

cant improvements. It should be abundantly clear that the poor, the group with the most profound health problems, are not a sufficiently powerful interest group to compete effectively in the establishment of priorities or in the distribution of available facilities, manpower, and services. Moreover, the problems of health care are only one part of a more complex pattern of social, economic, and environmental difficulties. The health care needs of the poor can begin to be met within a larger and more basic reconstruction of health care that insures access to medical care for all and establishes guaranteed levels of health service irrespective of social status or geographic location. The word "guaranteed" is not used casually, for to promise service without taking steps to put manpower and facilities into underserved areas is to insure nothing at all. And effecting such policies would require efforts beyond anything as yet suggested.

It serves us well to recognize openly that an underlying issue in the medical care debate involves some redistribution of utilities. The reallocation of scarce medical resources inevitably entails taking from some to give to others, and the givers do not yield willingly, particularly when their share is not also growing. Medical care is a matter that few people take lightly and, given the inadequacy of present manpower, the irrationality of the allocation of health functions, the difficulties of geographic distribution, and the strength of vested interests, it is difficult to see how greater balance can be achieved without government's imposing firmer direction on the training of health personnel, its allocation among varying functions, and its distribution throughout the nation. In reviewing the President's proposed health strategy, not only is it difficult to find strong incentives for major change but it also seems likely that the poor in the wealthier states will receive smaller benefits than they now have. Moreover, there is no clear mechanism even to control costs, which give every indication of continuing to soar. What the President's proposals appear to do is shift the burdens and uncertainties to employer and employee, and probably to some of the poor as well.

Although it is obvious that the shape and intensity of our attempts to alter the structure of health care must be fought in the political arena, it should be equally plain that however we resolve the structural and economic or-

ganization of medicine, innumerable personal, moral, and social dilemmas will persist. How does one weigh the relative merits of delivering the care we now know how to give against the need to develop and enlarge basic knowledge and interventions? How do we cope with the moral meanings of life and death relative to the growing numbers of persons whose lives are sustained in name alone? How do we encourage personal responsibility for and consciousness of health without running the risk of increasing the prevalence of hypochondriasis? How do we achieve a reasonable balance between growing technology and the need to deal with the more pervasive and common troubles that people bring to doctors? Perhaps most important, how do we develop a tighter, more efficient system of delivering health services without frustrating the essential personal and social elements of medicine as a humane institution?

In the last analysis, resources are limited and we cannot have the best of all possible worlds. We must make difficult choices for which we often lack the knowledge or the judgment to foresee what the future will hold. That we as a nation are not facing up to such choices is apparent for all to see; and for the most part we have let the resolution of our problems depend on the active clash of dominant interests. It

is perfectly clear that the resolutions arrived at in this way penalize the poor and the powerless, and the consequences of this are pervasive. It is my view that the nation can and must assure at the very minimum that access to basic health services is available to all, and that necessary manpower and facilities are developed and distributed so that this goal is feasible. The enactment of even this modest outcome will threaten some and will require public action which is far from implementation at the present time. It will necessitate changes in federal financing, in medical education, in licensing and other legal aspects, the use of paraprofessionals, and even some restrictions on professional prerogatives. Such minimal services, adequately distributed, have been available elsewhere in the world and under social and economic conditions posing far greater pressures on national resources. We have the capacity to do this without threatening the overall quality of care, the integrity of medical education, or the potentialities for continued innovation in research and development. If we do not have the will or the inclination to take on the vested interests that will resist, perhaps the radicals will turn out to be right after all.

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Laws and Morals

Marijuana—The New Prohibition. JOHN KAPLAN. World, New York, 1970. xii, 388 pp. \$8.50.

Some months ago, the Surgeon General of the United States escalated his warnings to the American public regarding the dangers of cigarette smoking. He even suggested that a society sincerely interested in public health ought to prohibit cigarette smoking in crowded public places, in order to protect nonsmokers from discomfort and possible (though unproven) risk of lung injury and as a means of emphasizing its opposition to the cigarette habit. Predictably, this proposal was greeted with cries of outrage from all points on the political spectrum. Common objections were that there was no proven medical justification for

such a prohibition and that laws imposing direct controls on private vices were undesirable. The supreme courts of Illinois and Kentucky expressed the same objections in 1911 and 1914 respectively when confronted with local ordinances prohibiting cigarette smoking in public.

Needless to say, there is today no such uniformity of opinion on the inadvisability of criminal sanctions against the use and sale of marijuana. Until the last two or three years, in fact, legislative, judicial, and public opinion was uniformly allied in favor of severe criminal sanctions against the "killer weed," a condition that has prevailed since the 1920's and 1930's, when antimarijuana laws first appeared on the statute books. Now, however, it

is generally thought that the marijuana issue is being subjected to the crucible of public debate. Progress in rational decision making is measured by the increased allocation of funds by the National Institute of Mental Health to marijuana research; by the appointment of a presidential commission and various state commissions to study the marijuana laws; and by a knee-jerk reduction, by Congress and numerous state legislatures, of first-offense penalties for possession.

But is there really a debate? If by debate we mean rational, dispassionate inquiry, John Kaplan doesn't think so. Indeed, the confrontation more nearly resembles a war in which each side passionately defends "right" against the forces of evil. In many ways, Kaplan was an early casualty of this war now being waged by proponents and opponents of marijuana law reform, and his book is a painstaking attempt to neutralize the emotionalism and rhetorical excess that have inhibited rational debate.

Kaplan, a professor of law at Stanford and a former United States attorney, was selected to be one of six Reporters to the Joint Legislative Committee to Revise the California Penal Code, in which capacity he devoted much of his energy to the drug laws, the marijuana laws in particular. After substantial study and soul-searching, the Reporters circulated a Preliminary Tentative Draft on Marijuana, recommending significant liberalization of the state's laws. When this information was released, Kaplan and his colleagues were dismissed forthwith by the Joint Committee.

Marijuana—The New Prohibition, containing large parts of the suppressed draft report, is Kaplan's effort to appeal, in his words, to a tribunal of last resort—the public itself. The book is primarily an analysis of the benefit conferred by the present marijuana laws and the cost to society of enforcing them. Kaplan winds his way through this analysis in a painstaking fashion, always precise, never evangelical, leaving no medical, social, or legal effect unexplored.

In fact, he apologizes at the outset for spending "so much time refuting the nonsense." But as we have suggested, and as Kaplan well knew, the old misconceptions persist, and the symbolic value of the marijuana "issue" must dissipate before the true issues emerge and rational debate is possible.

For those who are initially opposed to "legalization" in any of its various forms, marijuana is likely to symbolize "hippieism," "permissiveness," nonproductive life-styles, and radical politics; they view drug use largely in quasi-moral terms. And those on the other side of the fence are likely to regard marijuana use as a form of spiritual protest against the materialism and distorted values of a "dehumanized" society.

To pursue Kaplan's cost-benefit theme, there can be little doubt that American society is paying dearly to enforce the present laws. Although the costs are common to all "crimes without victims"—selective enforcement, constant collision with constitutional protections—the sheer scope of marijuana use raises the ante considerably. Kaplan believes, and we agree, that society cannot afford to convert so many of its younger citizens into criminals, especially where the "criminal" conduct connotes immorality to fewer and fewer people. The deterrent value of the criminal sanction dissipates rapidly as more and more young people experiment with marijuana, experience no harmful effects from it, and think the law insane. Disrespect for one law can easily become disrespect for all law; and the gulf between the experienced effects of marijuana and the teaching of the elders impairs the credibility of legislative pronouncements against other, more dangerous drugs. Thus the stability of the legal system itself is the real victim of the marijuana laws.

An ancillary cost of categorizing large numbers of otherwise law-abiding citizens as criminals is the actual monetary outlay entailed in capturing and processing the people who are daily hauled before the courts on charges of possession or sale of marijuana. This extensive law enforcement cost also includes a misplaced-resource factor; that is, police time is now expended in enforcing the laws against the possession and sale of marijuana which could be allocated to prevention and control of criminal activity directly injurious to the public safety.

On the other side of the ledger, the bulk of Kaplan's book is devoted to refuting allegations of the harmful effects of the cannabis drugs and therefore of the supposed beneficial purposes of the marijuana laws. We shall not detail his conclusions here; suffice it to say that his findings are in line

with those of most authoritative observers, including the National Institute of Mental Health in its recent annual report to the Congress. In general, the old myths that marijuana was addictive and led to violent crime and to the use of "hard" drugs have finally been put to rest. The short-term or acute effects have been found to be not very different from those of alcohol, and there is not yet firm scientific knowledge about the effects of long-term chronic use.

Kaplan concludes that the present scheme of criminal penalties is an inappropriate and costly way of dealing with marijuana use. As the title of his book suggests, he believes that society, the legal system in particular, is faced with the same basic question that confronted it in 1933 when the prohibition of alcohol was repealed. The major difference is that the public opinion process had been in operation for 80 years on the alcohol question, the succeeding cycles of prohibition and repeal having each been preceded by vigorous public debate, whereas the marijuana laws appeared surreptitiously on the books in the 1920's and 1930's with little public attention. At that time, concern about marijuana was related primarily to the fear that its use, then limited for the most part to a growing Mexican-American minority and to Bohemian subcultures in the major cities, would spread as a substitute for the opiates and alcohol, each made more difficult to obtain by recent legislation. Especially in the western and Mississippi Delta states, this concern was inseparable from ethnic prejudice. It is clear that neither the Congress nor any state legislature undertook any empirical or scientific study of the effects of the drug. The legislators, relying on lurid and unfounded accounts of the evils of the "killer weed," simply assumed that cannabis was addictive and had the same evil effects as opium and cocaine. Not until 1965, when marijuana use became a white middle-class phenomenon and the public opinion process was energized, were these assumptions challenged. It is important to realize that any movement to repeal marijuana prohibition must overcome the inertial effect of two generations of unchallenged public policy.

Having concluded that the present laws were misconceived, Kaplan proceeds to outline three alternative methods for dealing with marijuana in the

future. The first is the so-called "vice model," under which marijuana would be dealt with as many jurisdictions now deal with gambling, prostitution, abortion, illegal traffic in unprescribed drugs, and obscenity—that is, by ignoring the "victim" and focusing on the promoters of the objectionable activity, the organizer, solicitor, and purveyor. By continuing to treat distribution as criminal, society would demonstrate its steadfast opposition to marijuana, maintain an indirect control over its use, and hinder proselytization. However, by excising the casual user from the criminal justice process, it would greatly reduce the social costs of enforcement of the present laws.

Such a scheme is, of course, self-contradictory, and is in many ways a compromise. Much difficult line-drawing would be required, since "possession" and "sale," although convenient legal labels, do not reflect reality. For example, all sale is not for profit; it has been demonstrated repeatedly—most recently by Erich Goode in *The Marijuana Smokers* (Basic Books, 1970)—that a substantial percentage of casual marijuana users often buy and sell small amounts of the drug among themselves. On the other hand, once we acknowledge a legitimate societal interest in inhibiting distribution, we must also recognize the interest in prohibiting possession of large amounts which the possessor presumably will utilize only for sale. Kaplan accurately describes the various difficulties with the vice model and rejects it. It is interesting to note, however, that the draft report which precipitated his dismissal by the Joint Committee merely advocated reform legislation based on the vice model.

The second alternative is the "medical model," under which marijuana would be treated as a prescribed drug. Such a scheme would miss the point completely, as Kaplan notes. Although the recent NIMH report suggests that cannabis may have certain medical uses, it is mainly a social euphoriant. Obviously, regulation based on medical utility would not legalize enough of the marijuana traffic to affect matters significantly.

The third alternative—the one Kaplan favors—is the "licensing" model: the state would license distribution and sale of marijuana; neither use nor possession would be criminal; and the state, flexing its taxing muscles, would stand to gain substantial revenues. Such

a scheme would affect marijuana consumption no more directly than it has affected that of cigarettes and alcohol, and would require society to depend upon persuasion rather than prosecution to deter its use. Apart from the difficulties of quality control, which Kaplan discusses at some length, the major obstacles to such a scheme are not operational but ideological ones.

Dedicated effort by Kaplan—and by those of us who agree with him—to focus public attention on the unique aspects of marijuana and on shortcomings of the present laws may well induce compromise legislation based on the vice model. But it has become increasingly apparent that, as a practical matter, the licensing model is achievable only if the public begins to reconsider the legal-moral values that underlie the prohibition of marijuana. On the one hand, marijuana is *scientifically* analogous to cigarettes and alcohol. Excessive use of either of the latter can cause serious physical and, in the case of alcohol, psychological harm to the user. Yet, as reaction to the Surgeon General's suggestion regarding cigarette smoking illustrates, society is unwilling to take punitive steps to save the user of alcohol or cigarettes from his own folly. On the other hand, for historical reasons the law has traditionally classified marijuana with the so-called "hard" drugs with properties far more serious and harmful; and to deter the use of these, society has seen fit to employ punitive measures. Philosophically, and politically, review of the marijuana laws seems inevitably to suggest to the general public a review of narcotics laws. Despite the clarity of the "scientific" classification, the legal classification, clothed with the authority of time, has left a deep imprint on the public mind.

Thus we are afraid it is not enough to say that the costs of the present law outweigh its benefits, although Kaplan says this well; and it is not enough to say that marijuana became identified with narcotics by historical accident, although we have gone to great length elsewhere (*Virginia Law Rev.* 56, 971–1203 [1970]) to make this point. Contemporary social circumstances—the symbolic meaning of marijuana, if you will—will not permit the logical way out. For this we are distressed. But we must be realistic. Major marijuana law reform, in the form of a licensing scheme, will not come about separately from a wider

public acceptance of a more limited societal role regarding purely private conduct.

Our emphasis on this relationship is not meant to induce pessimism. On the contrary, we believe that the value of private choice for "self-regarding" conduct is in the ascendancy. Abortion laws are being liberalized. Prohibitions against private consensual sexual conduct are being challenged, as are obscenity laws. Gambling is being legitimized in state after state as a revenue-producing measure. The American Civil Liberties Union is advocating a "right to use one's own body as one sees fit" as a bar to criminal sanctions against drug use.

As Troy Duster has documented in his recent book *The Legislation of Morality* (Free Press, 1970), the first national antinarcotics legislation in 1914 converted what had previously been a sociomedical problem into a legal-moral problem. Sympathy for unfortunate victims turned into moral indictment. And to the extent that this new public policy effectively ostracized addicts from the rest of society and drove them to criminal activity, this moralistic public image was confirmed. There are signs that large segments of the public and of the lawmakers and judges are now willing to reconsider this law enforcement approach. We would urge those who seek significant marijuana reform to join also in the move toward enlightened policy on drug abuse.

In sum, Kaplan presents a compelling, rational case for reform of present marijuana legislation, and his essentially pragmatic cost-benefit analysis is a significant contribution to the reform effort, but we suspect that his book does not present a complete case for adoption of the licensing model which he so heartily recommends. Considerations of political convenience may induce legislative adoption of a modified version of the vice model. But only direct confrontation with the underlying philosophical problem—the role of the state regarding conduct that is harmful only to the actor—will lead to major reform even for marijuana. By major reform, we mean the use of persuasion rather than prosecution to protect the individual from his own folly.

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