

ALASKA LEGISLATURE COMMITTEE FILES 1987-1988 8672

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that its citizens must read certain books or must view certain films. Cf. *United States v. Roth*, 237 F.2d 796, 823 (CA2 1954) (Frank, J., concurring). However laudable its goal -- and that is obviously a question on which reasonable minds may differ -- the State cannot proceed by means that violate the Constitution. 37 L.Ed.2d 446, 488-89 (footnote omitted).

Justice Brennan's dissent, simply stated, is the better view. Respondent urges upon this Court the recognition of the legislative right to invade the privacy and liberty of the citizenry whenever a Gabriel Nahas can be found to warn of potential dangers not yet known. Ironically, even Nahas supports decriminalization. Men of common knowledge realize that the basis for the proscription of the possession and use of marijuana springs from this same bush which bears the fruit of fear that the human mind can be corrupted by obscene materials. This Court should not say that although there is no conclusive proof of a connection between the use of marijuana by adults and anti-social behavior, the legislature of Alaska could quite reasonably determine that such a connection does or might exist.

Respondent urges that the evidence supports the finding of compelling state interest. The purported facts cited scarcely, if at all, rise to the threshold of justifying a regulatory scheme for the distribution of marijuana. The evidence and credibility of witnesses and the reliability of their testimony has been explored in depth in petitioner's opening brief. Respondent urges with respect to public safety that because there is no reliable test at present which can be used to prove cannabis intoxication that therefore blanket proscription is justified. Assuming *arguendo* that

marihuana does affect driving, the concept of overbroad legislation as being justified by such a failure of technology cannot give rise to or rise to the stature of a compelling state interest anymore than an unprovable assumption which gives rise to a provisional hypothesis can. When respondent says that decriminalization and private possession for personal use amounts to legalization of its use by drivers and that the level of automobile accidents will therefore be increased (respondent's brief p. 24) he is appealing to passion and prejudice. He states:

Respondent urges this Court, likewise, to declare that the people of Alaska are not constitutionally required to welcome into their midst yet another mind altering chemical. (Respondent's brief p. 25).

The true issue is whether society can Constitutionally make persons who may be popularly unwelcome in its midst, criminals, absent a compelling state interest to do so.

Respondent speaks of the United States Supreme Court's opinion in Roe v. Wade, 410 U.S. at 154, 35 L.Ed.2d at 177-78 as showing the exercise of a balancing process since the Court found there is a point in pregnancy where the state interest becomes sufficiently compelling to sustain the regulation of the factors governing the abortion decision. Paranthetically it should be noted that the Supreme Court used the word "regulation" not "criminalization." Respondent urges that a similar process be applied to the right to ingest substances and it will be seen, he states, that the state will then have the power to forbid the ingestion of harmful or potentially harm-

ful substances. (Respondent's brief pp. 33-34). Applying the actuality of Roe v. Wade to respondent's theory, it would appear that by his own argument the present legislative proscription of all possession and use of marijuana is constitutionally overbroad assuming, arguendo, that at some point acute and chronic marijuana use could give rise to a compelling state interest to regulate.

A compelling state interest is directly analogous to the clear and present danger test of the First Amendment. Speech was first in the order of priorities to the Founding Fathers and relates well to a revolutionary government. Mr. Justice Brandeis, in his now famous Olmstead dissent, first recognized the importance of the privacy doctrine in this century.

The protection guaranteed by the Amendments is much broader in scope. 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. Olmstead v. United States, 277 U.S. 438 (1928), 72 L.Ed. 944.

At this time in our history privacy is the most important constitutional guarantee and has in fact even surpassed the First Amendment. Mr. Justice Holmes' dissent in Abrams v. United States, 250 U.S. 616, 63 L.Ed. 1173 (1919) at p. 630 lays the proper spirit and significance of the right to be let alone in relation to the competing interests of society and privacy.

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas, -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree with the argument of the government that the 1st Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of July 14, 1798 (1 Stat. at L. 596, chap. 74), by repaying fines that it imposed. Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, "Congress shall make no law abridging the freedom of speech." Of course I am speaking only of expression of opinion and exhortations, which were all that were uttered here; but I regret that I cannot put into more impressive words my belief that in their conviction upon this indictment the defendants were deprived of their rights under the Constitution of the United States.

We must be eternally vigilant against attempts to invade privacy unless what is occurring in private eminently threatens immediate interference with the lawful and pressing purposes of the law so that an immediate check is required to save society.

Mr. Justice Douglas in delivering the opinion of the Court in Terminiello v. Chicago, 337 U.S. 1, 93 L.Ed. 1131, 1134 (1949) stated:

That is why freedom of speech, though not absolute, Chaplinsky v. New Hampshire, *supra*, (315 U.S. pp. 571, 572, 86 L.Ed. 1034, 1035, 62 S.Ct. 766), is nevertheless protected against censorship or punishment unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. See Bridges v. California, 314 U.S. 252, 262, 86 L.Ed. 192, 202, 62 S.Ct. 190, 159 A.L.R. 1346; Craig v. Harney, 331 U.S. 367, 373, 91 L.Ed. 1546, 1550, 67 S.Ct. 1249. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

The same rationale applies to privacy as well as speech. Our Constitution now dictates that unless a particular activity is shown to produce a clear and present danger of a serious and substantive evil, there is no justification for a state invasion of this privacy particularly, and specifically here, through the criminal law processes. The prohibition against restriction and regulation upon free speech is the same vital spirit of freedom which shall now give life to our Alaska Constitutional mandate of privacy when legislative actions which threaten privacy are held to the test.

III. PETITIONER HAS BEEN DENIED EQUAL PROTECTION

In response to petitioner's irrational classification arguments respondent cites United States v. Maiden, 355 F.Supp. 743 (1973). Petitioner urges that the reasoning of this case not be followed. In Maiden, the Court stated:

In setting penalties, Congress is not limited to an assessment of harm. Even if barbituates and amphetamines pose greater health hazards than marijuana, Congress is entitled to conclude that the pervasiveness of marijuana distribution justifies an equivalent maximum penalty or that such penal purposes as general deterrence will be appropriately served by such a penalty. . . . Congress can rationally conclude that interstate traffic in such a drug should be prohibited by a maximum five-year penalty. Id. 747-48.

The rational basis test is inappropriate when determining criminal classifications of substances which can be used in private. A substance to be so classified must also pass the compelling state interest hurdle. Respondent states that we are not here dealing with an inherently suspect classification such as race or national origin (respondent's brief p. 41). In reality we are dealing with an inherently suspect classification as it provides for the exercise of the police power into citizens' protected privacy and liberty. As such any classification within these parameters is suspect absent compelling state interest.

In speaking of petitioner's unequal protection arguments Respondent urges cognizance by this Court that it would not be possible to muster the necessary votes in the legislature to pass a measure proscribing alcohol and tobacco, and that such

a measure would probably be unenforceable if passed. Such a phenomenon, which is probably true, speaks of need for the strong recognition of the citizens' rights to privacy and liberty for it is equally true that it would probably not be politically possible to muster the necessary votes to repeal AS 17.12.150 with respect to Cannabis Sativa L.

IV. CRUEL AND UNUSUAL PUNISHMENT

A. The state argues that since petitioner has not been sentenced he cannot raise the issue of a cruel and unusual punishment.⁵ Such a narrow reading of this important provision of the Bill of Rights is unsupported by the language or the known history of the constitutional provision (see Weems v. United States, 217 U.S. 349, 368-373 (1910)), and is as inconsistent with the interpretive decisions of the Supreme Court as it is with common sense.

The Court in Weems, supra was at least as much concerned with the statutory scheme of penalties as with the sentence imposed. While examples can be multiplied, a few convey the flavor of the Court's constitutional concern:

These provisions (of the statutes) are attacked as infringing that provision of the Bill of Rights . . . which forbids the infliction of cruel and unusual punishment. It must be confessed that they (the provisions of the legislation) and the sentence in this case, excite wonder in minds accustomed to

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Petitioner however does take heart from the state's position that probation is indicated since his "record is good" and the quantity possessed "small". (Respondent's brief p. 50).

a more considerate adaptation of the punishment to the degree of crime. (emphasis supplied)

Weems, supra 217 U.S. at 365.

We can now give graphic description of Weems' sentence and of the law under which it was imposed. Let us confine it to the minimum degree of the law, for it is with the law that we are most concerned.

Weems, supra 217 U.S. at 366.

The principle that statutes themselves, and not merely particular sentences imposed, can be repugnant to the cruel and unusual punishment clause of the Eighth Amendment was again forcefully applied by the Supreme Court in Robinson v. California, 370 U.S. 660 (1962).

Common sense would dictate that a statutory scheme of penalties must be challengable by themselves whether a defendant has been sentenced or not. It is not only the interest of the isolated criminal defendant, who may or may not on conviction be subjected to the maximum penalty allowed, that the Eighth Amendment protects. Rather it is the interest of society, and that of each of its members -- including potential defendants -- in assuring some degree of proportionality between the act and the consequences, which the Eighth Amendment secures.

It is true that any particular defendant may, after conviction, receive a sentence less than the maximum allowed. But society's members are "presumed to know the law" Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57 (1910), and the knowledge presumed by the law in citizens is not knowledge of the Court's discretion,

but knowledge of the maximum penalty. He is not charged with knowing, nor could he know, what judge will ultimately determine the degree of punishment, within the statutory limits, to be imposed; he is not charged with knowing, nor could he know, the factors which might influence the sentencing judge. Because he has a good record and because the quantity possessed was small, Irwin Ravin could receive probation. Because he has long hair or seems unrepentant or says the wrong words he could receive one year in jail and a thousand dollar fine. See Judge Marvin Frankel, Criminal Sentences: Law Without Order (1973). As the Supreme Court observed in Trop v. Dulles, 356 U.S. 86, 102 (1958), "It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear. . . . The threat makes the punishment obnoxious."

It seems clear that petitioner's claim is properly before the court and ripe for decision. That he must go be sentenced seems an absurd requirement for him to raise the issue that any sentence whatsoever for possession of marihuana violates the prohibition against cruel and unusual punishments.

B. The state argues "men are not hanged for stealing horses, but that horses may not be stolen". Respondent's brief, p. 54. Men, of course, are no longer hanged for any reason; however, the state apparently overlooks State v. Chaney, 477 P.2d 441 (Alaska 1970). "That horses may not be stolen" is not shorthand for

rehabilitation of the offender into a non-criminal member of society, isolation of the offender from society to prevent criminal conduct during any period of confinement, deterrence of the offender himself after his release from confinement or other

penalological treatment, as well as deterrence of other members of the community who might possess tendencies toward criminal conduct similar to that of the offender, and community condemnation of the individual offender, or, in other words, reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves.

State v. Chaney, supra, at 444. Obviously, many more criteria are to be considered than preventing horse theft. People are to be considered, the nature of the offense and the offender. Indeed, appellee sets forth a good digest of recent sentencing opinions on page 53 of its brief. For possession of marihuana the fact remains that rehabilitation is not accomplished because there is nothing to rehabilitate (the legislature was clearly mistaken in giving the option of treatment in AS 17.12.020 since none does nor can exist for marihuana possession, see testimony of Heesch). Considering the harmless, non-violent nature of marihuana possession, the possessor need not be removed from society to make society feel safer, and the reaffirmation of societal norms, deterrence of harmless conduct is as relevant as penalological cures for the common cold. Robinson v. California, 370 U.S. 660, 667 (1962).

We thus reach the conclusion from objective scientific evidence (as to the relative harmlessness of the offense of the possession and use of marihuana) and the legislature's own punishment standards (with respect to offenses which are self-evidently much more dangerous and threatening to human being) that the punishment prescribed for the possession of marihuana is extremely disproportionate to the offense proscribed. From these objectively ascertainable standards the conclusion is inescapable that the statutory provisions involved in this case violate the prohibition against cruel and unusual punishment contained in

the Eighth Amendment to the Constitution of the United States.

United States v. Grady and Thorne, (D.C.S.C. 1974). The above decision was reversed, United States v. Thorne and Grady, (D.C. App. 1974), the appellate court stating "any party assailing the constitutionality of a statute has the heavy burden of demonstrating that it has no rational basis." id., at 846. In Alaska the standard is compelling state interest and not rational basis. Gray v. State, ___ P.2d ___, (Opinion No. 1068, Alaska, August 12, 1974); Breese v. Smith, 501 P.2d 159 (Alaska 1972); see Bush v. Reid, 516 P.2d 1215 (Alaska 1973). The opinion of the District Court in Grady and Thorne, supra, consequently remains of great persuasive effect in Alaska.

Nor does this Court's decision in Green v. State, 390 P.2d 433 (Alaska 1964) mandate any different determination. At issue there was the mandatory minimum sentence imposed for two forms of homicide. The vitality of the decision was undercut by AS 12.55.085(a) allowing probation no matter what mandatory minimum sentence was set by statute. See Fresneda v. State, 458 P.2d 134, 136 (Alaska 1969). Whatever continued vitality Green has it cannot stand for appellee's proposition that the Eighth Amendment of the United States Constitution after which our own Article I, Section 12 was patterned allows sentences systematically disproportionate to crimes. The Eighth Amendment requires and "it is a precept of justice that punishment for crime should be graduated and proportioned to offense". Weems v. United States, supra, 217 U.S. 367.

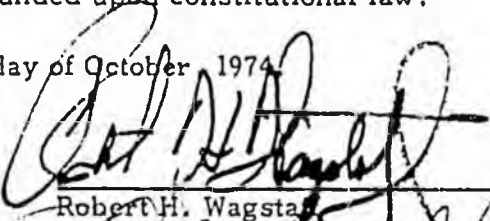
While Appellee may be correct that the criminal penalty for possession

and use of marihuana deters many from possession and using it, in fact there is no compelling reason for such deterrence and the use of a criminal sanction creates a cruel and unusual punishment for an activity that simply is not criminal.

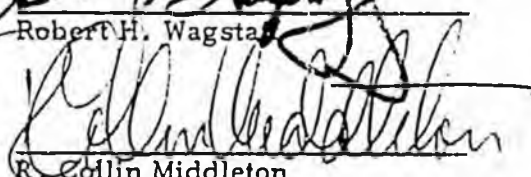
CONCLUSION

Respondent concludes that the only reason for prohibiting the possession of a dangerous drug is to discourage its use, in the interest of the health and safety of the public. (respondent's brief p. 54). In a rational, free, and constitutional society discouragement of use is properly accomplished by education, not through use of the criminal law as emphatically stated by the National Commission on Marijuana and Drug Abuse. Respondent states that a criminal statute which is never violated is in all probability unnecessary (respondent's brief p. 56). Similarly, a criminal statute which has no rational or compelling basis, is always violated and yet enforced (see appendix) is more than unnecessary as its existence is inimicable to the continued existence of government founded upon constitutional law.

Respectfully submitted this 4th day of October, 1974



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- 4. chlorzoxazone
- 5. zolofhamid
- 6. lysergic acid
- 7. lysergic acid amide
- 8. methyprylon
- 9. sulfonethylnmethane
- 10. sulfonethylnmethane
- 11. -itonmethane
- (1) Schedule IIIA includes

(a) Schedule IIIA includes, unless specifically excepted or unless listed in another schedule any material, compound, mixture, or preparation containing any of the following narcotic drug or their salts calculated as the free anhydrous base or alkaloid, in the following quantities:

(1) not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with an equal or greater quantity of an isoquinoline alkaloid of opium.

(2) not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(3) not more than 300 milligrams of dihydrocodemone per 100 milliliters or not more than 15 milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid of opium.

(4) not more than 300 milligrams of dihydrocodeine per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active nonnarcotic ingredients in recognized therapeutic amounts;

(5) not more than 1.8 grams of dihydrocodeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active nonnarcotic ingredients in recognized therapeutic amounts.

(6) not more than 300 milligrams of ethymorphine per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active nonnarcotic ingredients in recognized therapeutic amounts.

(7) not more than 500 milligrams of -pram per 100 milliliters or per 100 grams or not more than 25 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(8) not more than 50 milligrams of morphine per 100 milliliters or per 100 grams, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(f) Schedule IIIA includes

- (1) hashish,
- (2) hash oil, or hashish oil, and
- (3) tetrahydrocannabinols. (21 CFR 1301.16)

THE SUPREME COURT OF THE STATE OF ALASKA

IRWIN RAVIN,)
)
Petitioner,)
)
vs.)
)
STATE OF ALASKA,)
)
Respondent.)
_____)

No. 2135

BRIEF OF RESPONDENT

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Filed in the Supreme Court of
the State of Alaska this 4th
day of September, 1974.

Veronica H. Knapick *JK*
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CONSTITUTIONAL PROVISIONS,
STATUTES AND RULES

UNITED STATES CONSTITUTION

Eighth Amendment provides:

Bails, fines and punishments. Excessive bails shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ALASKA CONSTITUTION

Article I, Sec. 12 provides:

Excessive Punishment. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Penal administration shall be based on the principle of reformation and upon the need for protecting the public.

ALASKA STATUTES

Sec. 65-2-4 ACLA provides:

Punishment for Misdemeanors. That whenever, by any law relating to said Territory, an act is declared to be a misdemeanor, and no punishment is prescribed therefor, the person committing the same, upon conviction thereof, shall be punished by imprisonment in the county jail not more than one year, or by fine not more than five hundred dollars.

Ch. 53, Sec. 15, SLA 1973 provides:

Punishment for Misdemeanors. Whenever an act is declared to be a misdemeanor, and no punishment is prescribed, the person, upon conviction, is punishable by imprisonment for not more than one year, or by a fine of not more than \$500.

AS 17.12.010 provides:

Acts Prohibited. Except as otherwise provided in this chapter, it is unlawful for a person to manufacture, compound, counterfeit, possess, have under his control, sell, prescribe, administer, dispense, give, barter, supply or distribute in any manner, a depressant, hallucinogenic or stimulant drug.

AS 17.12.150(3)(A) provides:

"depressant, hallucinogenic or stimulant drug" means:

cannabis, psilocybin, dimethyltryptamine, lysergic acid diethylamide, and every other substance having similar physiological effects.

AS 17.12.110(a) provides:

A person who violates a provision of this chapter relating to the possession or control of depressant, hallucinogenic and stimulant drugs, when his possession or control is for his own use, is guilty of a misdemeanor and upon conviction is punishable by imprisonment for not more than one year, or by a fine of not more than \$1,000, or by both.

AS 12.55.085 ~~as~~ provided in pertinent part at Page 50,
infra.

STATEMENT OF JURISDICTION

The State of Alaska accepts respondent's jurisdictional statement.

TABLE OF TRANSCRIPT REFERENCES

The transcribed record in this case is quite extensive, and is divided into a number of small volumes rather than a few large ones. In order to avoid both confusion and lengthy citations to the transcript, the State in this brief has made reference to specific testimony using transcript volume numbers assigned as follows:

<u>VOL. NO.</u>	<u>DESCRIPTION</u>
I	H & M Court Reporting "Transcript of Proceedings" dated May 2, 1973, of 107 pages.
II	H & M Court Reporting "Transcript of Proceedings" dated May 2, 1973, of 108 pages.
III	H & M Court Reporting "Transcript of Proceedings" dated May 3, 1973, of 28 pages.
IV	State of Alaska "Transcript of Evidentiary Hearing and Motion to Dismiss (Excerpt)" dated May 3, 1973, of 70 pages.
V	H & M Court Reporting Transcript, Cross-Examination of Joel Fort, of 57 pages.
VI	H & M Court Reporting transcript, testimony of Lester Grinspoon, of 136 pages.
VII	H & M Court Reporting transcript, testimony of Sanford Feinglass, of 146 pages.
VIII	H & M Court Reporting "Transcript of Proceedings" dated May 5, 1973, of 29 pages.

CORRECTION

**THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY**

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VOL. NO.

DESCRIPTION

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| IX | R & R Court Reporters "Transcript of Testimony of David Powelson, M.D., before the Hon. Dorothy Tyner", dated June 21, 1973. |
| X | H & M Court Reporting "Transcript of Proceeding" dated June 22, 1973, of 94 pages. |
| XI | State of Alaska "Transcript of Proceedings Vol. I of III," dated June 22, 1973--Pages 3-194. |
| XII | State of Alaska "Transcript of Proceedings Vol. II of III," dated June 25, 1973--Pages 197-362. |
| XIII | State of Alaska "Transcript of Proceedings Vol. III of III," dated June 26, 1973--Pages 365-429. |
| XIV | H & M Court Reporting "Transcript of Proceedings," incorrectly dated May 25, 1973, 94 pages. |

STATEMENT OF THE CASE

The Legislature of the State of Alaska has prohibited the possession of the psychoactive drug cannabis or marijuana, including its possession for private, personal use. The offense is a misdemeanor, and carries a common misdemeanor penalty: a fine of up to \$1,000, a jail term of up to one year, or both. Pursuant to this statute, petitioner Irwin Ravin has been charged.

By means of a motion to dismiss before trial, Ravin has raised the issue of the constitutionality of Alaska's marijuana statute, claiming that the possession of marijuana for personal use by adults may not be prohibited.

Evidentiary hearings were conducted, and a voluminous body of expert testimony was introduced by both parties.¹ Evidence was presented on the chemical nature of

¹ Although the evidence presented to the court below was unusually extensive in scope, it is not correct to say, as petitioner claims, that "There are no known facts concerning marijuana that were not presented to the court and which are not contained in the transcript and record. New research is constantly being done and new facts, or possible facts, are constantly coming to light: E.g., "Pot and Sexuality," Newsweek, April 29, 1974 at 57 (effects on male hormones, sperm count, etc.), commenting upon Kolodny, et al, Depression of Plasma Testosterone Levels After Chronic Intensive Marijuana Use, The New England Journal of Medicine, April 18, 1974 at 872.

marijuana and its principal psychoactive ingredients, Delta-8 and Delta-9 tetrahydrocannabinol,² its effects upon the mind, upon the body and upon the user's performance as a member of society. The cultural and social patterns of the use of the drug both in Alaska and elsewhere were also explored. Evidence was introduced to the effect that various groups, including the Alaska State Medical Association, had recommended that criminal penalties, at least for private use, be removed.³

The evidence concerning marijuana's potential for social harm is, to say the least, in conflict. As the

²The two most active ingredients of cannabis were referred to by most witnesses according to the nomenclature which denominates them as Delta-8 and Delta-9 tetrahydrocannabinol. One defense witness, the psychoanalyst Lester Grinspoon (VI Tr. 3) used a different system of nomenclature to refer to the same substances (VI Tr. 9). Some of the other cannabinoids found in the marijuana plant may be active, and some are definitely inactive, but these two substances, so far as is now known, are the principal intoxicants. Ibid. See Paton, Statement Before the United States Senate Internal Security Subcommittee at 1 (May 16, 1974).

³The Medical Association's resolution was apparently passed by one vote (II Tr. 19) after an initial tie, which was broken by disqualifying one "no" voter for nonpayment of dues. (X Tr. 91). The Association also passed, almost unanimously, a resolution disapproving the use of marijuana (X Tr. 90).

district court stated:

The evidence presented at the hearing clearly indicates that there exists a real controversy in the scientific community regarding the effects of the use of marijuana, including mental, physical and social consequences.

Opinion of the District Court at 12. For example, the existence of a marijuana-related "amotivational syndrome" was denied by defense witness Joel Fort (IV Tr. 57-59); Dr. Grinspoon stated that it was "certainly a possibility" although he apparently doubted that the effect was permanent (VI Tr. 38), and Dr. Gabriel Nahas was quite sure that the syndrome did occur, and, in his opinion, was caused by prolonged heavy use of the drug (XI Tr. 156).⁴ Dr. Fort also stated that marijuana does not cause a physical tolerance to develop in the user (IV Tr. 38); Dr. Nahas testified that it did (XI Tr. 29-31). The controversial phenomenon of "reversed tolerance" has been explained in various ways (XI Tr. 53-54), and its very existence has also been called into question (XI Tr. 120).⁵ Dr. Nahas testified that

⁴Other authorities have agreed. N. Bejerot, Statement to the United States Internal Security Subcommittee on the Physical, Psychological, and Social Consequences of Cannabis Use at 3.

⁵The weight of evidence seems to be that such a phenomenon does exist. Recent research would indicate that Dr. Powelson's explanation of it, to the effect that it is caused by the accumulation of the drug in the body (IX Tr. 29), may be substantially correct. See Statement Before the United States Senate Internal Security Subcommittee at 3-4 (May 20, 1974).

cannabis has been shown to be related to chromosomal breakage in man (XI Tr. 109-11); Dr. Feinglass testified that this appeared unlikely, although there were a number of conflicting reports (VII Tr. 117).⁶ There do exist, apparently, animal studies indicating that fetal damage may occur. W. Paton, Statement Before United States Senate Internal Security Subcommittee at 3 (May 16, 1974). (Fetal death and abnormality observed in three species of animals.) Although defense witnesses testified that there was no truth to the theory that the use of marijuana leads to the use of other drugs, including narcotics (e.g. IX Tr. 55-57), there

⁶The author of one of these studies, Dr. Morton A. Stenchever, has stated:

In conclusion, we feel our data have demonstrated that there is an increased chromosome breakage rate in users of marijuana and that this apparently is not related to the extent of use of the drug, as light users had about the same damage rate as did heavy users. We have not demonstrated only between marijuana use and an increase in fetal damage or fetal loss, in mutagenesis or in the increased incidents of cancer. We have demonstrated a need to identify the agent in marijuana which causes chromosome damage and our data would suggest that further studies in both humans and animals should be undertaken to determine if indeed this agent is capable of damaging fetuses, causing an increased mutation rate and possibly being related to the development of neoplasms.

M. Stenchever, Statement Before United States Senate Internal Security Subcommittee at 6 (May 16, 1974).

does appear to be a statistical relationship between marijuana use and the abuse of other drugs (XI Tr. 28, 83-90). Even the generally agreed-upon statement that cannabis does not cause a physical dependence and abstinence syndrome (withdrawal symptoms) has been challenged.⁷

Amid all of the controversy, certain facts appear to be fairly well agreed. Cannabis or marijuana is a psychoactive drug. It is not harmless, and its use, and particularly continuous heavy use, is attended by certain risks, particularly to the younger user. It adversely affects the user's ability to operate an automobile; it is capable of precipitating a psychotic reaction, at least in individuals who are predisposed toward such reactions. The "at risk" population in this regard cannot be determined, since the number of such people abroad in society is unknown (VI Tr. 50-52). Although it has been used in other countries for a long period of time, its introduction into American society as a psychoactive drug used by a significant percentage of the population is quite recent, and prolonged

⁷ See Kaymakcalan, Physiological and Psychological Dependence on THC in Rhesus Monkeys, in Paton and Crown, Cannabis and Its Derivatives, 142 (1972).

heavy use by Americans, particularly of the stronger
forms of the drug, is still relatively rare.⁸

Having received its evidence, the district court in a written opinion denied defendant's motion to dismiss. A petition for review was then taken to the superior court, and the decision of the trial court was affirmed. This petition followed.

⁸The extent to which this rarity is due to the current social policy of prohibiting possession of cannabis is, like almost everything else about this drug, a debatable question. A study of the incidence of intravenous drug abuse in Sweden, however, where the legal policy toward dangerous drugs was twice radically altered during the 1960's, would appear to indicate that the current policy is more effective than its opponents believe.

The study comparing drug abuse and drug policy showed that during a liberal and permissive period of drug policy intravenous abuse accelerated. On a return to a traditional restrictive policy in 1967, the acceleration was checked, and when an extra restrictive policy was introduced with a police offensive on the drug trade in 1969, the rates of abuse fell in this study.

N. Bejerot, Statement Before the United States Senate Internal Security Subcommittee, supra at 5.

ARGUMENT

Introduction: Judicial review and the role of the Legislature

The power and duty of the courts "to pass on the validity of legislation is now too much part of our constitutional system to be brought into question." American Federation of Labor v. American Sash & Door Co., 335 U.S. 538, 556-557, 93 L. Ed. 222, 233 (1949) (Frankfurter, J., concurring). "But the judicial function exacts considerations very different from those which may determine a vote" in the legislature, or the decision of a governor to sign or veto a bill. United States v. Lovett, 328 U.S. 303, 319, 90 L. Ed. 1252, 1261 (1946) (Frankfurter, J., concurring). The power of judicial review is not the power "to set right that which is wrong," Brief for Petitioner at 10, but is instead the power, and the correlative duty, to strike down enactments of the people's duly elected representatives only when those enactments clearly contravene the commands of the Constitution.

"Prominence is given to the power of the Legislature to define crimes and their punishment," Weems v. United States, 217 U.S. 349, 378, 54 L. Ed. 793, 803 (1910), for under our democratic political system, the Legislature, directly

responsible to the people, is entrusted with the primary power to define social policy.

The judicial process is too principle-prone and principle-bound--it has to be, there is no other justification or explanation for the role it plays. It is also too remote from conditions, and deals, case by case, with too narrow a slice of reality. It is not accessible to all the varied interests that are in play in any decision of great consequence. It is, very properly, independent. It is passive. It has difficulty controlling the stages by which it approaches a problem. It rushes forward too fast, or it lags; its pace hardly ever seems just right. For all these reasons, it is, in a vast, complex, changeable society, a most unsuitable instrument for the formation of policy.

Bickel, The Supreme Court and the Idea of Progress 175 (1970).¹

The importance of remembering these principles is underscored by the very independence of our judiciary which is so necessary for the functioning of the constitutional system, for "the province and duty of the judicial department to say what the law is," Marbury v. Madison, 1 Cranch 137, 177, 2 L. Ed. 60, 73 (1803), necessarily includes the responsibility

¹As one respected judge has written:

It is folly and a contradiction of the teachings of history to believe, whatever the defects of the legislative institution, that democracy can be preserved without legislative primacy in a people-elected and a people-responsive delegate legislature.

C. Breitel, The Lawmaker, 65 Colum. L. Rev. 749, 762 (1965).

to define its own powers. Petitioner urges, in effect, that this be done as broadly as possible, and that this court must now take upon itself what is normally a legislative function: that of deciding a strongly contested political controversy over the State's fundamental policy toward the drug marijuana; a question which has been loudly and not always responsibly debated in public and in private by the proponents of both sides. The State replies that that issue should properly be determined by the people's elected representatives. The court's decision of this cause will have far-reaching effects, not only upon the marijuana controversy, but also upon the future course of legislative power in Alaska. Your respondent asks only that it be grounded firmly upon constitutional principles, with due regard for the principle of separation of powers. For as one of our greatest jurists has said,

Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

Northern Securities Co. v. United States, 193 U.S. 197, 24 S. Ct. 436, 468 (1904) (Holmes, J., dissenting).

ARGUMENT

I

THE RIGHT TO PRIVACY DOES NOT PRECLUDE
PROHIBITION OF MARIJUANA.

- A. Where substantial evidence exists from which a compelling state interest could be found, the courts should defer to the legislature.

A perusal of petitioner's brief would leave the reader with the impression that there is no scientific evidence whatever indicating that marijuana is in any way dangerous to anyone. In fact, of course, this is not the case. As has been shown supra, the expert testimony and scientific publications presented to the court below are in sharp conflict on almost every aspect relating to the social necessity to prohibit the possession of cannabis. The only areas of relatively complete agreement among the experts would seem to be embodied in the statements that (1) marijuana is not harmless, and (2) its use does not directly provoke in the user the commission of dangerous anti-social acts.

Thus, this case differs widely from the situation presented in such cases as Griswold v. Connecticut, 381 U.S. 479, 14 L. Ed. 2d 510 (1965), in which the basic controversy is the legal weight to be accorded the State's claimed

interest, rather than the actual nature and effects of the object of prohibition.

If we are to assume that within the right of privacy provided by Art. I, Section 22, of the Alaska Constitution, there is a "fundamental" right to "the ingestion of food, beverages or other substances," Gray v. State, Op. No. 1068 at 9 (Alaska, August 12, 1974), and that a "compelling state interest" is required before any state regulation may touch upon the subject, the question of the nature and amount of evidence necessary to establish such an interest arises. In Breese v. Smith, 501 P.2d 159, 174 (Alaska 1972), that question was expressly left open.

If the State is required to prove by some absolute or nearly absolute standard that it is compelled to prohibit or limit the possession of an ingestible substance, there is probably no regulation affecting the ultimate consumer of any such substance which could stand, for "experts" can be found to testify that it would be wise social policy to legalize, or at least to "decriminalize," the possession of almost anything, including LSD and heroin.¹ In the area of regulation of food, drugs and poisons, the State would indeed be in the position envisaged by Mr. Chief Justice

¹See testimony of Joel Fort, V Tr. 23-25.

Burger in Dunn v. Blumstein, quoted by Mr. Justice Irwin of this court in Breese v. Smith, 501 P.2d at 177.² Yet to fail to regulate an ingestible substance is to legalize it, and thus the Legislature would be faced with a forced option in all such matters, despite the fact that "The basic objective of government is to protect and promote the health, safety and general welfare of the people." Suber v. Alaska State Bond Committee, 414 P.2d 546, 551 (Alaska 1966).

A far more workable approach is that taken to a similar question by the United States Supreme Court in Paris Adult Theatre v. Slaton, 413 U.S. 49, 37 L. Ed. 2d 446 (1973). There the Court, working in the delicate area of censorship and freedom of communication, was faced with an argument to the effect that there were no scientific data conclusively demonstrating that exposure to pornography had an adverse

2

Some lines must be drawn. To challenge such lines by the 'compelling state interest' standard is to condemn them all. So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection.

405 U.S. 330, 31 L. Ed. 2d 274, 296 (1972).

social effect, and that therefore regulation of obscene films and literature was not permissible. The court rejected this contention, and stated that

'We do not demand of Legislature's scientifically certain criteria of legislation.' Noble State Bank v. Haskell, 219 U.S. 104, 110 [55 L. Ed. 112, 31 S. Ct. 186]. Although there is no conclusive proof of a connection between anti-social behavior and obscene material, the Legislature of Georgia could quite reasonably determine that such a connection does or might exist.

413 U.S. at 60-61, 37 L. Ed. 2d at 459.

It is, of course, recognized that in Paris Adult Theatre, the court was not dealing directly with a requirement that a "compelling state interest" be found, for neither the first amendment nor "penumbral" privacy protects the dissemination of obscene material. However, the court went on to say:

From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. Such assumptions underlie much lawful state regulation of commercial and business affairs. . . . The same is true of the Federal securities, anti-trust laws and a host of other Federal regulations. . . . On the basis of these assumptions both Congress and State legislatures have, for example, drastically restricted associational rights by adopting anti-trust laws, and have strictly regulated public expression by issuers of and dealers in securities, profit sharing

"coupons," and "trading stamps," commanding what they must and may not publish and announce. . . . Understandably those who entertain an absolute view of the First Amendment find it uncomfortable to explain why rights of association, speech, and press should be severely restrained in the market place of goods and money, but not in the market place of pornography.

413 U.S. at 61-62, 37 L. Ed. 2d at 459-60.

It is submitted that Paris Adult Theatre points the way toward a resolution of any difficulty which may be encountered in enunciating a standard of review in cases such as that at bar. For if first amendment rights may be limited on the basis of "unprovable assumptions" relative to economic effects, surely the Legislature may limit to some degree the right of privacy in pursuit of its "primary objective" of protecting the public health and safety in a case where there is substantial evidence indicating the existence of a compelling state interest, even though that evidence is contradicted.

B. The evidence supports a finding of a compelling state interest.

The State has a compelling interest in the protection of the health of its citizens. As previously noted, this court has described that interest as a basic objective of government, Suber v. Alaska State Bond Committee, *supra*. One well-known commentator has stated:

One of the most important societal interests is that of safeguarding and protecting the public health and it can be expected to prevail over most other interests.

Antieau, Modern Constitutional Law, Section 2.2 (1969). In the interests of health, religious freedom has been abridged, Braunfeld v. Brown, 366 U.S. 599, 6 L. Ed. 2d 563 (1961); see Application of President and Directors of Georgetown College, 331 F.2d 1000 (D.C. Cir. 1964); United States v. George, 239 F. Supp. 752 (D. Conn. 1965); Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson, 201 A. 2d 537 (N.J. 1964), and children have been protected over the objection of their legal guardians, even when those objections were religious in nature, Anderson v. State, 65 S.E. 2d 848 (Ga. 1951); Commonwealth v. Green, 168 N.E. 101 (1929); State v. Drew, 192 A. 629 (N.H. 1937).

The position of public safety is similar, Suber v. Alaska State Bond Committee, *supra*, and the State clearly

has the power to prevent a citizen from inflicting harm upon himself, either for his own good, see State v. Mele, 247 A. 2d 176, 178 (N.J. 1968), or to prevent him from possibly becoming a burden upon society. Colvin v. Lombardi, 241 A. 2d 625, 627 (R.I. 1968); People v. Newhouse, 287 N.Y.S. 2d 713, 715 (N.Y. 1968). In Kingery v. Chappel, 504 P.2d 831 (Alaska 1972), this court said:

Because of the compelling state interests in providing for safety of the travelling public, we are not confronted with an invasion of privacy issue such as was present in Breese v. Smith. . . .

Id. at 835 n.6 (emphasis added).

There is substantial evidence in the record indicating that the use of marijuana presents hazards to the public health, and that the long-term use of the drug, particularly in its more concentrated forms, presents additional hazards. In its Memorandum in Opposition to Motion to Dismiss in the District Court at 15-19 (filed September 18, 1973), the State listed a large number of the actual and potential harmful effects from the consumption of cannabis as reflected in the record. The State will not here repeat that list, for the memorandum is before the court; the court is urged to examine it carefully. In addition, a number of other points should be mentioned.

It is interesting to note that the State's witness, Dr. Powelson, originally believed that marijuana was not harmful, and has said so in print (IX Tr. 5). After dealing with patients who used the drug over a number of years in psychotherapy, he came to different conclusions (IX Tr. 6). In the field of mental health, Dr. Powelson's observations lead him to believe that even small amounts of the drug affect the thinking process to an observable degree for as long as 48 hours, that regular use increasingly impairs the memory and judgment and accentuates whatever pathological thinking is already present. Further, if use is continued over a period of years, these changes become less and less reversible by mere cessation of use (IX Tr. 24-25, 30-32). He also feels that, because late adolescence and early adulthood are periods of great instability in the lives of many, the drug is more dangerous to the young (IX Tr. 40-41), and further that it is particularly dangerous to children and younger adolescents (IX Tr. 47-49).

Dr. Gabriel Nahas, an anaesthesiologist with further background in physiology and pharmacology, who has conducted lengthy research on marijuana and other drugs acting on the central nervous system (X Tr. 3-4), and has

been consultant to the French Ministry of Health on marijuana and drug abuse since 1969 (X Tr. 9), testified not only to his own research on the effect of tetrahydrocannabinol on the immune systems of the body (XI Tr. 16-24), but also on other effects of the drug. His principal concern was with the use of the stronger preparations such as hashish (XI Tr. 25-28), and in particular with long-term users, (XI Tr. 115, 123, 156), due apparently to his study of other cultures where chronic, long-term use is endemic.³ In such users, a physical tolerance develops (XI Tr. 29-31, 123), the controversial "amotivational syndrome" can occur (XI Tr. 156), and one study has demonstrated an association with various respiratory ailments, decrease in respiratory function and the presence of abnormal bronchial tissue of the type associated with lung cancer, such as is observed in heavy cigarette smokers (XI Tr. 41-42).⁴

³ See Nahas, Marijuana - Deceptive Weed 19-24 (1973).

⁴ The same author has indicated that hashish abuse in conjunction with alcohol is particularly hazardous (XI Tr. 167). There are animal studies which indicate that THC potentiates the action of certain other drugs. Kaymakcalan, Physiological and Psychological Dependence on THC in Rhesus Monkeys, in Paton and Crown, Cannabis and Its Derivatives 142, 145 (1972).

With relation to public safety, both State's and defendant's witnesses were concerned with the effect of cannabis upon the ability to drive. While the scientific evidence in this area is not entirely in agreement (IX Tr. 67), there are definite adverse effects "like with alcohol, barbituates, etc." (XII Tr. 329.) It is no answer to this problem to state that "driving under the influence" could be specifically prohibited, as with alcohol, because there is no reliable test at present which could be used to prove cannabis intoxication in court (XII Tr. 330). No valid information is as yet available on the present number of deaths and injuries on the highway caused by marijuana intoxication (II Tr. 78). It is apparent, however, that because of the lack of a usable test for such intoxication, "decriminalizing" private possession of the drug for personal use would amount to legalization of its use by drivers, and that whatever the present level of cannabis-caused accidents is, that level could be expected to increase. The same thing can be said, of course, for the effect of cannabis intoxication upon other potentially hazardous activities, such as the use of firearms, power tools, machinery, etc. We are a mechanized society, and the interaction of mechanization and alcohol has already created quite a sufficient hazard. To relax our control

over an additional drug can only increase that hazard.⁵

Among all the conflicting evidence, it is worthy of note that no witness, not even the proponents of "decriminalization;" would say that cannabis is harmless. And it is not harmless. It is a psychoactive drug with definite abuse potential, and with at least the capability of becoming a major obstacle to public health and safety. We live today in a society in which the problem of drug abuse has achieved frightening proportions. The elected representatives of that society have so far chosen not to remove the State's deterrent hand from the drug marijuana, even in the context of private possession. The district and superior courts have found the evidence below sufficient to justify that action. Respondent urges this court, likewise, to declare that the people of Alaska are not constitutionally required to welcome into their midst yet another mind-altering chemical.

⁵ One study in which cannabis was compared with alcohol in its effect on driving skills has concluded that

Cannabis has such pronounced effects on skills and judgments essential for driving to make motoring during cannabis intoxication a hazardous undertaking.

Rafaelsen, Cannabis and Alcohol: Effects on Simulated Car Driving and Psychological Tests in Paton and Crown, Cannabis and Its Derivatives 184, 189 (1972). In some aspects, the effects of cannabis were found to be more pronounced than those of alcohol. Id. at 185-88.

C. Is there a "fundamental" right to possess marijuana?

Up to this point, it has been assumed that the "fundamental" right to privacy implies a right to possess substances such as marijuana, and that therefore a "compelling state interest" must be shown in order to justify the State's prohibition of the drug. Respondent now, however, proposes to examine some of the implications of that position.

Under the Federal Constitution, the existence of a limited right to privacy is well-established. See Griswold v. Connecticut, 381 U.S. 479, 14 L. Ed. 2d 510 (1965). Recent decisions of the United States Supreme Court, however, clearly suggest that neither this right nor the Fourteenth Amendment concept of "liberty" make "fundamental" any right which the individual may have to ingest harmful or potentially harmful substances into his body. In Paris Adult Theatre I v. Slaton, 37 L. Ed. 2d 446 (1973), the Court stated:

It is argued that individual "free will" must govern, even in activities beyond the protection of the First Amendment and other constitutional guarantees of privacy, and that Government cannot legitimately impede individual's desire to see or acquire obscene plays, movies, and books. We do indeed base our society on certain assumptions that people have the capacity for free choice. Most exercise of individual free choice-- those in politics, religion and expression of ideas--explicitly protected by the

Constitution. Totally unlimited play for free will, however, is not allowed in ours or any other society. We have just noted, for example, that neither the First Amendment nor "free will" precludes States from having "blue sky" laws to regulate what sellers of securities may write or publish about their wares. . . . Such laws are to protect the weak, the uninformed, the unsuspecting, and the gullible from the exercise of their own volition.

Id. at 460-61.

Our prior decisions recognizing a right to privacy guaranteed by the Fourteenth Amendment included "only those personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.'" . . . This privacy right encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing. . . . Nothing, however, in this Court's decision intimates that there is any "fundamental" privacy right "implicit in the concept of ordered liberty" to watch obscene movies in places of public accommodation.

Id. at 462 (citations omitted). In Roe v. Wade, 410 U.S. 113, 35 L. Ed. 2d 147 (1973), the Court said:

In fact, it is not clear to us that the claim asserted by some amici that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. . . .

410 U.S. at 154; 35 L. Ed. 2d at 177. Nor does Stanley v. Georgia,

394 U.S. 557, 22 L. Ed. 2d 542 (1969) assist petitioner's argument, for in that decision the court specifically disclaimed any limitation on the power of government to punish the possession of narcotics or other private acts as crime. Id. at 568 n.11, 22 L. Ed. 2d at 551.

Turning to state law, it is submitted that the case of Breese v. Smith, 501 P.2d 159 (Alaska 1972) likewise does not suggest a "fundamental" right to use psychoactive drugs. There this court found that the "spectre of governmental control of the physical appearances of private citizens, young and old, is antithetical to a free society, contrary to our notions of a government of limited powers, and repugnant to the concept of personal liberty." Id. at 169. Surely, however, that cannot be said of the time-tested and well-established governmental practice of insuring the health and safety of its citizens by regulating the use of harmful and potentially harmful substances.

Recently, however, this court decided the case of Gray v. State, Op. No. 1068 (Alaska August 12, 1974). In that opinion, Article I, Section 22 of the Alaska Constitution was interpreted for the first time. That section provides:

The right of the people to privacy is recognized and shall not be infringed.

This court noted that there was no available recorded history

of this recent amendment, but suggested that "clearly it shields the ingestion of food, beverages or other substances." Gray v. State, supra, at 9. The court further stated:

But the right of privacy is not absolute. Where a compelling state interest is shown, the right may be held to be subordinate to express constitutional powers such as the authorization of the legislature to promote and protect public health and provide for the general welfare.

Id. at 9-10.

The implications of this language are vast, and vastly troubling. If there is a "fundamental" right to ingest all "substances" and a "compelling state interest" in the strict sense must be shown in order to justify regulation, does it then follow that one has a constitutional right to abuse barbituates? LSD? Heroin? Is there a right to commit suicide by the ingestion of poison? Is there a right to drink alcohol in any manner one chooses? If so, is AS 47.37.190 (Involuntary Commitment of Alcoholics) constitutional? Since children too have fundamental rights, Breese v. Smith, 501 P.2d 159, 167 (Alaska 1972), can the state prohibit a minor from possessing or consuming alcohol, which petitioner's witnesses characterized as the worst and most abused drug in America? Medicinal drugs, too,

are "substances." Can the state prohibit their sale without prescription, or is every man now his own physician?⁵

The root of the problem lies, in respondent's view, in the bipolar concept of "rights" to which the appellate courts of this country generally subscribe. That is, a right is either "fundamental" or it is not. If it is "fundamental," any encroachment upon it is viewed with "strict scrutiny" and must be justified by a "compelling state interest," a standard which often seems impossible to meet. If, on the other hand, the right is not "fundamental," the state may infringe it upon any "rational basis." This polarization does justice neither to the state nor to the citizen. In a recent law review article, the problem has been stated very well:

The fundamental rights doctrine, as it has been developed by the Court, lacks coherent and objective underlying principles. It therefore seems impossible to determine, other than by judicial fiat, just what rights should be treated

⁵The State recognizes, of course, that a constitutional distinction can be drawn between the sale of something and its private use. Compare Paris Adult Theatre I v. Slaton, supra, with Stanley v. Georgia, supra. An argument of some logic can be made, however, for the proposition that if there is a constitutional right to use a substance, there is a concomitant right to obtain it, and the fact that Gray, supra was a sale case would seem to indicate that the problem is real. If so, "decriminalization" of marijuana may be a red herring, and "legalization" the constitutionally foreordained result.

as fundamental and as justifying strict review. The threat of judicial legislation is thus raised and, without a showing of principles, cannot be satisfactorily allayed.

There is also what might be called the cannonization problem. Declaring a right to be fundamental appears to give the right an infrangible sanctity, for state authority cannot regulate or burden its exercise without showing a compelling interest to do so. Most "rights" are just categorical names for recognized legal protection of a variety of similar or related human interests. The interests subsumable under any given right may range from the trivial to the extremely important. If the right is declared fundamental, the state may be precluded from regulating even the trivial instances of its exercise. On the other hand, strained analysis may be required to show that the claimed right is not really an issue, or that the state actually has a compelling interest, or that the exercise of the right is not really burdened in the particular case. Declaration of a right as fundamental, therefore, without an attendant statement as to wherein it is fundamental, generates severe analytic problems and precludes judgments responsive to the real nature of the rights and interests involved.

The fundamental rights doctrine also does not solve the problems of a double standard of judicial review, a standard felt to be correct when first amendment or minority right are involved, but never even then satisfactorily justified on a sound jurisprudential basis. The winner-take-all result of the double standard encourages the upgrading or downgrading of interests so that they may fit into the proper category, but in doing so does not do justice to the interests under review. On the other hand, if justice is to be done, there may be a

watering down of both the rational basis and the strict scrutiny standards of review. When this happens, it screens a more subtle form of judicial legislation and, more importantly, fails to give principle guidance to the lower levels of our vast legal system.

Finally, the current fundamental rights doctrine creates an anomaly in our constitutional life under which interests which may be of little importance to many, such as travel, are given extreme protection, while interests of extreme importance to virtually all, such as opportunities to work, do not receive special protection. . . . But contemporaneous pressures are generated to distill constitutional protection for highly valued human interests from out of the often times vague generalities of the Constitution. The fundamental right of privacy, for example, was found in that way. But the creation of constitutional rights by implication may be the very substance of judicial legislation. Thus, the fundamental rights doctrine generates constitutional action and reaction, expansion and retrenchment--all without ever having resolved the basic intellectual and jurisprudential issues.

G. Goodpaster, The Constitution and Fundamental Rights, 15 Ariz. L. Rev. 479, 505-06 (1973). Professor Goodpaster reasons that the chief issue presented by all this is not what the fundamental rights are, but "whether there shall be judicial review and how much judicial review there shall be." Id. at 513. He concludes that only a few very basic rights justify full-fledged strict review, and that, in all other cases, a sort of balancing test is needed.

In the recent case of Roe v. Wade, supra, the United States Supreme Court appears to have engaged in something resembling such a process. Consider the following passage:

The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some amici that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the court's decisions. The court has refused to recognize an unlimited right of this kind in the past. . . .

We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.

410 U.S. at 154, 35 L. Ed. 2d at 177-78. Although the Roe decision does speak in terms of compelling state interests, it is apparent that some sort of balancing process is going on. The State submits that if a similar process is applied to the right to ingest "substances," considered against the State's

traditionally broad power and important interests in public health and safety, it will be seen that the State must have the power to forbid the ingestion of harmful or potential harmful substances, and that, given the evidence of its harmfulness discussed supra, the "right" to ingest marijuana is not "fundamental" in the strict sense at all, although the right to eat the foods of one's choice may well be.

II

THE UNEQUAL APPLICATION QUESTIONS

- A. The Legislature need not prohibit tobacco and alcohol in order to prohibit marijuana.

Defendant has argued that to prohibit the possession of marijuana without at the same time prohibiting the possession of tobacco and alcohol is violative of the principle of equal protection of the law. Such arguments have been dealt with in two recent Federal cases. In United States v. Maiden, 355 F. Supp. 743 (1973), an opinion which also dealt with petitioner's second contention concerning unreasonable classification, the court stated:

Next defendants attack as arbitrary the provisions of federal law that accomplish the proscription of marijuana distribution. They contend the provisions are irrational in omitting alcohol and nicotine, and providing equivalent penalties for marijuana and for such drugs as amphetamines, barbituates and LSD, and in classifying marijuana in Schedule I along with heroin.

The premise of defendant's first two contentions is that the Equal Protection Clause requires legislators to scale penalties in proportion to the danger of the conduct penalized. The premise is not sound. In setting penalties, Congress is not limited to an assessment of harm. Even if barbituates and amphetamines pose greater health hazards than marijuana, Congress is entitled to conclude that

the pervasiveness of marijuana distribution justifies an equivalent maximum penalty or that such penal purposes as general deterrence will be appropriately served by such a penalty. Nor is Congress required to take an all or nothing approach to drug regulation. Marijuana, however slight a health hazard it may be to the total population, is a drug that can cause euphoria at low doses and hallucinogenic reaction at higher doses among most users, and a severe psychological disturbance among a few users. Congress can rationally conclude that interstate traffic in such a drug should be prohibited by a maximum five-year penalty. This judgment is not rendered irrational because a similar penalty is established for distribution of more dangerous substances, nor because other drugs with capacity for harm are not prohibited. The legislative judgment concerning alcohol and nicotine may well have taken into account the degree to which their dangers are known, the adverse consequences of prohibition, and the economic significance of their production. Whether such factors should lead to similar judgments concerning marijuana is within legislative discretion.

Id. at 747-48.¹

¹As pointed out in respondent's trial memorandum, this case is particularly significant because the court in reaching its conclusion had the aid of expert testimony from Doctors Grinspoon and Fort, who testified for the defendant in this case.

In United States v. Kiffer, cited in respondent's trial memorandum at 14-15, the court again considered the question of the necessity to prohibit alcohol and tobacco, and concluded:

If Congress decides to regulate or prohibit some harmful substances, it is not thereby constitutionally compelled to regulate or prohibit all. It may conclude that half a loaf is better than none.

477 F.2d 349, 355 (2d Cir. 1973).

When weighing a legislative decision to adopt a policy of legislating upon one subject and not upon another, perhaps similar one, it must be remembered that

[m]atters of policy . . . are by definition matters which demand the resolution of conflicts of value, and the elements of conflicting values are largely imponderable. Assessment of their competing worth involves differences of feeling; it is also an exercise in prophecy. Obviously the proper forum for mediating a clash of feelings and rendering a prophetic judgment is the body chosen for those purposes by the people.

American Federation of Labor v. American Sash & Door Co., supra, (Frankfurter, J. concurring). Surely one of the values which a Legislature is entitled to weigh in deciding to prohibit, or not to prohibit, a particular substance is the political feasibility of the proposed prohibition.

Although marijuana may have been used in other societies for thousands of years, in our culture alcohol and tobacco are, unfortunately, inseparably woven into the social fabric. As is well known, an attempt at prohibition of alcohol on a national scale has already failed with disastrous results. In contrast, marijuana, despite the statements of those who advocate its use, is a relatively recent newcomer upon the American scene. The Legislature may well have decided that, in view of the problems which alcohol demonstrably causes in the State of Alaska, we do not need another intoxicant freely available.

On the other hand, any rational legislator contemplating prohibition of alcohol and tobacco must realize that, (1) it would not be possible to muster the necessary votes to pass such a measure, and (2) it would in all probability be unenforceable if passed. Whatever one's political views on the question of "gun control," it is apparent that similar considerations have motivated the congressional decision to curtail severely the lawful private possession of such things as machine guns and dynamite, while leaving the regulation of sporting firearms largely in the hands of the several states. This is the sort of political judgment which legislators are peculiarly

competent to make, and which they must be permitted to make in a democratic society. To hold that, because it is not politically feasible to prohibit certain hazardous substances, it is constitutionally forbidden to prohibit others would be an exercise in absurdity, and dangerous to the concept of government by the people.

B. Alaska's classification of marijuana with other dangerous drugs is not unreasonable.

In the State of Alaska, marijuana is legislatively classified not as a narcotic, as is done in some states, see, e.g., People v. Summit, 517 P.2d 850 (Colo. 1974), nor in its own separate category, as defendant urges. Instead, it is grouped together with a number of other substances in a category called "depressant, hallucinogenic or stimulant drugs." This class includes:

(A) cannabis, psilocybin, dimethyltryptamine, lysergic acid diethylamide, and every other substance having similar physiological effects;

(B) a drug which contains barbituric acid or any of the salts of barbituric acid; or a derivative of barbituric acid which has been designated by the commissioner under Section 40 of this chapter as habit forming or dangerous;

(C) a drug which contains amphetamine or any of its optical isomers; or a substance which has been designated by the commissioner as habit forming or dangerous because of its stimulant effect on the central nervous system; or

(D) a drug which contains any quantity of a substance which the commissioner, 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. . . .

AS 17.12.150(3). Petitioner contends that this is a constitutionally irrational classification. The State submits that

such an argument is supported neither by the law nor by the evidence.

The basic legal framework in which such contentions must be placed has been discussed at length by the State in its Memorandum in Opposition to Motion to Dismiss in the district court below, as has most of the case law directly bearing on the subject of the classification of marijuana. Memorandum at 3-9. The State will not reiterate that argument here; it is enough at this point to note that the equal protection clause

permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others,

McGowan v. Maryland, 366 U.S. 420, 425, 6 L. Ed. 2d 393, 399 (1961), and that a statutory discrimination is not to be set aside as a denial of equal protection "if any state affects reasonably may be conceived to justify it." Metropolitan Casualty Insurance Co. v. Brownell, 294 U.S. 580, 584, 79 L. Ed. 1070, 1073 (1935). It should be remembered that we are not dealing here with an inherently suspect classification such as race or national origin.² As the defendant's witnesses were at pains to point out, there is no particular

² See Goodpaster, The Constitution and Fundamental Rights, 15 Ariz. L. Rev. 480, 494 (1973).

class of society which is peculiarly identified with the use of marijuana.

Although some courts have found it unreasonable to classify marijuana as a "narcotic" drug, e.g. People v. McCabe, 275 N.E. 2d 407, 414 (Ill. 1971), other recent cases have disagreed. State v. Wadsorth, 505 P.2d 230 (Ariz. 1973); Egan v. Sheriff, 503 P.2d 16, 19 (Nev. 1972); Sanders v. State, 482 S.W. 2d 648, 651-52 (Tex. 1972). In People v. Summit, 517 P.2d 850 (Colo. 1974), the Supreme Court of Colorado, after considering a wealth of published authority on the subject, held that although the issue was "a decidedly close one," it was proper to defer to the Legislature as the forum in which to settle the issue of whether marijuana should be classified as a narcotic. Id. at 854.

Defendant cites no single case holding that marijuana cannot properly be classified with the depressant, stimulant and hallucinogenic drugs. The cases which he does cite on the classification of cannabis, all of which deal with the propriety of classifying it as a narcotic, in fact constitute better authority for the State than they do for petitioner's position. In McCabe, supra, the rationale of the court's decision was to the effect that marijuana would be more properly classified with the barbituates, LSD, etc. than with the true narcotics such as heroin, and that there was no rational basis for

distinguishing between marijuana and the depressant, stimulant or hallucinogenic drugs. Id. at 411-14. In People v. Sinclair, 194 N.W. 2d 878 (Mich. 1972), the case arose after a statute had been passed by the State Legislature classifying possession of marijuana as a misdemeanor, and removing it from the "narcotic drug" group. Two justices were of the opinion that the "narcotic" classification, which had been in effect at the time of appellant's conviction, constituted a denial of equal protection. The most extensive opinion on the subject, that of Swainson, J., suggests that, until the effective date of the new statutes, marijuana offenses be prosecuted under the section relating to hallucinogenic drugs. Id. at 887 n.36. The separate opinion of Justice Williams upon the equal protection question does not suggest otherwise. Id. at 891.

In English v. Miller, 341 F. Supp. 714 (E.D. Va. 1972), it was indeed held constitutionally impermissible for the State of Virginia to classify marijuana as a "narcotic drug." In addition to the fact that such holdings have little if any bearing on the precise question before this court in the case at bar, it should also be noted that the value of the English opinion as Federal precedent is undermined, to say the least, by the fact that the case was reversed by

the Fourth Circuit Court of Appeals, which stated:

Assuredly, the legislative classification inherent question was not so arbitrary and unreasonable as to deny English the full protection of the law.

English v. Virginia Probation & Parole Board, 481 F.2d 188, 192 (4th Cir. 1973).

Bearing in mind that the Constitution does not require the Legislature to scale penalties precisely in proportion to "the danger of the conduct penalized," United States v. Maiden, supra, 355 F. Supp. at 747, it is apparent from the record that there is ample evidence to justify the Alaska Legislature's inclusion of cannabis among the depressant, stimulant and hallucinogenic drugs--much of it from the mouths of defendant's own witnesses. Thus, defense witness Joel Fort, although he was of the opinion that marijuana more properly belonged in a separate category of its own (IV Tr. 43), testified that it had some of the qualities of depressant drugs, and some of the qualities of stimulant drugs (V Tr. 13), and that it was capable of producing hallucinatory experiences (V Tr. 11). He also stated that cannabis was more properly classified with the depressants and stimulants than it would be with the opiates or narcotics (V Tr. 13).³ The psychoanalyst, Lester Grinspoon, said

³Dr. Fort would not, apparently, classify the hallucinogenic drugs such as LSD along with stimulants or depressants either (V Tr. 10-13).

that he would not classify cannabis as a "true hallucinogen," for the reason that it normally produces a distorted perception of something which actually exists in the environment, rather than a true hallucination, which he defined as a phenomenon in which "one believes something exists or he hears something, and, in fact, there is absolutely nothing in the reality from which this comes from." (XI Tr. 66) Despite this, he testified that the drug does have some of the traits of the hallucinogens (XI Tr. 104).

Sanford Feinglass, a pharmaceutical chemist, testified that the chemical structure of tetrahydrocannabinol was quite different from that of the other drugs in the depressant, stimulant and hallucinogenic group, and he would thus expect it to have different effects on the body (XII Tr. 36-46). He also testified, however, that THC was a psychoactive drug, and produced alterations in perception relating to time and space (XII Tr. 51), some of which it apparently shares with other drugs of the group such as LSD and mescaline (XII Tr. 105-06). He further stated that he knew of one individual in whom the ingestion of a large quantity of marijuana had produced actual hallucinations (XII Tr. 103-04). Dr. Thomas Ungerleider, a psychiatrist (XII Tr. 197) who had been a member of the National Commission on Marijuana and Drug Abuse (XII Tr. 202), also testified

that marijuana had "some sedative properties and it also has some what we call psychedelic or hallucinogenic properties." (XII Tr. 334) Thus, in a legal system which attempts to classify drugs at least in part by their effects upon the user, it would appear that the manner in which the Legislature of the State of Alaska has classified marijuana is perfectly rational, even if not pharmacologically precise.

III

CRUEL AND UNUSUAL PUNISHMENT

Section 17.12.010 of the Alaska Statutes makes it unlawful for any person to possess, except as otherwise authorized, a depressant, hallucinogenic or stimulant drug, which, of course, includes cannabis or marijuana.

AS 17.12.150(3)(A). AS 17.12.110(a) provides:

A person who violates a provision of this chapter relating to the possession or control of depressant, hallucinogenic and stimulant drugs, when his possession or control is for his own use, is guilty of a misdemeanor and upon conviction is punishable by imprisonment for not more than one year, or by a fine of not more than \$1,000, or by both.

Petitioner contends that this provision runs contrary to the constitutional prohibitions against cruel and unusual punishment.¹ The State replies that, to begin with, that question is not properly before the court, and, further,

¹ The Constitution of Alaska at Article I, Section 12, provides in pertinent part:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The wording of the United States Constitution, Amend. VIII, is identical.

that the range of penalties provided by the statute is neither cruel nor unusual.

- A. The issue of cruel and unusual punishment is not properly before this court.

This case is here upon petition for review, which is a proceeding in the nature of an interlocutory appeal.² Mr. Ravin has not yet even been convicted, much less sentenced. In the words of the State and Federal Constitutions, no punishment has been "inflicted" upon him.

In People v. Summit, 517 P.2d 850, 854 (Colo. 1974), one of the appellants advanced an argument similar to that in question here. Noting that this defendant had been given a suspended sentence and granted probation, the court refused to consider the question, quoting from People v. Stark, 400 P.2d 923, 928 (Colo. 1965):

With reference to the argument that the several offenses defined in the statute are punishable by 'cruel and unusual punishment' we hold that until some person has been convicted of a crime and a sentence has been imposed which is then asserted to be 'cruel and unusual' there is no justiciable question presented. No one would contend that the minimum sentence provided by statute for the offenses

² Alaska R. App. P. 23, 24.

with which the defendants in error stood charged, would be 'cruel or unusual.' Generally, the matter of punishment for commissions of crime is a matter for determination by the Legislature. Where there is a wide spread between the minimum and maximum punishment, whether any particular sentence is 'cruel or unusual' is a matter to be determined under all the facts and circumstances surrounding each offense. Until the defendants in error have actually been sentenced in a 'cruel or unusual' manner, they cannot be heard to say that they or some other person might at some future time be subjected to 'cruel or unusual' punishment.

See People v. Sinclair, 194 N.W. 2d 878, 904 (Mich. 1972) (Kavanagh, J., concurring).

If the statute in question made provision for a mandatory minimum punishment such that the defendant, if convicted, could be certain of receiving at least a jail sentence of some given length "imposed without consideration for [his] individual personality and history," see People v. Lorentzen, 194 N.W. 2d 827, 834 (Mich. 1972), perhaps an argument might be made, but that is not the case here. Permissible sentences under our statute begin with a fine of one penny and no jail time at all. Further, the execution of any sentence imposed could be suspended; indeed, under the provisions of AS 12.55.085, Mr. Ravin might never

be sentenced at all.³

Certainly no one could argue that a sentence of probation, or a suspended imposition of sentence, or a relatively light fine constitutes cruel and unusual punishment. Yet although it does not appear in the record at bar, from the facts known to the State at this point Mr. Ravin would seem to be an excellent candidate for this type of sentence.⁴

Petitioner argues that incarceration for possession of marijuana is constitutionally impermissible.

³AS 12.55.085 provides in pertinent part:

(a) If it appears that there are circumstances in mitigation of the punishment, or that the ends of justice will be served, the court may, in its discretion, suspend the imposition of sentence and may direct that the suspension continue for a period of time. . . .

* * *

(e) Upon the discharge by the court without imposition of sentence, the court may set aside the conviction and issue to the person a certificate to that effect.

⁴Information on file in the office of the District Attorney, Third Judicial District at Anchorage, indicates that petitioner's prior record is good, and that the quantity of marijuana found in his possession was quite small.

Brief for petitioner at 72. But he is not incarcerated, nor has he been ordered to be incarcerated, nor is there any law requiring him to be incarcerated, nor can he even point to any facts which would indicate that he will probably be incarcerated. Under such circumstances, he has raised no issue of cruel and unusual punishment.

B. The range of penalties provided for possession of marijuana is neither cruel nor unusual.

Petitioner argues that the penalty provided for possession of marijuana in this State amounts, on its face, to cruel and unusual punishment. His contention actually divides itself into several sub-issues. The first question is whether a range of penalties beginning at zero and ending at one year in jail and a fine of \$1,000.00 can be considered to be cruel and unusual because it is "disproportionate" to the penalties provided for other misdemeanors. At the outset, this argument encounters the opinion of this court in Green v. State, 390 P.2d 433 (Alaska 1964), which states:

There are a number of states in which the courts have held that punishment for crime must be proportioned to the offense. Such holdings have usually been based upon the enunciation of the restriction in the respective state constitutions that penalties

shall be proportioned to the nature of the offense. The Alaska Constitution, though of recent origin, contains no such restriction, nor does one appear in the Federal Constitution. We conclude, therefore, that in this jurisdiction punishment for crime need not be strictly proportioned to the offense. Only those punishments which are cruel and unusual in the sense that they are inhuman and barbarous, or so disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice may be stricken as violating the due process clauses of the State and Federal Constitutions. Such punishments would also be void under Article I, Section 12, of the Alaska Constitution which declares that cruel and unusual punishments shall not be inflicted.

Id. at 435 (Footnotes omitted.)

The wording of the Alaska Constitution's clause concerning criminal penalties, and the development of the law of sentencing in this state since the passage of the sentence appeal statutes, indicate the continued necessity to maintain the rule of Green. Article I, Section 12, of our Constitution provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Penal administration shall be based on the principle of reformation and upon the need for protecting the public.

As this court has made clear in the cases interpreting this clause in the context of sentence review, our Constitution

does not envision "standard" penalties strictly proportioned according to the nature of the offense, considered in a vacuum. See Adams v. State, Op. No. 2105 at 9 (Alaska April 22, 1974). Instead, penalties must be tailored not only to the nature of the offense, State v. Chaney, 477 P.2d 441, 446 (Alaska 1970), but also to the circumstances under which the crime is committed, see Gordon v. State, 501 P.2d 772, 776-77 (Alaska 1972), the personality and character of the offender, Robinson v. State, 484 P.2d 686, 690 (Alaska 1971); Newsom v. State, 512 P.2d 557, 562 (Alaska 1973), his age, Gullard v. State, 497 P.2d 93, 94 (Alaska 1972), his attitude toward his offense, State v. Chaney, supra at 447, his prior criminal record and other behavior patterns, Adams v. State, supra at 9-10, etc. Given this body of law, and considering also the range of discretion which must be afforded the trial courts in their efforts to achieve the proper objectives of criminal sentencing, Nicholas v. State, 477 P.2d 447, 448-49 (Alaska 1970), it is apparent that a penalty should be held to be "cruel and unusual" only when it is barbarous in its nature, or when, considered in the context of the individual offense as committed by the individual offender, it is so disproportionate that it is "completely arbitrary and shocking to the sense of justice." Faulkner v. State, 445 P.2d 815, 818 (Alaska 1968) (Dimond, J.).

Petitioner also argues that criminal penalties for the private possession of marijuana accomplish none of the goals that this Court has set as the objectives of punishment for crime. These are:

rehabilitation of the offender into a non-criminal member of society, isolation of the offender from society to prevent criminal conduct during any period of confinement, deterrence of the offender himself after his release from confinement or other penalogical treatment, as well as deterrence of other members of the community who might possess tendencies toward criminal conduct similar to that of the offender, and community condemnation of the individual offender, or, in other words, reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves.

Chaney v. State, supra at 444 (Footnote omitted). In order to understand the relationship of these objectives to the crime in question, it is necessary first to examine the reason why statutes such as AS 17.12.010 are enacted.

"Men are not hanged for stealing horses, but that horses may not be stolen." Similarly, the only reason for prohibiting the possession of a dangerous drug is to discourage its use, in the interest of the health and safety of the public. In such a context, the concepts of rehabilitation, deterrence both primary and secondary, and maintenance of respect for societal norms merge into

one. Obviously, one who is neither physically nor psychologically dependent upon a drug does not need to be "rehabilitated" in the sense that a heroin addict, for instance, does. Indeed, one 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" is probably not "rehabilitatable" at all.⁶ Most users of marijuana, however, fall into neither of these categories. They are merely people who use this drug, which the Legislature has determined to be dangerous, because they find its effects pleasant, or because friends or acquaintances use it. Each time one of these is deterred by his brush with the law, so that in future he seeks his pleasures elsewhere, he has been "rehabilitated" to the extent necessary.

In a similar situation are those who have never tried the drug at all. If their unwillingness to do so is influenced to any significant degree by the possibility of criminal sanctions (secondary deterrence) or by a desire to live as a law abiding citizen (respect for societal

⁶ M. Dicther, Marijuana and the Law, 13 Villanova L. Rev. 851, 870 (1968), quoted in brief for petitioner at 77.

norms), then the statute is accomplishing its objectives.

Petitioner's argument that "the evidence indicates that the laws have not had any significant deterrent effect;" (Brief for Petitioner at 77) is an attempt at "the insertion⁷ of judicial conceptions of wisdom and propriety" to limit "the legislative power to define crimes and fix their punishment. . . ." Weems v. United States, 217 U.S. 349, 378, 54 L. Ed. 793, 803 (1910). The question of the need to redefine social policy in light of the effect, or lack of effect, of a particular statute on the crime rate is a matter for the Legislature. In addition, such an argument fails for lack of logic. A criminal statute is enacted precisely because a significant number of citizens are indulging in a particular type of socially undesirable behavior. Universal deterrence is not a result that can reasonably be expected of any law, and a criminal statute which is never violated is in all probability unnecessary. Some criminal and quasi-criminal offenses are extremely common. Probably a great deal more than 24 or 26 million Americans have, at some time or another, committed a moving

⁷Furman v. Georgia, 408 U.S. 238, 269, 33 L. Ed. 2d 346, 366 (1972).

traffic violation. The number of those who have violated the prohibition against drunken driving is certainly very great; most people have probably, at some time in their lives, stolen something, even if only a pencil from the office. Yet it cannot be seriously suggested that no penalty should therefore attach to speeding, drunken driving and petty larceny. Even those cynics who maintain that everybody cheats on his income tax do not suggest that tax fraud be legalized. The effectiveness of a criminal statute as against some other means of discouraging unwanted behavior may be a weighty consideration in a legislative determination of social policy; it should not, however, be permitted to raise the constitutional spectre of cruel and unusual punishment in the courts.

Surely little need be said about "evolving standards of decency," Trop v. Dulles, 356 U.S. 86, 101, 2 L. Ed. 2d 630, 642 (1958). Imprisonment for a period of up to one year, together with a fine, is one of the most commonly prescribed punishments for misdemeanors in the State of Alaska. Indeed, imprisonment for not more than one year is the jail sentence provided in the "catchall" statute defining the punishment for any misdemeanor for

which no specific penalty is prescribed. AS 11.05.010.⁸
Certainly such a penalty cannot be described as "so severe as to be degrading to the dignity of human beings," Furman v. Georgia, supra, 408 U.S. at 271, 33 L. Ed. 2d at 367. It is true, of course, that other jurisdictions have recently prescribed lesser penalties for possession of marijuana, see Brief for Petitioner at 74, but petitioner cites no authority suggesting that they were constitutionally required to do so. We are not dealing here with lengthy prison sentences,⁹ and the State knows of no constitutional requirement that our Legislature place itself in what some might describe as the "forefront" of reform in its enactments of criminal penalties.

8

Whenever an act is declared to be a misdemeanor, and no punishment is prescribed, the person, upon conviction, is punishable by imprisonment for not more than one year, or by a fine of not more than \$500.00.

This statute was amended only last year, but the penalty was not changed. Compare Section 65-2-4 ACLA 1949 with Ch. 53, Section 15 SLA 1973.

⁹E.g., People v. Lorentzen, 194 N.W. 2d 827 (Mich. 1972) (20 years), relied upon by petitioner. Even when such penalties are involved, the Federal cases have held that the question of reducing them is a legislative one. United States v. Drotar, 415 F.2d 914, 916 (5th Cir. 1969); United States v. Ward, 387 F.2d 843, 848 (5th Cir. 1969).

CONCLUSION

A new intoxicant has intruded itself upon the American scene. Although it has been used in other societies for many years, true scientific study of its effects has been but recent. The evidence concerning its physical, psychological and social effects is in conflict, and little about it can be said for certain.¹ In a classic exercise of their function as the electorate's chosen directors of social policy, our legislators have prohibited its use. Petitioner now asks that this court assume that function, and overturn the legislature's decision.

If this court should choose to do so, the social consequences will in all probability be irreversible, no matter what evidence is unearthed in the future. Our cultural experience with alcohol has, if nothing else, shown that when a psychotropic drug has once become ingrained into the social fabric, it becomes not only impossible to extirpate altogether, but also essentially uncontrollable, no matter how harmful it may be.

"Decriminalization" as a true social policy is in all likelihood impossible; it is a way-station on the road to legalization, and to free availability. And as with

¹Cf., H. Brill, Statement Before the United States Senate Subcommittee on Internal Security (May 9, 1974).

alcohol, free availability is just that; availability to all, adult and child, driver and non-driver, incipient psychotic and stable personality. Surely so momentous a step should be taken by the people, through their elected representatives. The decision of the court below must stand.

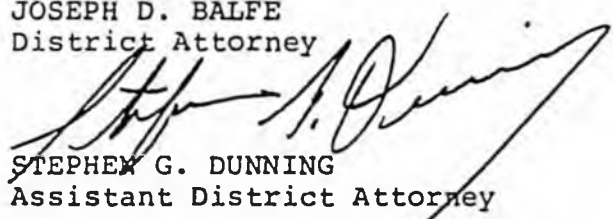
DATED at Anchorage, Alaska, this 4th day of September, 1974.

Respectfully submitted,

NORMAN C. GORSUCH
Attorney General

JOSEPH D. BALFE
District Attorney

By:


STEPHEN G. DUNNING
Assistant District Attorney



ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

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Juneau, Alaska 99811-3100
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December 11, 1986

MEMORANDUM

TO: Representative-Elect Johnny Ellis

FROM: Penelope Weyhrauch
Legislative Analyst *PW*

RE: New York Drug Legislation
Research Request 87.059

You requested a copy of the recently enacted New York law which increased penalties for selling drugs on school grounds.

New York

The New York legislation which increased penalties for selling drugs on school grounds was passed on July 16, 1986. A copy of the new law with related statutes and notes is Attachment A. The new law established sentences of no less than six years and no more than 25 years for selling controlled substances on or near school grounds to persons less than 19 years of age.

Alaska

The delivery of a controlled substance to a person under 19 and at least three years younger than the person delivering the substance is a felony. A person delivering Schedule IA, IIA or IIIA substances to a person under 19 and at least three years younger than the deliverer is committing an unclassified felony. IA, IIA, and IIIA substances are considered to be dangerous to an individual or the public. The sentence for an unclassified felony is from five to 99 years and a \$75,000 fine. A person 18 years or older possessing a controlled substance on school grounds, or a parking lot adjacent to a school, commits a class B or C felony subject to a sentence of up to ten years and a fine of up to \$50,000. (Applicable Alaska Statutes are attached as Attachment B.)

Chapter 280

CONTROLLED SUBSTANCES--SALE ON SCHOOL GROUNDS

--INCREASED PENALTIES

AN ACT to amend the penal law, in relation to increasing the penalties for sale of controlled substances on school grounds, defined to include within one thousand feet thereof

Approved July 16, 1986, effective as provided in § 6.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph (b) of subdivision two of section 70.00 of the penal law, as amended by chapter two hundred seventy-six of the laws of nineteen hundred seventy-three, is amended to read as follows: § 1

(b) For a class B felony, the term shall be fixed by the court, and shall not exceed twenty-five years; provided, however, that where the sentence is for a class B felony offense specified in subdivision two of section 220.44, the maximum term must be at least six years and must not exceed twenty-five years;]

§ 2. Paragraph (b) of subdivision three of section 70.00 of such law, as amended by chapter eight hundred seventy-three of the laws of nineteen hundred eighty, is amended to read as follows: § 2

(b) Where the sentence is for a class B or class C violent felony offense as defined in subdivision one of section 70.02, the minimum period shall be fixed by the court pursuant to subdivision four of section 70.02. Where the sentence is for a class B felony offense specified in subdivision two of section 220.44, the minimum period must be fixed by the court at one-third of the maximum term imposed and must be specified in the sentence. Where the sentence is for any other felony, the minimum period shall be fixed by the court and specified in the sentence and shall be not less than one year nor more than one-third of the maximum term imposed.

§ 3. Section 220.00 of such law is amended by adding a new subdivision fourteen to read as follows: § 3

14. "School grounds" means in or on or within any building, structure, athletic playing field, playground or land contained within the real property boundary line of a public or private elementary, parochial, intermediate, junior high, vocational, or high school, or within one thousand feet of the real property boundary line comprising any such school.

or in italics is new

matter in brackets [] is old law to be deleted.

LEGISLATIVE HIGHLIGHTS

...quent conviction committed
... 18 months, a fine of not less
... than \$750 or imprisonment
... 180 days, or both such fine and
... S Veh & Tr Law § 1174(c), (d),
... added.—5 CLS Adv Leg Serv ch

...tricts may purchase insurance
...jures incurred by an authorized
...hool volunteer program, includ-
...d to, those authorized partici-
... school buses, school sponsored
...nd from school, or on school
...s or any other school sponsored
... Law §§ 1604 subd 31-b, 1769
... subd 4, 2503 subd 10-b, 2559
... is amended.—6 CLS Adv Leg

...1987, every passenger seat on
...manufactured for use in New
...e equipped with approved seat
...reased seat back padding; fur-
...ng school bus which is sched-
...g must be retrofitted with ap-
...belts and additional padding;
... for limiting liability of boards
... of trustees, and school district
...onal injuries relating to seat
...aw §§ 3602 subd 7, 3623 subd
... d 4, CLS Veh & Tr Law § 383
... l and added.—7 CLS Adv Leg

...h school districts which
...rganization incentive building
...capital projects and earn such
...ed to July 1, 1988 CLS Educ
...4.—7 CLS Adv Leg Serv ch

...r of education is authorized to
...ain a demonstration program
...alth education in elementary
... grants under the program to
...boards of cooperative educa-
... Educ Law § 804-a, as added
...rv ch 730.

...ning purchases of produce by
...een amended to allow smaller
...nily farms to combine their
...allow them to take advantage
...ng the volume requirement of
... Gen Mun Law § 103 subd 9,
... Adv Leg Serv ch 741

...ay enter into agreements for
...instructional equipment, with
...applied against the purchase
...nt CLS Educ Law § 1725-a,
... Adv Leg Serv ch 759

...in demanded of a claimant
... town, village, fire district or
... commenced within 90 days of

...service of the demand, the claimant may com-
...mence an action against the municipality or dis-
...trict unless the claimant has failed to appear or
...has requested an adjournment or postponement
...beyond the 90 day period; if the claimant has
...requested an adjournment, hearing of the examina-
...tion will be rescheduled at the earliest available
...date. CLS Gen Mun Law § 50-h subd 5, as
...amended.—7 CLS Adv Leg Serv ch 761.

...★ A student who is not permitted by a school
...district to participate in an athletic program be-
...cause of a physical impairment based upon a
...medical examination conducted by the school phy-
...sician, may commence a special proceeding in
...Supreme Court to enjoin the school district from
...prohibiting his participation, subject to certain
...limitations. CLS Educ Law § 3308-a, as added —7
...CLS Adv Leg Serv ch 763.

...★ Municipalities and school districts may issue
...sinking fund bonds for any object or purpose for
...which serial bonds may be issued. CLS Local Fin
...Law §§ 22.00, 22.10, 31.00, 90.00, as amended and
...added.—7 CLS Adv Leg Serv ch 866.

SCHOOL GROUNDS

...Penalties are increased for the sale of controlled
...substances on school grounds to a maximum
...prison sentence of no less than 6 years and no
...more than 25 years, and the minimum sentence
...must be set at $\frac{1}{2}$ the maximum term imposed.
...CLS Penal Law §§ 70.00 subds 2, 3, 220.00 subd
...14, 220.34, 220.44, as added and amended.—6
...CLS Adv Leg Serv ch 280.

...The Governor, in his memorandum concerning
...said chapter 280, appearing at 6 CLS Adv Leg
...Serv p Gm-189, states that the crack problem is
...one of the most important issues facing our nation
...today, and that the bill amends the Penal Law to
...increase the penalties for selling drugs to school
...children and defines school grounds to include the
...area within 1000 feet, equivalent of two city
...blocks, of the real property boundary line of the
...school.

SCHOOLS

...★ The hours for voting in school board elections
...and budget votes may now begin as early as 6
...o'clock a.m. CLS Educ Law § 2013, as amended.
...—7 CLS Adv Leg Serv ch 589.

...★ In promulgating regulations governing the tu-
...tion liability of students attending private schools,
...the commissioner shall require that the tuition
...charge for programs approved for participation in
...student financial aid general awards programs
...shall be apportioned on the basis of terms or
...semesters or on the basis of portions of the calen-
...dar year if instruction is not offered by term or
...semester; in addition, the tuition refund policy for
...such programs which are offered on a flexible start
...basis shall provide for a full refund of tuition to
...any student who cancels his or her enrollment
...agreement prior to or during the first week of
...instruction. CLS Educ Law §§ 665 subds 1, 3,

...665-a, 681-a, 5001 subd 3, 5002 subds 3-5, 5003,
...5004, 5005, as added and amended.—7 CLS Adv
...Leg Serv chs 680, 681.

...★ An occupational therapist permittee is autho-
...rized to practice in an elementary or secondary
...school for the purpose of providing occupational
...therapy as a related service for a handicapped
...child. CLS Educ Law § 7905 subd 2, as amended
...—7 CLS Adv Leg Serv ch 703.

...★ The office of mental health is responsible for
...tuition expenses for a child who is a resident of
...New York State receiving care in a residential
...treatment facility for children and youth, who was
...not placed in the facility by a school district,
...social services district, the division for youth or
...the Family Court. CLS Educ Law § 4004 subd 2,
...CLS Men Hyg Law § 3126 subd f, as amended
...and added.—7 CLS Adv Leg Serv ch 810.

SECRETARY OF STATE

...The Secretary of State shall determine the type
...and amount of all fees to be collected by the
...Department of State for services rendered by the
...department pursuant to the provisions of the Uni-
...form Commercial Code, and the Uniform Com-
...mercial Code services account is established in
...which shall be deposited all such fees. CLS Exec
...Law § 96-a; CLS Lien Law § 243; CLS State Fin
...Law § 97-y; CLS Uniform Commercial Code §§ 9-
...403—9-407, as added, amended and repealed —6
...CLS Adv Leg Serv ch 453.

SECURITY

...A distributor of motor fuel, alcoholic beverages
...or cigarettes must file with the department of
...taxation and finance a bond issued by an approved
...surety company as to solvency and responsibility
...and authorized to transact business in the state or
...other security acceptable to the tax commission; if
...it becomes necessary to sell the security in order
...to recover any taxes due, no sale shall be had until
...after the person has had an opportunity to litigate
...the validity of any tax, and upon such sale, any
...surplus above the sums due must be returned to
...the person. CLS Tax Law §§ 283 subd 3, 4, 5,
...422, 423, 431 subd 3, 472 subd 1, 481 subd 3, 504
...subd 4, 511 subd 4, 1137 subd (e)(2), 1817 subd
... (h), as amended.—6 CLS Adv Leg Serv ch 275.

...★ Any petroleum business selling, transferring,
...using or otherwise disposing of petroleum within
...the state of New York must register with the tax
...commission, unless the transaction is one as to
...which the United States Constitution or laws
...enacted thereunder preclude such a requirement.
...In addition, the tax commission may require the
...business to post a bond or other security to secure
...the payment of any sum due from the business to
...the commission. CLS Tax Law § 302, as added
...and amended.—7 CLS Adv Leg Serv chs 581, 582.

SECURITY EMPLOYEES

...A survivor's benefit for a state employee in a

CORRECTION

**THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY**



ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

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December 11, 1986

MEMORANDUM

TO: Representative-Elect Johnny Ellis

FROM: Penelope Weyhrauch
Legislative Analyst *PW*

RE: New York Drug Legislation
Research Request 87.059

You requested a copy of the recently enacted New York law which increased penalties for selling drugs on school grounds.

New York

The New York legislation which increased penalties for selling drugs on school grounds was passed on July 16, 1986. A copy of the new law with related statutes and notes is Attachment A. The new law established sentences of no less than six years and no more than 25 years for selling controlled substances on or near school grounds to persons less than 19 years of age.

Alaska

The delivery of a controlled substance to a person under 19 and at least three years younger than the person delivering the substance is a felony. A person delivering Schedule IA, IIA or IIIA substances to a person under 19 and at least three years younger than the deliverer is committing an unclassified felony. IA, IIA, and IIIA substances are considered to be dangerous to an individual or the public. The sentence for an unclassified felony is from five to 99 years and a \$75,000 fine. A person 18 years or older possessing a controlled substance on school grounds, or a parking lot adjacent to a school, commits a class B or C felony subject to a sentence of up to ten years and a fine of up to \$50,000. (Applicable Alaska Statutes are attached as Attachment B.)

Representative-Elect Ellis
December 11, 1986
Page 2

Delivering or possessing controlled substances other than IA, IIA or IIIA substances, on or near school grounds, is a class B or C felony. Although marijuana is classified as a schedule VIA substance and is considered to have the lowest degree of danger to individuals or the public, delivery or possession of marijuana on or near school grounds is a class B or C felony and is subject to the penalties stated above.

I hope this information is helpful to you. If you have any questions or would like additional information please contact this agency.

PW

Attachments

Chapter 280

CONTROLLED SUBSTANCES--SALE ON SCHOOL GROUNDS

--INCREASED PENALTIES

AN ACT to amend the penal law, in relation to increasing the penalties for sale of controlled substances on school grounds, defined to include within one thousand feet thereof

Approved July 16, 1986, effective as provided in § 6.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph (b) of subdivision two of section 70.00 of the penal law, as amended by chapter two hundred seventy-six of the laws of nineteen hundred seventy-three, is amended to read as follows:

§ 1

(b) For a class B felony, the term shall be fixed by the court, and shall not exceed twenty-five years; provided, however, that where the sentence is for a class B felony offense specified in subdivision two of section 220.44, the maximum term must be at least six years and must not exceed twenty-five years;

§ 2

§ 2. Paragraph (b) of subdivision three of section 70.00 of such law, as amended by chapter eight hundred seventy-three of the laws of nineteen hundred eighty, is amended to read as follows:

(b) Where the sentence is for a class B or class C violent felony offense as defined in subdivision one of section 70.02, the minimum period shall be fixed by the court pursuant to subdivision four of section 70.02. Where the sentence is for a class B felony offense specified in subdivision two of section 220.44, the minimum period must be fixed by the court at one-third of the maximum term imposed and must be specified in the sentence. Where the sentence is for any other felony, the minimum period shall be fixed by the court and specified in the sentence and shall be not less than one year nor more than one-third of the maximum term imposed.

§ 3. Section 220.00 of such law is amended by adding a new subdivision fourteen to read as follows:

§ 3

14. "School grounds" means in or on or within any building, structure, athletic playing field, playground or land contained within the real property boundary line of a public or private elementary, parochial, intermediate, junior high, vocational, or high school, or within one thousand feet of the real property boundary line comprising any such school.

or in italics is new;

matter in brackets [] is old law to be deleted.

*

§ 4. Section 220.34 of such law, as amended by chapter three hundred forty-one of the laws of nineteen hundred eighty-five, is amended to read as follows:

§ 220.34 Criminal sale of a controlled substance in the fourth degree.

A person is guilty of criminal sale of a controlled substance in the fourth degree when he knowingly and unlawfully sells:

- 1. a narcotic preparation; or
- 2. ten ounces or more of a dangerous depressant or two pounds or more of a depressant; or
- 3. concentrated cannabis as defined in paragraph (a) of subdivision five of section thirty-three hundred two of the public health law; or
- 4. fifty milligrams or more of phencyclidine; or
- 5. methadone; or
- 6. any amount of phencyclidine and has previously been convicted of an offense defined in this article or the attempt or conspiracy to commit any such offense; or

7. a controlled substance in violation of section 220.31 of this chapter to a person less than nineteen years of age, when such sale takes place upon school grounds.

Criminal sale of a controlled substance in the fourth degree is a class C felony.

§ 5. Such law is amended by adding a new section 220.44 to read as follows:

§ 220.44 Criminal sale of a controlled substance in or near school grounds.

A person is guilty of criminal sale of a controlled substance in or near school grounds when he knowingly and unlawfully sells:

- 1. a controlled substance in violation of any one of subdivisions one through six of section 220.34 of this chapter to a person less than nineteen years of age, when such sale takes place upon school grounds; or
- 2. a controlled substance in violation of any one of subdivisions one through eight of section 220.39 of this chapter to a person less than nineteen years of age, when such sale takes place upon school grounds.

Criminal sale of a controlled substance in or near school grounds is a class B felony.

§ 6. This act shall take effect on the first day of November next succeeding the date on which it shall have become a law.

NEW YORK

RIVER

AN ACT to amend the laws relating to scenic and recreational areas, and to amend the laws relating to such law relating to scenic and recreational areas.

Approved and

The People of the State of New York, by and through their

Section 1. Subchapter 1 of chapter 1 of title 1 of the conservation law is amended to read as follows:

s-1. North Branch of the outlet of Big Pond.

§ 2. Paragraph f of section 1 of chapter 1 of title 1 of the conservation law is amended to read as follows:

§ 3. Subchapter 1 of chapter 1 of title 1 of the conservation law is amended by adding two new paragraphs to read as follows: m-1. Middle Branch of the outlet of Big Pond, four-tenths miles from the confluence of the outlet of Big Pond into the outlet of Big Pond.

m-2. North Branch of the outlet of Big Pond, four-tenths miles from the confluence of the outlet of Big Pond into the outlet of Big Pond.

§ 4. Paragraph 4 of section 1 of chapter 1 of title 1 of the conservation law is amended to read as follows: REPEALED.

§ 5. This act shall take effect on the first day of November next succeeding the date on which it shall have become a law.

EXPLANATION—Matter underlined or in italics is new;