police reported in 1966 that the local price for a single cigarette ranged between 50 and 75 cents. Lower prices were reported nearer to the Mexican border. With inflation and stricter enforcement—prices have gone up.

Several recent research studies have failed to cover new and more ominous data regarding possible long range effects of marijuana. While direct evidence of a causal relation between marijuana and crime remains lacking—and it is doubtful that a rational connection will ever be supplied—it is being pointed out that as an intoxicant the drug produces changes in human consciousness and therefore requires similar supervision to that accorded to alcohol. Driving under the influence of marijuana is thus hazardous and instances of panic, depression and psychotic states have been reported, though infrequently, by consumers.

Only the new widespread use of marijuana in the United States is finally producing the intensive clinical and community inquiries which should have been undertaken prior to the 1937 law. The National Institute of Mental Health reports that marijuana—not surprisingly for an intoxicant—has been found to interfere with the thinking process and with recent memory. It weakens the concentration power and slightly retards speech. Instead of stimulating conviviality it can stimulate anxieties and guilty feelings and develop introversion.

But while it appears that the pleasurable effects of marijuana may

33. NARCOTICS, LSD, MARIJUANA AND OTHER DANGEROUS DRUGS, RECENT RESEARCH 7 (N.I.M.H., Pub. 1961, Oct. 1969).

at times be countered by feelings of discomfort, dizziness and sluggishness, the long-term effects still remain uncertain. The most adverse recent report is that "There is a growing body of evidence that the continuing user, or 'pothead', becomes so involved in the process of securing and using the drug that his drive and motivation toward any other activities are impaired. Additionally, since the drug appears to attract youngsters who already have emotional problems, it may aggravate those conditions . . ." ³⁴ Yet in the final analysis all that this suggests is that excessive involvement with the drug—much as any other excess including sex, alcohol or overweight—is likely to interfere with a healthy and balanced life and personal growth.

It is in the face of this still uncertain and bland record of marijuana as a personal and social threat that the justification for its criminalization and its subsequent channelling into underworld markets and profits must be tested. Indeed, it is this very criminalization which may contribute to one of marijuana's manifested ills: the fact that the difficult process of securing and using the drug may impair one's drive and motivation toward other activities. Certainly no one has ever seriously charged that the process of securing and using tobacco in an open society has a significant effect upon the smoker's role in the community. Yet in a prisoner of war camp or among reformatory inmates, access to prohibited or stringently supplied cigarettes may become a major pre-occupation.

In 1937, before the Senate subcommittee considering the outlawing of marijuana, the representative of the American Medical Association questioned the validity of criminal sanctions in curing vices. Once a given substance is prohibited, substitutes always spring forth. A narcotic officer in Egypt thus reportedly recounted how people were using tea for the purpose of getting a jab, by "boiling that tea, day after day, and day after day, until they got a hyperconcentrated extract, and then sitting up all night to drink it, and spending their money for tea, rendering themselves unfit and unable to work." ³⁵

Inherent in a democratic society is a commitment to as much social diversity and pluralism as can be tolerated without direct harm to others. Implicit in this commitment is the requirement that governmental regulations be reasonably imposed and be supported by

34. Yolles, *supra* note 8, at 22.

35. Woodward, Statement, in Senate Hearings, *supra* note 29 at 96.

a compellingly demonstrated need. The test should not be: why not governmental restrictions upon the individual? The democratic requirement instead, must be no criminalization without responsible proof.

The case for the total outlawing marijuana falls much too short of this standard. I have no doubt that with present knowledge as compelling a case could be made for outlawing the consumption of alcohol or the sale and smoking of cigarettes as could be made against marijuana.

A reporter for the South Carolina press asked me: "We know that liquor and tobacco are vices. We have nevertheless tolerated them in this country. But why should we expand the list of tolerated vices when we know that none of these is particularly beneficial?" The answer must be based on diverse considerations. Honesty requires that we admit to our youth that marijuana is no more dangerous than adult vices. Realism requires that we admit that the total abolition of vices is unlikely unless we order a society of intolerable conformity. Pragmatism requires rational priorities in our search for law and order—certainly the control of such dangerous crimes as murder, robbery and rape justifies a greater police effort than the suppression of vices, which now requires an inordinate amount of money and manpower.

As the history of prohibition has hopefully demonstrated the best route to greater public health and welfare does not necessarily travel through the territories of criminal justice. There are other avenues for social and behavioral influence, control and engineering—with a lesser price tag in terms of costs to individual liberty and social diversity.

Viewing the evidence in its totality, the conclusions that one must inescapably draw today with regard to marijuana are not much different from the conclusions reached in the Report of the Indian Hemp Drugs Commission of 1893-94.

Total legal prohibition of the cultivation, manufacture, sale or use of marijuana is neither justified nor expedient on the basis of existing knowledge. This conclusion must rest not only on the lack of ascertained ill effects, but also upon the prevalence of the habit, the social feelings on the subject and the possibility of driving the consumers to more deleterious stimulants or narcotics.

Since marijuana is an intoxicant and its excessive use is likely to produce adverse effects somewhat similar to those of alcohol and

tobacco, a public policy must be developed to restrain and restrict its use—aimed at the suppression of excessive use and at keeping the moderate use within confined limits, such as limiting it to adults.

The most proper and effective means for attaining such a social program would be mainly non-criminal measures. Needed instead is a system which utilizes appropriate taxation, requires that cultivation be under government licensing, and imposes careful licensing for both wholesale and retail sales. To further curtail the underworld trade, the unlicensed grower and seller should be subject to even stricter penalties.

Once the profit bottom has been knocked out from under the illicit marijuana market, public health and welfare measures designed to educate consumers against excesses would be commenced. Parental influence could be as readily exercised with regard to marijuana as it is used in connection with the other vices of adulthood. And for the adult who despite all knowledge and education prefers to seek out his artificial euphoria, there ought to be the liberty to smoke pot and pay for the consequences—if any are discovered—much as the cigarette smoker is given the opportunity to test out his chances against lung cancer.

This is neither a recommendation nor a plea for indulgence in marijuana. I certainly would not urge any person to smoke tobacco, drink alcohol or use other drugs—whether tranquilizers, pep-up or sleeping pills. For my minor children I shall continue to exercise my parental responsibility: in telling them what is right and tolerable within the family circle and what is not. Equally, I believe it is the duty of the mass media to continue reporting the updated facts regarding alcohol, tobacco and drugs.³⁶ But laws which turn into criminals some twenty million Americans; for the use of a substance the chemical qualities of which are comparatively mild—are a national mistake.

Some will persist: you are merely giving in to the pressures of youth for the legitimization of one more vice. I must respond that if pressure for change is to be resisted it must be so only in those areas where change is not justified. As adults we must not allow marijuana to become a test case for adult ignorance, inconsistency and arbitrariness.

36. In his 1937 opposition to the federal marijuana law, the representative of the A.M.A. noted: "Newspaper exploitation of the habit has done more to increase it than anything else." Woodward, *Id.* at 118.