(7 Cir. 1967); Giacomelio v. Murray, 311 F.2d 285, 287 (3 Cir. 1962); Matter of Gutierrez, Interim Decision 2234 (BIA 1973). Although counsel indicated at oral argument that a challenge to the British conviction was being contemplated, we have received no information that such a challenge has actually been undertaken (Transcript of oral argument, pp. 45-6).

B. Is Cannabis Resin Marihuana Within the Meaning of Section 212(a)(23)?

The respondent asserts that the term "marihuana" as used in section 212(a)(23) does not include cannabis resin. Counsel introduced expert testimony by Lester Grinspoon, M.D., and a book written by Dr. Grinspoon, to show that cannabis resin is not marihuana (Transcript of hearing, pp. 35-43; Ex. 13).

According to Dr. Grinspoon, there are three grades of intoxicating drug which are prepared in India from the plant Cannabis sativa (L.), and which serve as standards against which preparations produced in other parts of the world are compared for potency. Bhang consists of Cannabis sativa leaves dried and then crushed into a coarse powder and perhaps mixed with seeds and chopped up stems of the plant. Ganja, the second strongest preparation, is made from the tops of cultivated female plants and is estimated as being two or three times as strong as bhang. Pure resin of the pistillate flowers is called charras and is the most potent of the intoxicants, being five to eight times more potent than bhang. Charras, or cannabis resin, is called hashish in some places.

Dr. Grinspoon has stated that the chemical compounds responsible for the intoxicating effect of cannabis are commonly found in the resin. Although it is generally believed that the plant's active agents are found solely

in the resin, there is insufficient evidence to support this hypothesis. It is possible that other parts of the female and male plants may contain active substances.

The gist of Dr. Grinspoon's testimony is that, as used in the United States, the term "marihuana" refers only to a preparation comparable to Indian bhang, and should be distinguished from cannabis resin which is comparable to Indian charras (or hashish) (Transcript of hearing, p. 37). While this argument has some technical appeal, we are not persuaded by it.

The term "marihuana" is not defined in the Act, nor is the legislative history explicit as to the meaning to be given to the term. In the absence of explicit legislative guidance, we must strive to interpret the Act in a manner consistent with the congressional purpose.

The provisions for the exclusion and deportation of persons convicted of possession of marihuana were part of a congressional scheme to deal with the evils of drug abuse. S. Rep. No. 1651, 86th Cong., 2d Sess., U.S. Code Cong. & Ad. News 3134-35 (1960). In other statutes having the same objective, Congress has treated the term "marihuana" as including cannabis resin. 21 U.S.C. 802(15); Act of August 16, 1954, ch. 736, 68A Stat. 565; Act of July 18, 1956, ch. 629, §106, 70 Stat. 570; see United States v. Piercefield, 437 F.2d 1188 (5 Cir. 1971), cert. denied, 403 U.S. 933 (1971); United States v. Cepelis, 426 F.2d 134 (9 Cir. 1970), cert. denied, 404 U.S. 846 (1971). In the absence of express congressional direction to the contrary, we shall not create a distinction between cannabis resin and marihuana under the Immigration and Nationality Act.

Several federal courts have noted that hashish (cannabis resin) is merely a refined form of marihuana. United States v. Piercefield, supra; see United States

v. Cenelia, supra. It would be illogical to construe the term "marihuana" under section 212(a)(23) as including the cannabis leaves (possibly mixed with stems and seeds) which contain intoxicating cannabis resin, while not including the pure form of the resin which has a much greater intoxicating effect. While it is true that ambiguous provisions of the immigration laws are often construed in favor of the alien, this general maxim does not require us to ignore common sense and legislative objectives in order to reach a construction favoring the alien. Cf. Chaman Din Khan v. Barber, 253 F.2d 547, 550 (9 Cir. 1958), cert. denied, 357 U.S. 920 (1958).

Matter of Paulus, 11 I&N Dec. 274 (BIA 1965), is distinguishable. That case involved a factual issue concerning the identity of the drug that the alien was convicted of trafficking in. The record of conviction referred only to a "narcotic drug" under California law, which included substances not defined as "narcotic drugs" under the immigration laws as interpreted by the federal courts. Since the conviction was alleged to be the ground for deportation under section 241(a)(11), we held that the factual uncertainty as to what drug was involved had to be resolved against the Service, the party bearing the burden of proving deportability.

In the present case, however, there is no factual dispute as to what drug the respondent was convicted of possessing. The issue is a legal one: Is cannabis resin "marihuana" within the meaning of section 212 (a)(23)? We have resolved this legal issue against the respondent.

Counsel has cited Matter of Grey, A30 310 271 (IJ September 23, 1971), an unpublished decision by an immigration judge, which held that hashish is not "marihuana" within the meaning of section 212(a)(23) of the Act. The Service took an appeal from that decision, but the appeal was later withdrawn. Such withdrawal, however, does not

indicate Service acquiesence to that decision. Cf. Matter of Menasbat, Interim Decision 2131 (BIA 1972), aff'd on other grounds Cabasa-Flores v. INS, 477 F.2d 108 (9 Cir. 1973). Our decisions are binding precedent on the immigration judges, rather than vice versa. 8 C.F.R. 3.1(g). The short answer to counsel's use of Gray is that we disagree with that decision and decline to adopt its reasoning in the present case.

In his brief, counsel attacks the constitutionality of section 212(a)(23). 19/ As he concedes, however, we have no power to consider a constitutional challenge to the statutes which we administer. Matter of Santana, 13 I&N Dec. 362, 365 (BIA 1969); Matter of Wong, 13 I&N Dec. 820, 823 n. 2 (BIA 1971); Matter of L-, 4 I&N Dec. 556, 557 (BIA 1951).

We are not unsympathetic to the plight of the respondent and others in a similar situation under the immigration laws, who have committed only one marihuana violation for which a fine was imposed. Nevertheless, arguments for a change in the law must be addressed to the legislative, rather than the executive, branch of government.

IV. SUMMARY AND CONCLUSION

We have concluded that the respondent's motion to defer our decision must be denied. We have also concluded that the respondent is deportable under section

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19/ We have also considered the amicus curiae brief submitted in behalf of the respondent by the American Civil Liberties Union. A large portion of that brief is devoted to arguments concerning the constitutionality of section 212(a)(23). We believe that the other issues raised in the amicus brief have been dealt with adequately in the course of our opinion and need not be reiterated.

241(a)(2) of the Act, and that he is statuterily ineligible for adjustment of status under section 245 of the Act. The respondent is not eligible for any relief from deportation except voluntary departure, which has been granted to him by the immigration judge. The immigration judge reached the correct result; the appeal will therefore be dismissed.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order, the respondent is permitted to depart from the United States voluntarily within 60 days from the date of this order or any extension beyond that time as may be granted by the District Director; and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

Maurice O Roberts

Chairman

JPM:emw

73-3362, 73-3363

May 6, 1974

John L. Murphy, Esq.
Chief, Government Regulations Section
Criminal Division
U. S. Department of Justice
Washington, D. C. 20530

Attention: Robert Widner, Attorney

Re: John Winston Ono Lennon v. Richardson, et al.
73 Civ. 4476 (RO)
John Winston Ono Lennon v. United States of America - 73 Civ. 4543 (RO)

Dear Mr. Murphy:

Reference is made to our letter of March 6, 1974, advising that the plaintiff has moved to enjoin the Board of Immigration Appeals from taking any further action.

On May 1, 1974, Judge Owen denied the plaintiff's motion for a preliminary injunction. We are enclosing a copy of Judge Owen's opinion and we will advise of any further developments.

Very truly yours,

PAUL J. CURRAN
United States Attorney

By: Joseph P. Marro
JOSEPH P. MARRO
Assistant United States Attorney
Telephone: (212) 264-6588

cc: W.E. Farnham, Esq.
Regional Counsel
Immigration and Naturalization Service
Federal Building
Burlington, Vermont 05402

JFM:mmw
73-3362/3

cc: Charles Gordon, Esq.
General Counsel
Immigration and Naturalization Service
119 "D" Street, N.E.
Washington, D. C. 20530

Honorable Maurice A. Roberts
Chairman, Board of Immigration Appeals
United States Department of Justice
Washington, D. C. 20530

JOHN WINSTON ONO LENNON,

Plaintiff,

-against-

ELLIOT RICHARDSON, Attorney General of the United States; LEONARD CHAPMAN COMMISSIONER, Immigration and Naturalization; EDWARD A. LOUGRAN, Associate Commissioner, Immigration & Naturalization; SOCRATES ZOLATAS, Regional Commissioner, Northeastern Region, Immigration & Naturalization; SOL MARKS, Director, District No. 3, Immigration and Naturalization,

Defendants.

#40669

73 Civ. 4476

JOHN WINSTON ONO LENNON,

Plaintiff,

-against-

THE UNITED STATES OF AMERICA; ROBERT H. BORK, as Acting Attorney General of the United States; RICHARD KLIENDIENST, individually and as former Attorney General of the United States; JOHN A. MITCHELL, individually and as former Attorney General of the United States; RAYMOND FARRELL, individually and as former Commissioner of Immigration and Naturalization; LEONARD CHAPMAN; individually and as Commissioner of Immigration and Naturalization; SOL MARKS, individually and as District Director, New York, Immigration and Naturalization; the IMMIGRATION AND NATURALIZATION SERVICE: and PERSONS UNKNOWN IN THE UNITED STATES GOVERNMENT,

Defendants.

73 Civ. 4543

FILED
U.S. DISTRICT COURT
S.D. OF N.Y.
MAY 3 1 45 PM '74

United States District Court
S. D. New York
May 1, 1974

Leon Wildes, New York, N.Y. for Plaintiff

Paul J. Curran, United States Attorney for the Southern District of New York, for United States of America, Joseph Marro, Assistant United States Attorney, of counsel

OPINION AND ORDER

Plaintiff John Lennon has moved for an order enjoining various officials involved in the enforcement and administration of United States immigration laws from further proceedings regarding his deportation.* An appeal from his deportation order of March 23, 1973 is presently pending before the Board of Immigration Appeals (the "Board").

Plaintiff and his wife entered the United States in 1971 with authority to remain until February 29, 1972. On March 1, 1972 they were advised that their authorization had expired and they were expected to leave by March 15. However, on March 6, concluding they had no intention to leave by March 15, the District Director of the Immigration and Naturalization Service ("INS") commenced deportation proceedings against them. This proceeding came on to be heard before Immigration Judge Fieldsteel. At that time, plaintiff and his wife asserted that the deportation proceedings had been discriminatorily commenced because INS had violated its practice by not allowing them "non-priority" status.**

*Those officials are the defendants in the two actions Lennon commenced in October 1973 described infra.

**"Non-priority" refers to a category of cases in which the INS will defer the departure of an alien indefinitely and take no action to disturb his immigration status on the ground that such action "would be unconscionable because of the existence of appealing humanitarian factors."

In this case, the asserted grounds for "non-priority" status were that the wife desired to remain in the United States to endeavor to locate and obtain custody of her child by a former marriage, and plaintiff-husband desired to remain with and assist her.

The Immigration Judge allowed the wife permanent residence,* but plaintiff-husband was ordered deported. The Immigration Judge ruled that his sole function was to determine whether the deportation charge was sustained by sufficient evidence, and finding that plaintiff-husband had been convicted in England upon his plea of possession of "cannibis resin", ruled he was deportable as a matter of law.** The Immigration Judge denied plaintiff's request to terminate the deportation proceedings on the grounds of (1) discriminatory commencement and (2) because of INS' alleged violation of its own practice as regards "non priority" status, stating:

> It is within the District Director's prosecutive discretion whether to institute deportation proceedings against a deportable alien or temporarily to withhold said proceedings. Where such proceedings have begun, it is not in the province

*Pursuant to Section 245 of the Immigration and Nationality Act, 8 U.S.C. Sec. 1255.

**Section 212(a)(23) of the Immigration and Nationality Act, 8 U.S.C. Sec. 1182(a)(23).

> of the Immigration Judge or of the Board on Appeal to review the wisdom of the District Director's action starting the proceedings...

Plaintiff's appeal from the determination of the Immigration Judge to the Board of Immigration Appeals is sub judice.

Thereafter, and in October 1973, plaintiff commenced two actions in this Court. Action #1, under the Freedom of Information Act, 5 U.S.C. Section 552, seeks INS information and records relevant to the maintenance by INS of a "non-priority" category of cases and the standards used in determining its applicability.

Action #2 seeks an order 1) requiring certain government defendants to divulge, pursuant to 18 U.S.C. Sec. 3504, whether or not plaintiff has been the subject of unlawful surveillance and 2) granting a hearing on the question of whether or not the defendants had "prejudged the case against him."

Plaintiff's principal contention is that he is entitled to a stay of all proceedings "until a reasonable time after plaintiff has been furnished with the information and records sought in Action No. 1," on the

ground that while he is not subject to deportation until after a final decision of the Board,* and review by the Court of Appeals,** he will be forced to go to the Court of Appeals on an inadequate and prejudicial record in the event the decision of the Board is against him.***

There seems little question that the District Court has jurisdiction to enjoin agency action for violation of a Freedom of Information Act claim. Renegotiation Board v. Bannercraft Clothing Co., 42 U.S.L.W. 4203 (U.S. Feb. 19, 1974); Sears Roebuck & Co. v. N.L.R.B., 473 F.2d 91 (D.C. Cir. 1973). However, such power is to be exercised only upon a clear showing of irreparable injury. Sears Roebuck, supra, at p. 93 states:

> ...it is only in extraordinary circumstances that a court may, in the sound exercise of discretion, intervene to interrupt agency proceedings to dispose of a single, intermediate or collateral issue. A cogent showing of irreparable harm is an indispensable condition of such intervention.

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*8C.F.R. Section 3.6(a) (1973).

**8 U.S.C. Section 1105(a)(3).

***Plaintiffs point out that review before the Court of Appeals "shall be determined solely upon the administrative record upon which the deportation order is based. The Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive;" 8 U.S.C. Section 1105(a)(4).

On the facts before me, there is no such showing. The plaintiff cannot be deported as a matter of law until a final determination has been made herein by the Court of Appeals, unless that Court so orders. The information and records sought have been held to be irrelevant as a matter of law by the Immigration Judge.* If that ruling is proper, there is no basis for an injunction to permit plaintiff to obtain these records to introduce in that proceeding. If it is improper, either the Board or the Court of Appeals may reverse with appropriate directions to the Immigration Judge to receive and consider such proof.**

*I note that even if the requested information should prove to be relevant in a way overlooked by the parties or the Court, plaintiff is not entirely without remedy. 8 C.F.R. Sec. 3.8 provides a procedure for the reopening of a Board determination upon motion of a party. If the Board should fail to permit plaintiff to reopen and in doing so commits an abuse of discretion, judicial review is available in the Court of Appeals. Schieber v. Immigration and Naturalization Service, 461 F.2d 1078 (2d Cir. 1972). The existence of this procedure further supports my view that the plaintiff will not suffer irreparable injury by the continuation of Board proceedings.

**In the event that the position of the Immigration Judge is held to be incorrect and proceedings to determine the merits of plaintiff's selective prosecution claim proceed without awaiting the release of the information to which plaintiff is entitled in Action #1, I will, at that point, reconsider plaintiff's application for a stay.

2,2D

Thus plaintiff will have his review and be protected against improper deportation during its course.

The plaintiff alternatively seeks this preliminary injunction pending the outcome of Action #2 on the ground that if the injunction is not granted, he will have no recourse from his asserted "prejudgment" herein and/or the claimed use of tainted evidence against him.

However, plaintiff, in his very limited presentation on this ground, has made no showing that any Immigration official involved in this proceeding has not exercised his independent judgment,* and the Board has yet to rule. Any claim of prejudgment is necessarily premature when an agency's appellate body has yet to act.**

Nor has plaintiff demonstrated a need for a stay of the Immigration proceedings until defendants affirm or deny the use of illegal evidence against plaintiff. Judge Fieldsteel's opinion is based solely

*Exhibit "D" to the complaint in Action #2, while provocative, is not a showing.

**Given a proper showing, a hearing on prejudgment might be appropriate after the Board's determination. See U.S. v. ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954). To stay the proceedings at this point would be improperly disruptive, even assuming a proper showing had been made.

on the record of Lennon's conviction in England.* Plaintiff has, in any event, specified no evidence admitted in the proceedings which might be inadmissible as the product of an unlawful act and therefore I see no reason to delay further proceedings. Consequently, I decline to grant a preliminary injunction on the alternative grounds urged as to Action #2.

For the foregoing reasons, the plaintiff's motion for a preliminary injunction is denied.

SO ORDERED:

U. S. D. J.

*There can be, and is, no claim that the evidence of the conviction was illegally obtained.

Board of Immigration Appeals

Memorandum of Outside Contact

In re: John Winston Ono Lennon

File: A17 595 321

Richard L'Estrange of the London Sun telephoned from New York. He stated he had spoken to Immigration Judge Fieldsteel about this case and had been referred to me. Mr. L'Estrange stated that there has been renewed interest in this case on the part of the press because the respondent was recently involved in a fracas in the Troubadour Restaurant in Los Angeles, during which glasses were thrown and a reporter was injured.

Mr. L'Estrange inquired when a decision on the respondent's appeal could be expected from the Board. I told him that the case was now under active consideration but that I could not predict with any degree of certainty when the decision would be made.

I notified Horace Webb of the Public Information Office of the foregoing, in the absence of Mr. Stevenson.

Maurice A. Roberts
Chairman

March 18, 1974

cc: Theodore P. Jakaboski
Executive Assistant
Board of Immigration Appeals

LEON WILDES
ATTORNEY AT LAW
515 Madison Avenue
New York, N.Y. 10022
PLAZA 3-0488

CABLE ADDRESS
"LEONWILDES," N. Y.

RECEIVED
MAR 1 - 1974
Board of Immigration Appeals

February 26, 1974

Board of Immigration Appeals
U.S. Department of Justice
521 12th Street, N.W.
Washington, D.C. 20530
Attention: Mr. Maurice Roberts, Chairman

Re: LENNON, John Winston Ono
A17 597 321

Dear Sir:

In further support of the brief filed in connection with the appeal pending in connection with deportation proceedings in the above-captioned matter, I submit herewith an article recently published in the Brooklyn Law Review, Vol.XL, No.2 (Fall, 1973). As prescribed, I am enclosing three copies of the article to be appended to my brief.

I wish also to bring to your attention at this time that I have filed a motion before Judge Owen in the District Court, Southern District of New York, for an order staying the Immigration and Naturalization Service including the Board of Immigration Appeals from taking any action in connection with this matter pending the outcome of the federal litigation now before the District Court. That motion is returnable on Friday, March 1, 1974.

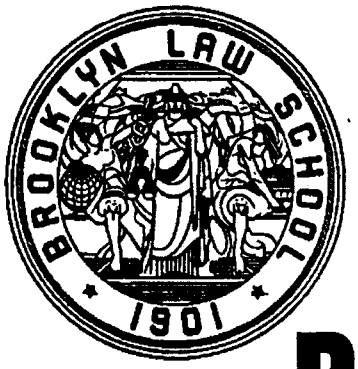
Very truly yours,

LEON WILDES

LW/ts
Encls.
CC: Mr. Irving A. Appleman, Appellate Trial Attorney
Immigration and Naturalization Service
Washington, D.C.

Trial Attorney Section
Immigration and Naturalization Service
New York, New York

CORRESPONDENCE FILE



BROOKLYN LAW REVIEW

VOL. XL **FALL, 1973** **NO. 2**

2167

THE UNITED STATES IMMIGRATION SERVICE V. JOHN LENNON: THE CULTURAL LAG

*Leon Wildes**†

*Although historically the United States has been a haven to immigrant peoples from throughout the world, at present, the right to reside in this country is subject to the numerous qualitative and quantitative limitations provided for in the Immigration and Nationality Act.*** *In reviewing the application of one such limitation—section 212(a)(23) of the Immigration and Nationality Act,** ** *providing,* inter alia, *for the exclusion of aliens previously convicted of illicitly possessing marijuana—to the case of John Lennon, Mr. Wildes contends that Lennon's British* cannabis *resin (hashish) conviction should not be included in the limitation's exclusionary provisions. Further, he argues that in view of modern science's revisionary stance with respect to marijuana, the exclusionary provisions of section 212(a)(23) are, at best, unreasonable and possibly unconstitutional. Wildes concludes by recommending that the provision in question be either repealed or amended to provide for waiver in hardship cases.*

INTRODUCTION

In 1968, before a British court, John Lennon, an internationally recognized rock musician, pleaded guilty to the charge of possessing *cannabis* resin in violation of British law. While this guilty plea resulted in nothing more than the assessment of a modest fine in Lennon's native Britain, its effect under the law of the United States may ultimately bring about the entertainer's forcible deportation. The inequity of this situation is ironically scored by the fact that Lennon's underlying "crime" was, arguably, never strictly a criminal offense in the United States and is

* B.A., Yeshiva University; LL.B., LL.M., New York University School of Law; Member, New York Bar. Mr. Wildes is a past president of the Association of Immigration and Nationality Lawyers, as well as counsel to John Lennon and Yoko Ono in their deportation proceedings.

† The author would like to express grateful appreciation to Lawrence Gabe, J.D., Brooklyn Law School, 1973, for his invaluable assistance in the preparation of this Article.

** 8 U.S.C. § 1101 *et seq.* (1970).

*** 8 U.S.C. § 1182(a)(23) (1970).

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no longer criminal in Britain.

Lennon's bizzare involvement with American immigration authorities began when the United States Immigration and Naturalization Service [hereinafter referred to as the Service], a branch of the United States Department of Justice, commenced deportation proceedings against him and his wife, during March of 1972. These proceedings, while ostensibly based upon an allegation that the Lennons' unauthorized overstay in this country was a violation of their *visitor's status* in the United States, were also implicitly founded upon the contention that John Lennon's previous "drug conviction" should effectively preclude his ever gaining *residence status* in this country. While the merits of this issue were before the Service, Lennon and his wife filed applications for preferred-entry status, in the event that their bid for permanent-resident status were ultimately accepted. Ironically, although the Service approved the preliminary applications, so that both Lennons were designated outstanding artists "who, because of their exceptional ability in the arts, [would] substantially benefit prospectively the national economy, cultural interests or welfare of the United States,"[1] only Mrs. Lennon's application for residence was granted.

Although John Lennon's desirability as an oustanding artist was officially acknowledged, what at the same time made him an undesirable alien, and therefore unable to become a permanent resident, was a little-known provision of the immigration law barring from admission any alien convicted of any offense—no matter how trivial—relating to the possession of marijuana.[2] A

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[1] 8 U.S.C. § 1153(a)(3) (1970).

[2] 8 U.S.C. § 1182 (1970).

Excludable aliens.

(a) General classes

Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

. . .

(23) Any alien who has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or who has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, or any salt derivative or preparation of opium or coca leaves, or isonipecaine

similar provision exists requiring deportation of aliens who are already residents.[3]

It is the Service's administrative view that this absolute bar applies regardless of whether any punishment was imposed,[4] whether the offense is technically considered a crime under local law,[5] or even whether the offense was in fact the subject of an executive pardon.[6] Moreover, no extenuating circumstances or possibility of waiver may ever be considered.[7]

Utilizing John Lennon's case as a vehicle, this Article will explore the policies and practices involved in the intractable marijuana provisions of the immigration law and will argue that, at best, these statutes are ill-conceived, nebulously drafted and at worst, are probably unconstitutional.

I. EXCLUSION OF ALIENS—A SOVEREIGN RIGHT

No one doubts the legal right of nations to impose severe conditions upon the admissibility of aliens, or to provide for their deportation. As a normal incident of their sovereignty, states have traditionally restricted the privilege of aliens to enter their territory, prescribing such conditions as they believed consonant with their national interests.[8] Even provisions of international treaties have not been interpreted to imply a surrender of this sovereign right to exclude.[9]

In the United States, the authority to formulate immigration policy rests with the Congress and is derived from the constitutional power to regulate commerce with foreign states.[10] Laws

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> or any addiction-forming or addiction-sustaining opiate; or any alien who the consular officer or immigration officers know or have reason to believe is or has been an illicit trafficker in any of the aforementioned drugs. . . .

[3] 8 U.S.C. § 1251(a)(11) (1970).

[4] *In re* H.V., 9 I. & N. Dec. 428 (1961).

[5] C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 4.17 (1965). Note that Charles Gordon is general counsel to the Immigration Service and often expresses the administrative view.

[6] Act of July 18, 1956, § 301, 70 Stat. 575, *amending* § 241(b) of the Immigration Act, 8 U.S.C. § 1251(b) (1970).

[7] The waiver provisions which afford exceptions to other exclusionary grounds do not relate to marijuana and narcotics offenses. *Cf.* 8 U.S.C. § 1182(h) *et seq.* (1970).

[8] G. HACKWORTH, 3 DIGEST OF INTERNATIONAL LAW 717 (1942). *But see* International Declaration of Human Rights, adopted by the United Nations General Assembly, Dec. 10, 1948 (Resolution 217A(IV) of the Gen'l Assembly, Off'l Records, 3d Sess., pt. I, Resolutions CA/810) 71-77.

[9] *E.g.*, Convention of Commerce and Navigation Between the United States and Great Britain, 8 Stat. 228, art. 1 (1815).

[10] U.S. CONST. art. I, § 8, cl. 3. *See* Harisiades v. Shaughnessy, 342 U.S. 580 (1951).

providing for exclusion and deportation of "undesirables" have existed in this country since 1882.[11] Numerous statutory amendments now comprise a maze-like patchwork of some thirty broad grounds for exclusion and deportability, including thousands of variations covering a broad spectrum of "undesirables."[12] Most of these grounds are reasonably related to a legitimate governmental interest.[13]

Importantly, too, the law in this area provides a basis to apply for relief from deportation, in most cases, if it can be shown that such relief is necessary to avoid serious hardship. Notably, however, this relief is unavailable in the case of the drug offender.

Although, initially, statutes of this nature might appear to be reasonable and even strategic—albeit somewhat harsh—weapons against drug activities within our borders, a more critical view tends to underline the draconic harshness incident to such statutes' application, while undermining the necessity for their further existence.

As the ample legislative history behind the various immigration laws concerning narcotics indicates, the severe and inelastic provisions directed against aliens who have committed narcotic infractions were intended by Congress less as a determination of individual guilt than as an implementation of an exclusionary bar guaranteeing the excludability of any person even tangentially connected with the drug menace.[14] However, the extension of such a bar to persons guilty of marijuana possession, in view of medical science's revisionist stance with respect to that drug,[15] seems most unwarranted. On another level, too, the exclusionary bar must be criticized, for, in most cases, the bar is triggered by a foreign

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[11] 22 Stat. 214 (1882).

[12] 8 U.S.C. § 1182 (1970).

[13] *E.g.*, the provision excluding "[a]liens who have been convicted of a crime involving moral terpitude." Immigration and Nationality Act of 1952, § 212(a)(9), 8 U.S.C. § 1182(a)(9) (1970) [hereinafter cited as the Immigration Act].

[14] *See, e.g.*, Varga v. Rosenberg, 237 F. Supp. 282 (S.D. Cal. 1964), in which the court cited a 1956 House Report on a bill intended to amend sections 241(a)(11) and 212(a)(23) of the 1952 Walter-McCarren Act to provide for both the deportation and exclusion of aliens convicted of possessing narcotics:

> Drug addiction is not a disease. It is a symptom of a mental or psychiatric disorder. Because contact with a drug is an essential prerequisite to addiction, elimination of drug servility on the part of addicted persons can best be accomplished by the removal from society of the illicit *trafficker*. It is to this end that your committee has taken favorable action on H.R. 11619.

Id. at 284.

[15] *See* text accompanying notes 188-90 *infra*.

conviction,[16] which means that the administration of an American penalty is often a function of a penal system wholly alien to our own. Finally, the absence of any waiver provision mitigating the exclusionary bar, even in cases of hardship, works particular injustice upon those aliens involved in the least serious offenses, for, generally, the cases which involve the greatest hardships are those relating to the possession of marijuana.

II. UNITED STATES IMMIGRATION SERVICE V. LENNON

Lennon's present predicament stems from a trip to the United States which he began in August of 1971. Both he and his wife received permission to remain in this country until September 24, 1971.[17] Two extensions of temporary stay were approved by the central office of the Service in Washington, D.C.; the first to November 30, 1971, and a second to January 31, 1972. Subsequently, on January 31, 1972, the Service conferred H-1 status[18] on Lennon to authorize certain television appearances, and finally readjusted his status to B-2 (visitor) status[19] with permission to remain until February 29, 1972.

The primary purpose of the Lennons' trip to the United States, as approved by the Service, was to appear in a custody proceeding in the Virgin Islands with respect to Mrs. Lennon's child by a prior marriage. Lennon and his wife did appear in the proceeding and ultimately secured an order granting custody of the child to Mrs. Lennon.[20] When Mrs. Lennon's former husband failed to gain a reversal of the Virgin Islands custody order on appeal,[21] he illegally removed the child to Texas where he recommenced the custody battle. The Lennons were then obliged to appear there as well and once again succeeded in securing an

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[16] *See, e.g., In re* Lennon, File No. A17 595 321—N.Y. (United States I. & N. Service, Mar. 23, 1973) [hereinafter cited as *In re* Lennon].

[17] His admission was authorized pursuant to a waiver under section 212(d)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(d)(3)(A) (1970), for the purposes of editing film, consulting with business associates, and attending a custody hearing in the Virgin Islands on Sept. 16, 1971. The waiver stated that no extension of stay, change in activities or deviation of itinerary should be authorized without prior approval of the district director in Washington, D.C. There is, of course, no similar provision for waiver in connection with application for permanent residence. *See* note 7 *supra*.

[18] 8 U.S.C. § 1101(a)(15)(H) (1970). H-1 status is granted to an alien coming to this country primarily to perform noncompetitive temporary services. *Id.*

[19] 8 U.S.C. § 1101(a)(15)(B) (1970).

[20] Cox v. Cox, Civ. No. 20-1969 (D.V.I. Mar. 15, 1972).

[21] Cox v. Cox, Docket No. 71-2090 (3d Cir. Mar. 30, 1972).

order of custody.[22] However, the Texas court stipulated that such custody might be exercised only within the territorial limits of the United States. Subsequent to this last decree, however, the child's father absconded from Texas with her, and remains unlocated as of this writing.

On March 1, 1972, the Service's District Director of New York advised Lennon and his wife by letter that

> [t]he records of this Service indicate that your temporary stay in the United States as visitors has expired on February 29, 1972.
>
> . . . .
>
> It is expected that you will effect your departure from the United States on or before March 15, 1972. Failure to do so will result in the institution of deportation proceedings.[23]

On March 6, 1972, a second letter was sent, but on this occasion the letter was manually delivered by two Service investigators. It advised the Lennons that

> [y]our temporary stay in the United States as visitors expired on February 29, 1972. On March 1, 1972 we advised you in writing that you were expected to effect your departure from the United States on or before March 15, 1972. It is now understood that you have no intention of effecting your departure by that date. We are therefore revoking the privilege of voluntary departure as provided by existing regulations.[24]

Accompanying the above letter were orders to show cause[25] initiating deportation proceedings against Lennon and his wife, and charging each with violation of section 241(a)(2) of the Immigration and Nationality Act [hereinafter referred to as the Immigration Act],[26] in that they overstayed their permissible period of

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[22] Cox v. Cox, No. 876,663 (Dom. Rel. Ct., Harris County, Tex., July 12, 1972).

[23] Letter from Immigration and Naturalization Service, District Director of New York, S. Marks to John Lennon, Mar. 1, 1972. Copy on file at office of *Brooklyn Law Review*.

[24] Letter from Immigration and Naturalization Service, District Director of New York, S. Marks to John Lennon, Mar. 6, 1972. Copy on file at *Brooklyn Law Review*.

8 C.F.R. § 242.5(c) (1973) provides that

> [i]f, subsequent to the granting of an application for voluntary departure under this section, it is ascertained that the application *should not have been granted*, that grant may be revoked without notice by any district director, district officer in charge of investigations, officer in charge, or chief patrol inspector.

Id. (emphasis added).

[25] Since February, 1956, deportation proceedings have been commenced by orders to show cause, rather than by arrest warrants. 8 C.F.R. § 242.1(a) (1973).

[26] 8 U.S.C. § 1251(a)(2) (1970).

sojourn in this country when they remained here after February 29, 1972 without authority. On the following day, Lennon and his wife were once again served by the immigration authorities. This set of "superseding" orders to show cause alleged additional facts and another technical ground for deportability.[27] Each order to show cause contained a notice of trial hearing scheduled for March 16, 1972.[28]

At this point it is essential to perceive fully the thrust of these government orders, for, like the iceberg, their most dangerous portions lie beneath the surface. The gravamen of the orders maintained that the Lennons were deportable because they had violated their visitor's status by unauthorized overstay and change of itinerary. However, such a threat of deportation would, in the ordinary case, present the visiting alien with no insoluble problem, for deportation might be averted by filing an application for adjustment to immigrant status. Indeed, as a matter of practical occurrence, aliens who have unlawfully overstayed in the United States, while technically in peril of deportation, have been allowed to remain in the country if they have filed for immigrant status and their particular national quota is either unfilled or will soon become open.[29] However, while such an option seemed open to Mrs. Lennon,[30] John Lennon, who had previously pleaded guilty to possession of hashish in violation of British law, was excluded as a potential American immigrant under the terms of section 212(a)(23) of the Act.[31] Nevertheless, after receiving the Service's letter of March 1, both Lennons applied for immigrant status. Thus, when the Service began deportation proceedings against the Lennons on March 6, charging violations of visitor's status, the controlling, although hidden, issue, at least with respect to Mr. Lennon, was whether John Lennon's foreign hashish conviction would extinguish the possibility of his ever achieving immigrant status.

At the deportation hearing, the Lennons' counsel offered a number of witnesses whose testimony related to the discretionary

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[27] Section 241(a)(9) of the Immigration Act provides for deportation of any person who fails to comply with the conditions of his visitor status. 8 U.S.C. § 1251(a)(9) (1970).

[28] *See* note 23 *supra*.

[29] Lumarque v. INS, Docket No. 71-1886 (7th Cir. June 12, 1972). *See also* 8 C.F.R. § 245.1 (1973).

[30] 8 U.S.C. § 1153(a)(3) (1970). This section provides for a "third preference priority," speeding the entry process of certain aliens otherwise meeting basic entry standards. Lennon's wife, as an internationally known artist, would come within the statute.

[31] 8 U.S.C. § 1182(a)(23) (1970).

aspects of Mr. Lennon's requests for permanent residence[32] and/or voluntary departure.[33] In addition, their attorney produced an expert witness, whose qualifications were conceded by the Government, and who testified that "*cannabis* resin," the drug Lennon was previously convicted of possessing, was neither a "narcotic drug" nor "marijuana." Rather, he described it as being "hashish," which, unlike marijuana, was not a product indigenous to the United States.[34] The Government offered no contrary evidence or testimony.[35]

Several motions to dismiss filed by Lennon's attorney were denied.[36] The Immigration Judge's decision, rendered on March 23, 1973, granted permanent-resident status to Mrs. Lennon, but denied the same status to Mr. Lennon.[37] Mr. Lennon promptly appealed the decision to the Board of Immigration Appeals.[38]

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[32] 8 U.S.C. § 1255(a) (1970).

[33] 8 U.S.C. § 1254(e) (1970). Permission to depart voluntarily would *not* have been available had the Government charged Lennon with deportability under 8 U.S.C. § 1251(a)(11) (1970), as a person convicted of an offense relating to the illicit possession of marijuana. It was available, however, where the deportation charge was overstay (8 U.S.C. § 1251(a)(2) (1970)) or violation of nonimmigrant status (8 U.S.C. § 1251(a)(9) (1970)).

[34] *In re* Lennon, Transcript of Proceedings at 37 *et seq.*

[35] *Cf.* United States v. Piercefield, 437 F.2d 1188 (5th Cir. 1971), in which the Government took a position contrary to that taken in the *Lennon* case, and maintained that marijuana and hashish were not the same substance. *See also* United States v. Ceplis, 426 F.2d 137 (9th Cir. 1970).

[36] Lennon moved to terminate the proceedings both before and after the Government's case was presented, as well as at the close of respondent's case. The motions were denied, as part of the full decision rendered on March 23, 1973. *In re* Lennon, at 45-46.

[37] ORDER: IT IS ORDERED that the application of Yoko Ono Lennon for adjustment of status under Section 245 of the Immigration and Nationality Act to that of a permanent resident of the United States be and the same hereby is granted,

IT IS FURTHER ORDERED that the application of John Winston Ono Lennon for adjustment of status under Section 245 of the Immigration and Nationality Act be, and the same hereby is, denied.

IT IS FURTHER ORDERED that in lieu of an order of deportation the respondent, John Winston Ono Lennon, be granted voluntary departure without expense to the government on or before sixty days from the date this decision becomes final or any extension beyond such date as may be granted by the District Director and under such conditions as the District Director shall direct.

IT IS FURTHER ORDERED that if the respondent, John Winston Ono Lennon, fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: the respondent shall be deported from the United States to England on the second charge contained in his Order to Show Cause, to wit: Section 241(a)(2) of the Immigration and Nationality Act.

In re Lennon, at 46-47.

[38] The Board of Immigration Appeals is not directly a statutory body. Rather, 8

III. The British Statute

Admittedly John Lennon was adjudged guilty, by way of plea,[39] of violating the Dangerous Drug Act of 1965 [hereinafter referred to as the Act],[40] particularly, Regulations 3, Dangerous Drugs (No. 2) [hereinafter referred to as the Regulations],[41] in that he had had in his possession a quantity of *cannabis* resin, without due authorization. Although lack of knowledge provided him with no defense under the Act,[42] it was undisputed that at the time of the purported offense, Lennon was unaware that he was in possession of any illicit substance whatsoever.[43] This conviction being his sole offense, the magistrate imposed only a fine.

U.S.C. § 1226(b) (1970) provides for appeal to the Attorney General of the United States, by whose regulation, in turn, the Board was created. Appeals from the Board's decisions are filed directly with the Circuit Courts of Appeals, in cases of deportation (8 U.S.C. § 1105(a) (1970)), 8 C.F.R. § 3.1(b)(2) (1973).

[39] The record of conviction is reproduced in *In re* Lennon, at 10.

[40] Dangerous Drugs Act 1965, c. 15.

[41] *Possession of Drugs*

Sec. 3 A person shall not be in possession of a drug unless he is generally so authorised or, under this Regulation, so licensed or authorised as a member of a group, nor otherwise than in accordance with the provisions of these Regulations and, in the case of a person licensed or authorised as a member of a group, with the terms and conditions of his license or group authority.

. . . .

Possession of drugs and preparations

Sec. 9 (1) A person shall not be in possession of a drug or preparation unless he is generally authorised or, under this Regulation, so licensed or authorised as a member of a group, nor otherwise than in accordance with the provisions of these Regulations and, in the case of a person licensed or authorised as a member of a group, with the terms and conditions of his license of group authority.

. . . .

Definition of Possession

Sec. 20 For the purposes of these Regulations a person shall be deemed to be in possession of a drug if it is in his actual custody or is held by some other person subject to his control or for him and on his behalf.

Dangerous Drugs (No. 2) Regulations 1964, Stat. Instr. 1964 No. 1811.

[42] *See* text accompanying notes 44-59 *infra*.

[43] Lennon has consistently maintained that he expected the police raid which brought about his drug conviction, inasmuch as a number of other famous "rock" musicians had been arrested by a team of drug-squad detectives led by one Detective Sergeant Pilcher. Sensing the imminence of his own entrapment, Lennon had searched his apartment throughly prior to the raid, and was convinced that the premises were drug free. *In re* Lennon, Transcript of Proceedings, at 83.

As a matter of record, Detective Sergeant Pilcher, his Chief and other members of that Scotland Yard drug squad were subsequently suspended from their duties, indicted on various charges, including perjury and "perverting the course of justice," and are awaiting trial in England on such criminal charges at this writing. The Times (London), Nov. 15, 1973, at 4, col. 1-2.

Understanding the issue of whether Lennon's plea should stand as the admission of an act which would come within the ambit of the exclusionary provisions of section 212(a)(23) will be advanced considerably by an analysis of the British Act and Regulations. The Act and Regulations under which Mr. Lennon was convicted have had a truly controversial history. These British laws proscribed the possession of certain controlled substances listed in various schedules. The specific section at issue in Lennon's case, section 3 of the Regulations, stated, in brief, that "a person shall not be in possession of a drug unless he is generally so authorised . . . ."[44] The language of the section did not specify that the proscribed possession was criminal only as to those persons "knowing" or "with knowledge of their illicit possession" and, therefore, ostensibly provided for an absolute or strict liability. Furthermore, the Act defined "*cannabis resin*" specifically and distinguished it from the other defined term "*cannabis*"; the former referring to the "separated resin" (hashish) and the latter referring to the "flowering or fruiting tops" (marijuana) of the plant.[45]

Judicial controversy over the Act apparently commenced upon its enactment, and culminated in the case of *Lockyer v. Gibb*,[46] which represented the leading interpretation of the statute prior to its examination by the House of Lords. In *Lockyer*, a Queen's Bench Division decision, the defendant, when stopped by the police, was found to be carrying a small bottle of "tablets" inside a large totebag. Upon analysis the tablets were found to contain morphine sulfate, a "dangerous drug" within the Act and Regulations. The defendant contended that she did not know what was in the bottle, nor what the tablets contained. The trial court convicted the defendant, finding that the offense in question was sufficiently established by a bare unauthorized possession and that defendant's disclaimer of knowing possession was no defense, inasmuch as *mens rea* was not an essential ingredient

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[44] *See* note 41 *supra*.

[45] Sec. 24 (1) In this Act the following expressions have the meanings hereby assigned to them respectively, that is to say:—

"cannabis" (except where used in the expression "cannabis resin") means the flowering or fruiting tops of any plant of the genus cannabis from which the resin has not been extracted, by whatever name they may be designated;

"cannabis resin" means the separated resin, whether crude or purified, obtained from any plant of the genus cannabis . . . ."

Dangerous Drugs Act 1965, c. 15.

[46] [1966] 3 W.L.R. 84.

of the charge.

On appeal, the Queen's Bench Division affirmed, stating that section 9 of the Regulations[47] "on the face of it imposed an absolute liability"[48] subject only to license and authorization, and, while it was necessary to show (as had been shown) that the appellant knew she possessed *an article* which turned out to be a drug, it was not necessary that she should know also that the article was in fact a drug.

Lord Parker, in his opinion, contrasted the elements of *mens rea* and possession:

> In my judgment, before one comes to a consideration of a necessity for *mens rea* or, as it is sometimes said, a consideration of whether the regulation imposed an absolute liability, it is of course necessary to consider possession itself. In my judgment, it is quite clear that a person cannot be said to be in possession of some article which he or she does not realize is, or may be, in her handbag, in her room, or in some other place over which she has control.[49]

However, as to the defendant's further contention that she could not be convicted unless it was proved that she *knowingly* possessed the drugs, Lord Parker disagreed and opined that:

> I cannot, though it is not conclusive, omit from consideration the fact that the word "knowingly" does not appear before possession.[50]

He refused to follow a Canadian decision[51] interpreting a similar Canadian statute as requiring a presence of *mens rea* for conviction, and concluded that it was "not necessary that defendant should know that in fact she possessed a drug . . . ," for conviction under the British statute.[52]

Lockyer was scrupulously followed by the lower courts in hundreds of cases, and also by the Court of Appeal, Criminal Division, in the case of *Regina v. Warner*.[53] In *Warner*, police stopped the driver of a van, and found therein one case containing bottles of perfume and another case containing twenty thousand

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[47] Section 9 is almost identical in language to section 3, the section here at issue. *See* note 41 *supra*.

[48] 3 W.L.R. at 88.

[49] [1967] 2 Q.B. at 248.

[50] *Id.* at 249.

[51] Beaver v. Regina, [1957] S.C.R. 531.

[52] 2 Q.B. at 251.

[53] [1967] 1 W.L.R. 1209 (C.A.).

amphetamine sulphate tables. The defendant testified that he picked up the cases thinking them both to be perfume and, therefore, did not know that one case contained illegal drugs. The trial judge instructed the jury that absence of knowledge by the defendant of the second parcel's contents could be considered only in mitigation of sentence and could not be treated as a total defense.

On appeal, the decision of the trial court was affirmed.[54] The Court of Appeal, in applying *Lockyer*, held that the offense charged was one of absolute liability, and that, therefore, the fact that the driver was ignorant of the second parcel's contents was no defense. *Warner* was appealed further, and culminated in the first House of Lords decision on the issue, *Warner v. Metropolitan Police Commissioner*.[55] In the thirty-nine page decision, the five Law Lords discussed thoroughly all issues, but the only holding they offered was that the appeal be dismissed.

Lord Reid, in a separate concurring opinion, contended that defendant's absence of knowledge of the true nature of an article he possessed should be a valid defense, should that article, in fact, turn out to be contraband:

> Any person may, and most people do, from time to time take into their custody an apparently innocent package without ascertaining what it contains, without having the slightest reason to suspect that it may contain anything out of the ordinary, and indeed without having any right to open the package and see what is in it. If every person who takes such a package into his custody must do so at his peril, then this goes immensely farther than any enactment imposing absolute liability has yet been held to go, and I refuse to believe that Parliament can ever have intended such an oppressive result.[56]

Lord Reid gave a further example:

> [S]uppose that an innkeeper is handed . . . a box or package by a guest for safe keeping. He has no right to open the box—it may be locked. If he is told truthfully what is in it, it may be right to say that he is in possession of the contents. But what if he is told nothing or is told that it contains jewellery and it contains prohibited drugs? It may contain nothing but drugs or it may contain both jewellery and drugs or it may be an antique trinket apparently empty but containing drugs hidden in a

[54] Regina v. Warner, [1967] 3 All E.R. 93.

[55] [1968] 2 W.L.R. 1303 (H.L.). Note that *Warner* was decided in May, several months prior to Lennon's November conviction.

[56] *Id.* at 1316.

> small secret recess. It would in my opinion be irrational to draw distinctions and say that in one such case he is in possession of the drugs and therefore guilty of an offense, but not in another. It is for that reason that I cannot agree with the contention that if the possessor of a box genuinely believes that there is nothing in the box then he is not in possession of the contents, but that on the other hand, if he knows there is something in it he is in posession of the contents though they may turn out to be something quite unexpected.[57]

Unfortunately, Lord Reid's discussion remains dictum. As for the remainder of the court, two Lords thought that, while true *mens rea* was not requisite, the statute did require that the defendant have had a reasonable opportunity to detect the contents, and two Lords stated that the statute was reasonable as interpreted by *Lockyer* and the lower courts, so that with respect to these four opinions, it has been said that:

> When we turn to the majority judgments we find that their Lordships seem to have had little difficulty in holding that Parliament intended an absolute offence when it enacted . . . the Drugs Act of 1964.[58]

Therefore, *Warner*, decided on a technical ground,[59] let *Lockyer* stand as good law, although that decision was seriously called into question by at least three of the *Warner* court's five members.

Thus, the British statute, which was considered carefully by the House of Lords of England, was consistently held to be one of "strict liability," so that the fact that a defendant lacked any knowledge of possessing a drug was no defense against prosecution under the statute; it was merely an element which might be pleaded in mitigation of punishment.

This was the status of the law when Lennon pleaded guilty to violation of the Act and Regulations. Subsequently, the House

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[57] *Id.* at 1318.

[58] Note, *Possession of Drugs and Absolute Liability*, 84 L.Q. REV. 382, 387 (1968). *See also* Note, *Possession of Drugs—The Mental Element*, 26 CAMB. L.J. 179 (1969).

In the instant case, the "dangerous drug" was found inside Mr. Lennon's binocular case which had only recently been delivered to Mr. Lennon's home, and which had been in the possession of many others for a period of the previous six months. Mr. Lennon was totally unaware of the contents of the binoculr case. *In re* Lennon, Transcript of Proceedings at 83.

[59] The appeal was dismissed on the ground that, as a matter of law, no reasonable jury could find the facts as defendant related them. Criminal Appeal Act 1966, § 4, c. 14.

of Lords did modify its position somewhat with respect to one particular section of the Regulations.

In *Sweet v. Parsley*,[60] a case decided some time after Lennon's plea, section 5(b) of the Act[61] dealing with the duties of a landlord, was held to require an element of *mens rea* for prosecution. In *Sweet*, the defendant was the tenant of a farmhouse, who, after moving out herself, sublet the premises to various subtenants, and occasionally returned to collect rents. Police had searched the house and found small quantities of drugs. The defendant was then charged with and convicted of being concerned in the management of premises which were used for the purpose of smoking *cannabis* or *cannabis* resin, contrary to section 5(b).[62] On appeal, the conviction was upheld.[63] Although the appeals court rejected the proposition that defendant's responsibility for the rent and maintenance of the house could of itself establish her concern in the "management of the premises," it nevertheless found that the trial court was justified in its determination that the appellant was concerned in the "management of the premises" under all circumstances of the case. Notably, Miss Sweet's ignorance of the premises' being used for the purpose of smoking illegal drugs was held to be no defense.

In January, 1969, the House of Lords considered *Sweet* and reversed the appeals court.[64] The highest court held that no offense under section 5(b) had been disclosed inasmuch as that section required a showing of defendant's intention to use the premises for smoking an illegal drug. Additionally, two Lords found that, for conviction under section 5(b), the defendant must have had actual knowledge of the particular purpose to which the premises were being put. Thus, although *Sweet* seemed to posit a *mens rea* requirement under section 5(b), the decision did not purport to effect a similar modification with respect to other sec-

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[60] [1969] 2 W.L.R. 470 (H.L.).

[61] *Penalization of Permitting Premises to be Used for Smoking Cannabis, & c.*

Sec. 5 If a person—

(a) being the occupier of any premises, permits those premises to be used for the purpose of smoking cannabis or cannabis resin or of dealing in cannabis resin (whether by sale or otherwise); or

(b) is concerned in the management of any premises used for any such purpose as aforesaid; he shall be guilty of an offence against this Act.

Dangerous Drugs Act 1965 c. 15.

[62] *Id.*

[63] [1968] 2 Q.B. 418.

[64] [1969] 2 W.L.R. 470 (H.L.).

tions of the Act and consequently left *Warner* and *Lockyer* unaffected.

The theoretical distinction between *Warner* and *Sweet* was thoroughly analyzed in many law reviews and several disparate approaches were taken.[65] However, with respect to the practical holding of the case, the commentators were in agreement that in *Sweet*,

> [t]he House was dealing with an offence quite distinct from that which arose in *Warner* [prosecuting landlords for what their tenants did, rather than prosecuting simple possessors] and was clearly substantially influenced by the social implications of holding that section 5(b) did not require a mental ingredient.[66]

Interestingly enough, the 1965 Act under which Lennon was convicted was repealed and replaced by the Misuse of Drugs Act of 1971,[67] which does allow "lack of knowledge" as a defense to a possession charge. Thus Lennon's unknowing possession, although criminal in 1968, would be innocent today.

In reprise, an overview of the case law on the British statute under which Lennon was convicted reveals that the highest court of England construed it as one of "strict liability," not requiring any component of *mens rea* for conviction.[68] Consequently, Lennon's guilty plea served only as an admission that he possessed a certain receptacle; that Lennon in fact had any idea that an illicit drug was contained therein was a state of affairs neither affirmed by Lennon nor inquired into by the court.

IV. SECTION 212(A)(23): PROBLEMS OF INTENTION AND CONSTRUCTION

The statute at the foundation of John Lennon's deportation plight, section 212(a)(23) of the Immigration Act,[69] leaves much to be desired in the way of clarity. An examination of the legisla-

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[65] *See, e.g.*, Note, *Absolute Liability*, 85 L.Q. REV. 153 (1969).

[66] Miers, *The Mental Element*, 20 N. IR. L.Q. 370, 371 (1969).

[67] Misuse of Drugs Act 1971, § 28 *et seq.*, c. 38.

[68] *Cf.* Regina v. Marriott, [1971] 1 W.L.R. 187 (C.A.). In that case, the court indicated "that nothing said in *Warner's* case negatives the necessity for some . . . direction" to the jury to find for the Crown only where it found that accused "had reason to know" of a proscribed drug. *Id.* at 190. It should be noted that *Marriot* was decided two years after Lennon's conviction—and merely weeks before the *Warner* rule was modified by statute. *See* note 67 *supra*.

[69] 8 U.S.C. § 1182(a)(23) (1970).

tive history behind that statute,[70] as well as related case law,[71] fosters the argument that Congress never intended section 212(a)(23) to apply to a person in Lennon's circumstance. On a second level, a review of the legislative use of the terms marijuana, *cannabis* and *cannabis* resin indicates that, regardless of actual congressional intent, section 212(a)(23) is too nebulously drafted to include in its exclusionary ambit the offense Lennon had committed.[72]

A. "Possession" Must Involve Trafficking Potential

When originally enacted as part of the Immigration and Nationality Act of 1952,[73] section 212(a)(23) did not contain a provision for the excludability of aliens convicted of simple drug possession offenses. Thus, under that earlier version of the law, Lennon would have faced no peril. More importantly though, a review of the relevant legislative history and case law makes it substantially certain that even after the section was amended by the Narcotics Control Act of 1956[74] to include conviction for the mere possession of narcotics, the type of "possession" of which Lennon was convicted was not contemplated by the amendment.

In the case of *Varga v. Rosenberg*,[75] an alien who had been convicted under a California statute[76] of being under the influence of narcotics was held not subject to deportation under the federal statute providing for deportation of any alien who was convicted of a violation "of any law or regulation relating to illicit possession of narcotic drugs or marijuana."

The petitioner in *Varga* was a Mexican citizen admitted to the United States in 1961 as a permanent resident; in December of 1963, he was convicted here of violating section 11721 of the California Health and Safety Code,[77] which prohibited the use of narcotics. Subsequently the Service held a hearing in order to decide whether Varga was deportable under section 241(a)(11).[78]

The issue before the trial court was whether the bar in section

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[70] *See* text accompanying notes 73-83 *infra*.
[71] *See* text accompanying notes 75-85 *infra*.
[72] *See* text accompanying notes 87-126 *infra*.
[73] Act of June 27, 1952, 66 Stat. 166.
[74] Act of July 18, 1956, 70 Stat. 567.
[75] 237 F. Supp. 282 (S.D. Cal. 1964).
[76] CAL. HEALTH & S. CODE § 11721 (West 1964).
[77] CAL. HEALTH & S. CODE § 11721 (West 1964).
[78] 8 U.S.C. § 1251(a)(11) (1970).

241(a)(11), the parallel provision to section 212(a)(23),[79] was brought into play by petitioner's California conviction. The court reviewed the legislative history of the statute and concluded that "[w]hile Congress undoubtedly intended to close 'every possible loophole where a person had been convicted of a crime relating to the possession of narcotics,' the legislative history indicated that the Committee's aim was to eliminate traffic in narcotics as distinguished from use."[80] The court quoted the concluding words of a House report:

> Because contact with a drug is an essential prerequisite to addiction, elimination of drug servility on the part of addicted persons can best be accomplished by the removal from society of the illicit *trafficker*. . . .[81]

The court concluded by stating that "Congress undoubtedly has aimed its attack upon possession which would give the possessor 'such dominion and control . . . as would have given him the power of disposal.' "[82] Therefore, the court reasoned, inasmuch as Varga was hardly in a position to traffic in a drug which was already in his system, he could not be said to have had the type of possession which would have given him such dominion and control as to come within the ambit of the section 241(a)(11) deportation provision.

Inasmuch as the "deportable" and "excludable" subsections of section 241 are identical,[83] it follows that the *Varga* interpretation of what kind of possession was intended to trigger the deportation provision of section 241(a)(11) should be equally applicable to section 212(a)(23). Consequently, it would seem that Mr. Lennon's case is included in neither, for the British statute under which Lennon was prosecuted mandated conviction even where the defendant was totally unaware of any proscribed possession on his part; a party ignorant of the very act of possession certainly lacks such dominion and control with respect to the object of possession as would allow his disposing of it.

Furthermore, it would seem that the Service has acquiesced

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[79] 8 U.S.C. § 1182(a)(23) (1970). Insofar as they concern conviction for illicit marijuana possession, section 241(a)(11), the deportation provision concerning resident aliens, and section 212(a)(23), the exclusion provision concerning aliens seeking entry, contain virtually identical language.

[80] 237 F. Supp. at 284.

[81] *Id.*, *citing* 1956 U.S. CODE CONG. & ADMIN. NEWS 3274.

[82] 237 F. Supp. at 284.

[83] *See* note 79 *supra*.

in the *Varga* rationale. In *Matter of Sum*,[84] decided by the Board of Immigration Appeals in 1970, the Board overruled previous precedents and held that a conviction for unlawful *use* of proscribed drugs would not make an alien deportable as one who has been convicted of unlawful *possession* of such drugs. In that case, the respondent had been convicted of violating section 11720 of the California Health and Safety Code[85] for "taking or otherwise using any narcotics."[86] The Board, citing *Varga* and adopting that case's approach to possession, observed that *Varga* should be binding on the Service inasmuch as the Solicitor General of the United States declined to authorize an appeal in *Varga*.

To recapitulate, although in one sense *all* laws touching on narcotics relate to their traffic, the immigration laws limit their concern to convictions which directly touch upon traffic or, in cases of possession convictions, to those which clearly require a type of possession which conjoins a power to traffic in or dispose. Knowledge of possession is an essential element of such power, and this type of knowledge is precisely what Lennon lacked. Although Lennon's lack of knowledge was not a defense to the British statute under which he pleaded guilty and was convicted, this conviction was not of a character which would render him excludable from United States residence, because although his actions constituted "possession" within the British statute, that type of "possession" was at variance with the meaning of the term as found in section 212(a)(23) of the Act, and as construed in *Varga* and *Sum*.

B. *Cannabis Resin and Marijuana*

Not the least cumbersome problem involved in redacting a legislative proscription of dangerous drugs is the task of compiling and describing a definitive schedule of such banned substances.[87] Where a statute fails to include a sufficiently detailed

[84] Interim Dec. No. 2045, file A47 130 47 (Board of Immigration Appeals, May 22, 1970). *See also In re* Schunck, Interim Dec. No. 2137, file A13 120 144 (Board of Immigration Appeals, Mar. 23, 1972). *Cf. In re* Martinez-Gomez, Interim Dec. No. 2138 (Board of Immigration Appeals, Mar. 23, 1972), in which the Board held that a conviction under a California statute prohibiting the maintenance of premises for the selling of drugs *was* a conviction for violation of a law relating to "illicit traffic in narcotic drugs or marijuana" within the meaning of section 241(a)(11) of the Immigration Act.

[85] CAL. HEALTH & S. CODE § 11720 (West 1964).

[86] CAL. HEALTH & S. CODE § 11720 (West 1964).

[87] *See, e.g.*, UNIFORM CONTROLLED SUBSTANCES ACT §§ 202-12 (approved by the National Conf. of Comm'rs on Uniform State Laws in 1970).

definition of a particular drug, or neglects to incorporate one by reference, courts have surprised legislators by finding that a substance ostensibly included within the legislative ban was in fact deemed unincluded.[88] This history of strict construction with respect to drug legislation, when applied to the statute involved in Lennon's case,[89] leads to the conclusion that, regardless of congressional intent, section 212(a)(23) of the Immigration Act does not include *cannabis* resin convictions within its terms.

Prior to a detailed analysis of the American immigration statute, it is revealing to note that the British statute under which Lennon was convicted did provide specific definitions for the substances which it proscribed. A schedule appended to the Act contained, *inter alia*, separate definitions for the terms *cannabis* (commonly known as marijuana) and *cannabis* resin (commonly known as hashish).[90] Lennon's conviction dealt solely with the latter form of *cannabis*, or hashish.

In studying our own Immigration Act, one must note at the outset that it nowhere refers specifically to hashish or *cannabis* resin, nor does it anywhere contain a specific definition of the term "marijuana."[91] Thus, in determining whether a hashish possession conviction is one relating to the possession of marijuana within the limits of the Immigration Act, we must look to legislative history. The term "marijuana" made its first appearance in our country's immigration laws in a 1931 act,[92] which remained in force until the enactment of the Walter-McCarran Act of 1952.[93] The former act provided

> [t]hat any alien (except an addict who is not a dealer in, or peddler of, any of the narcotic drugs mentioned in this Act) who, after the enactment of this Act, shall be convicted and sentenced for violation of or conspiracy to violate any statute of the United States taxing, prohibiting, or regulating the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium,

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[88] *See, e.g.*, Rojas-Gutierrez v. Hoy, 161 F. Supp. 448 (S.D. Cal. 1958), *aff'd*, 267 F.2d 490 (9th Cir. 1959); Mendoza-Rivera v. Del Guercio, 161 F. Supp. 473 (S.D. Cal. 1958), *aff'd sub nom.* Hoy v. Mendoza-Rivera, 267 F.2d 451 (9th Cir. 1959).

[89] 8 U.S.C. § 1182(a)(23) (1970).

[90] Dangerous Drugs Act 1965, c. 15, schedule 1, § 2.

[91] Significantly, section 101 of the Immigration Act, 8 U.S.C. § 1101 (1970), the general definitional section, provides no definition for marijuana, although the term is used in sections 212(a)(23) and 241(a)(11) of the Immigration Act.

[92] Act of Feb. 18, 1931, 46 Stat. 1171.

[93] Act of June 27, 1952, ch. 477, 66 Stat. 166.