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Symposium: Drugs and the Law: Introduction

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Symposium: Drugs and the Law

INTRODUCTION

Let the Earth bring forth Grass . . .

Genesis 1:11

The drug drama has many scenes. Some people stage it as a cultural movement, 1 embodying its own language, 2 literature, 3 music, 4 art, 5 morals, 6 and dress. 7 To some it is the great religious phenomenon of our time, 8 to others but a passing passion for hedonism. 9 Still others consider

1 "Whatever their meaning and wherever they may be headed, the hippies have emerged on the U.S. scene ... as a wholly new subculture ...." TIME, July 17, 1967, at 18.

2 As part of their lexicon of drugs, initiates use such terms as "dope" (signifying all drugs), "acid" (LSD), "smack" (heroin), "speed" (amphetamines), "roach" or "reefer" (marijuana cigarette), "goof balls" (barbiturates), and various terms for marijuana—"pot," "grass," "Acapulco Gold," "Panama Black," "Mex," and "Cambodian Red." See San Francisco Chronicle, Oct. 31, 1967, at 1, col. 2; Chapman, Oakland Tribune, Nov. 5, 1967, at 20-21 (Parade Section); San Francisco Chronicle, Nov. 1, 1967, at 1, col. 3.

3 See, e.g., C. Baudelaire, THE ESSENCE OF LAUGHTER AND OTHER ESSAYS, JOURNALS, AND LETTERS (1956); W. S. Burroughs, NAKED LUNCH (1959); TIBETAN BOOK OF THE DEAD (Evans-Wentz ed. 1957); A. Ginsberg, KADDISH AND OTHER POEMS, 1958-1960 (1961); A. Huxley, BRAVE NEW WORLD (1946); A. Huxley, DOORS OF PERCEPTION (1954); BHAGAVAD- GITA (F. Edgerton transl. 1944); J. Kerouac, ON THE ROAD (1957); K. Kesey, ONE FLEW OVER THE CUCKOO'S NEST (1962); H. M. McLuhan, UNDERSTANDING MEDIA (1964); F. Rabelais, GARGANTUA AND PANTAGRUEL (1928); J. R. R. Tolkien, THE HOBBIT (1937); A. Watts, THE JOYOUS COSMOLOGY (1962).

4 Consider the music of the following groups, all of which have been "busted" at one time or another on charges of possessing hallucinogens: The Rolling Stones, The Grateful Dead, The Lovin' Spoonful, Canned Heat, and the Electric Flag. See Berkeley Barb, Oct. 6, 1967, at 2, col. 1; San Francisco Chronicle, Oct. 28, 1967, at 2, col. 4; San Francisco Chronicle, Oct. 23, 1967, at 3, col. 8; San Francisco Chronicle, Oct. 31, 1967, at 5, col. 6. The Beatles have also admitted to having used hallucinogenic drugs. San Francisco Chronicle, July 25, 1967, at 3, col. 7.


6 Consider the communal, often promiscuous, sometime nudist life in such settlements as Morning Star in Northern California, Drop City near Trinidad, Colorado, Timothy Leary's colony of Millbrook in New York, and the Haight-Ashbury in San Francisco. See TIME, July 7, 1967, at 18, A-F. See also San Francisco Chronicle, Nov. 7, 1967, at 1, col. 5. To the extent that drug subculture localizes in isolated enclaves, it may be entitled to special legal consideration of the kind granted nudist colonies.

7 See TIME, July 7, 1967, at 18, A-F.

8 See note 50 infra.

9 San Francisco Chronicle, Nov. 2, 1967, at 1, col. 2.
it a division of generations, at worse a protest by the young against white, middleclass America, at best a flightly fad like goldfish swallowing. The idiom itself of the drug theater—of "narcotics," "sedatives," "pep pills," "addiction," "habit," and "dependence"—is as confused and as rich as its theme. Critics, of course, will forever debate the meaning of this drug drama; in the future, they will also focus more closely on individual scenes—on opiates, on barbiturates, and on hallucinogens. However, it is not our purpose here either to discuss the meaning of the whole or to focus on any one scene. Rather, ours is a legal inquiry and, therefore, an inquiry into the way society may regulate drugs because of their effects on human conduct. Our inquiry, then, touches upon those points of the spectrum of drug use which affect human conduct.

In February, 1967, the President's Commission on Law Enforcement published findings that marijuana should not be classified as an opiate-like narcotic and recommended inquiry into the wisdom of punishing the possession of marijuana. Three months later, the United States Senate ratified an international convention outlawing the wrongful possession of marijuana. This confusion indicates that the time is ripe for a legal discussion of drugs. As a general matter, the topic should interest students of the law for several reasons. For one thing, our legislative and adminis-

10 See statement by Dr. Constandinos J. Miras, San Francisco Chronicle, Sept. 13, 1967, at 1, col. 4: "What will be the future of a nation whose young people have no interest in success?"

11 See statement of Stanley Yolles, Director, National Institute of Mental Health, as reported in TIME, July 7, 1967, at 18.


The spelling of "marijuana" in this Symposium varies according to the preference of the author. The word is apparently of Mexican Spanish origin, 14 ENCYCLOPEDIA AMERICANA 92 (1961), but that source itself provides conflicting spellings. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1381 (1966) (marijuana, marihuana). While federal usage prefers "marihuana," U.S. GOVT. PRINTING OFFICE, STYLE MANUAL 63 (1967), states differ and are even internally inconsistent. Compare, e.g., CAL. HEALTH & SAFETY CODE §§ 11530, 11531 (West 1964) (marijuana) with id. § 11001(d) (West 1964) (marihuana) and People v. Antista, 129 Cal. App. 2d 47, 276 P.2d 177 (1954) (marihuana). Additional variants abound. BLACK'S LAW DICTIONARY 1119 (4th ed. 1951) lists, in addition to "marihuana" and "marijuana," the following: maraguana, marajuana, marahuanu, marihuana. While the trend of popular publications and recent authorities, e.g., 14 Encyclopaedia Britannica 889 (1963), seems to favor "marijuana," it is yet premature to impose a uniform and purportedly authoritative spelling.

tive processes face the challenge of accommodating the new drugs which private industry is continually developing. It is estimated, for example, that American industry produces nine billion barbiturate and amphetamine tablets annually, providing every man, woman, and child in America with seventeen doses of barbiturates and twenty-four doses of amphetamines a year. Similarly, in the psychedelic community, hippie chemists have succeeded in synthesizing THC—the active ingredient in marijuana—which may fall outside the specific prohibitions of the Federal Marihuana Tax Act. In 1967, these chemists also developed DET (diethyl-tryptamine), a mild hallucinogen, and even more striking, STP, a hallucinogen six times more powerful than LSD, both of which are still legal. It seems clear that the legislative process is incapable of accommodating these continual innovations in pharmacology. To achieve necessary flexibility, Congress in 1965 amended the Federal Food, Drug, and Cosmetic Act, giving the Secretary of Health, Education, and Welfare the power to include in the pharmacopoeia of regulated drugs “any drug which . . . [he], 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 nervous system or its hallucinogenic effect . . .” Almost immediately, the Secretary included peyote, mescaline, and LSD within such regulation. By means of such incorporation, the legislature is attempting to confront the crescendo of drug science.

The Director of the Federal Food and Drug Administration estimates that 20 million Americans have experimented with marijuana at one time or another; veteran John Steinbeck IV, son of the novelist, estimates that three-fourths of all servicemen in Vietnam smoke marijuana, some

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14 "A new oral antituberculosis drug—hailed as apparently representing a new breakthrough in treating the age-old scourge—is available for prescription now by doctors and hospitals. . . . Spokesmen . . . said it was marketed Monday following approval by the Food and Drug Administration." San Francisco Examiner, Dec. 6, 1967, at 1, col. 5.


19 See the suggestion that new mind altering drugs are being produced so fast that legislators cannot possibly keep up with them. San Francisco Chronicle, Oct. 28, 1967, at 1, col. 2.


21 21 C.F.R. § 166.3 (1967).

even under combat conditions. Closely related to the legislative task of assimilating new drugs is the law enforcement problem—the problem of enforcing the law against mass violation. It is estimated, for example, that two million Americans take barbiturates and amphetamines in excess. It is also estimated that between 300,000 and 4.5 million Americans smoke marijuana regularly; even prison officials have discovered it being smuggled into county jails. The number of abuses defies regulation. Where so many people live in violation of the law, two consequences may follow: either the law is not enforced, or it is enforced selectively.

Faced with such frustration, law enforcement officers may well find it more effective to control manufacture and distribution than to regulate possession and use, and more helpful to rely on education than on suppression. It seems particularly futile to seek regulation in a field where even bananas, nutmeg, airplane glue, and morning glory seeds are suspect. Liberating the police from the task of enforcing unenforceable laws might also allow them to concentrate on policing more serious conduct.

24 See note 15 supra.
27 Both the courts and the prosecuting authorities are reacting to the increasing number of violations by devising new modes for discriminating between mild and serious offenses. In California, the courts construe statutes against illegal possession as applying only to the possession of usable or salable quantities. In People v. Sullivan, 234 Cal. App. 2d 562, 44 Cal. Rptr. 524 (1965), the court dismissed the indictment based on a finding of heroin residue on a spoon: "We conclude that possession of a minute crystalline residue of narcotic not intended for consumption or sale and useless for either of these purposes is insufficient evidence to sustain a conviction for known possession of a narcotic." Furthermore, a number of California judges have said they would not enforce the harsh laws against marijuana possession. See San Francisco Chronicle, Sept. 24, 1967, at 9, col. 1; San Francisco Chronicle, Oct. 22, 1967, at 1, col. 3; San Francisco Chronicle, Oct. 13, 1967, at 2, col. 2; San Francisco Chronicle, Nov. 12, 1967, at 3, col. 7; San Francisco Examiner, Dec. 6, 1967, at 8, col. 5. The San Francisco District Attorney, on the other hand, rarely prosecutes the possession of marijuana where the amounts involved are less than that needed for a single cigarette (300 milligrams). See Fontan, Legal Decisions Pertaining to Small Amounts of Narcotics and Marijuana, 1967 (unpublished manuscript on file with the California Law Review).
29 See Newsweek, July 24, 1967, at 45 (dismissal of charges against ballet stars Dame Margot Fonteyn and Rudolf Nureyev for being in a place where marijuana was being used); San Francisco Chronicle, Oct. 24, 1967, at 5, col. 2 (California superior court judge sentences twenty-four-year old coed to jail to "point out to the University community that the use of marijuana is not a frivolous offense.")
30 See generally, Laughlin, LSD-25 and Other Hallucinogens: A Pre-Reform Proposal, 36 Geo. Wash. L. Rev. 23 (1967).
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It is difficult enough to enforce the law in an area where violations occur on a colossal scale. It is even more perplexing to discover that the major offenders are, almost without exception, young people. At one time, marijuana circulated in minority circles, as an elixir for Negroes, Latin Americans, and bohemians. More recently, however, it has captivated middleclass users, particularly the young—that most gifted, educated, idealistic, promising generation in America. For example, a survey of graduate schools in the San Francisco Bay Area reveals that approximately one-third of all students in law and medicine have experimented with marijuana at one time or another. Those who confront the legal problems of drug use must therefore recognize that they are dealing in large part with the mores and well-being of people under twenty-five years of age, people unable to represent themselves in the legislative halls of America. On the other hand, they must also recognize their peculiar responsibility for young people which, as with obscenity legislation, may justify discrimination on the basis of age.

A bloodied mother in bluejeans, apparently under the influence of amphetamine, is found in a trance after cutting the heart out of her two-year old son, filling the cavity with a soft-drink bottle, and stuffing his dead body into a bathtub. A young mother, perhaps unintentionally, swallows a massive overdose of a potent barbiturate which sends her into a coma and, six days later, to her death. The dangers of drug use are said to justify the machinery of police power, while use of the police power in turn invokes strictures of the Constitution. Drug use does, of course, touch the Bill of Rights at several points: as a first amendment issue of free exercise of religion, as a fifth and fourteenth amendment...
question of unreasonable classification, as a general question of right to privacy, and as an eighth amendment question of cruel and unusual punishment. To discuss constitutionality is in some cases to question the very existence of dangers. For example, it is unconstitutional to sterilize criminals unless the state can show that there is some danger that criminality is hereditary. In other cases, to discuss constitutionality is to balance the benefits of unregulated conduct against its dangers. For example, the state cannot regulate an assembly for political discussion unless it can show that the dangers of such assembly outweigh its benefits. On the other hand, one could not justify a practice of cannibalism by incorporating it into his religion, because the hazard to human life outweighs its religious rewards. As a preface to the constitutionality of drug use, one must therefore inquire whether and to what extent drugs are dangerous.

Mass media, of course, regularly report incidents of the drug peril. It is said, for example, that LSD may cause physical birth defects and internal chromosome damage. It is said that marijuana may have an adverse effect on people with allergies and on the insulin levels of diabetics. However, newspapers also report incidents of alcoholic abuse, including the fact that six million Americans are alcoholics, that alcohol causes 15,000 deaths and 200,000 injuries every year. The constitutional inquiry into state interest is not whether dangers exist, but rather whether the dangers are such as to justify regulation of a constitutionally protected interest. In some cases the purported dangers are social, as where it is claimed, that marijuana induces sensualism, escape from reality, and indolence. To regulate such behavior, however, is to evoke all the perplexities of legislating morals. In still other cases the dangers are unknown because they concern long term effects. In such cases, where the desirability of present conduct is strong and the risk of future danger slight, it may be better to warn the public of possible dangers and let them act accordingly.

41 San Francisco Chronicle, Nov. 24, 1967, at 1, col. 1.
44 See Fort, Social and Legal Responses to Pleasure-Giving Drugs, in THE UTOPIATES 210 (R. Blum ed. 1964); Bleibtreu, Marijuana and the New American Hedonism, PSYCHEDELIC REVIEW, 1967, No. 9, at 72.
“LSD is the New Sacrament; so it has been revealed to me.... The continued use of these drugs has developed my Spiritual Consciousness... that this is the Dawn of the New Age.... That the sacrament by which the awakening occurs, is LSD, and even more than that, STP, which is the most sacred thing I have ever experienced. ... Without the sacrament, I would not perish, nor would I be without religion, but I could not practice what is now my religion.”

The religious use of drugs is as old as recorded history. The Dead Sea Scrolls, according to some, suggest that pre-Christian sects in the Qumran Community ingested psychedelic mushrooms. Groups of Navajo Indians in the Native American Church have been smoking peyote, a mild hallucinogen extract of cactus, since the 16th century. The Supreme Court of California has accordingly held that these Navajos, in the absence of a compelling state interest in regulation, have a constitutional right to use peyote as a central part of their religion.

State interest is only one side of the equation involving constitutional issues of drug use and free exercise; the other side of the equation is religion. To sustain a constitutional claim for religious use of drugs, one must not only counter evidence of compelling state interest, he must also prove that his drug use constitutes an essential element of genuine religious belief. The first amendment may preclude a court from inquiring into the validity or authenticity of religious belief, but it does not preclude inquiry into the defendant’s good faith. A North Carolina court has therefore held that a member of the Neo-American Church has no constitutional right to use peyote and marijuana where he invokes a


62 People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964). Although peyote is subject to regulation by the Food and Drug Administration, the Secretary of Health, Education and Welfare has permitted its use by the Native American Church as a sacrament. 21 C.F.R. § 166.3(c)(3) (1967).


religious claim in bad faith to shield otherwise prohibited conduct.\(^{54}\) Besides good faith, the defendant may also have to show that his belief forms part of a collective movement. Thus, a California court has denied the defense of free exercise to a marijuana user on the ground that he propounded a one-man religion which more closely resembled a personal philosophy of life than an institutionalized church.\(^{66}\) And finally, the defendant may be compelled to demonstrate that his religious belief conforms with the general tradition of established or mystical religions. A defendant could not argue, for example, that his religion consists of parking in front of fire hydrants. He must show that his belief "occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption. . . ."\(^{53}\)

_Mrs. Garnet Brennan, a fifty-eight-year old grade school teacher, admits to having smoked marijuana in the privacy of her home for the past eighteen years as a tranquilizer.\(^{57}\) A bartender admits to having smoked marijuana privately as "just something to take away the taste of liquor."\(^{58}\) Those who are unable to invoke a religious defense, may nonetheless argue that they have a right in the privacy of their home to moderate use of drugs which create no substantial dangers and which affect only themselves.\(^{58a}\) In _Griswold v. Connecticut_\(^{60}\) the Supreme Court held that the State of Connecticut could not prevent married couples from practicing contraception in the privacy of their home. In effect, the Court found that the individual's interest in deciding how to live outweighed the state's interest in preventing promiscuity. Similarly, in the case of drug use, it can be argued that the individual's right to choose psychedelia for himself outweighs society's interest in preventing dependence.\(^{60}\) As an


\(^{56}\) United States v. Seeger, 380 U.S. 163, 176 (1965). Although application of the free exercise clause requires the determination of standards, to establish such standards is to discriminate, almost invariably, against esoteric, individual beliefs in favor of conventional, community values.

\(^{57}\) San Francisco Chronicle, Nov. 3, 1967, at 3, col. 5.

\(^{58}\) See Fenster v. Leary, 20 N.Y.2d 309, 312, 229 N.E.2d 426, 428, 282 N.Y.S.2d 739, 742 (1967), in which the court held the New York vagrancy statute unconstitutional "on the ground that it . . . unreasonably . . . provides punishment for conduct of an individual which in no way impinges on the rights or interests of others and which has in no way been demonstrated to have anything more than the most tenuous connection with the prevention of crime . . . ."

\(^{59}\) 381 U.S. 479 (1965).

analogy, although the federal government has found that cigarette smoking threatens health, it does not prohibit cigarette smoking altogether, but rather warms smokers of such hazards and permits them to weigh those dangers for themselves.

Apposite also is the problem of alcoholic intoxication. Like drugs, alcohol is known to cause physical dependence; like drugs, alcohol is known to disrupt family cohesion and social mores; like drugs, alcohol is often linked with criminal behavior. And yet, the possession and imbibing of alcohol, unlike the possession and ingestion of drugs, is not generally a criminal offense. With alcohol the line of criminality lies between “private” drinking and “public” drunkenness. Perhaps the criminal law should treat drugs, like alcohol, as something one may possess or ingest in private, and focus instead on the resulting public misconduct it deems undesirable. It is interesting to note that the President’s Commission on Law Enforcement questioned whether even public drunkenness should be a crime: “The Commission seriously doubts that drunkenness alone . . . should continue to be treated as a crime. . . . The application of disorderly conduct statutes would be sufficient to protect the public against criminal behavior stemming from intoxication.” In view of its findings concerning marijuana, the Commission might well have recommended that being under the influence of marijuana, like public drunkenness, no longer be a crime.62

Late in October, 1967, Dr. James Goddard of the Food and Drug Administration told Congress that marijuana may be even less dangerous than alcohol.63 The following day, a Commissioner of the Narcotics Bureau told the same Congressional Committee that marijuana “is definitely a dangerous drug with potentials for far-reaching damage to individuals and to society.”64 A more difficult constitutional argument for marijuana use involves challenging its classification as a “narcotic.” Under both federal and state law, marijuana is classified as a narcotic along with heroin, opium, morphine, cocaine, and codeine.65 Strong evidence indicates

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61 President’s Commission, supra note 12, at 235.
63 San Francisco Chronicle, Oct. 20, 1967, at 8, col. 2; San Francisco Chronicle, Nov. 10, at 27, col. 5.
65 “Narcotic,” as used in federal and state legislation is not a scientific, but a legal term. See President’s Commission, supra note 12, at 212. Under federal law, marijuana—although not technically a narcotic—is treated for all purposes just like the opiates. Compare 26 U.S.C. §§ 4701-40 (1964), with id. §§ 4741-76 (1964). Under state law, “narcotic” includes both marijuana and the opiates. See Uniform Narcotic Drug Act, enacted in substan-
that marijuana—unlike the opiates—induces neither physical dependence nor increasing tolerance nor withdrawal discomfort, and no evidence has yet established a connection between marijuana use and either crime or subsequent addiction to more potent drugs. Thus, some argue on grounds of substantive due process that marijuana should not be classified as a narcotic drug.66 Furthermore, because possession of marijuana is punished as a felony while possession of more powerful hallucinogens like LSD is not, some argue on grounds of equal protection that marijuana should be reclassified with other hallucinogens.67

Reclassification is essentially a legislative function. In fact, there is a legislative effort in at least one state to remove marijuana from the category of narcotics.68 In the absence of legislative action, however, courts must decide whether such classification of marijuana is constitutionally permissible. And yet it is difficult to convince a court that a particular classification has no support in evidence,69 because to do so is to ask a court to perform an essentially legislative function.70 It is also difficult because decisions do not rest on facts alone. For example, although the President’s Commission on Law Enforcement found massive factual evidence that marijuana was relatively harmless, it balked at recommending a repeal of laws against marijuana possession.71 Like legislatures and like the President’s Commission, courts must recognize that factual inquiry has inherent limitations, that evidence on almost all important questions is inconclusive, and that decisions must nonetheless be made.

*A father and former magician accused of giving marijuana to his children and found outside his house in the rain recounting a “resurrection in the sky,” pleads not guilty by reason of insanity.*72 A twenty-year old boy arrested for possessing marijuana claims he was so “stoned” on drugs at
tially all the states except Pennsylvania and California, and including the District of Columbia, Puerto Rico, and the Virgin Islands, 9B U.L.A. § 2 (1967 Supp.).

66 It is argued that because society has no real interest in similarly treating marijuana and the opiates, it is arbitrary to do so. See *Marijuana and the Narcotic Control Act*, 3 U. BRIT. COL. L. REV. 250 (1967). *But see* United States v. Ward, 36 U.S.L.W. 2426 (7th Cir. Jan. 23, 1968) (similar penalties for marijuana and hard narcotic violations do not constitute cruel and unusual punishment).


68 Michigan State Senator Roger Craig is attempting to challenge his state’s marijuana law. NEWSWEEK, July 24, 1967, at 49.


70 San Francisco Chronicle, Nov. 29, 1967, at 2, col. 3.


the time of his arrest that he did not understand the sheriff's warning of his right to remain silent.\textsuperscript{73} The argument that punishing drug use violates the eighth amendment stricture against cruel and unusual punishment shares something with arguments for right to privacy and for reasonable classification. It differs only in those cases of drug addiction where the defendant claims that the state cannot criminally punish addiction itself.\textsuperscript{74} It is argued that penal laws creating "status offenses" like alcoholism and drug addiction violate the clause against cruel and unusual punishment.\textsuperscript{75} To punish drug addiction, the Supreme Court has said, is like making "it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease."\textsuperscript{76}

Questions of cruel and unusual punishment bear closely on general questions of criminal responsibility for those acting under the influence or drugs. Generally, drug "intoxication" is treated much like alcohol intoxication for purposes of the criminal law.\textsuperscript{77} And yet the peculiarities of addiction may distinguish the two, particularly within the meaning of criminal insanity. In a New York case, a heroin addict accused of selling narcotics pleaded insanity by arguing that his compulsive craving for narcotics deprived him of will power to resist illegal commercial activity. The Second Circuit reversed his conviction by adopting the Model Penal Code formulation of criminal insanity that a defendant is not criminally responsible if he "lacks substantial capacity . . . to conform to the requirements of the law."\textsuperscript{78} In a California case involving a conviction for first degree murder, the defendant was entitled to instructions on diminished capacity because of evidence that, at the time of the crime, he was under the influence of methedrine.\textsuperscript{79} Although he was entitled to instructions negating specific intent, he was not entitled to instructions on excusable homicide because—unlike the heroin addict—he voluntarily chose to use methedrine.\textsuperscript{80}

\textit{Parents of a boy who hurled himself from a third story window on a "bad trip" file $600,000 suit in wrongful death against Timothy Leary.}\textsuperscript{81}

\textit{In San Francisco, a civilian police clerk files a suit in damages for back}

\textsuperscript{73} San Francisco Examiner, Dec. 6, 1967, at 13, col. 3.
\textsuperscript{74} See Robinson v. California, 370 U.S. 660 (1962).
\textsuperscript{75} See Murtagh, \textit{Status Offenses and Due Process of Law}, 36 Ford. L. Rev. 51 (1967).
\textsuperscript{76} 370 U.S. at 666 (1962).
\textsuperscript{78} Model Penal Code § 4.01 (Proposed Official Draft 1962), quoted in United States v. Freeman, 357 F.2d 606 (2d Cir. 1966).
\textsuperscript{79} People v. Sievers, 255 A.C.A. 54 (1967).
\textsuperscript{80} 255 A.C.A. at 58.
\textsuperscript{81} Berkeley Gazette, July 29, 1967, at 1, col. 6.
pay against police officers for slipping LSD into his coffee and causing his discharge. As agents which alter human conduct, drugs affect not only criminal but also civil responsibility. Inquiry has already been made into the capacity of those under the influence of drugs to contract, to testify, and to execute a testament. It seems likely that "drugged" states of mind will be treated for civil purposes much like alcoholic intoxication, although those who commit civil wrongs while violating criminal statutes against drug use may find themselves liable per se under the doctrine of Martin v. Herzog.

More important than the liability of drug users is the liability of drug distributors, both commercial and private, for the injuries they cause. Some drugs cause severe injuries, as did the drug MER/29 which purported to reduce cholesterol in the body but in fact induced cataracts. In other cases, drug ingestion may result in special damages such as lost wages; in still other cases, like the mistaken ingestion of hallucinogens, the damage is largely psychic. Much of this conduct may be conveniently subsumed under traditional products liability doctrine, where major problems concern users with uncommon allergies and users who abuse drugs.

The civil liability of drug manufacturers may consolidate many of the problems of drug use. By tolerating drug use while focusing on the responsibility of drug manufacturers, one could minimize problems of blackmarket distribution, of home-brew manufacture, and of organized crime. Rather than prosecuting individual drug abusers, authorities might better succeed through civil registration, recordkeeping, inspection,
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and distribution by prescription only. Even at present, many drug manufacturers are deterred much more by fear of civil than of criminal liability. The manufacturers of MER/29, for example, lost only $80,000 in criminal fines, while they lost millions of dollars in civil liability. It may well be that individual users too would respond more effectively to civil than to criminal sanctions. As with alcohol, one might make special regulations for the young and for the addicted. As with cigarettes, the reality of known dangers and the possibility of unknown dangers may be better conveyed through education and warnings than through penalties.

On returning to the United States with less than one-half ounce of marijuana, Timothy Leary is sentenced under federal law to 30 years in prison and $40,000 in fines for unlawfully importing marijuana from Mexico. The previous discussion has presupposed a framework of penalties regulating the production, distribution, possession and use of drugs. This is not, of course, the place to make a detailed account of those laws. In brief, however, they fall into two jurisdictions—federal and state—and, within each jurisdiction, into laws concerning narcotics and laws concerning “dangerous drugs.”

The federal laws divide into two categories: on the one hand, those regulating marijuana and “narcotics,” like opium, heroin, morphine, cocaine, and codeine; and, on the other hand, those regulating “dangerous drugs,” including depressants, stimulants, and hallucinogens. The marijuana and narcotics laws are administered by the Bureau of Narcotics as part of the Treasury Department. Every producer and distributor is required to register and pay a transfer and occupation tax; those wrong-

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96 For an excellent study of federal and state laws concerning marijuana and dangerous drugs, see Rosenthal, Dangerous Drug Legislation in the United States: Recommendations and Comments, 45 Texas L. Rev. 1037 (1967).
fully failing to register and pay taxes are subject to severe penalties of five to twenty years imprisonment for the first offense, and ten to forty for the second.\textsuperscript{99} Possession, moreover, is prima facie evidence of guilt.\textsuperscript{100} The United States Supreme Court has upheld the constitutional authority of Congress to enact the Marihuana Tax Act, and therefore the narcotics legislation, as a "tax" as opposed to a "penalty."\textsuperscript{101} Just this term, however, it indicated that to prosecute someone for failing to register and pay the tax would unconstitutionally violate his privilege against self-incrimination.\textsuperscript{102}

The federal laws against dangerous drugs are administered by the Bureau of Drug Abuse Control within the Food and Drug Administration under the Department of Health, Education, and Welfare.\textsuperscript{103} In 1965 Congress amended the Food, Drug, and Cosmetic Act to give the Director of Health, Education, and Welfare the authority to regulate dangerous stimulants, depressants, and hallucinogens.\textsuperscript{104} Almost immediately, under this amendment the Director added several tranquilizers such as Miltowns and several hallucinogens including LSD, peyote, and mescaline.\textsuperscript{105} Manufacturers of regulated drugs must register with the Food and Drug Administration.\textsuperscript{106}

Although there is no penalty for possession alone, penalties for unauthorized manufacture or failure to register range from one year in prison and a 1,000 dollar fine for the first offense, to six years in jail and a 15,000

\begin{itemize}
\item \textsuperscript{101} United States v. Sanchez, 340 U.S. 42 (1950).
\item \textsuperscript{102} In Marchetti v. United States, 36 U.S.L.W. 4143 (U.S. Jan. 30, 1968), and Grosso v. United States, 36 U.S.L.W. 4150 (U.S. Jan. 30, 1968), the Supreme Court found it violative of the privilege against self-incrimination to prosecute someone for failing to register and pay taxes under the federal Wagering Tax Act, 26 U.S.C. §§ 4401-12 (1967), on the ground that the information so disclosed might subject the defendant to possible punishment under both federal and state laws against wagering. Although the Supreme Court has never ruled on the relation between payment of the marijuana tax and the privilege against self-incrimination, Grosso and Marchetti would seem to be controlling. As with the Wagering Tax Act, so with the narcotics tax laws, 26 U.S.C. §§ 4721-22 (1967), and with the Marihuana Tax Act, 26 U.S.C. §§ 4751, 4753 (1967), the defendant paying the tax is required to disclose information which might subject him to the risk of prosecution under comprehensive state criminal statutes. 36 U.S.L.W. 4156 (Warren, C.J., dissenting). Thus, even though the marijuana tax itself may be constitutional, the Act cannot be used to subject the taxpayer to the risk of prosecution in violation of his privilege against self-incrimination. 36 U.S.L.W. 4152 n.7. With significance for narcotics legislation generally, the Court has further indicated that it may be unconstitutional to punish anyone for withholding information required by legislation which encompasses largely criminal conduct. See Haynes v. United States, 36 U.S.L.W. 4164 (U.S. Jan. 30, 1968) (firearms registration).
\item \textsuperscript{103} 21 U.S.C. §§ 301-92 (1964).
\item \textsuperscript{105} 21 C.F.R. § 166.3 (1967).
\item \textsuperscript{106} 21 U.S.C. §§ 331, 355 (1964).
\end{itemize}
INTRODUCTION

dollar fine for the second offense of distributing drugs to juveniles under eighteen years of age.\textsuperscript{107}

State laws against narcotics and marijuana generally follow the Uniform Narcotic Drug Act, under which marijuana is classified as a narcotic.\textsuperscript{108} Unlike the federal law of narcotics and marijuana, state law prohibits possession and occasionally even use, with penalties ranging as high as life imprisonment for repeating offenders.\textsuperscript{109} Possession in California is a felony punishable by one year in prison with the possibility of a life sentence for repeating offenders.\textsuperscript{110} It is a misdemeanor to be in a place where marijuana is being used,\textsuperscript{111} or to be under the influence of a narcotic.\textsuperscript{112} State laws concerning stimulants, depressants, and hallucinogens vary. Some states are quite strict, modeling their legislation after the Uniform Narcotic Drug Act,\textsuperscript{113} while others have not yet regulated hallucinogens.\textsuperscript{114} The President’s Commission on Law Enforcement recommends that states adopt the Model Drug Abuse Control Act prepared by FDA officials.\textsuperscript{115} California carefully regulates the distribution of “hypnotic drugs,” which include barbiturates,\textsuperscript{116} punishing simple possession as a misdemeanor.\textsuperscript{117} Until 1966 it was not clear whether hypnotic drugs included amphetamines and hallucinogens. But that year the legislature amended the Health and Safety Code with a section on “dangerous drugs” including amphetamines, barbiturates, LSD, and DMT.\textsuperscript{118} Unlike the federal law, California has no administrative procedure for incorporating new drugs into the regulatory scheme.

\textit{In concluding its study of “Narcotics and Drug Abuse,” the President’s Commission on Law Enforcement recommended greater research in the area of dangerous drugs and the law.}\textsuperscript{119} The essays in this Symposium are grouped into three general categories: those concerning problems in criminal law of classifying drugs; those concerning problems in constitutional law of drug use and religious freedom; and those dealing with

\begin{itemize}
  \item \textsuperscript{108} 9B U.L.A. § 2 (1967 Supp.).
  \item \textsuperscript{109} See PA. STAT. ANN. tit. 35, § 780-20(c)(d) (1964).
  \item \textsuperscript{110} CAL. HEALTH & SAFETY CODE § 11530 (West 1967).
  \item \textsuperscript{111} CAL. HEALTH & SAFETY CODE § 11556 (West 1967).
  \item \textsuperscript{112} CAL. HEALTH & SAFETY CODE § 11721 (West 1967).
  \item \textsuperscript{113} See N.Y. PUB. HEALTH LAW §§ 3370-96 (McKinney Supp. 1967).
  \item \textsuperscript{114} See KY. REV. STAT. §§ 217,461, 217,720 (Supp. 1965) (barbiturates and amphetamines only).
  \item \textsuperscript{115} PRESIDENT’S COMMISSION, supra note 12, at 220.
  \item \textsuperscript{116} CAL. BUS. & PROF. CODE §§ 4211-42 (West 1962).
  \item \textsuperscript{117} CAL. HEALTH & SAFETY CODE § 11910 (West 1967).
  \item \textsuperscript{118} CAL. HEALTH & SAFETY CODE §§ 11901, 11916 (West 1967).
  \item \textsuperscript{119} See PRESIDENT’S COMMISSION, supra note 12, at 211-16.
\end{itemize}
problems of civil responsibility for drug distribution. As a preface to proper classification, Joel Fort, M.D., presents an overview of drugs and, by comparing them with generally unregulated substances like alcohol and nicotine, suggests substantive issues of equal protection. After attorneys Joseph Oteri and Lawrence Norris describe the process of persuading a court that certain legal classifications lack factual foundation, a student Comment summons the constitutional spectre of substantive due process in antinarcotic testing in California. Joseph Gusfield, sociologist, in turn questions the wisdom of legislating morals to punish crimes without victims. As background to a student Comment on drug use and religious free exercise, philosopher Alan Watts describes the religious character of the drug experience, while theologian Walter Houston Clark relates that experience to historical traditions of religious mysticism. And finally, Paul Rheingold and Page Keeton inquire into the limitations of civil and criminal liability for drug distribution by making a case study of the MER/29 litigation. As an afterword, David Isrealstam, M.D., offers a bibliography of psychedelia with a comment on the heated controversy surrounding its effects.

Law review symposiums, like 12-gauge birdshot, fall into two categories: those that form a concentrated pattern of small pellets, and those—like the instant one—that scatter a broad pattern of large shot. We have chosen a broad pattern on the assumption that many of the legal problems surrounding drugs flow from the very process of creating categories. In some cases as in the regulation of sale to minors, the category “drugs” itself is too narrow in excluding alcohol and nicotine. In other cases, as with the dangers of overdose, the category of “hallucinogens” is too broad in not discriminating between marijuana and LSD. Within the meaning of legal addiction, “narcotics” is both too narrow in excluding barbiturates and too broad in including marijuana. For lawmakers, therefore, the following essays suggest the hazards of appropriating scientific terms without carefully scrutinizing their various purposes. For lawyers they suggest the problems which arise when such misappropriation occurs.

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