POT, PRAYER, POLITICS AND PRIVACY: THE RIGHT TO CUT YOUR OWN THROAT IN YOUR OWN WAY*

Jonathan A. Weiss**
and
Stephen B. Wizner***

The constitutional freedoms of religion and expression have been persistently urged as defenses to charges for violation of the drug laws. These efforts to expand the symbolic dimension of first amendment protection have been for the most part unsuccessful. The authors question the failure to recognize the defenses forwarded in these cases. To attempt a resolution of the issue, they consider the principles of liberty and procedural due process as they apply to the police power and individual rights under the Constitution. Focusing principally on the freedom of expression and its underlying rationale, they propose an analysis which logically includes drug use within the scope of the first amendment.

Drugs, narcotics and addictive substances are common topics of discussion. Positions concerning their use, however, are polarized. Devotees of psychedelic drugs, for example, claim to find in their use everything from self-knowledge to the essential roots of a new idealistic society. Opponents of drug use for pleasurable personal experience claim that it accelerates addiction, impels users into crime to maintain their habit and induces eventual self-destruction. This debate rages in the face of inadequate information about the personal effects of various drugs. For one thing, it is frequently difficult to establish whether a drug is in fact addictive or harmful; drug users claim that alcohol itself is harmful, dependence inducing and reality distorting. Secondly, the difference between addiction and habit is ill-defined; many people appear dependent on caffeine, nicotine and aspirin. Finally, the personal effects of drug use vary—different people report different experiences; nor are medical pronouncements much of a guide.

*This article was conceived and organized by Jonathan Weiss who also did the majority of the writing and research. The section on privacy and its relation to the police power is primarily Stephen Wizner's product. Both authors have discussed and criticized each other's work and together developed the affirmative thesis we present here.

**Managing Attorney, Mobilization for Youth, Inc., New York City; B.A., LL.B., Yale University.

***Managing Attorney, Mobilization for Youth, Inc., New York City; B.A. Dartmouth College; J.D., University of Chicago.

The law has nonetheless entered this thicket of emotional discussion and personal commitment with proscriptions and pronouncements. Distinguishing precisely between "medical drugs" and "addictive drugs," it permits the sale of the former while imposing criminal penalties on sale of the latter.2 Further, in the case of narcotic and psychedelic drugs, the law imposes additional penalties for mere possession, perhaps regardless of a doctor's prescription.3 The logical and factual basis of such classification is not always apparent.4 For our purpose, however, this article need not inquire into the rationale of current drug legislation which is often factually very suspicious. It assumes arguendo that some drugs may be addictive, may cause adverse personality changes and may be factors in users' decisions to commit crimes. At the same time, we accept as honestly presented the claim of some that drugs provide progress to a new way of life. Where necessary, we indicate when disputed facts are relevant and to what degree they affect the legal issues raised by current drug laws, but the primary focus is on the roots of the controversy and claims of the contestants.

By drugs we mean any substance not normally considered food which, upon entering the blood stream, effects chemical change. We will not use the word as defined by druggists or lawyers, but instead in the broadest form possible. This article assesses major legal issues generated by drug laws and their enforcement. First, assuming that the current "narcotic" drug laws are constitutionally valid, can defenses to prosecutions for possession and use, as opposed to sale, be framed around the first amendment guarantees of freedom of religion and expression? Second, do current laws punishing possession and use violate the constitutional rights to privacy and to be left alone? Third, to what degree can taking drugs be considered an act defined as criminal?

These issues lead us to consider the relation of the self to society and, derivatively, the stake society has in the self, abnormal behavior, mental illness and self-destruction. Through this approach we attempt to locate neutral constitutional and legal principles which establish a range of rights to drug use. To that task we now turn.

---

I. Freedom of Religion

One defense to prosecution for drug use has been that certain drugs, particularly peyote and other psychedelics, are essential to the user’s religious life and therefore protected by the first amendment guarantee of free exercise of religion. This defense depends in part on the claim that psychedelic drugs foster mystical religious experiences.

The religious defense has failed in analogous areas. Thus, a law prohibiting polygamy was upheld despite the claim that polygamy was a Mormon religious duty. States have particularly proscribed the use of snakes in religious activities. Fortune telling, defended on religious grounds, has nevertheless been prosecuted. People have been prohibited from beating drums in the streets even for religious purposes. A preacher was prohibited from advertising the performance of marriage ceremonies in order to make money. Finally, in 1926, a religious defense to a prosecution for the use of peyote failed. These cases seem to indicate that an act, otherwise unlawful, which endangers or inconveniences the public, may not be exclusively defended against by invoking the label “religion.”

5 Reynolds v. United States, 98 U.S. 145 (1878). More sanctions were imposed such as disenfranchisement, Davis v. Beason, 133 U.S. 333 (1890), and exclusion from office, Murphy v. Ramsey, 114 U.S. 15 (1885). One could inquire whether such rules so clearly directed against Mormons are suspect under Yick Wo v. Hopkins, 118 U.S. 356 (1886).

6 See Lawson v. Commonwealth, 291 Ky. 437, 164 S.W.2d 972 (1942); State v. Massey, 229 N.C. 734, 51 S.E.2d 179 (1949). See also Mormon Church v. United States, 136 U.S. 1, 50 (1890). For a saga of snake bites and murder at a religious meeting, see Amburgey v. Commonwealth, 287 Ky. 421, 153 S.W.2d 918 (1941).

7 See State v. Neitzel, 69 Wash. 567, 125 P. 939 (1912). But see Dolan v. Hurley, 283 F. 695 (D. Mass. 1922), where the court upheld a defense to a fraud prosecution for selling “lucky” stones on the ground that there is nothing immoral in a belief that gems or amulets affect the wearer’s fortunes. It is an old and respectable superstition. Indeed, it is by no means sure that the confidence inspired by a belief in such objects may not be of real value. Some room must be left for the play of individual fancy.” Id. at 696.


9 Hopkins v. State, 193 Md. 489, 69 A.2d 456 (1949), following State v. Clay, 182 Md. 639, 35 A.2d 821 (1944). One could query the test: Such advertising was “not compatible with the ministerial calling and not practiced by any respectable minister.” 193 Md. at 497, 69 A.2d at 459.

10 State v. Big Sheep, 75 Mont. 219, 243 P. 1087 (1926). One justification for the holding was that the state “may inhibit acts or practices which tend toward the subversion of the civil government.” Id. at 240, 243 P. 1073.

11 Although moral judgments and concern for moral corruption by polygamy and fortune-telling are certainly involved, this aspect would seem constitutionally infirm. See text accompanying notes 5-7 supra.
Two other groups of related cases illuminate the borderlands of the religious defense: (1) those compelling parents to act against their religious beliefs for the presumed benefit of their children, and (2) those forcing medical treatment on adults contrary to their religious convictions. Typical of the first group are criminal prosecutions for child neglect against parents who refuse to provide medical services for their children.\textsuperscript{12}

The most difficult case in the first group is \textit{Prince v. Massachusetts},\textsuperscript{13} which upheld a parent's conviction for violating the Massachusetts child labor laws by participating in her young niece's distribution of \textit{Watchtower} on the streets. The majority of the Supreme Court felt bound by the state's characterization of the act as a "sale" and therefore unlawful under the state's child labor laws. Mrs. Prince defends on the ground that the Massachusetts law violated her child's right to freedom of religion, that is, her right "to preach the gospel . . . by public distribution of 'Watchtower' . . . in conformity with the scripture: 'A little child shall lead them.'"\textsuperscript{14} The court, however, reasoned that the state's interest in protecting its children from "the crippling effects of child employment" justified the impingement upon a claimed religious freedom.\textsuperscript{15} Justice Murphy dissented on the ground that the first amendment guarantee of religious freedom compelled the Court to reject the state's characterization of the act as a sale.\textsuperscript{16} He argued that the Jehovah Witness designation of the act as essentially religious, and therefore protected, must prevail since there was no evidence of a legitimate state interest in proscribing the act. Moreover, since the Constitution commands that religious teaching never be considered harmful, the Jehovah Witness characterization must be accepted. Justice Jackson, also in dissent,\textsuperscript{17} reaffirmed his position that, although public activities may be regulated neutrally, acts occasioned by religious principles which do not harm others are protected and may not be prohibited.

One crucial problem in \textit{Prince} is characterizing the child's act. The state must decide whether to characterize it as a simple "sale" in vio-

\textsuperscript{12}Most of the cases involve a sickness and steadfast refusal to see a doctor. Courts have normally handled the question by treating it as a crime. The leading case is \textit{People v. Pierson}, 176 N.Y. 201, 68 N.E. 243 (1903). \textit{See also Regina v. Wagstaff}, 10 Cox Crim. Cas. 530 (1868); \textit{Owens v. State}, 6 Okla. Crim. 110, 116 P. 345 (1911). On the other hand, while acknowledging that religion is no defense to a crime of neglect, a court has reversed on a finding of no gross dereliction. \textit{Graig v. Maryland}, 220 Md. 590, 155 A.2d 684 (1959).

\textsuperscript{13}321 U.S. 158 (1944).

\textsuperscript{14}Id. at 164.

\textsuperscript{15}Id. at 168.

\textsuperscript{16}Id. at 171.

\textsuperscript{17}Id. at 176.
ration of the child labor laws, or to characterize it in light of the act's religious aspects. Murphy maintains that we must accept its religious nature to maximize freedom; Jackson argues that a public act which harms no one can be treated as symbolically protected, but not criminally prohibited. Notwithstanding the arguments of Justices Murphy and Jackson, the majority position seems sounder to the extent that the regulated conduct is public and has tangible public consequences. The state had a legitimate stake in preserving its children from harm and could prohibit child labor as a reasonable regulation toward that end. To consider activity involving money and materials as labor is possible; to characterize it as purely symbolic is mistaken. Of course, if the law were just a cloak for persecution, it would be unconstitutional in any event. But as a characterization of concrete acts whose tangible aspects could be considered harmful, it is proscribable.

The Prince case is based on narrow grounds. If Rutledge and colleagues had been convinced that children had the same rights as adults and/or that Massachusetts could not interpret a public act or was using such a definition as a cloak to attack religious principles and perspectives, the statute would have been ruled unconstitutional. At the same time, the Justices were not directly countenancing a religious defense. Rather, they were exploring what type of proscriptions a state may formulate without infringing constitutional freedoms. In short, the leading case and conceptually related decisions indicate a judicial reluctance to proscribe or prescribe the activities of children counter to the parents' religious principles, unless such intervention will prevent a child from being physically harmed by parental acts or omissions. This formulation offers no definite guidelines for a religious defense to prosecution for drug use since the reluctance recognizes on the one hand parental rights and the sanctity of the family, while the enactment of proscriptions and their application derives in part from the special state concern for infants.

The second class of cases involves the use of coercive action against adults, such as compulsory vaccination and mandatory chemical

18 See People v. Ewer, 141 N.Y. 129, 36 N.E. 4 (1894), upholding a law preventing children from theatrical performances even though the parents' rights were affected. Somehow, when aesthetic preferences rather than religious ones are at stake, the decision seems easier, although both are protected by the first amendment. See also Busey v. District of Columbia, 129 F.2d 24 (D.C. Cir. 1941).


treatment of drinking water.\textsuperscript{21} Denying the religious defense in these cases is fairly justified on grounds of protecting the health of others. Hence, the state’s right and interest in the isolated individual’s integrity is not directly at stake. More perplexing, however, are those cases involving compulsory blood transfusions. The opinions in these cases differ both within and among jurisdictions and tend to avoid the question of whether the state can compel transfusions for a person’s own good against his religious convictions. Apparently, the state can compel a pregnant mother to accept a transfusion to save her child,\textsuperscript{22} and may assume that absence of consent is not refusal.\textsuperscript{23} Further, courts have compelled transfusions where the doctor’s conscience and the threat of criminal liability for failure to administer the transfusion were involved.\textsuperscript{24} On the other hand, courts have respected patients’ refusals of blood transfusions where there is medical disagreement as to their necessity.\textsuperscript{25} The spectacle of compulsion leads some courts to accept the patient’s refusal of blood and even to acknowledge religious “rights” to refuse.\textsuperscript{26} These cases, read together, unfortunately offer no clear guidelines for the use, context or extent of religious defenses in drug use cases.

\textbf{A. The Religious Defense in Prosecution for Drug Use}

Recently the courts have considered the religious defense to prosecutions for drug use. In \textit{People v. Woody}\textsuperscript{27} a group of Navajo Indians

\begin{footnotesize}
\begin{enumerate}
\item[$\textsuperscript{22}$] Raleigh Fitzkin-Paul Mem. Hosp. v. Andersen, 42 N.J. 421, 201 A.2d 537 (1964).
\item[$\textsuperscript{26}$] \textit{See In re Brooks}, 32 Ill. 2d 361, 205 N.E.2d 435 (1965).
\item[$\textsuperscript{27}$] 61 Cal. 2d 716, 394 P. 2d 813, 40 Cal. Rptr. 69 (1964). Compare id., with \textit{In re Grady}, 61 Cal. 2d 887, 394 P. 2d 728, 39 Cal. Rptr. 912 (1964) (solitary peyote users), where the court said that the defendant had “not proved... an honest and bona fide” belief and remanded for a trial on that issue. Investigation into sincerity clearly is impossible under the Constitution. \textit{See United States v. Ballard}, 322 U.S. 78, 92-95 (1944) (Jackson, J., dissenting); \textit{Clancy \\& Weiss, The Conscientious Objector Exemption: Problems in Conceptual Clarity and Constitutional Considerations}, 17 Maine L. Rev. 143, 153-54 (1965); Weiss, supra note 19 at 599-601.
\end{enumerate}
\end{footnotesize}
appealed a conviction for possession of peyote in violation of a California statute. The court held that since the defendants used peyote in a bona fide pursuit of a religious faith, and since the practice does not frustrate a compelling interest of the state, application of the statute improperly defeated the immunity of the first amendment.\textsuperscript{28} It rested its analysis on two Supreme Court decisions, \textit{Sherbert v. Verner}\textsuperscript{29} and \textit{In re Jennison}.

\textit{Sherbert} held that a state unemployment compensation board must pay benefits to a Seventh-Day Adventist who refused to work on Saturday, her Sabbath, even though she was arguably not available for Saturday employment. (What the result would have been had her religion designated every day or week-days as a Sabbath is not clear.) The rationale was that the withholding of compensation benefits penalized petitioner for exercising her religion. The Court in \textit{Jennison} reversed the Minnesota Supreme Court which had denied the invocation of the biblical injunction "judge not lest ye be judged" to excuse petitioner from jury duty.\textsuperscript{31} In neither case did the Court find a compelling state interest to justify the substantial infringement on petitioners' first amendment rights.

\textit{Woody} extracted the principle from these cases that a religious practice or ritual must be first examined to determine whether it presents a danger to the society which the state has a compelling interest in preventing. Utilizing this principle, the court performed a balancing test, weighing the importance of the religious freedom against the state's compelling interest, and concluded:

Since the use of peyote incorporates the essence of the religious expression, [its] weight is heavy. Yet the use of peyote presents only slight danger to the state and to the enforcement of its laws; [this] weight is relatively light. The scale tips in favor of the constitutional protection.\textsuperscript{32}

The opinion in \textit{Woody} makes the Warren report appear in contrast as a model of coherence, reasoning and persuasiveness. If \textit{Sherbert} and \textit{Jennison} present the definite formulation of the law, which they do not, they still do not justify the approach taken in \textit{Woody}. In \textit{Sherbert} and \textit{Jennison} there was no weighing of social harm against religious importance. Firstly, both involved a refusal based on a precept, a refusal that had no physical or public consequences, and both related to duties owed the government. In \textit{Woody} members

\textsuperscript{28} 61 Cal. 2d at 727, 394 P.2d at 821, 40 Cal. Rptr. at 77.
\textsuperscript{29} 374 U.S. 398 (1963).
\textsuperscript{30} 285 Minn. 96, 120 N.W.2d 515 (1963), rev'd per curiam and remanded, 375 U.S. 14 (1963).
\textsuperscript{31} Id; see Weiss, supra note 19 at 620-21.
\textsuperscript{32} People v. Woody, 61 Cal. 2d 716, 727, 394 P.2d 813, 821, 40 Cal. Rptr. 69, 77 (1964).
of a group insisted that a ritual involving many people in physical acts with concretely measurable consequences can be done by those who claim it is religious. Second, just as the analogy is not there, neither is the claimed principle of harm versus religious importance. The Sherbert Court rests its decision on penalization of the past exercise of a claimed religious freedom, and does not measure the Sabbath's religious importance against labor market needs. Further, in Woody, members of a group insisted that they had a religious right to engage in a ritual involving many people in illegal physical acts with concretely measurable consequences, a situation present in neither Sherbert nor Jennison.

The balancing test formulated in Woody cannot be administered by the courts. To do so, a court must independently evaluate both the merits of the religious act and the degree of its perceived danger. Now is not the time to engage in a dissertation about the separation of powers, but decisions about harm, degrees and competing values should be in the legislative realm. The impracticality of a balancing test reflects its factual and social rather than legal nature. Perhaps most important in this context is the point that to examine a religion to determine the importance of a particular ritual is to engage in a dissection and investigation of religion which is forbidden under the Constitution. The dangers of such an inquiry are illustrated by People v. Mitchell decided by a lower court in California two years after Woody. The court upheld Mitchell's conviction for possessing and using marijuana upon a finding that the courtroom discussion of the Bible and Hindu practices was an expression of "personal philosophy" rather than religious practice. At the minimum, Mitchell limits the application of Woody to religious groups and rituals, a limitation seemingly contrary to the notion that the first amendment was incorporated not to safeguard institutions, but to protect and increase individual freedom, choice and action.

In particular, assessing the amount of damage which may result to society from an unlawful act is not a proper judicial function.

---

33 374 U.S. 398, 404 (1962). See Leary v. United States, 383 F.2d 851 (5th Cir. 1967), where the court determined that reliance on Sherbert was misplaced since marijuana laws are concerned with "protection of society" while the Sherbert Court was concerned with protecting the individual.

34 United States v. Ballard, 322 U.S. 78 (1944) was cited in Leary v. United States, 383 F.2d 851, 860 (5th Cir. 1967), to prevent inquiry into the "truth or verity of appellant's religious beliefs." For an extended discussion of this point, see Weiss, supra note 19 at 604-09. For the implications of this position and the resulting argument that a religious exemption from military service is unworkable, see Clancy & Weiss, supra note 27 at 152-58.

35 244 Cal. App. 2d 177, 52 Cal. Rptr. 884 (1966).

36 244 Cal. App. 2d at 182, 52 Cal. Rptr. at 888.
Courts are not free to say that acts the legislature has determined to be dangerous are not in fact dangerous. The courts are not designed, and do not function, to ascertain and weigh facts of "social" harm, particularly those of degree. Legislative concepts of danger may differ and it is those concepts which predicate enactments. Extracting a nonexistent balancing test from such situations infringes religious freedom and legislative prerogatives.

Woody and Mitchell do not provide much authority for a religious defense of drug use. Rather, viewed together, they illustrate the difficulties of implementing a balancing test which requires the judiciary to inquire into the merits of religions to assess individual belief and its importance on a scale balanced against conjectural harm. Different courts have different ideas concerning what is "personal philosophy" and what is "religious activity." One individual's religious practices and convictions may be completely private; another's public posturing may have no individual religious basis. Such formulations tend to favor religious groups over individuals, orthodox beliefs over strange ones and present religions over past ones. Hence, they inhibit the growth of new, minority religions while favoring and encouraging old, established ones. This leads to protection of strongly structured groups rather than strong feeling individuals. Further, the distinction between "private" and "public" religions is not legitimate under the Constitution.

Moreover, if courts accept the religious defense, they must determine both the domain of religion generally and the boundaries of particular religions. Defining the domain of a religion may be intellectually impossible because religions often claim relevance and control in all dimensions of life. To define the boundaries of a particular religion is to act as a theologian and to do what often a believer himself cannot. This point cannot be over-emphasized. Mitchell more closely resembles Sherbert and Jennison in that it involved one person following what he believed to be religious practice. Woody, on the other hand, exempts "members" of a sect thereby raising issues of equal protection. Both Woody and Mitchell, however, define religion and its limits and implications in a confusing context of "harm".

---

37 See generally E. Freund, Standards Of American Legislation (1965), and its excellent introduction by F.A. Allen.
38 It also raises questions of equal protection and due process. See Clancy & Weiss, supra note 27 at 154-55.
39 See id. at 153-54.
40 See generally Weiss, supra note 19 at 600-05.
41 See Clancy & Weiss, supra note 27 at 155-56; Weiss, supra note 19 at 600-05.
B. Inherent Problems of the Religious Defense

Beyond the difficulties of these cases lie the problems inherent in a generalized "religious defense." First, virtually any action could be defended by utilizing the religious defense, and individuals could create privileges in the courts not uniformly available to the public. Second, even if the Constitution and rational administration of criminal justice could accommodate this defense, courts would have to develop contexts and criteria of application which do not presently exist. In what areas would we countenance a religious defense and why? How would it be applied and by what government agency? As noted above, references to groups, feelings about rituals and current religious practices cannot provide such principles. Finally, as the criticism of the Woody decision indicates, balancing tests involve the courts in prohibited judgments about religious beliefs and intrusion into legislative prerogatives.

Given the weak case support for the religious defense, the constitutional and conceptual problems and the current lack of standards, development of a generalized religious defense seems impossible. The remainder of this article attempts to define the areas of free expression and private individual integrity which the state may not infringe in attempting to regulate drug use.

II. FREEDOM OF EXPRESSION

Proponents of drug use, particularly LSD, believe they have discovered a new social doctrine. Not only do they often reject normal

---

42 See Weiss, supra note 19 at 602-08 for a more complete exposition. But if any individual can claim religious motives as a defense, then an indiscriminate license issues and there is no "law." Leary v. United States, 383 F.2d 851 (5th Cir. 1967). This rule would motivate the wrongful recourse to groups and is part of the proof that the religious defense is unworkable, particularly when inquiry into sincerity is precluded. See Reynolds v. United States, 98 U.S. 145, 166 (1878) (human sacrifice); Delk v. Commonwealth, 166 Ky. 39, 178 S.W. 1129 (1915) (swearing by a minister in church). See the failure of the religious defense to a prosecution for not carrying draft cards. United States v. Kime, 188 F.2d 677 (7th Cir. 1951), cert. denied, 342 U.S. 823 (1951); cf. Hamilton v. Regents of Univ. of Calif., 293 U.S. 245 (1954) (refusal to join ROTC); United States v. Aarons, 310 F.2d 341 (2d Cir. 1962) (free expression defense to violation of Coast Guard regulation); Gara v. United States, 178 F.2d 38 (6th Cir. 1949) aff'd per curiam 340 U.S. 857 (1950); People v. Penn, 16 N.Y.2d 581, 208 N.E.2d 789, 260 N.Y.S.2d 847 (1965). See notes 34-38 supra. For particular reference to narcotics and grand juries, see People v. Woodruff, 26 App. Div. 2d 236, 272 N.Y.S.2d 786 (1966). Consider the difficulties, finally, in construing a religious exemption previously defined by the legislature. See United States v. Seeger, 380 U.S. 163 (1965); Clancy & Weiss, supra note 27.
social values and goals, but many also assert that they are members of a “love” generation or that they are creating a new way of life. Many wear buttons and picket to legalize various drugs. Some even staged a “smoke-in” in Tompkins Park in New York. The constitutional question which arises is whether, given the social values implicitly expressed by use of drugs, and given the fact that social groups embodying new ideals of social living center around the drugs, drug use can be constitutionally defended as free expression under the first amendment. There are three areas of inquiry: (1) What activities are included in the concept of “expression”? (2) Is drug use included in the concept of expression? (3) If drug use is expression, is it therefore protected under the first amendment?

A. The Concept of Protected Expression

Communication by words alone is clearly expression. However, other means of communication have engendered litigation on the meaning of “expression”: “The First Amendment affords protection not merely to the voicing of abstract opinions upon public issues. It also protects implementing conduct which is in the nature of advocacy.” In 1940 the Court, per Justice Murphy, held in Carlson v. California that displaying signs and banners was a form of protected speech. Earlier, the Court in Stromberg v. California had assumed that displaying flags was protected speech, striking down a statute prohibiting such actions on grounds of vagueness. Peaceful picketing has also been held a form of speech by a unanimous court. Arguably, sit-ins have been treated as speech. Performance of a “topless” dance, for the entertainment of an audience in a com-

45 NLRB v. International Longshoremen’s Ass’n., 332 F.2d 992, 999 (4th Cir. 1964) (emphasis added).
46 310 U.S. 106 (1940). In West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), a compulsory flag salute was held unconstitutional, thereby recognizing that gestures communicate.
47 283 U.S. 359 (1931).
48 See Thornhill v. Alabama, 310 U.S. 88, 102 (1940). The purity and scope of this decision have been considerably weakened by such cases as Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287 (1941) in which the relation of acts of violence to picketing justified upholding the injunction against it. Cf. Beauharnais v. Illinois, 343 U.S. 250 (1952); Feiner v. New York, 340 U.S. 315 (1951). See Weiss, Book Review, 72 Yale L.J. 1655, 1669–70 (1963). In any event, the picketing cases are another illustration of non-verbal communication.
mercial establishment, has also been considered protected expression within the first amendment. On the other hand, the Supreme Court, while talking of noise control, has imposed absolute bans on sound trucks. Also, lower courts have rejected the claim that flag desecration is protected speech and a local court has upheld a prohibition against hanging materials on clotheslines to protest taxes.

Recently the Supreme Court handed down a very narrow reading of protected "symbolic" speech. In United States v. O'Brien, reviewing two conflicting circuit court opinions, it held that draft card burning was neither political speech nor symbolic expression. With great effort, reminiscent of Fleming v. Nestor, the Court found many practical reasons why a prohibition of draft card burning efficiently aided the Selective Service System. One could therefore argue that this case was merely a holding on the facts that a regulation justified by actual necessity will not be struck down merely because it affects methods of action by which people choose to express themselves. Historically, it may also be viewed as a result of political pressure. The dangerous dicta, however, includes a thesis on how legislative intent to punish speech is irrelevant. Viewed in any light, the case is hard authority against the expansion of "symbolic expression" and must be distinguished by an advocate and considered aberrational from the real rationale of other symbolic expression cases.

Although no definitive guidelines emerge concerning the protection of speech which is considered symbolic, yet public activity, the decisions have involved several common elements: (1) a clear political issue—statements on labor conditions, party loyalty, segregation and war; (2) actions clearly related to political issue either

---

59 In re Giannini, 446 F.2d 535, 72 Cal. Rptr. 655 (1968).
60 Kovacs v. Cooper, 336 U.S. 77 (1949).
64 See United States v. Miller, 367 F.2d 72 (2d Cir. 1966); Smith v. United States, 388 F.2d 529 (8th Cir. 1966).
67 But see Yick Wo v. Hopkins, 118 U.S. 356 (1886).
by immediate content—signs—or by dramatizing the specific grievance—draft card burning and sit-ins; and (3) individuals or groups acting in a specific locale or for a limited time. The inquiry, then, is whether these elements are present in the use of drugs, and, if not, whether they are essential to a defense based on free speech.

B. Drug Use as Political Expression

Not all drug use has clear political overtones. A man dependent on morphine after hospital treatment may have been involuntarily addicted. On the other hand, cooperative living and the growth of conventions among users of psychedelic drugs manifest a social vision. Insofar as drug users utilize drugs as an explicit rejection of society or societal modes of living, they are engaging in political action. Recently a three-judge panel enjoined the enforcement of an over-vague statute proscribing nudity against a nudist colony. Although this ruling was based on vagueness, Judge Darr reached the merits to hold that the nudists' privacy should be protected and that the statute violated the freedom of association, and the rights to privacy and equal protection of the law. One might argue that the impulse beneath the vagueness ruling and the concern for the freedom of association was a recognition that these people were living according to their social ideals. Similarly, communal use of drugs, because it embodies particular social values, could be viewed as political expression.

60 252 F. Supp. at 848-49 (concurring opinion). See also Fenster v. Leary 20 N.Y.2d 309, 229 N.E.2d 426, 282 N.Y.S.2d 739 (1967) discussed infra at note 95. One might worry about an extension of the argument in the text to the proposition that anti-social behavior is necessarily protected political speech. What about thieves? Consider the movie Thief of Paris (1967) for an example of thievery as expression. See also Lynden, The Last Holdouts, ATLANTIC MONTHLY, Aug. 1967, at 42-43. This issue is considered implicitly in the text accompanying notes 101-107 infra. See Justice Jackson's discussion in West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) on the right to differ on things "that touch the heart of the existing order" and make gestures in regard to them. In thievery, particular acts are prohibited that may manifest the thief's rejection of the social order. In nudity and drug sessions the style of life is at stake. Of course, alleged thieves like all others may gather socially. See United States v. Bufalino, 285 F.2d 408 (2d Cir. 1960).
61 252 F. Supp. at 850. Darr then added a humorous addendum attacking nudists. Id. Also, the decision of a California lower court that nudist camps are protected by the first amendment was recently upheld on narrow grounds. People v. Lang, No. 8187 (Los Angeles County Super. Ct., Dec. 4, 1968).
In the case of noncommunal use of drugs,\footnote{Even “solitary users” often use drugs in a social group. Junkies go to shooting galleries; pot is often social; and many users belong to a little society composed of individuals with common problems and a common language.} the political aspect is harder to perceive and define. It can be argued, however, that because use of illegal drugs so unequivocally sets one against public morality and defines a different way of life, a clear rejection of society and its values, it could very well be treated as political.\footnote{But note Justice Black’s conclusion that “the First Amendment does not protect speech and assembly only to the extent it can be characterized as political.” United Mine Workers v. Illinois State Bar Ass’n, 389 U.S. 217, 223 (1967).}

Two famous cases have dealt with individual acts as relevant to the good moral character which aliens must maintain for the five years preceding naturalization. On Repouille v. United States,\footnote{165 F.2d 152 (2d Cir. 1947).} Judge Learned Hand held for the majority of two that an alien who committed an act of euthanasia during this five-year period failed to meet the “good moral character” requirement since most people considered mercy killing to be immoral.\footnote{Judge Frank dissented on the ground that public opinion and ethical leaders should be consulted before making a decision. Id. at 154.} In Schmidt v. United States,\footnote{177 F.2d 450 (2d Cir. 1949).} Judge Learned Hand, in dealing with a man who with “unnecessary frankness”\footnote{177 F.2d at 450. One could query whether a Judge should suggest that a man lie on a governmental form. See 18 U.S.C. §1001 (1966).} admitted occasional acts of fornication, decided that he still possessed the requisite good moral character. Both men, of course, had violated laws. If they had done so to protest or change the laws, their acts would have appeared to be political in nature.\footnote{The range of criminal actions normally committed by people in protest or desperation that may be morally justifiable and even legally acceptable is discussed at length in Allen, Civil Disobedience and the Legal Order, 36 U. Cin. L. Rev. 1 (1967).} In absence of an express motive, however, can we conclude that their actions were political? We can say at least that their acts had political-moral content, so much so that a single act was sufficient in one case, and almost in the other, to lead to a conclusion of ‘immorality’ by public standards—an act therefore of political content.

People rarely use drugs in public; such use is a seeming end in itself. While pickets and draft card burners intend to convey an idea, drug users rarely intend their acts to convey ideas explicitly. Yet drug users, like members of nudist colonies, have a style of life at stake. Both the “digger” and the solitary junkie embody their concept of life in their acts. Their acts, therefore, if not specifically oriented to communicating, are nonetheless expressive of their view...
and function for them, perhaps due to a similar psychological motivation, as would displaying banners and signs.\textsuperscript{69} We might say that style of life may be viewed as political expression, just as a monastic life may be viewed as religious devotion.

\textbf{C. Drug Use as Protected Expression}

If drug use can be treated as political expression, is it therefore exempt from prosecution? The fact that speech is used in an act does not protect the act: "[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."\textsuperscript{70} This position is even stronger when the act in question is not so conspicuously purposeful, political expression.\textsuperscript{71} Clearly whispers of conspirators are not immune. Radio is regulated for content,\textsuperscript{72} and individuals may be prosecuted for fraudulent statements.\textsuperscript{73} A proscribed act, once labeled political, does not become less criminal.

But our inquiry does not end here. The above argument rests on the assumption that taking drugs, even if embodying a social idea or politically purposeful, is a proscribable act or proscribed aspect of an area of activity. It may be, however, that drug use is an entirely political and social act, lacking those tangible nonideological elements present in the ends and effects of conspiracy, libel, fraud or, arguably, draft interference. Our inquiry, therefore, is whether taking drugs has proscribable aspects or belongs in a scheme of activity that produces effects which are sanctionable. To do this, we must examine both the act itself and the power of the state.

\textbf{III. The Right to be Self-Destructive}

The keystone to this section can be found in Justice Jackson's account of the activities of infant Jehovah Witnesses: "The freedom

\textsuperscript{69} Id. \textit{See also} P. Weiss & J. Weiss, \textit{Right And Wrong}, A \textit{Philosophical Dialogue Between Father and Son} (1987).


\textsuperscript{71} See note 63 \textit{supra}. Clearly, the claim of political vision is often more literary than actual.

\textsuperscript{72} Cox, \textit{The FCC, The Constitution, and Religious Broadcasting}, 34 Geo. Wash. L. Rev. 186 (1965) is an excellent attack on the efficacy and constitutionality of such regulation.

asserted by these appellees does not bring them into collision with rights asserted by any other individual. . . . Nor is there any question in this case that their behavior is peaceable and orderly."

In that case, much to the consternation of many locals and local officials, Jehovah Witness students were upheld in their refusal to salute a flag while other classmates did so pursuant to a school regulation. Similarly, much to the consternation of others, drug users commit acts which may or may not have effects on their minds. The question is whether the analogy holds—Does taking physical substances because of their effects on personal attitudes and experiences have the same constitutional nature as taking or refusing to take a symbolic position because of its meaning to the individual? The resolution of this question requires an examination of our criminal system and other acts analogous to drug use.

The fundamental document in American democracy is the Constitution. Explicitly based on an accord, it establishes governmental powers and individual rights. Many specific sections deal with crimes. The fifth amendment states that no one is to be denied "liberty" without due process of law. The implication of this command is that all individuals, or at least all adult citizens, have liberty as an inherent characteristic of their citizenship. Their ability to consent implicitly or explicitly reject or affirm, and their part in the continuing pronouncement, "We, the people," rests on the recognition that all individuals have liberty. So we can say that the Constitution envisions a society composed of "free" individuals living together. Yet that freedom can be taken away. The Constitution also envisions arrests, trials and imprisonment, and a criminal process which must be conducted in a manner consistent with guaranteed procedural safeguards.

Thus, there are two elements to be considered in analyzing the imposition of criminal sanctions—liberty and procedural safeguards. Although, in a constitutional context, these elements could be considered separately, many reasons favor reading them together. First, because the Constitution is an attempt to generate fundamental principles by which government and society can function, its provisions are better viewed as related parts in a scheme. Second, the history of constitutional interpretation by the Supreme Court evidences a reading of the document as a unity, and the principles as related.

---

Third, liberty and due process are not only conceptually related, but also related in fact by specific procedural guarantees, such as reasonable bail, thereby indicating that due process reasonableness was intended to serve as a protection of liberty. Procedural protections therefore serve the dual functions of guaranteeing optimum continuation of liberty and of preserving liberty during the criminal process.

How can these elements be combined? On any democratic principle one man's freedoms and rights are as valuable as another's. We all start as free individuals, but some may act in such a way as to affect other people's freedoms and rights. If we say that it is only justifiable to interfere with a person's freedom when he interferes with the freedom of others, the elements are neatly combined. What is needed then is a procedure for resolving these conflicts. The state serves this function by determining which acts so adversely affect other people's freedoms that limitations must be imposed on the freedom of the actor.

As further proof of the reasonableness of this constitutional ground of criminal law, consider the implications of a system not based on a recognition of liberty. If the state could proscribe any act and the state countenance, as it must and does, prosecutorial discretion, significant equal protection problems could arise and the whole point of procedural due process would vanish. An ordinance against breathing, selectively applied, could lead to oppression. If any act can be proscribed then we have little need for due process protections since all we need do is proscribe the acts or characteristics of those we do not like. (There is more than one way to skin a cat).

But most important is the fact that the Constitution has created specific categories of exempt acts, those that only affect other people's beliefs not their freedoms. The first amendment establishes freedom to promulgate ideas. Again, in Justice Jackson's words:

> If official power exists to coerce acceptance of any patriotic creed, what it shall contain cannot be decided by courts, but must be largely discretionary with the ordaining authority whose power to prescribe would no doubt include the power to amend. . . . If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception they do not now occur to us. . . . It would seem that involuntary affirmation

---

76 U.S. Const. amend. VIII.

77 Of course, there are other constitutional guarantees such as those against bills of attainder which, if properly applied, would protect many rights. U. S. Const. art. I, § 9. See United States v. Brown, 381 U.S. 437 (1965); Note, 72 Yale L.J. 330 (1962). Equal protection is also a powerful tool. See Hernandez v. Texas, 347 U.S. 475 (1954); Yick Wo v. Hopkins, 118 U.S. 356 (1886).
could be commanded only on even more immediate and urgent grounds than silence.\textsuperscript{78}

In short, compulsion to perform a symbolic act with specific ideological content is forbidden. Persons cannot be compelled to affirm a pledge which has manifestations cognizable only by those who believe or those who are concerned with the beliefs of others.\textsuperscript{79} There exists not only the range of freedom of expression but also the specific area of symbolic activity. In this connection, let us note a refusal to participate in a ritual when others do can be as symbolic a gesture as participation itself—an upright person amidst kneeling people; a person sitting down while others stand in tribute.

The principle we may extract is that the Constitution has defined a range of criminal acts. That range encompasses acts whose physical nonideological consequences affect the rights and freedoms of others. Restraint is justified upon proof that the acts of one have physical consequence to the detriment of another's freedom:

\begin{quote}
[T]he power of a state to regulate and control the conduct of a private individual is confined by those cases where his conduct injuriously affects others. With his faults or weaknesses which he keeps to himself and which do not operate to the detriment of others, the state as such has no concern.\textsuperscript{80}
\end{quote}

Such an inchoate principle has been evidenced in analogous situations. One judge has stated that the state cannot prescribe what a man shall eat and wear or drink or think.\textsuperscript{31} On the same rationale, peyote and LSD are eaten. Another court has stated that cigarette smoking cannot be made illegal.\textsuperscript{82}

In a different context, courts have disputed utilizing the police power to force motorcyclists to wear helmets. The dialogue may be viewed as starting when a New York judge, later reversed,\textsuperscript{83} stated

\begin{quote}
...the presumption of constitutionality, legislative fact-finding, harm to others by careening motorcycles and the need for a healthy citizenry. The decision is not persuasive but, as yet, there is no record of an appeal.
\end{quote}

\textsuperscript{80} See Weiss, supra note 19 at 610-11. It is not entirely clear whether the black letter of the law is that establishing the ritual is forbidden, whether compelling children to take postures infringes religious and/or free speech rights, or whether it is the compulsion of affirmation which is the crucial distasteful element. Id. The objective in that article was to harmonize all facets; here to explore the theoretical underpinnings.
\textsuperscript{81} Eidge v. Bessemer, 164 Ala. 599, 51 So. 246 (1909).
\textsuperscript{82} Hersberg v. Barbourville, 142 Ky. 60, 133 S.W. 985 (1911).
that "the police power is understood by this court . . . [to] justif[y] the regulation of the conduct of one person because of the effect of that conduct upon other persons,"84 arguing that alcohol and narcotics are proscribable because they produce anti-social behavior, but that to force wearing of helmets is unconstitutional. This pronouncement was preceded by another decision that held the prohibition unconstitutional because it was too indefinite to meet criminal legislative standards, thereby indicating that the legislature really had no place in prescribing how people dressed.85

Then came the answering cases. Rather than directly deny the validity of sic utere tuo abenum non loedas—that there can only be crimes when things are done which are dangerous or destructive to others—courts found justification in the safety danger presented by helmetless motorcyclists.86 For, they reasoned, if a motorcyclist was hurt for lack of a helmet, he might careen about creating a danger to others.87 They thereby avoided the issue of the constitutionality of legislating to protect individuals from themselves, although one court intimated that because injured people were a burden on the state, the state could exercise its police power broadly to enact such legislation.88

To this argument, the Michigan Court of Appeals, after quoting John Stuart Mill, posed the classic answer. The aim of preventing motorcyclists from going out of control could be served by narrower legislation which did not infringe individual choice.89 Rejecting "paternalism," the court reasoned that legislation concerning safety devices, such as motorcycle windshields, would be better adapted to the purpose of preventing injured motorcyclists from endangering others.90

84 53 Misc. 2d at 590, 279 N.Y.S.2d at 277.
87 Id.
90 Id.
(Query, however, the effect of aesthetic objections by owners to such designs.) If, on that narrow ground of reasonable regulation to effectuate the purpose of safety, the Michigan court appears the most persuasive, it is clear that the principle of constitutional freedom from "paternalism" is not universally accepted and must be argued for, at least in that context. The dialogue though indicates a judicial and judicious hesitation with respect to laws which preclude people from taking personal risks. Such an approach reflects the constitutional considerations previously suggested and traditional "liberal" doctrines on the police power.91

Recently an alternate analysis, based upon complementary constitutional doctrines, was advanced by Professor Bork.92 He suggested taking Justice Goldberg's concern in Griswold v. Connecticut93 with the ninth amendment more seriously, reasoning that the first eight amendments could be conceived of as specific examples of the general set of natural rights protected by those eight and the ninth, and one might argue, the tenth. Dealing mainly with the issue of legal activism, Bork suggested that the Supreme Court should extrapolate on a case by case basis from the first eight amendments to give cognitive content to the concept of rights in the ninth. Unfortunately, he offers no principles, so it is hard to see how such an approach would not be an excuse for judicial legislation. On the other hand, one could argue that the ninth and tenth amendments reflect a doctrine of natural rights, if not natural law, so to invade a person's identity—manifesting and identity-constituting activities, is a suspect invasion of this realm. Bork aptly suggests that the selected invasion must be the least destructive means available: "[A]ll human behavior should be entitled to the same level of constitutional consideration . . . that is currently afforded non-political speech . . . . The new concept of rights becomes, indeed, something roughly describable as a presumption in favor of human autonomy."94

91 Recently, the United States Supreme Court dodged this issue and entered into a confused debate on public drunkenness and criminal responsibility. Powell v. Texas, 392 U.S. 514 (1968). There is neither a majority opinion in Powell nor much inspirational reasoning. Since a condition of public drunkenness, as in this case, could be "dangerous," it arguably falls out of the class of action or expression without tangible harmful aspects. However, because by definition public drunkenness is a crime without an act, there is an implied undermining of the rationale of restraining only dangerous acts. Until the issue is directly confronted, Powell should be considered in tandem with Robinson v. California, 370 U.S. 660 (1962), and, although troublesome, not dispositive.


93 381 U.S. 438 (1965).

94 Bork, supra note 92 at 174.
might say, that recognizing the complexity of activity and motive, constitutional protections are relevant not only to discreet activities but also to those who engage in them.

In this regard, it should be noted that courts have increasingly emphasized the right to be the way you are regardless of how repugnant it may be to others. In striking down the New York vagrancy law, the New York Court of Appeals recently stated:

[A] statute whose effect is to curtail the liberty of individuals to live their lives as they would and whose justification is claimed to lie in . . . police power . . . must bear a reasonable relationship to . . . the alleged public good. . . . It is also obvious that today the . . . only crime [of vagrants], if any, is against themselves, and whose main offense usually consists in leaving the environs of skid row and disturbing by their presence the sensibilities of residents of nicer parts of the community....

Reminiscent of the language in Barnette v. West Virginia State Bd. of Educ., the Court concluded that the unconstitutionality consisted of an "overreaching of the proper limitations of police power in that it unreasonably makes criminal . . . conduct of an individual which in no way impinges on the rights or interests of others. . . ." Also recalled is Justice Brandeis' dissent in Olmstead v. United States:

The makers of our constitution undertook to secure conditions favorable to the pursuit of happiness . . . 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.

The "right to be let alone," a recognition of the inviolability of a person's identity and purely personal evidencing of it, is often characterized and recognized as "privacy" and harks back to the original attempt to create a society in which men were free to "pursue happiness," to conduct their lives as seen fit, and to experience pain, pleasure and individual fulfillment. An underlying impulse and factor in the formulation of "liberty," its most recent expression by the Supreme Court was in Griswold v. Connecticut, where the Court refused to let a state proscribe means of contraception and procreation. This decision in turn echoed older pronouncements about "the right of the citizen to be free in the enjoyment of all his faculties." The "right to be let alone" logically entitles citizens to engage in behavior which the majority might consider distasteful or even com-

---

100 165 U.S. 578, 599 (1897).
pletely immoral, such as nudism or vagrancy. In analogous areas, this conduct is often potentially harmful to the person himself; yet to interfere with this constituting of his identity is to "unreasonably interfere with the right of the citizen to determine for himself such personal matters."101

Private personal indulgence in conscious-altering substances for reasons of personal preference concerning the constitution of identity and consciousness is an act whose essential and overriding purpose and effect is not only that of inducing a personal private experience, but also that of defining himself in part by the act. Whether the act is motivated by or described as related to a desire for religious experience or metaphysical insight or merely a wish to "get high," it is not and does not affect others or limit the freedom of others to live their lives as they see fit, except as a result of the way in which people's identities affect others. A man who swears constantly may offend some, an addict others. Both may bore even their friends, but they are not affecting another's freedom by acts or policies, but only by the identical insistence on their own mode of life. Friends or enemies may ignore them. It would appear, therefore, that the use of such drugs falls within the class of constitutionally protected private identity-constituting and identity-reflecting conduct which is placed beyond the reach of the state's police power by the Constitution and its underlying principles.

This argument must be placed at least congruently to the context of political expression. It pays nodding acknowledgement to the idea of unconscious intention and the relation and interpenetration of psychology and politics. It suggests freedom to create and affect identity and reactions may be a necessary condition for future political speculation, formulation and action. On the other hand, it recognizes that appearances and expressions reflect reactions and positions about society that may have political implications. In short, there exists a joinder of rationales—the hesitation to extend police power beyond acts harmful to others, engendered by the common-law fear of power; an interpretation of the Constitution which suggests that there are no criminals, only crimes defined in terms of liberty-deprivation; and a constitutional command of free speech whose effect is to protect its origins and, wherever, possible impure expressions. These rationales suggest a principle of law, often not strictly followed, that the rationale of state sanctioning under the Constitution prevents sanctioning for those self-directed acts which reflect ideas and express, affect and constitute personal identity.

---

101 Hershberg v. City of Barbourville, 142 Ky. 60, 61, 133 S.W. 986, 987 (1911). See cases cited in note 106 infra; Cortland v. Larson, 273 Ill. 602, 113 N.E. 51 (1916).
Cases both ancient and recent suggest that courts do recognize and apply the rationale developed above in analogous areas. There exist only three possible reasons for not applying such reasoning in the area of drug use: (1) use creates crime; (2) use leads to insanity, causing parents to not support their children, who then become burdens on the state; (3) use is tantamount to suicide. Noting that there is considerable factual dispute about the accuracy of these contentions, we will assume them true to discuss their relevance.

An old distinction exists, often ignored, particularly in the early 1950's, between words used in furtherance of a crime, perhaps in its commencement, and words or ideas which are considered dangerous to government and community. Those ideas which may lead to action (e.g.; Das Kapital and Mein Kampf) are protected; those words involved in the action (e.g., “you get the rope to hang him”) do not protect the actor. The rationale behind this distinction would seem to rest on a belief in individual responsibility and free will. Ultimately a man's act is his choice and his responsibility. Those things which may encourage crime do not necessarily produce it. A man regardless of temptation is guilty if he breaks the law. Crimes are acts and so punished. Even to maintain that alcohol and drugs encourage or motivate to crime does not argue for proscription—we maximize freedom to receive all influences on the faith that a man chooses and is responsible and we can punish accordingly. In particular, the requirement of mens rea suggests it is the decision to do the act that predicates guilt, so that we look to an act of will, as it were. Since an act of will is necessary, temptation, influence and inclination are factors for the will, not direct causes. To punish factors is to change the concept of guilt. Having a law of crime, not criminals, and acknowledging the tremendous range of factors that may lead to the commission of crimes, leads to the conclusion that even if drug use

102 Cases like Dennis v. United States, 341 U.S. 494 (1951) and American Communications Ass'n v. Douds, 339 U.S. 382 (1950) are direct authority, if of dubious vitality, counter to the proposition. While this distinction is a theoretical one supported by some authority, requiring full argumentation perhaps beyond the scope of this article, it is, according to the authors, the only constitutionally valid one and of sufficient force to employ here. Certainly tests such as “clear and present danger” are not relevant. Since the suggested distinction is not ideologically directed toward violence or incitement thereto, its authoritative base and clear relevance justify using it as established law here.

103 Only at the extreme limits of self-defense do we let duress or temptation excuse a crime. See Regina v. Dudley & Stephens, 15 Cox Crim. Cas. 624 (1884); Clancy & Weiss, supra note 27 at 148-49; cf Wallace v. United States, 162 U.S. 466 (1896).
is associated with substantially higher crime commission, it may not be proscribed on those grounds.\textsuperscript{104}

But saying this does not mean that some controls may not be exercised. Courts have repeatedly held that dispensation of drugs and liquors may be done only pursuant to a license and/or a prescription.\textsuperscript{105} There is no reason why this principle could not be employed to regulate sale of the drugs in question. Our argument goes to use and possession. Distributing drugs to others could be proscribed; it is not beyond the laws to issue rules about the circulation of dangerous instrumentalities.\textsuperscript{106} The law can reasonably prohibit minors from using drugs, liquor and tobacco\textsuperscript{107} by controlling distribution, while refraining from broad proscriptions against possession and use by the adult populace. That and that alone is protected as not being an act which directly and nonideologically affects the lives and actions of others.

While it is beyond the scope of this article to propose a regulatory scheme, it may not be entirely inappropriate to suggest the outlines of one. The unauthorized giving or selling of certain drugs could be made illegal. The state could dispense drugs or have authorized sellers, similar to state liquor store arrangements. In this way, price and quality could be regulated. Inflated prices in the illicit drug market would be decreased, making such activities less lucrative and diminishing the likelihood that potential buyers would be compelled to commit crimes to secure the purchase price. Negative propaganda campaigns akin to those presently being conducted against cigarette smoking, could also accompany drug legalization. Other crimes, such

\textsuperscript{104} To deny this we would have to reverse all criminal law. If junkies necessarily commit crimes, then they lack a \textit{mens rea}. If they act without a specific guilty choice they have no requisite guilty mind. A whole line of cases has grown up in this area. See Townsend v. Sain, 372 U.S. 293 (1963); Hansford v. United States, 365 F.2d 920 (D.C. Cir. 1966); People v. O'Neil, 66 Wash. 2d 263, 401 P.2d 928 (1965); Robinson v. California, 370 U.S. 660 (1962). \textit{See generally} Goldstein & Katz, \textit{Abolish the "Insanity Defense"—Why Not?}, 72 YALE L.J. 353 (1963).

\textsuperscript{105} Findings establish that marijuana does not cause crime. See \textit{Hearings on Taxation of Marijuana H.R. 6385 Before the House Committee on Ways and Means, 75th Cong., 1st Sess.,} (1937); Bromberg & Rodgers, \textit{Marijuana and Aggressive Crime}, 102 AM. J. OF PSYCHIATRY 825-26 (1946). \textit{See generally} Murphy, \textit{The Cannabis Habit, a Review of Recent Psychiatric Literature, 15 Bull. Of Narconics,} No. 1 at 15, 19 (1963). On the other hand, the growth of riots following integration and demonstrations are grist for the mill of the racist right.


\textsuperscript{107} \textit{Cf.} Prince v. Massachusetts, 321 U.S. 158 (1944).
as providing drugs to a minor and aiding a minor in their use could be created. Once dispensation is restricted to authorized sources, regulation, except as to quantity which is an individual choice, may be engrafted as it is for alcohol and off-track betting. In such a system, sanctions are applicable and only private individual use or communal use by adults would be permitted, and only if the drugs were obtained from legal sources.

Many also maintain that use of drugs, particularly LSD and DMT, has serious psychological consequences. But the problem is very difficult. In many cases the state-labeled “insanity” is labeled by others the ideal experience or style of life—“nervous.” Claims that drug use results in bizarre behavior and unproductive people are met by claims that such behavior is ideal and that productivity is a false value. Insanity itself raises many of the issues in the range of freedom of expression. Whether drugs create or manifest psychological patterns is in dispute; many materials legally obtainable may contribute to a breakdown in mental functioning or lead to temptations to obtain money illegally. Against this range of considerations we may return to our previous distinction between tendency-creating acts and expressions and the act itself. The use of materials which may create a state of being characterized by some as insanity cannot be prohibited, although illegal acts committed by the user, such as child neglect, may be punished. The only difficult issue is the moral question of these persons becoming a burden on the state and our right therefore to prevent those things that increase that possibility. But this issue appears to have been laid to rest by decisions in the welfare field. People are free to move and to be burdens on the state, and procreate and be burdens with their children on the

\[\text{footnote108}\]

The authors would like to thank H. Leroy Jackson, Jr., for this suggestion.

\[\text{footnote109}\]

See text accompanying notes 52-68 supra; note 99 supra. Note the dicta in Allgeyer v. Louisiana that police power must respect and not infringe the right to pursue happiness and use one’s faculties in a lawful way. 165 U.S. 578, 589-90 (1897).

\[\text{footnote110}\]

What of the argument, if sound, that use of LSD results in chromosome damage? Even Thomas Aquinas thought a child not a murderable human until eight days after conception, so it is hard to believe a conjectural statistical effect on a non-existent could be made the subject matter of a crime. We have come some way since Holmes’ third-generation-of-idioty rationale. Compare Buck v. Bell, 274 U.S. 200 (1927) with Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942) and Griswold v. Connecticut, 381 U.S. 479 (1965). Chromosomes are unlikely victims for crimes; eugenics is not yet jurisprudence. Let us note in passing that cigarette smoking and hunger have been better demonstrated to injure the unborn. Yet prosecutions of the welfare mother for failure to purchase foods constituting a balanced diet would violate the established money-payment principle which allows recipients to spend as wanted.

\[\text{footnote111}\]

See Edwards v. California, 314 U.S. 160 (1941); Thompson v. Shapiro, 270
state. If the consequence of a protected act means direct state support, that is the unpredictable price a free society has to pay. Many maintain, although many dispute, that drug use creates a propensity to commit crimes. Assuming that were the case it would make no argument. Could one prosecute for poverty? Could one prosecute for belonging to a reading society whose traditions were violence? or for having a cook-out where members were "likely" to commit crimes? Again, we must recur to the implicit model of man in criminal law. We punish for acts made after decision. Many factors, rational and psychological, may enter a decision and culminate in an act. We may not punish on the basis of factors, although there may be some statistical correlation between factors and acts, since the function of punishment is directed toward the individual, and must attend to his individual acts, and the utilization, manifestation and control of the various factors ingredient in a decision. A sum of factors is neither a decision or an act—it requires the man to do something. Moreover, factors interrelate and to prosecute for one factor without knowing what others may be necessary to trigger the result would violate even the rationale of prevention. Recognizing the complexity of decision even without the common-law assumption of free will leads to a rejection of decision-factor prohibition. And, let us note, that the acts worried about are crimes subject to prosecution (and to prosecute for drugs might lead to more irrationality in plea-bargaining) so one could increase sanctions for crimes committed while under the influence of drugs as is done for liquor and gun use.


We encourage the payment of direct and indirect support for those things enabling choice in the area of constitutional freedom. See Everson v. Board of Educ., 330 U.S. 1 (1947); Weiss, supra note 19 at 612-17, 621-22. Armies are raised and supported so that people may live freely. The consequent loss of income and burden on the state are the price of supporting freedoms of choice.

See Taylor, Narcotics, Nature's Dangerous Gift 19 (1943). Consider the reverse argument that crime and happiness are inversely related to heroin use.


Rather than violating the second amendment, proponents of gun control legislation would be better-advised to follow the English method of imposing more severe sanctions for crimes committed with guns.
One might argue for possible prosecution for attempted suicide of those who employ drugs. The analogy fails. In Russian roulette we have a clear individual probability, in drug use statistical. For some individuals, drugs might never decrease life expectancy for others certainly; it may depend on the body type. Until we know the precise mechanism for accurate prediction, we have no proof that a drug user is risking his life and arguably attempting suicide. To the degree that drugs are classified with those items which may tend to diminish life, the distinction between tendency-creating acts and direct acts of destruction still holds.

To approve of proscriptions against suicide is not inconsistent with our thesis. Suicide is a form of murder. Not only an avoidance rather than a solution of life's problems, it also can be considered immoral because it, like all human deaths, wreaks irrevocable havoc on others and destroys unduplicable potentialities. Unlike other acts which manifest or create a propensity toward acts which are destructive, suicide is irreversible and destroys the agency while creating harm.

Taking the steps one at a time: (1) Suicide is an act after which there is no more. If a person does something which creates a tendency, the tendency may be resisted or even the tendency-creating acts ceased. An act of suicide is ultimate—nothing can reverse it or stop its consequences. (2) The argument against prohibition of tendency-creating acts rests on the idea that we punish on a model of free-will. Sanctioning after mens rea does not apply to suicide for, after its completion, there can be no free-will. The agency is no more. Suicide prevents resisting the tendency. (3) Suicide has consequences on others. On all these grounds, our argument does not prevent sanctioning suicide. If not, then the argument can be extended without ruining the rationale on policy reasons.

IV. Conclusion

There is no impediment to our conclusion. Use of drugs reveals certain perspectives and psychological patterns. When observed, it may communicate sentiments as it arouses reactions. In a society formed of equally free men with no restrictions on the pure communication of positions, with sanctions predicated on acts creating tangible harm to others, drug use is outside the range of sanctions and protected as private expression. Assuming we only punish for acts chosen by free men, those activities, including drug use, which a man does to live with himself and articulate for himself his style of life may not be forbidden.