v. Immigration and Naturalization Service, 389 F.2d 129 (3rd Cir., 1968), and Werrmann v. Perkins, 79 F.2d 467 (7th Cir., 1935).

Prior to the decision in Woodby v. Immigration and Naturalization Service, infra, when the test was one requiring only "reasonable, substantial and probative evidence", Courts had still held that where inferences were inconsistent, and the evidence gave equal support to each inference, the test of substantial evidence is not met. N.L.R.B. v. Shen-Valley Meat Packers, Inc., 211 F.2d 289, 293 (4th Cir., 1954), Zito v. Moutal, 174 F.Supp. 531 (N.D.Ill., 1959), and Sawkow v. Immigration and Naturalization Service, 314 F.2d 34, 38 (3rd Cir., 1963). Therefore, even prior to the Supreme Court's definitive ruling on the issue which establishes a stricter rule, the rule in existence would have prevented a finding of deportability under the facts presented at the hearing in the instant case.

However, Woodby v. Immigration and Naturalization Service, 385 U.S. 276, 87 S.Ct. 483, 17 L.Ed. 2d 362 (1966) changed the rule. The Supreme Court therein was presented with the question

in two cases (one arising in the Second Circuit, the other in the Sixth) as to what burden of proof the Government must sustain in deportation proceedings. The Court concluded that the substantial evidence rule was improper and that it is incumbent upon the Government in such proceedings to establish the facts supporting deportability by "clear, unequivocal, and convincing evidence."

> "To be sure, a deportation proceeding is not a criminal prosecution. Harisades v. Shaughnessy, 342 U.S. 580, 72 S.Ct. 512, 96 L.Ed. 586. But it does not syllogistically follow that a person may be banished from this country upon no higher degree of proof than applies in a negligence case. This Court has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land...In words apposite to the question before us, we have spoken of 'the solidity of proof that is required for a judgment entailing the consequences of deportation..."
>
> "In denaturalization cases the Court has required the Government to establish its allegations by clear, unequivocal, and convincing evidence. The same burden has been imposed in expatriation cases. That standard of proof is no stranger to the civil law.
>
> "No less a burden of proof is appropriate in deportation proceedings. The immediate hardship of deportation is often greater than that inflicted by denaturalization, which does not, immediately at least, result in expulsion from our shores.

> And many resident aliens have lived in this country longer and established stronger family, social, and economic ties here than some who have become naturalized citizens."
>
> "We hold that no deportation order may be entered unless it is found by clear, unequivocal and convincing evidence that the facts alleged as grounds for deportation are true." 385 U.S. 276, 277, 87 S.Ct. 483, 484, 17 L.Ed. 2d 363.

The proposition has been, of course, followed and was recently reiterated in Nason v. Immigration and Naturalization Service, 394 F. 2d 223 (2d Cir., 1968).

It is not surprising, therefore, that almost the exact statement is now incorporated in the Code of Federal Regulations:

> "A determination of deportability shall not be valid unles it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true." 8 CFR 242.14(a).

Respondents are charged under Section 241(a)(9) and 241 (a)(2) of the Immigration and Nationality Act as having, after admission as non-immigrants, "failed to comply with the conditions of such status", and "remained in the United States

for a longer time than permitted." Respondents denied both conclusions of law.

In order for the Government to sustain either of its charges, it is necessary that it prove the factual allegations of the Order to Show Cause which were put in issue by respondents' denial, by clear, convincing and unequivocal evidence. The only evidence adduced by the Government on these issues was the testimony given by respondent John Lennon. No independent evidence was offered.

Mr. Lennon testified, in a highly equivocal manner, that he was unable to fix upon any specific intention because his plans depended upon the status of the desperate daily search for Kyoko and of legal proceedings which were still in process in two different jurisdictions. This is, submittedly, a legitimate temporary purpose and, on the issue of abandonment of temporary purpose, is so inconclusive as to fall below the standard of proof prescribed by decisional law and regulaion for the government to prove its case on deportability.

POINT III: RESPONDENT JOHN LENNON'S CONVICTION UNDER THE BRITISH STATUTE IS NOT INCLUDED IN SECTION 212(a)(23) OF THE IMMIGRATION AND NATIONALITY ACT AS A BAR TO HIS APPLICATION FOR PERMANENT RESIDENCE.

A. Analysis of the British statute under which respondent John Lennon was convicted demonstrates that the statute did not require proof of "mens rea" for a conviction, and that a conviction could thus be obtained without proof that the accused was aware that he possessed a forbidden substance.

The British statute under which Mr. Lennon was convicted has long been a controversial one, to say the least. The statute (The Dangerous Drugs Act 1965; the Dangerous Drugs (No.2) Regulations 1964) [hereinafter referred to as the ACT and the REGULATIONS, respectively] concerns possesion of various controlled substances listed in various schedules. The specific section at issue herein is Section 3 of the REGULATIONS, which briefly summarized, states that "a person shall not be in possession of a drug unless he is generally so authorised..." The statute does not specify that possession must be "knowingly" or "with knowledge" and prescribes, therefore, an absolute or insurer's liability.

The controversy over the statute apparently commenced upon its enactment, and culminated in the case of Lockyer v. Gibb, (1966) 3 W.L.R. 84, 130 J.P. 306, 110 S.J. 507, 2 All E.R. 653, which remained the leading interpretation of the statute prior to any decision by the House of Lords.

In Lockyer, a Queen's Bench Division decision, the appellant was stopped by the police, and in a large bag which she was carrying was found a small brown bottle containing tablets. The appellant said that she did not know what the tablets were and that a friend had given them to her to look after for him. When asked for his name, she gave a different explanation saying that she was in a cafe with him and some other people when the police came in, and he must have dumped them on her. On analysis, the tablets were found to be a "dangerous drug" as defined by the ACT and REGULATIONS. The appellant was charged with possessing the tablets without being duly authorised, contary to Section 9 of the REGULATIONS [Note that Section 9 is almost identical in language to Section 3, the Section here at issue.]

The appellant contended that she did not know what was in the bottle, nor what the tablets contained. The lower court (Magistrate) convicted the appellant, being of the opinion that the offense was sufficiently constituted by her being in unauthorized possession of a bottle containing the dangerous drug (morphine sulphate), notwithstanding she did not know the contents of the bottle and that her contention that mens rea was an essential ingredient of the charge was not well founded.

On appeal, the Queen's Bench Division affirmed and dismissed the appela, stating that Section 9 of the REGULATIONS "on the face of it imposed an absolute liability" subject to license and authorization, and, while it was necessary to show (as had been shown) that the appellant knew that she had the article which turned out to be a drug, it was not necessary that she should know that in fact it was a drug.

The Court in Lockyer, supra, by Lord Parker, C.J., discussed the aspects of both "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 realise is, or may be, in her handbag, in her room, or in some other place over which she has control." 2 All E.R. 653, 655.

However, as to the appellant's further contention that she could not be convicted unless it is proved that she was knowingly in possession of drugs, the Court stated that it was "not necessary that she should know that in fact it was a drug..." 2 All E.R. 653, 656. The Court also stated:

> "I cannot, though it is not conclusive, omit from consideration the fact that the word "knowingly" does not appear before "possession"." 2 All E.R. 653, 656.

The Court referred to Beaver v. R., S.C.R. 531 (1957), a Canadian Court of Appeal of Ontario decision, in which a divided court (3-2) had held just the opposite under a similar Canadian statute, and stated that he preferred the Canadian "dissenting judgment". The Lockyer decision was uananimous.

Lockyer, supra, was followed religiously by the lower courts in literally hundreds of cases, and by the Court of Appeal, Criminal Division, in R. v. Warner, 1 W.L.R. 1209; 131 J.P. 485; 111 S.J. 559 (1967); 3 All E.R. 93; 51 Cr. App. R. 437 (1967).

In Warner police stopped the driver of a van and in the van was found one case containing bottles of perfume and another case containing twenty thousand amphetamine sulphate tablets. The appellant testified that he had picked up both cases thinking both to be perfume and that he did not know that one case contained any drugs whatsoever. The jury was directed that absence of knowledge by the appellant of what the second parcel contained went only to mitigation (as per the rule of Lockyer, supra) of sentence and could not be considered as a defense.

On appeal to the Court of Appeal, the lower court's judgment was affirmed. The Court, considering and applying Lockyer in its totality, held that the offense was one of absolute liability and the fact that the appellant did not know what the second parcel contained was no defense. The appeal was dismissed.

Warner was appealed further, and culminated in the first House of Lords decision on the issue. Warner v. Metropolitan Police Commissioner, 2 All E.R. 356 (1968, decided on May 2, 1968.

In a 39-page decision, the five Lords thoroughly discussed all the issues. The only solid holding of all five Lords was that the appeal should be dismissed. Lord Reid, in a sole dissenting opinion, although he concurred in dismissing the appeal, believed that it should be a defense that the person convicted did not know that what was in his actual possession was a drug prohibited by law to be in his possession. Two Lords thought that the defendant should have a reasonable opportunity to detect the contents; two Lords thought that the statute was reasonable as interpreted by Lockyer, supra, and by the lower courts.

Lord Reid was clearly upset, and rightly so, with the interpretation of the statute by the decision:

> "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." 2 All E.R. 356, 366.

Lord Reid gave a further example:

> "...suppose that an innkeepr 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 todl truthfully what is in it, it may be right to say that he is in possession of the contents; but what if he is todl 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 containg drugs hidden in a small scret 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 offence, 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 possession of the contents though they may turn out to be something quite unexpected." 2 All E.R. 356, 368.

Unfortunately, Lord Reid's discussion remains dicta. The appeal was decided on a technical ground, leaving the Lockyer interpretation to stand as law, although called into question quite seriously by at least three of the five Lords. (The appeal was dismissed on the ground that since the Lords could not believe that any reasonable jury would accept the appellant's story, and would be certain to return a verdict of guilty, there was no miscarriage of justice in the case, and the appeal should be dismissed under Section 4 of the Criminal Appeal Act 1966.)

With respect to the other Lords' 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 1964." "Possession of Drugs and Absolute Liability", 84 Law Quat. Rev. 382, 387.

See also "Possession of Drugs--The Mental Element", 26 Cambridge Law J. 179.

This was the status of the law when the respondent, John Lennon, pleaded guilty to violation of the ACT and REGULATIONS. No "mens rea" was present as an element to be proved by the prosecution; absolute liability prevailed. One needed the necessary mental intent to possess the "container", but the statute was automatic with respect to the "contents." No mens rea whatsoever was necessary for prosecution or conviction with respect to the "contents". In the respondent's case, the "dnagerous 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 binocular case.

Therefore, the British statute, which was considered carefully by the House of Lords of England, and which had caused great controversy in the legal establishment in England, was consistently held to be one of "strict liability", and the fact that the defendant had no knowledge that he was in possession of a drug was not a defense to its prosecution -- it was an element which could only be pleaded in mitigation of punishment.

Under Section 5(b) of the REGULATIONS, the House of Lords later held that "mens rea" was a necessary element for prosecution. Sweet v. Parsley, 1 All E.R. 347 (1969), in a case decided some time after Mr. Lennon pleaded in his case. Section 5(b), however, deals with the duties of a landlord (see text of statute, supra)

In Sweet the defendant was a tenant of a farmhouse. After moving out, she sub-let the rooms to various sub-tenants, and occasionally visited the house to collect rent. After a search, the police found small quanitties of drugs. The defendant was charged with being concerned in the management of premises which were used for the purpose of smoking cannabis or cannabis resin contrary to Section 5(b). The lower Court, Queen's Bench Division, upheld the trial court and the conviction and held that although the fact that appellant was tenant of the house and thus responsible for its rent and maintenance did not of itself establish that she was concerned in the management of the premises, yet the justices were fully entitled to hold that the appellant was concerned in the management of the premises under all the circumstances

of the case. The fact that Miss Sweet was unaware that the premises were being used for the purpose of smoking dangerous drugs was held to be no defense. 2 All E.R. 337 et seq. (1968).

The opinion in Sweet was written by Lord Parker, C.J., the author of Lockyer, supra, and was decided eleven days after the House of Lords decision in Warner, supra; absolute liability still prevailed. It was clear, however, that this matter should go to the House of Lords for a thorough review, which it finally did.

The House of Lords considered the appeal and reversed the Queen's Bench Division. 1 All E.R. 347 (1969), decided January 23, 1969. The Court held that no offense under Section 5(b) had been disclosed since (by three of the Lords) for the offense to be committed it must be shown that it was the appellant's purpose that the premises be used for smoking cannabis; i.e., that she intended that the premises be so used; (by two of the Lords) that the section required that, before conviction, the appellant must be shown to have had knowledge of the particular purpose to which the premises were being put. However, the Lords were still split on how best to make a definite ruling

on the issue of "mens rea", and the Sweet decision unfortunately did not in any way effect the Warner rationale, although Sweet did create quite a stir in England.

The difference between Warner and Sweet was discussed thoroughly in many law review articles and attempts at clarification were made. See, for example, "Absolute Liability, 85 Law Quat. Rev. 153 (April, 1969); "Sweet v. Parsley and Public Welfare Offences," 32 Mod. L. Rev. 310 (May, 1969).

As was said in "Sweet v. Parsley: Disappointment and Danger,"

> "While all their Lordships...commented at length on the question of 'mens rea' in criminal offences, the actual decision rested on an interpretation of the meaning of the following term in the Subsection: 'a person... concerned in the management of any premises (used for the forbidden purpuse)'. Their Lordships unanimously held that on that question the said term must be narrowly interpreted as referring only to one who manages premises actually and specifically for the forbidden purposes, and does not apply to a person who manages premises for a legal purpose but on which premises unknown to the manager someone is conducting an illegal activity." 3 Manitoba L. J. 63 (1969).

And in "Drugs--The Unpurposeful Manager," 27 Camb. L.J. 174, at page 177:

> "The decision in Sweet v. Parsley is welcome, and it is hoped that lower courts will not be less ready to infer an intention to impose strict liability. Legislation is still necessary to deal with existing cases of strict liability, such as Warner [1968] 2 W.L.R. 1303 [Emphasis supplied.]

Therefore, even after Sweet, it was the general considered legal consensus that under Sections 3 and 9 of the REGULATIONS (relevant to our case), Warner was still the existing rule and that part of the REGULATIONS existed as a "strict liability" statute, although Sweet had somewhat changed a similar interpretation of Section 5(b). And even of Sweet it has been said that,

> "It would be safe to conclude that the decision of the House of Lords in Sweet v. Parsley is one of the most important statements to be uttered by the judiciary concerning mens rea and crimes of strict liability. However, a reservation must be appended to such a conclusion; and this would be founded on the lack of agreement between some of the Law Lords as to the exact nature of mens rea, and on some indecisiveness displayed by their Lordships as to its relationship to crimes of strict liability. "The Mental Element in Drug Offences," 20 Nor. Ire. L.Q. 370 (December, 1969).

And further, the author continues in "The Mental

Element,"

> "Regrettably, it is not possible to conclude that the attitude of the House of Lords in Sweet v. Parsley will necessarily be followed in the lower courts; the tenor of Lord Wilberforce's speech indicates that his is a decision on paragrpah (b) of section 5 of the Dangerous Drugs Act 1965 only, and it is to be viewed as such. Moreover, the 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 s. 5(b) did not require a mental ingredient." 20 Nor. Ire. L.Q. 370, at 371.

The law was subsequently repealed in England. The Misuse of Drugs Act 1971 has accepted the majority view of the House of Lords in Warner, and has recently allowed "lack of knowledge" to be a defense. [See Sections 28, et seq.] The same act has also reclassified cannabis and cannabis resin to be "Class B" Drugs, a less harmful category including such drugs as codeine, as opposed to the old "Class A" listing, which included cocaine, opium, morphine, etc.

The 1971 Act repealed the Dangerous Drugs Act 1965, and the Dangerous Drugs Act 1967 which had followed it.

B. Only those convictions of marijuana possession under circumstances which would enable the accused to traffic in the substance are included in Section 212(a)(23) of the I.N.A.

Not all convictions for possession of marijuana result in excludability or deportability under the Immigration and Nationality Act.

Varga v. Rosenberg, 237 F.Supp 282 (S.D.Cal., 1964) held that an alien who had been convicted under the California statute of being under the influence of narcotics was not subject to deportation under the federal statute providing for deportation of any alien who is convicted of a violation "of any law or regulation relating to illicit possession of narcotic drugs or marijuana."

The petitioner, in a habeas corpus proceeding, was a Mexican citizen admitted to the United States on March 31, 1961 as a permanent resident; on December 9, 1963 he was convicted in the United States of violating California Health and Safety Code Section 11721 which prohibited the use of narcotics. On February 7, 1964 the Immigration Service held a hearing pursuant to an Order to Show Cause under Section 241(a)(11).

The question put by the trial was whether the Immigration law's bar included the crime of which petitioner was convicted in the California court. The legislative history was cited by the Service to clearly include this offense (unlawful use). The Court stated that "while 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 indicates that the Committee's aim was to eliminate traffic in narcotics as distinguished from use." 237 F.Supp 282, at 284. The Court quoted from the concluding words of the Legislative Committee:

> "Drug addition 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 favofable action on H.R. 11619.' 1956 U.S. Code, Congre. & Adm. News, p. 3274, et seq., 3281." 237 F.Supp 282, at p. 284.

> "Congress undoubtedly has aimed its attack upon possession which would give the possessor 'such dominion and control of the liquor as would have given him the power of disposal.' The quoted words are borrowed from Toney v. United States, 62 App.D.C. 307, 67 F.2d 573, a case involving the crime of possession of liquor." Varga v. Rosenberg, 237 F.Supp 282, at 284.

Petitioner in Varga was convicted for use or being under the influence of narcotics. The Court held that the alien was hardly in a position to traffic in the drug under these circumstances and can hardly be said to have had the type of possession as would give him such dominion and control which would include the power of disposition.

In Mr. Lennon's situation, a conviction was entered although the defendant did not even know that he was in possession of the drug, under a statute which did not allow proof of lack of knowledge as a defense. This could not have been the type of "possession" which Congress contemplated as would give respondent such dominion and control as to include the power of disposition. The conviction, therefore, should not bar an application for adjustment of status.

The Varga rationale has been adopted as the official view of the Immigration Service. In Matter of Sum, decided by the Board of Immigration Appeals on May 22, 1970, Interim Decision #2045, the Board overruled all its precedents holding that a conviction for unlawful use of prosecribed drugs makes an alien deportable as one who has been convicted for unlawful possession of such drugs. In that case, the respondent had been convicted of violating Section 11720 of the California Health and Safety Code in 1941 for "taking or otherwise using any narcotics." The Board decided to follow Varga, which was never appealed, observing that although aware of the decision, the Solicitor General of the United States declined to authorize an appeal in Varga; it thereby adopted its rationale as binding.

In Matter of Schunck, File A13 120 444, 40 L.W. 2687 (decided April 18, 1972), the Board of Immigration Appeals held that where an alien was convicted of violation of California Health and Safety Code Section 11556 (providing that it is unlawful to visit or be in any room or place where narcotics are being unlawfully smoked or used with knowledge that such activities are occurring) was not a proper basis for deportation. The Special

Inquiry Officer had correctly reasoned that the section was broad enough to result in the conviction of a defendant who was not himself involved in trafficking in marijuana or narcotic drugs. The Board affirmed that Section 241(a)(11) cannot be interpreted to include the conviction of a non-participating bystander under a statute that seeks merely to discourage visits to places where narcotics are unlawfully used. It was held that it was not the intent of Congress to deport an alien who finds himself in a place where marijuana or narcotics are unlawfully used, such action not being realted to trafficking under the Varga rationale.

In a sense, all laws touching on narcotics relate to traffic, even the statute in the Varga case. The Immigration law, however, limits its concern to those which directly touch upon traffic or, in cases of possession convictions, those which clearly require the type of possession in which there is a power to traffic in or dispose of the substance. Knowledge is an essential element of this power. It is clear from the British statute and caselaw, that the British statute under which respondent John Lennon was convicted mandated convictions for possession regardless of the mental element and that

lack of knowledge was not a defense. This is indeed what occurred in Lennon's case and was one of the prime considerations in his decision to plead guilty. As he stated at the hearing the "stuff was planted" on him without his knowledge in containers that were his. This could not conceivably have been the type of "possession" contemplated by the U.S. Immigration law to render him ineligible for residence under Section 212(a)(23). In essence, this is Mr. Lennon's major contention that he is statutorily eligible for permanent residence in the United States.

C. The Use of the Dangerous Drugs Act of England as a bar to residency under 212(a)(23) would deny respondent due process.

United States law is applicable in determining whether a crime committed by an alien in another country is a crime of a class which will preclude his admission. Giammario v. Hurney, 311 F.wd 285 (3rd Cir. 1962). It is therefore relevant to consult equivalent U.S. statutes on the subject.

A comprehensive review of the law of all fifty (50) states and of nieghboring countries is enlightening. It is apparent that the United States statutes concerning possession of marijuana all require as an element of prosecution and conviction for violation of said statutes, that the defendant be shown to have had possession with knowledge of such possession, i.e., that the statutes all contain the "mens rea" requirement missing in the Dangerous Drugs Act 1965 and the Regulations of 1964 in England. The same is true of the Mexican statutes as interpreted by Mexican case law. See Titulo Septimo, Delitos contra law salud, Capitulo I, Art. 193, 194 et seq., Codigo Penal Para El. D.F. Y Territorios F; and the same has been held true in Canada. (See earlier

discussion of Beaver v. R., supra.) Under our system, it is considered that the fairness of a criminal proceeding and the essential substantive and procedural safeguards of the criminal law would be endangered by a statute which required no proof of criminal intent. See United States v. Fueston, 426 F.2d 785 (9th Cir. 1970); Griego v. United States, 298 F.2d 845 (1962, 10th Cir.); Turner v. United States, 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed. 2d 610 (1970); Casella v. United States (D.N.J., 1969), and many other well-established cases.

The Uniform Narcotic Drug Act, adopted by forty-six states, Washington, D.C., and Puerto Rico provides in Section 2 that it shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense or compound any narcotic drug, except as authorized by the Act. In order to convict a defendant of the offense of possession of a narcotic drug within the meaning of Section 2 of the Act, it is necessary to show that the defendant was aware of the presence and character of the particular substance, and was intentionally and consciously in possession of it. California, one of the few states

which did not ratify the Uniform Narcotic Drug Act, has its own statute which has been interpreted to require the "mens rea" missing from the British statute herein concerned. See Peeple v. Winston, 293 P.2d 40 (1956); People v. Hancok, 319 P.2d 731 (1957), and People v. Redrick, 359 P.2d 255 (1961). Similarly, the Federal statutes, including the Food and Drugs Act, the Internal Revenue Act, and the Marijuana Tax Act, all require "mens rea."

No claim is made that a foreign conviction must necessarily conform to constitutional guarantees in the United States. What is claimed, however, as fundamental law, is that where a foriegn conviction was obtained in a manner where it denied due process of law, we are not precluded from making further inquiry. Marino v. Holton, 227 F.2d 886 (7th Cir. 1955), cert denied 350 U.S. 1006; and can indeed distregard it as a ground for deportation or exclusion. Thus a conviction void on its face under local law can be disregarded. United States ex rel. Freislinger v. Smith, 41 F.2d 76 7 (7th Cir. 1930); Wilson v. Carr, 41 F.2d 704 (9th Cir. 1930); and a conviction in absentia will not be recognized for deportation purposes. Ex Parte

Kowerner, 176 F. 478 (E.D. Wash. 1909); Ex Parte Watchorn, 160 F. 1014 (S.D.N.Y. 1908). Likewise in Gubbels v. Hoy, 261 F.2d 952 (9th Cir. 1958), where a military tribunal did not have the same safeguards deemed essential to fair trials of civilians in federal courts, the Court held that a court-martial conviction of larceny and robbery would not suffice to warrant a deportation, although a conviction by a U.S. Federal Court of the same crimes would be sufficient to support deportation.

Under British law, there was no criminal intent required for conviction of illegal drug possession under the law in question (see discussion, infra). Innocent possession of a package or substance which later proved to be a narcotic was held sufficient to result in a conviction, despite the fact that the accused had no knowledge or reason to know the contents of the package, nor the nature of the substance it contained. This type of conviction, lacking an element which we consider to be essential to elementary fairness, is alien and abhorrent to our system. Its use as a basis for exclusion from

permanent residence of an applicant whose child is a United States citizen and whose spouse is qualified to obtain residence shortly, is a patent denial of due process.

D. The legislative history of the Immigration Act supports the view that Mr. Lennon's conviction is not included in Section 212(a)(23).

There is no definition of marijuana in the Immigration Act, nor is there any reference to a definition elsewhere. The term is therefore ambiguous and reference to Congressional history may shed light on its meaning.

The pertinent legislative history surrounding the various amendments to the Sections in issue commences in 1956.

In 1956, Congress, by the Narcotic Control Act of 1956, amended Sections 212(a)(23) and 241(a)(11) by adding identical language to include the "illicit possession of narcotics" as an additional ground for deporting or excluding aliens. However, it was at all times clear from the legislative history that the purpose of the Narcotic Congrol Act of 1956 was to eliminate illicit trafficking in drugs, in order to tighten the criminal Federal laws with respect to drugs

to prevent the hardened and vicious criminal from escaping through loopholes in the law. See 56 U.S. Code Adm. & Cong. News, 3274 et seq.

In 1958 and 1959, however, two California cases exempted "marijuana" from the term "narcotic drugs", and this, apparently, created a stir in the legislature. In both cases the aliens were Mexican nationals who had been convicted under California law of possession of marijuana. The aliens contended that marijuana was not included in the term "narcotic drugs" as it appears in the portion of the above-mentioned statutes added by the 1956 amendment. The plaintiffs' contentions were upheld by the U.S. District Court for the Southern District of California in Mendoza-Rivera v. Del Guercio, 161 F.Supp. 473 (1958); and Rojas-Guiterrez v. Hoy, 161 F. Supp. 448 (1958). In 1959 the Court of Appeals for the Ninth Circuit affirmed the decisions of the lower courts affirming the conclusion that the aliens were not deportable. 267 F.2d 451 (9th Cir., 1959); 267 F.2d 490 (9th Cir., 1959).

The Circuit Court, in discussing the 1956 amendment and the Congressional purpose in

passing the provision, stated that if Congress had wished to include marijuana within the definition of narcotic drugs in the first part of the statutes [the "simple possession" parts] as it had in the latter parts [the "possession for the purpose of" parts] it would have done so. However, it chose not to, and any doubt as to its intent must be resolved in favor of the alien (see discussion, infra).

In 1960, to remedy the situation created by these two cases, Congress enacted a further amendment to Sections 212(a)(23) and 241(a)(11) by adding the words "or marijuana" to the simple possession part of the statutes. Cf., 1960 U.S. Code, Cong. & Adm News, p. 3124. It did not, however, define the term "marijuana."

The lack of a definition of the word "marijuana" in the Immigration and Nationality Act leaves its meaning uncertain. The un-rebutted evidence is that respondent John Lennon was convicted of possession of "cannabis resin". It is clear from all competent scientific evidence, that under common usage (and since Congress failed to indicate, common usage must be assumed) marijuana does not include, nor did it include, "cannabis resin", and it is equally clear that "cannabis

resin" is not a narcotic drug. In line with the rationale of the Court in Mendoza-Rivera and Rojas-Guiterrez, supra, if Congress had wished to include within the definition of marijuana the words "cannabis resin", etc., it would have so done. However, it did not, and any doubt as to the Congressional purpose (see discussion, infra) must be resolved in favor of the alien.

Should the Government contend that although Congress has failed to define the term "marijuana" under the Immigration and Nationality Act, a tax law definition of the term is implied, a clear violation of due process and decisional law would follow. The Government's position in such case would be contrary to normal rules of statutory construction and completely without foundation.

Congress has, in cases where it wished to import a definition from another body of law, known how to do so explicitly; for example, in the Food and Drugs Act, Section 176a, a direct reference is made to Section 4761 of the Internal Revenue Code. No such reference is made in any section of the Immigration and Nationality Act anywhere in the law, and it should not be supplied by implication.

It is clear that the failure to include a direct reference to the Internal Revenue Code or any other specific definition of the term "marijuana" was not an oversight. Moreover, if it was a matter which Congress did not actively consider and if there was no specific Congressional intent on the issue, the resultant ambiguity, upon the unquestionable basis of the decisional law and principles of statutory interpretation, must be resolved in favor of the alien.

It was likewise never very clear that a foreign conviction was intended by Congress to be included under 212(a)(23) or 241(a)(11) On the contrary, the only reference which appears from the legislative history that it was the intent to deport or exclude any alien who had been convicted of violation of any of "this Nation's narcotic or marihuana laws." See letter to Hon. Emanuel Celler from A. Gilmore Flues, Acting Secretary of the Treasury, January 12, 1960. 1960 U.S. Code, Cong. and Adm. News, p. 3141. A thorough review of all the reported court decisions fails to disclose even one foreign conviction used as a ground for exclusion under Section 212(a)(23).

The predecessor statute, in fact, specifically provided that it covered only statutes of any State, territory, possession or of the District ofColumbia (Act of February 18, 1931, 8 U.S. C.A. §156a) to which was added, by the Alien Reg-

istration Act of 1940, (Eg: Ch. 439, Third Session 76th Congress, 54 Stat. 673) the words "any statute of the United States." U.S. ex rel. Casetta v. Watkins, 73 F.Supp. 399 (S.D.N.Y. 1947):

> "Deportation is a proper and effective weapon against aliens who violate our laws and relieves the United States from the cost of maintaining them in our already overcrowded jails." Senate Report No. 1443, 71st Congress, 3rd Session. [Emphasis supplied]

Furthermore, it would appear to have been the intent of Congress in using the term "illicit" to import a type of possession which was felonious in nature or at least a knowing possession. The use of this adjective, a term nowhere else appearing in the Immigration and Naturalization Act, to modify the term "possession" excludes its applicability to the instant case, where the "possession" was without the knowledge of the respondent.

E. Since deportation visits great hardship upon an alien, language used by Congress should be strictly construed, and any doubt resolved in favor of the alien.

Deportation may be as severe a punishment as loss of livelihood. Delgadillo v. Carmichael, 332 U.S. 388, 391, 68 S.Ct. 10, 12, 92 L.Ed. 17.

"[I]t must be remembered that although deportation technically is not criminal punishment (Johannessen v. United States, 225 U.S. 227, 242, 32 S.Ct. 613, 617, 56 L.Ed. 1066; Gagajewitz v. Adams, 228 U.S. 585, 591, 33 S.Ct. 607, 608, 57 L.Ed. 978; Mahler v. Eby, 264 U.S. 32, 39, 44 S. Ct. 283, 286, 68 L.Ed. 549), it may nevertheless visit as great a hardship as the deprivation of the right to pursue a vocation or a calling. Cf. Cummings v. Missouri, 4 Wall. 277, 18 L.Ed. 356; Ex parte Garland, 4 Wall. 333, 18 L.Ed. 366. As stated by Mr. Justice Brandeis speaking for the [U.S. Supreme] Court in Ng Fung Ho v. White, 259 U.S. 276, 284, 42 S.Ct. 492, 495, 66 L.Ed. 938, 'deportation may result in the loss of all that makes life worth living.'" Bridges v. Wixon, 326 U.S. 135, 148, 65 S.Ct. 1443, 1449 (1945).

It is well-settled, therefore, that although deportation statutes are not considered criminal, since they may inflict the equivalent of banishment or exile they should be strictly construed. Barber v. Gonzales, 347 U.S. 637, 642, 74 S.Ct. 882, 98 L.Ed. 1009. In cases where language of Congress is suceptible to several possible meanings, because of the "dire consequences which may result, the language used by Congress should be given the narrowest of several possible meanings (Fong Haw Tan v. Phelan, 333 U.S. 6, 10, 68 S.Ct. 374, 92 L.Ed. 433; United States ex rel. Brancato v. Lehmann, 6 Cir., 239 F.2d 663, 666." Tutrone v. Shaughnessy, 160 F.Supp. 433, 437 (S.D.N.Y. 1958).

If there is any doubt as to the interpretation of a provision in the Immigration and Nationality Act, that doubt must be resolved in favor of the alien. Wood v. Hoy, 266 F.2d 825 (9th Cir., 1959).

As one Court said a long time ago, "The immigration statutes are very drastic, deal arbitrarily with human liberty, and I consider they should be strictly construed." Redfern v. Halpert, 186 F. 150 (5th Cir., 1911).

In Fong Haw Tan v. Phelan, 333 U.S. 6, 68 S.Ct. 374, 92 L.Ed. 433, the Supreme Court stated:

> "We resolve the doubts in favor of that construction [discussing single criminal scheme versus single criminal act] because deportation is a drastic measure and at times the equivalent of banishment or exile, Delgadillo v. Carmichael, 332 U.S. 388, 68 S.Ct. 10, 92 L.Ed. 17. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used." 68 S.Ct. 374, 376 [emphasis supplied]

See also Sawkow v. Immigration and Naturalization Service, 314 F.2d 34 (3rd Cir., 1963) and Zito v. Moutal, 174 F.Supp. 531 (N.D.Ill. 1959).

On the other hand, if Congress never considered the matter, we ought not to imply a meaning which expands the terms used beyond their necessary meaning.

> "Ascertainment of the intention of Congress in this situation is impossible. It is to indulge in a fiction to say that it had a specific intention on a point which never occurred to it. Western Union Tel. Co. v. Lenroot, 323 U.S. 490, 508, 65 S.Ct. 335, 344, 89 L.Ed. 414. We must take the Act as Congress gave it to us, without attempting to conform it to any notions of what Congress would have done if the circumstances of this case had been put before it. 323 U.S. at p. 501, 65 S.Ct. at p. 341." Gubbels v. Hoy, 261 F.2d 952 (C.A.Cal. 1958).

Section 212(a)(23) does not contain a definition of the term "marijuana" nor is any definition to be found elsewhere in the Immigration and Nationality Act. Respondent offered the testimony of an acknowledged expert that the substance which respondent was convicted of possessing was not marijuana, but hashish.

The British statute contains a definition and distinguishes between cannabis (including the flowering or fruiting tops of the plant, by whatever name they may be designated -- marijuana, as explained by Dr. Grinspoon, is one such name); and cannabis resin, the substance which respondent was convicted of possessing. It is apparent from the British statute that cannabis resin was not

intended to cover marijuana. A narrow interpretation of our own statute would compel a similar conclusion, that, as asserted by the expert witness, "marijuana" does not necessarily include and, indeed, is different from "cannabis resin."

POINT IV: SECTION 212(a)(23) I S UNCONSTITUTIONAL INSOFAR AS IT RELATES TO "ILLICIT POSSESSION OF MARIJUANA."

Although it is recognized that hearing officers do not generally deal with issues as to the constitutionality of the provisions they are called upon to construe and apply, the questionable constitutionality of theprovision is cited as a further reason not to extend its applicability.

A. An alien is a "person" entitled to the same protection for his life, liberty and property under the due process clause as is afforded to a citizen.

"[A]n alien who legally became part of the American community...is a 'person', and has "the same protection for his life, liberty and property under the Due Process Clause [of the Fifth Amendment to the U.S. Constitution] as is afforded to a citizen." Galvan v. Press, 347 U.S. 522, 74 S.Ct. 737, 742 (1954).

Although aliens outside the United States cannot complain of a lack of due process or equal protection of the law, "it is clear that aliens

residing or present within the United States must be afforded both procedural and substantive due process and equal protection." Cermeno-Cerna v. Farrell, 291 F.Supp. 521 (C.D.Cal. 1968).

As was stated by Mr. Chief Justice Warren,

> "Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint; Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective." Bolling et al. v. Sharpe et al, 347 U.S. 497, 74 S. Ct. 693, 694 (1954).

Although the Fifth Amendment itself contains no equal protection clause, it nevertheless forbids any discrimination that is so unjustifiable as to be violative of due process. Schneider, v. Rusk, 377 U.S. 163, 84 S.Ct. 1187 (1964).

It is puzzling to consider the proposition that a conviction for possession of marijuana may be a ground for deportation and exclusion, but that it does not automatically preclude naturalization, since the statute only requires good moral character for a period of five years. See Immigration and Naturalization Act, §§311 et seq. It must, at first blush, seem more than incongruous

that a higher standard is established for admission into the United States than for its coveted citizenship, yet that would clearly appear to be the case. In further viewing this irrational distinction, it clearly appears that under Schneider, supra, this distinction is one which creates such discrimination against the alien seeking admission as to violate a resident alien's rights to due process under the Fifth Amendment with no possible proper governmental objective as a rationale, since there is no question that aliens are entitled to the benefits of due process under the Fifth Amendment, Galvan v. Press, supra.

B. Section 212(a)(23) as enacted violates the right to privacy.

An arsenal of evidence has long been before us that marijuana is not a narcotic drug, not physically addictive, and does not produce psychological dependence harmful to society or the user. Marijauana does not cause criminal or aggressive behavior. "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), at 224. Marijuana does not lead to the use of dangerous or so-called hard drugs such as heroin. Mandel, "Who Says Marijuana Use Leads to Heroin Addition," 43 Journal of Secondary Education (May 1968), at 211. And marijuana does not cause insanity. Allentuck, S., and Bowman, K.M., "The Psychiatric Aspects of Marijuana Intoxication," 99 Am. J. Psychiatry (September 1942) at 249.

The reliable, modern, scientific evidence reveals that although n o drug, including aspirin, is totally harmless, marijuana is a comparatively mild, relatively harmless drug when taken by most people in conventional doses and produces no effects which are or would be harmful to society or the user in the vast majority of cases. The Government would be hard pressed to sustain its burden of proving a rational connection between the private use of marijuana and harm to the public or to the user. The same cannot be said of alcohol, however. Blum, "Mind Altering Drugs and Dangerous Drugs: Alcohol In the United States President's Commission on Law Enforcement and Administration of Justice, TASK FORCE REPORT: DRUNKENESS. Nor can the same be said of tobacco.

Alcohol and nicotine are both demonstrably harmful to the user and to the public at large. Nevertheless, it is not surprising to find that both are legal. Although alcohol was for a time prohibited, such "prohibition" was later found tobe unsuccessful. There is less and less rational basis for the prohibition of marijuana as its science develops.

For Congress to exclude or deport a resident alien from the United States simply because he or she may have used in private and for his or her own personal use marijuana violates the fundamental freedoms and rights to privacy and due process of law guaranteed by the U.S. Constitutional Amendments I, IV, IX and XIV in that this legislation cannot be proven either necessary to the protection of any compelling state interest or reasonably related to the serving of a legitimate public purpose.

The limited consideration which can be given to Constitutional argument necessarily limits the writer to contesting the application of this law to respondent John Lennon as being an unconstitutional violation of due process and the

right to privacy.

Clearly, even if Congress had been correct in prohibiting persons from entering this nation who had been convicted of selling, distributing, manufacturing marijuana, it is more difficult to defend its similar prohibition as to a person who merely may have used marijuana for his own private use. In the case at Bar, the violation of respondent's due process rights becomes even more unacceptable than the clear violation of the right to privacy, when combined with his conviction under the non-mens rea British statute.

The right to privacy was first enunciated in Justice Brandeis' famous dissent (which dissent and minority position has gradually become that of the majority) in Olmstead v. United States, 277 U.S. 438, 478, 48 S.Ct. 574, 72 L.Ed. 944 (1928):

> "The makers of our constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought

> to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone--the most comprehensive of rights and the right most valued by civilized men." 277 U.S. 438, 478.

This argument has now become accepted, and although various Justices of the Supreme Court have disagreed as to the true source of the "right of privacy", very few of the Justices have disagreed with the proposition that there was indeed a right to privacy. See Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1648, 14 L.Ed.2d 510 (1964); Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed. 2d 542 (1969).

An analogy to Stanley's argument may prove helpful:

> "Given the present state of knowledge [i.e. about marijuana] the State may no more prohibit mere possession of obscenity [i.-e. marijuana] on the ground that it may lead to antisocial conduct [i.e. hard drugs] than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits." 394 U.S. at 566, 567.

It is respectfully submitted that the private possession of marijuana in no way interferes