an element of that crime. The entire rationale for exclusion--criminal conduct--is lacking.

The immigration judge discussed the question of scienter in detail. It is believed his conclusions are erroneous.

First, the immigration judge reviewed the English law and found a requirement of scienter to exist in that law. Reference to the English law does not substantiate this:

At the time of the plea, November 28, 1968, the English law read in pertinent part as follows:

> Dangerous Drugs (No. 2) Regulations 1964
>
> 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."

In the subsequent year, the English changed their law to provide for knowing possession.

The immigration judge, reviewing the English cases (p. 20 of his opinion) found in the words of Lord Parker C.J. in Lockyer v. Gibb (1967) (2 Q.B. 243) an interpretation of the old law indicating that mens rea is required for a conviction of possession:

> "In my judgment it is quite clear that a person cannot be in possession of some article which he or she does not realize is, for example, in her handbag, in her room, or in some other place over which she has control."

Such language might appear to justify his conclusion that:

> "In other words, completely innocent and unknowing custody or potential control over a drug is not possession within the meaning of the act and regulation." (opinion p. 20)

In fact the conclusion is not justified.

John Lennon pleaded under a statute which on its face did not require knowledge. The lofty assumptions of Judge Parker in all probability were not a part of the administration of that statute in magistrate's court.

Both Lennon's testimony here and the change of the language of the English statute confirm this fact. In U.S. v. Carll, 105 U.S. 611 (1881), the Court made the distinction between the assumption that intent was an element and the need for the allegation of criminal intent as part of the crime charged. The fact that the statute in question, read in the light of the common law and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent. 108 U.S. at 612 and 613. John Lennon was not advised of the need for criminal intent, nor was such intent stated in the charge or the plea.

A further reading of the opinion below susta the conclusion that scienter was not a requirement under En law. The hearing officer cites Regina v. Marriott (1971)

Crim. L.R. 1972 in which the English court states that it does not lie in the mouth of a defendant to say he does not know of the contents of a box within his possession:

> "If a man is in possession, for example, of a box and he knows there are articles of some sort inside it and it turns out that the contents comprise, for example, cannabis resin, it does not lie in his mouth to say: 'I did not know the contents included resin.' On the contrary, on these facts, he must be regarded as in possession of it and, if not lawfully entitled, would, therefore, be guilty of an offense such as that charged in the present case."

These words are not consistent with the view of Lord Parke

In terms of American law this statement is simply wrong. While a jury or a judge--might not believe what lies in this man's mouth, the man has no other way to express what exists in his head. And it is what exists in his head, his state of mind, his mens rea, which is what makes the possession criminal. *

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* In the words of the court in U.S. v. Lester, 363 F.2d 68 (6th Cir. 1966): "True it is, of course, that criminal intent is an element of each crime charged in the indictment; indeed an essential element of every fel

Presumably it is criminal conduct that the Constitution and Congress intended to punish, not just the conduct. Yet a person cannot act criminally unless he knows what he is doing. It is not criminal to have a binocular case in one's apartment, nor to be ignorant of its contents. The mistake here results from a confusion of issues of credibility and standards of proof with standards of law.* The immigration judge concluded:

> "Finally the plea of guilty would admit that he was aware that there was some extra substance in the binocular case which was in his home but not necessarily that he knew it was cannabis resin."
> (Opinion p. 21)

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* An example best makes this point: If a defendant trying to show that he did not know that the white powder in his possession was heroin produced as a witness a doctor who explained that he had given the defendant the white substance thinking it was a different drug, no American court would refuse to entertain such proof and, upon believing the proof, acquit the defendant.

This conclusion is mistaken, for under the English statute, absent the scienter requirement, the only admission that can be inferred from a guilty plea is that the binocular case was in the apartment. Nothing in the plea nor the charge indicates that Lennon knew of the presence of the cannabis resin. But, more importantly, the officer below finds that by the plea under English law Lennon did not admit that he knew the substance was marijuana. In other words, the English did not require scienter--knowledge of illegality--to obtain a conviction for possession of marijuana. Apparently, criminal liability--according to the immigration judge--depends on the chance that someone has substituted "a substance" for binoculars.

Can it really be the law of the United States that a man who fails to check the contents of each

container in an apartment in which he is temporarily living can be excluded from the United States for his carelessness?

The immigration judge, given the uncertainty of the state of English law, proceeds to find that the omission of a requirement of guilty knowledge "is not as foreign and outrageous to the system of jurisprudence of the United States as counsel for the respondent would have me believe." (p. 21 and 22). A minority of jurisdictions, he finds, do not require knowledge as an element. Again, his conclusion is mistaken. The lack of a requirement that the state prove defendant knowingly possessed a certain drug is antithetical to our most basic principles of justice and our concept of criminality, as well as being in opposition to the law in our fifty states.

The immigration judge has incorrectly concluded that if a legislature eliminates the requirement of a

"specific intent to sell" as an element of possession it thereby makes "mere possession" the grounds of illegality.

In fact, in the very case cited for this proposition by the immigration judge (p. 24 of opinion) the following language appears:

> "Possess as used in criminal statutes, ordinarily signifies an intentional control of a designated thing accompanied by a knowledge of its character..." State v. Reed, N.J., 170 2d419 (1961)

It is true that in a number of jurisdictions "specific intent to sell" is not an element of the crime of possession; however, a distinction must and indeed has been drawn between this "specific intent" and "general intent"--commonly known as guilty knowledge or scienter. The rule requiring general intent as an essential element of possession prevails in the United States. See 91 ALR2d 810, also subsequent cases supplement in this annotation, i.e., State v. Hennings, Wash., 475

P.2d 926 (1970), Spataro v. State, Fla. 179 So.2d 873 (1965), State v. Gilman, R.I. 291 A.2d 425 (1972).

In a 1970 case, the Supreme Court of the State of Washington stated:

> "We respectfully disagree with the conclusion in Henker [relied on by the immigratic judge] that the legislative objective was to eliminate scienter (willful guilty knowledge) as an essential ingredient of the crime of trafficking in narcotics. As we discern the legislative purpose, it is to make possession of narcotics a crime without specific intent to sell. However, the elimination of the requirement of proof of a specific intent to sell does not, we believe, warrant the conclusion that a general intent--willful guilty knowledge--need not be proven."
> State v. Hennings, Wash., 475 P.2d 926, 930 (1970)

The immigration judge relies upon State v. Henker, 314 P.2d 645 (1957) and State v. Boggs, 358 P.2d 124 (1961), both State of Washington cases. While both cases appear to sanction the absence of scienter, they in fact do not. Henker, as seen in the interpretation in

Hennings, supra discussed the absence of intent to sell as an element of possession. In fact the jury below was instructed that it had to find general intent--knowledge--to convict the defendant of possession. In Boggs the court shifted the burden of proving guilty knowledge from the prosecution to the defendant, once possession was proven. This view of Boggs has been affirmed by the Supreme Court of Washington in a recent case:

> "The rule in this state is predicated upon our construction of R.C.W. 69.33. We have consistently held that it is not necessary for the prosecution to show knowledge or intent on the part of the accused to show knowledge or intent on the part of the accused to violate the act. State v. Boggs, 57 Wash. 2d 484, 358 P.2d 124 (1961), State v. Reid, 66 Wash. 2d 243, 401 P.2d 988 (1965); State v. Gania, 69 Wash. Dec. 2d 546, 419 P.2d 121 (1966). Mere possession is sufficient, State v. Henker, 50 Wash. 2d 809, 314 P.2d 645 (1957), absent a showing by the defendant that his possession was unwitting..."
> Washington v. Mantell, 430 P.2d 980, at 982 (1967)

Thus, the State of Washington law, as shown in the above cases, shifts the burden from the prosecution of proving wilful, intention possession of narcotic drugs, to the defendant of proving as a defense

that he did not wilfully, intentionally possess the narcotic drug in question; the question is one of credibility for the jury. If the jury believes the defendant's claim that his possession was unwitting, the defendant may not be convicted of illegal possession of a narcotic drug.

The immigration judge's discussion of the constitutionality of the omission of scienter in criminal cases such as U.S. v. Balint, 258 U.S. 252 (1922), U.S. v. Greenbaum, 138 F.2d 437 (3rd Cir. 1943)(p. 24 and 25) is clearly inapposite to the instant case.

The Balint case involved a conviction for violation of Section 2 of the Narcotics Act, 38 Stat. 786, selling narcotics without a written form issued by the Commissioner of Internal Revenue, ostensibly a strict liability offense. The defendants therein were in the business of dealing in drugs; they were drug sellers dealing with the public. The Balint decision is clearly understandable as it imposes a strict liability

and a higher standard of responsibility on those who consciously engage in a business such as selling drugs. Such individuals who have assumed the responsibility of their chosen profession "will not be heard to plead in defense good faith or ignorance." This conclusion seems inescapable in light of the widespread harm to the public which such an individual's acts may cause whether performed with or without knowledge. The court in Balint discussed its interpretation of Section 2 of the Narcotic Act, which omitted scienter and pursuant to which defendants were indicted:

> It is very evident from a reading of it that the emphasis of the section is in securing a close supervision of the business of dealing in these dangerous drugs by the taxing officers of the government... Its manifest purpose is to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute, and, if he

> sells the inhibited drug in ignorance of its character, to penalize him....Doubtless considerations as to the opportunity of the seller to find out the fact, and the difficulty of proof of knowledge, contributed to this conclusion."
>
> U.S. v. Balint, 258 U.S. 250, 259 (1922)

In "public welfare offenses" the defendant is charged with a duty to inspect his product. His failure to do so is criminal. These cases do not involve as the immigration judge seems to assume an absence of criminal mens rea. The mens rea is that of recklessness or of negligence. The defendant is charged with a duty to know that which he is disregarding.

Thus in U.S. v. Dotterweich, 318 U.S. 753 (1943) a prosecution of a jobber in drugs and a president for shipping in interstate commerce adulterated and misbranded drugs; the company violated a standard of care in U.S. v. Greenbaum, 138 F.2d 437 3rd Cir. 1943 (the president of a marketing company was indicted for unlawfully introducing cans of adulterated

eggs into interstate commerce. For exhaustive listing see Sayre, "Public Welfare Offenses," 33 Colum. Law Rev. 55 (1933).

These cases are hardly analogous to the situation of an individual living in the apartment not his own. There may be some obligation under the law to inspect the floor to protect licensees from injury, but there is no duty giving rise to criminal liability to assure that the apartment is free of illegal substances.

The distinction between public welfare offenses, omitting scienter (mens rea) and those offenses in which scienter cannot be omitted has been well documented.

> The modern rapid growth of a large body of offenses punishable without proof of a guilty intent is marked with real danger. Courts are familiarized with the pathway to easy convictions by relaxing theorthodox requirement of a mens rea. The danger is that in the case of true crimes where the penalty is severe and the need for ordinary criminal law safeguards is strong, courts following the false analogy of the public welfare

offenses may now and again similarly relax the mens rea requirement, particularly in the case of unpopular crimes, as the easiest way to secure desired convictions... The group of offenses punishable without proof of any criminal intent must be sharply limited... The problem is how to draw the line between those offenses which do and those which do not require mens rea... [T]wo cardinal principles stand out upon which the determination must turn.

"The first relates to the character of the offense. All criminal enactments in a sense serve the double purpose of singling out wrongdoers for the purpose of punishment or correction and of regulating the social order. But often the importance of the one far outweighs the other. Crimes created primarily for the purpose of singling out individual wrongdoers for punishment or correction are the ones commonly requiring mens rea; police offenses of a merely regulatory nature are frequently enforceable irrespective of any guilty intent.

"The second criterion depends upon the possible penalty. If this be serious, particularly if the offense be punishable by imprisonment, the individual interest of the defendant weighs too heavily to allow conviction without proof of a guilty mind. To subject defendants entirely free from

> moral blameworthiness to the possibility of prison sentences is revolting to the community sense of justice; and no law which violates this fundamental instinct can long endure. Crimes punishable with prison sentences, therefore, ordinarily require proof of a guilty intent."
> Sayre, supra, at 72, 79

Justice Jackson, in Morisette v. United States, 34 U.S. 246 (1952), discussed the requirement of intent as a basis for criminal liability. Citing Blackstones view that any crime must involve "vicious will" he notes that some inroads have been made on the requirement of intent:

> "Most extensive inroads upon the requirement of intention, however, are offenses of negligence, such as involuntary manslaughter or criminal negligence and the whole range of crimes arising from omission of duty."
> footnote, 342 U.S. at 251.

Most aptly, Justice Jackson points to Holmes' statement in The Common Law that "even a dog distinguishes between being stumbled over and being kicked." It is to be hoped that one can ask as much of American jurisprudence.

B. Appellant's Conviction for Possession of Marijuana is Not a Conviction for "Illicit Possession" of Marijuana Within the Meaning of Section 212(a)(23) of the Immigration and Nationality Act.

The statute pursuant to which the Immigration Service seeks to exclude appellant reads in pertinent part as follows:

> "Except as otherwise provided in this Act, 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..."
> Immigration and Nationality Act, Sec. 212(a)

Clearly, as the immigration judge admits, the purpose of this statute is to assure that an alien who has been convicted of "illicit" possession of marijuana (as defined by this section) may be excluded. The question arises as to Congressional intent in employing the term "illicit." The use of this adjective, a term

appearing nowhere else in the Immigration Act, to modify possession indicates more than mere possession; "illicit" in this context imports criminal unlawfulness and at least knowing possession. Consideration of the dire penalty of deportation involved is further evidence of the fact that knowing possession was intended by Congress. Additionally, the immigration judge makes reference to the Congressional intent underlying Sections 212(a)(23) and related 241(a)(11):

> "...it was the intention of Congress to make deportable those who had been convicted merely of illegal possession of a narcotic drug, though it erroneously concluded that under the decided cases mere possession would result in deportability under the statute as originally drawn. The Congressional expectation was erroneous and necessitated the subsequent amendment of the statute..."
> Opinion, p. 15

The current state of statutory and common law in the United States as discussed substantiates the "knowing possession" interpretation of the term "illicit".

Thus, a conviction for "illicit" possession

of marijuana gives statutory recognition and reinforcement to the requirement of knowledge of the presence of the marijuana as an essential element of the conviction in American law. This essential element of knowing possession was absent from the charge, plea and conviction of John Lennon. The English statute pursuant to which Lennon was convicted (the Dangerous Drugs Act of 1965) did not include knowing possession as an element of the crime and, therefore conviction cannot be a basis for exclusion pursuant to the statutory provision requiring a conviction for "illicit possession."

A serious discrepancy exists between the actual crime appellant has been convicted of and the crime for which the Immigration Service seeks to exclude him.

Where the crime for which one has been convicted (i.e. mere possession) is different from the asserted grounds for conviction in the deportation

order (illicit possession), although both offenses may be very similar in nature, the propriety of the deportation order is seriously open to question. Ablett v. Brownell, 240 F.2d 625 (D.C. Cir. 1957); Cf. Thromoulopolou v. U.S., 3 F.2d 803 (First Cir. 1925).

In fact, if the elements of the statute pursuant to which the alien is to be deported have not been explicitly found by the hearing examiner, the alien may not be deported. Thromoulopolou v. U.S., supra. Section 241(a)(11) of the Immigration and Nationality Act requires a finding of a conviction of a "violation of...any law or regulation relating to the illicit possession of...marihuana..." Given the Congressional intent underlying this statute, the potential penalty involved and the common interpretation of the offense of illegal possession of marihuana by courts in each of the 50 states, a conviction for mere possession or a

finding of simple possession is insufficient to satisfy the "illicit possession" requirement of the statute.

John Lennon's conviction does not fall within constitutional standards of due process nor the purview of Section 241(a)(11) of the Immigration and Nationality Act and consequently he may not be deported pursuant thereto.

II. THE PENALTY OF EXCLUSION FOR POSSESSION OF MARIJUANA IS EXCESSIVE, ARBITRARY AND DISCRIMINATORY IN VIOLATION OF THE FIFTH AND EIGHTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

John Lennon is one of the world's best and most famous musicians. He has also produced important works in the fields of painting and literature. He has extensive business interests in the United States and pays high taxes here. During the two years he has been living in our country, he and his wife, a well-known avant garde artist and musician (who has been granted resident alien status) have donated their services in many charitable and cultural projects. In short, Mr. Lennon is a highly "desirable alien" and this fact has been recognized by the Immigration and Naturalization Service which has granted him a Third Preference visa reserved only for those who have made valuable contributions in the arts and sciences.

The only barrier to Mr. Lennon's being granted resident alien status is his plea of guilty over five years ago to unknowing possession of a small quantity of marijuana, for which he received a small fine.

The circumstances surrounding this plea of guilty (discussed under Point I of this Memorandum), the ambiguities in the statute under which Mr. Lennon has been charged, and the constitutional problems raised by it, taken all together, compel the conclusion that the extreme penalty of exclusion is excessive, arbitrary and discriminatory in violation of the Fifth and Eighth Amendments to the United States Constitution.

A. The Classification of Marijuana with Narcotics is Irrational

The anti-marijuana laws in the United States were, without exception, passed before any empirical study whatever was made of the relationship between the use of the drug and any public or private harm.[1] In fact, all of the available modern scientific evidence shows marijuana to be relatively harmless. It is not a narcotic[2] and is not addictive. It causes

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1. Bonnie, Richard J. and Whitebread, Charles H., "The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition," 56 Va. L. Rev. 971, 1011-1012 (1970).

2. The Challenge of Crime in a Free Society, Report by the President's Commission on Law Enforcement and Administration of Justice (Washington, D.C., G.P.O. 1967) p. 224.

no serious psychological dependency in the user,[3] being far easier to give up than cigarettes or alcohol.[4] No evidence has been produced to show that marijuana use, unlike alcohol consumption, has a direct relationship to crime.[5] Marijuana does not lead to heroin use.[6] There is no known link between marijuana use and mental illness[7] and adverse reactions

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3. Testimony of Dr. Isbell, Director of Research, U.S. Public Health Service Hospital, Lexington, Ky., witness for the prosecution, before 1951 Kefauver Committee Hearings.

4. Ibid.

5. Bonnie and Whitebread, supra at 1105; Mandel, "Problems with Official Drug Statistics," 21 Stan. L. Rev. 991,1040 (1969); Kaplan, John, Marijuana: The New Prohibition (Pocket Book Ed. 1970) at 122, 136, 264-265.

6. Kaplan, supra at 255; Bonnie and Whitebread, supra at 1106; President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Narcotics and Drug Abuse, pp. 13-14.

7. Kaplan, supra at 192; Bonnie and Whitebread, supra at 1110; Allentuck, S., and Bowman, K.M., "The Psychiatric Aspects of Marijuana Intoxication," 99 Am. J. Psychiatry (Sept. 1942) at 249.

to the drug are extremely rare.[8] Marijuana is not totally harmless, but neither is any drug, including aspirin.[9]

To classify marijuana as a dangerous drug in the same category with narcotics for the purpose of establishing a penalty for its use is irrational because it is not based on fact. There is no question that the state has the right to proscribe the use, possession and sale of marijuana. But to classify it with "hard" drugs, considering

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8. Bonnie and Whitebread, supra at 1110.

9. Kaplan, supra at 270.

See also, generally: Marijuana Reconsidered, by Lester Grinspoon, M.D. (Bantam, 1971); Marijuana: A Signal of Misunderstanding, Official Report of the National Commission on Marihuana and Drug Abuse (1972); Licit and Illicit Drugs, Consumers Union Report (1972).

the present state of knowledge concerning the comparative natures and effects of marijuana and narcotics is arbitrary and constitutionally invalid. Even if such a classification when originally made was valid because little was known about the comparative properties of various drugs, the state has a duty to keep abreast of modern scientific developments and to change its laws accordingly. People v. McCabe, 275 N.E. 407 (1971); People v. Sinclair, 30 Mich. App. 473 (1972). The United States Supreme Court has held that a classifciation which does not rest upon a reasonable basis and which is essentially arbitrary in nature constitutes a violation of the Equal Protection Clause. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911) Most recently, the Supreme Court of Illinois specifically held in People v. McCabe, 275 N.E. 2d 407 (1971) that

the grouping of marijuana with narcotic drugs was irrational and violated the Equal Protection Clause. See also People v. Sinclair, 30 Mich. App. 473 (1972).

Similarly, the grouping of marijuana with "hard" drugs under the Immigration statute is arbitrary and irrational, and this fact, at least when viewed in the context of all of the circumstances surrounding this case is a violation of the applicant's right to due process of law.

B. Excessiveness of Penalty of Exclusion Violates Applicant's Eighth Amendment Rights

The Supreme Court has recognized that deportation is "a drastic measure and at times the equivalent of banishment or exile. It is the forfeiture for misconduct of a resident in this country." Tan v. Phelan, 333 U.S. 610 (1948). In Trop v. Dulles, 356 U.S. 86, 98 (1958), the Court called deportation "a harsh sanction that has a severe penal effect."

The nature of covert penal sanctions was analyzed in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). That case involved the constitutionality of a statute authorizing denaturalization of citizens who left the country in time of war or national emergency to avoid service in the armed forces. The

court held that such expatriation was, in fact, a penal sanction and, in so doing, indicated the criteria relevant to determining whether a sanction is criminal:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment--retribution and deterrance, whether the behavior to which is applies is already a crime, whether an alternative purpose for which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned, are all relevant to the inquiry, and may often point in differing directions. Absent conclusive evidence of Congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face. 372 U.S. at 168-169.

Almost all of these criteria apply in this case.

1. Exclusion is clearly an "affirmative