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DOES THE ILLINOIS CANNABIS CONTROL ACT VIOLATE THE RIGHT TO PRIVACY ENUNCIATED IN THE ILLINOIS CONSTITUTION?

INTRODUCTION

Narcotics control is an area of the law which has shown great change in recent years, particularly with regard to the use of marijuana and its prohibition by the state. In Illinois, narcotics law has been a dynamic area with two major statutory enactments,[1] one leading case,[2] and a host of case law development.

Of primary importance here is the current status of the Illinois law concerning cannabis control. An examination reveals that the law in the area of cannabis control is unsettled in Illinois and elsewhere.[3] Assertions have frequently been raised that violations of personal constitutional rights occur whenever the state attempts to prohibit marijuana use. A once rigid unanimity of judicial opinion in rejecting such assertions has wavered of late. Where it once seemed that there could be no serious doubt that the state has the unqualified right to prohibit marijuana use by the individual,[4] recent developments in the law suggest that the state's purported right is open to question. Indeed, the time may be at hand when the Illinois Supreme Court deems that the State no longer has an unqualified right to prohibit the use of marijuana.

CANNABIS PROHIBITION IN ILLINOIS: THE CANNABIS CONTROL ACT

In 1971 the Illinois Legislature significantly revised all the narcotics law in Illinois by enacting the Illinois Controlled Substances Act[5] and the Cannabis Control Act.[6] The Controlled Substances Act was thought to be a comprehensive act dealing with all aspects of the matter of abuse of controlled substances. As the Governor's Approval Message indicates,[7] it is noteworthy

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1. Act of Aug. 16, 1971, ILL. REV. STAT. ch. 56½, §§ 701-18 (Supp. 1975); Act of Aug. 16, 1971, ILL. REV. STAT. ch. 56½, §§ 1100-1603 (Supp. 1975).
2. People v. McCabe, 49 Ill. 2d 338, 275 N.E.2d 407 (1971).
3. The Oregon Legislature has recently passed a bill decriminalizing possession of marijuana in certain contexts. ORE. REV. STAT. 167.207 (1974). The Illinois Legislature has failed to enact a similar bill.
4. *See* United States *ex rel.* Fink v. Heyd, 287 F. Supp. 716 (E.D. La. 1968), *aff'd*, 408 F.2d 7, *cert. denied*, 396 U.S. 895; State v. Tabory, 260 S.C. 335, 196 S.E.2d 111 (1973); People v. Mistriel, 110 Cal. 2d 110, 241 P.2d 1050 (1952). *Cf.* Mugler v. United States, 123 U.S. 623 (1887).
5. ILL. REV. STAT. ch. 56½, §§ 1100-1603 (Supp. 1975).
6. ILL. REV. STAT. ch. 56½, §§ 701-18 (Supp. 1975).
7. Ill. H. Jour., 77th Gen. Assembly, 1971 Sess., Vol. III at 5464.

that marijuana does not come within the purview of the Controlled Substances Act. The legislature recognized that in dealing with the control of marijuana, it was dealing with a situation distinct from the larger issue of controlled substances.

In enacting the Cannabis Control Act, the Illinois Legislature realized that the then current state of scientific and medical knowledge made it necessary to acknowledge the physical, psychological, and sociological damage which accompanies the use of marijuana, but that it is used in Illinois despite this damage.[8] As previous legislation was deemed unrealistic and ineffective,[9] the General Assembly expressly declared that its intent in passing the Cannabis Control Act was to establish a reasonable penalty structure responsive to the current state of knowledge.[10] Sentences were to be progressively increased for correspondingly greater amounts of cannabis involved and the courts vested with a wide latitude of sentencing discretion.[11] Consequently, the Cannabis Control Act establishes graduated penalties with the severity of sentence being dependent upon *both* the amount of "substance containing cannabis" and the type of illegal activity involved, *i.e.*, possession, delivery, or manufacture.[12] In addition, first offenders may be placed on probation at the court's discretion.[13] Such is the rationale and structure of current cannabis control law in the State of Illinois.

THE CONSTITUTIONALITY OF CANNABIS CONTROL

The Right of the State

When a state regulates private activity in furtherance of the public welfare, it is exercising inherent police powers.[14] In utilizing such police powers to proscribe undesirable conduct, the government must demonstrate the existence of a legitimate state interest.[15] When an exercise of police power infringes on the rights of the individual, it is the assertion of legitimate state interest which is resorted to as justification for such state action.[16]

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8. ILL. REV. STAT. ch. 56½, § 701 (Supp. 1975). *But see* text accompanying notes 89, 90, 91 *infra*.
9. ILL. REV. STAT. ch. 56½, § 701 (Supp. 1975).
10. *Id.*; *see* Ill. H. Jour., 77th Gen. Assembly, 1971 Sess., Vol. III at 5464.
11. ILL. REV. STAT. ch. 56½, § 701 (Supp. 1975).
12. *Id.* §§ 704-09.
13. *Id.* § 710.
14. 72 C.J.S. 207 (1951).
15. *See* Bonnie and Whitebread, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 990 (1970). The discussion here pertains to the constitutional underpinnings of the state's right to exercise its police power towards the end of the prohibition of alcohol.
16. *See* Borras v. State, 229 So. 2d 244, 246 (Fla. 1969), *cert. denied*,

How courts perceive this inherent state right, and the corresponding requisite interest necessary to warrant its valid exercise, is frequently determinative when an individual asserts the invalidity or unconstitutionality of a purported exercise by the state of that police power. Those courts which take an expansive view of the inherent police power of the state, and of the virtually unbridled judgment of the legislature, seem to feel that the determination of a legitimate state interest is the domain of the legislature.[17] Once the legislature has enacted criminal legislation declaring the state's interest, the existence of such a law *per se* constitutes a compelling state interest. The legislature's discretion is then not subject to judicial scrutiny, unless it should prove to be wholly devoid of reason.[18]

Not all courts view the existence of a criminal statute as constituting *per se* a compelling state interest, but they do show deference to the legislature's judgment. The statute will be accorded a presumption of validity and the party asserting its invalidity will be saddled with the burden of proving the absence of a legitimate state interest.[19]

Thus, when a state has exercised its police power, and an individual claims that his rights have been violated, the issue will turn on the legitimacy of the state interest *vis-a-vis* the individual's right which is purportedly violated. Two cases are exemplary of this balancing process.

In *People v. Woody*[20] the Supreme Court of California was faced with a situation wherein the defendants, who were Navajo Indians, had been convicted of illegal possession of peyote. The defendants claimed that the statute under which they were convicted imposed an unreasonable burden on the free exercise of their religion because they used peyote as a sacramental symbol similar to the bread and wine used in Christian churches. The court in reversing the conviction declared that "the state may abridge religious practices only upon a demonstration that some

400 U.S. 808; Broom v. State, 463 S.W.2d 220 (Tex. Crim. App. 1970), *cert. denied,* 402 U.S. 933; *cf.* Miller v. State, 458 S.W.2d 680 (Tex. Crim. App. 1970).

17. *See* note 4 *supra.*

18. Leary v. United States, 383 F.2d 851, 861 (5th Cir. 1967), *rev'd* 395 U.S. 6 (1969). *See also* State v. Bullard, 267 N.C. 599, 602, 148 S.E.2d 565, 568 (1966), *cert. denied,* 386 U.S. 917 (1967). Courts that take this position often look for support to Reynolds v. United States, 98 U.S. 145 (1878), wherein the Supreme Court ruled that Congress could constitutionally apply to Mormons a prohibition against polygamy on the basis of a compelling and unavoidable state interest. As will be seen later, the "compelling and unavoidable state interest" language has acquired special significance.

19. *See* Commonwealth v. Leis, 355 Mass. 189, 243 N.E.2d 898 (1969); People v. Irvin, 264 Cal. App. 2d 747, 70 Cal. Rptr. 892 (1968); *cf.* Clark v. Craven, 437 F.2d 1202 (9th Cir. 1971).

20. 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

compelling state interest outweighs the defendant's interests in religious freedom."[21]

In balancing the conflicting interests, the court weighed the freedom of religion as protected by the United States Constitution against the State's asserted compelling interest. Since the use of peyote incorporated the essence of defendants' religious expression, the court felt that the freedom of religion scale was heavy. Yet the use of peyote presented only slight danger to the State and to the enforcement of its laws; as such, the second scale was deemed relatively light. The court concluded that the scales tipped in favor of constitutional protection.[22]

In contradistinction to *Woody* stands another California case, that of *People v. Collins*.[23] Here, the defendant, who had been convicted of possession of marijuana, did not worship or sanctify marijuana. Rather, the defendant testified that he used it as an auxiliary to engage in meditative communication with the Supreme Being.[24] The defendant asserted freedom of religion as a defense. The court replied that "the state has a limited authority to prohibit religiously motivated conduct which collides with a compelling state interest."[25] After examining the validity of the defendant's claims, the court concluded that the laws of California prohibiting marijuana possession expressed a compelling state interest and did not violate the defendant's constitutional right to freedom of religion.[26] As such, the scales here failed to tip in favor of the defendant.

Therefore, it appears that to warrant an exercise of the inherent police powers of the state, when such exercise is in conflict with an individual's constitutionally protected rights, the state must demonstrate a "legitimate and compelling" interest in the proposed action. Absent such an interest, the state's exercise of such police powers is unconstitutional.

The State Must Show a Compelling Interest Only if Personal Liberties Are Threatened

As noted earlier, when a state seeks to exercise its inherent police power, and such exercise conflicts with a constitutional right, the state will be required to demonstrate more than that a regulatory statute bears some rational relationship to the effec-

21. *Id.* at 718, 394 P.2d at 815, 40 Cal. Rptr. at 71 (emphasis added). Thus, when an exercise of the police power is in conflict with a constitutional right, it will apparently necessitate not just a legitimate, but a *compelling* state interest to sustain the exercise. *See* note 18 *supra*.
22. *Id.* at 727, 394 P.2d at 821, 40 Cal. Rptr. at 77.
23. 273 Cal. App. 2d 486, 78 Cal. Rptr. 151 (1969).
24. *Id.* at 487, 78 Cal. Rptr. at 152.
25. *Id.* at 488, 78 Cal. Rptr. at 152.
26. *Id.*

tuation of a proper state purpose.[27] "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."[28] The law must be shown to be "necessary, and not merely rationally related to the accomplishment of a permissible state policy."[29]

If a state enactment does not infringe upon personal liberties or constitutional rights, it will then be subjected to a less stringent judicial test, the test being only that there be a rational basis of fact that reasonably supports the enactment.[30] This in large part explains why in many cases assertions that set forth the purported unconstitutionality of state legislation have been rejected.

Courts have been uniform in failing to find a personal liberty or constitutional right to smoke marijuana. Absent such a liberty or right, the state prohibition need only meet the "rationality test" to be sustained. Thus, in *Commonwealth v. Leis*[31] the defendants insisted that the right to smoke marijuana is guaranteed by the Constitutions of the Commonwealth of Massachusetts and of the United States and must, therefore, be balanced against the interests of the State in prohibiting its use.[32] The response by the court was rather incisive: "No such right exists."[33] The court stated that such right was neither preserved by either Constitution, nor included within a zone of privacy formed by the penumbras of the first, third, fourth, fifth, and ninth amendments of the Constitution of the United States.[34] As if its position could have been seen as equivocal, the court reiterated that "[t]he defendants have no right, fundamental or otherwise, to become intoxicated by means of the smoking of marijuana."[35]

Having effectively dismissed the defendants' claims of the presence of a constitutional right, it became a simple matter for the court to proceed to uphold the Massachusetts' statute under the "rationality test." *Commonwealth v. Leis* poses a rather

27. Griswold v. Connecticut, 381 U.S. 479, 497 (1965) (J. Goldberg concurring). Note that Justice Goldberg uses the terms "personal liberty" and "Constitutional right" almost interchangeably.

28. *Id.* (J. Goldberg quoting Bates v. City of Little Rock, 361 U.S. 516, 524 (1960)).

29. *Id.* (J. Goldberg quoting McLaughlin v. Florida, 379 U.S. 184, 196 (1964)).

30. *See* Commonwealth v. Leis, 355 Mass. 189, 192, 243 N.E.2d 898, 901 (1969); *cf.* People v. McCabe, 49 Ill. 2d 338, 340-41, 275 N.E.2d 407, 408 (1969).

31. 355 Mass. 189, 243 N.E.2d 898 (1969).

32. *Id.* at 195, 243 N.E.2d at 903.

33. *Id.*

34. *Id.* at 195, 243 N.E.2d at 903-04.

35. *Id.*

common example of the reasoning involved in this area. Also exemplary is *People v. Aguiar*.[36] In this case the California court correctly pointed out that "[t]he enactment of laws for the protection of society is for the legislature and not for the courts unless a constitutional right is clearly violated . . . ."[37] The court then went on to point out that "there is no constitutionally protected right to indulge in the use of euphoric drugs."[38] The defendant's constitutional contentions were refuted.

State v. Kantner[39] provides another example of this type of reasoning. The defendants asserted, *inter alia*, that the use of marijuana involved an issue of "fundamental liberty," and that a different standard of review should have been applied to the statute in question. The Supreme Court of Hawaii did not feel that the defendants had established that the interest of the individual in possessing and using marijuana was within the class of interests to which the state and federal constitutions accord the highest degree of protection.[40] The court referred to *Griswold v. Connecticut*[41] and *People v. Aguiar*[42] and concluded that there was no fundamental guarantee protecting the use and possession of euphoric drugs.[43] Again, the statutes in question were upheld as constitutional.

It would appear that no claim of constitutional right or personal liberty relating to the use of marijuana would be adopted by any court. Thus, no state would have to bear the burden of showing a compelling state interest in the absolute prohibition of marijuana use. But in *State v. Ravin*[44] the Supreme Court of Alaska was persuaded that the right to privacy encompasses the right to consume marijuana in the privacy of one's home.

State v. Ravin: The Right to Privacy Encompasses the Right to Consume Marijuana in the Privacy of One's Home

In *State v. Ravin*[45] the constitutionality of Alaska's statute prohibiting possession of marijuana[46] was put in issue. The

36. 257 Cal. App. 2d 597, 65 Cal. Rptr. 171, *cert. denied*, 393 U.S. 970 (1968).
37. *Id.* at 601, 65 Cal. Rptr. at 173 (quoting People v. George, 42 Cal. App. 2d 568, 573, 109 P.2d 404, 407 (1941)).
38. *Id.* at 603, 65 Cal. Rptr. at 175. The court went on to discount the applicability of Griswold v. Connecticut, 381 U.S. 479 (1965).
39. 53 Hawaii 327, 493 P.2d 306 (1972).
40. *Id.* at 332, 493 P.2d at 310.
41. 381 U.S. 479 (1965).
42. *Supra* note 36.
43. 53 Hawaii at 332, 493 P.2d at 310. *See also* Miller v. State, 458 S.W.2d 680 (Tex. Crim. App. 1970).
44. No. 1156 (Alas., May 27, 1975).
45. *Id.*
46. ALAS. STAT. 17.12.010 (Supp. 1974).

thrust of the defendant's argument was that there exists under the United States and Alaska Constitutions a fundamental right to privacy, the scope of which is sufficiently broad to encompass and protect the possession of marijuana for personal use. Given such a fundamental constitutional right, it was argued by the defendant that the State would then have the burden of demonstrating a compelling state interest in prohibiting the possession of marijuana. The defendant further urged that the evidence submitted at trial by both sides demonstrated that marijuana is a relatively innocuous substance, at least as compared with other less restricted substances, and that nothing even approaching a compelling state interest was proven by the State.[47]

The court proceeded to discuss the test to be applied when a claim is made that state action encroaches upon an individual's constitutional rights:

> Once a fundamental right under the Constitution of Alaska has been shown to be involved and it has been further shown that this constitutionally protected right has been impaired by governmental action, then the government must come forward and meet its substantial burden of establishing that the abridgement in question was justified by a compelling governmental interest.[48]

The court also pointed out that this standard is familiar to federal law as well, citing *Bates v. Little Rock*.[49] After then distinguishing the less stringent "rationality test" to be applied when governmental action interferes with an individual freedom in an area which is not characterized as fundamental,[50] the court voiced dissatisfaction with the fundamental right-compelling state interest test.[51] The court elected to utilize a test whereby it would first determine whether there exists a proper governmental interest in the imposition of restrictions on marijuana use, and if so, whether the means chosen bear a substantial relationship to the legislative purpose. Thus, if governmental restrictions interfere with an individual's right to privacy, the court would require that the relationship between the means and the ends be not only reasonable, but also close and substantial.[52] The court, in applying the standard it had elucidated, set out on a two step undertaking: to determine if any of Ravin's rights had been abridged by the statute in question, and if so, to determine whether the statutory impingement was justified.[53]

The court first turned to federal law to determine if a federal

47. No. 1156 (Alas., May 27, 1975) at 3.
48. *Id.* at 4 (quoting Breese v. Smith, 501 P.2d 159, 171 (Alas. 1972)).
49. 361 U.S. 516, 524 (1960).
50. No. 1156 (Alas., May 27, 1975) at 5.
51. *Id.*
52. *Id.* at 6, 7.
53. *Id.* at 7.

constitutional right of privacy might be applicable. The court surveyed several United States Supreme Court decisions[54] and found from its survey that

> the federal right of privacy arises only in connection with other fundamental rights, such as the grouping of rights which involve the home. And even in connection with the penumbra of home-related rights, the right to privacy in the sense of immunity from prosecution is absolute only when the private activity will not endanger or harm the general public.[55]

The court then turned to the concept of privacy under the Alaska Constitution.[56] The court noted that the right of privacy is specifically enumerated in Alaska's Constitution, yet such a right of privacy is not absolute, but must be limited by the legitimate needs of the State to protect the health and welfare of its citizens.[57] After reflecting upon the leading Alaska case[58] and referring to other jurisdictions,[59] the court announced that *were it* to continue to utilize the fundamental right-compelling state interest test, *it would* conclude that there is not a fundamental right to possess or ingest marijuana in Alaska, as the right to privacy amendment of the Alaska Constitution cannot be read so as to make the possession or ingestion of marijuana itself a fundamental right.[60] Further, since a discrete federal right of privacy, separate from the penumbras of specifically enumerated constitutional rights, has not, in the view of the Supreme Court of Alaska, been articulated by the United States Supreme Court,[61] the court stated that *were it* employing its former test, it would likewise find there is no fundamental right under the United States Constitution to ingest marijuana.[62] But, the court went on:

> Ravin's right to privacy contentions are not susceptible to disposition solely in terms of answering the question whether there is a general fundamental constitutional right to possess or smoke

54. Griswold v. Connecticut, 381 U.S. 479 (1965); Stanley v. Georgia, 394 U.S. 557 (1969); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); United States v. Orito, 413 U.S. 139 (1973).
55. No. 1156 (Alas., May 27, 1975) at 10.
56. ALAS. CONST. art. I, § 22. The section reads:
The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.
57. No. 1156 (Alas., May 27, 1975) at 13.
58. Breese v. Smith, 501 P.2d 159 (Alas. 1972).
59. State v. Kanter, 53 Hawaii 327, 493 P.2d 306, *cert. denied*, 409 U.S. 948 (1972); People v. Sinclair, 387 Mich. 91, 194 N.W.2d 878 (1972). The court looked with favor towards the dissenting opinion of Justice T.G. Kavanagh in the *Sinclair* case. J. Kavanagh stated at 387 Mich. at 133, 194 N.W.2d at 896:
I find that our statute violates the Federal and State Constitutions in that it is an impermissible intrusion on the fundamental rights to liberty and the pursuit of happiness and is an unwarranted interference with the right to possess and use private property.
60. No. 1156 (Alas., May 27, 1975) at 16.
61. *Id.* at 17.
62. *Id.*

marijuana. This leads us to a more detailed examination of the right to privacy and the relevancy of *where* the right is exercised. At one end of the scale of the scope of the right to privacy is possession or ingestion in the individual's home. If there is any area of human activity to which a right of privacy pertains more than any other, it is in the home.[63]

The court returned to an examination of federal law[64] and Alaska law and concluded that "privacy in the home is a fundamental right, under both the federal and Alaska Constitutions."[65] Having found such a right, the court went on to delcare that

[t]his right to privacy would encompass the possession and ingestion of substances such as marijuana in a personal, non-commercial context in the home unless the state can meet its burden and show that proscription of possession of marijuana in the home is supportable by achievement of a legitimate state interest.[66]

The court turned to the question of whether the State had demonstrated a sufficient justification for the general prohibition of possession of marijuana in the interest of the public welfare, and whether the State had met its greater burden of showing a close and substantial relationship between public welfare and control of ingestion or possession or marijuana in the home for personal use.[67] The court reviewed the record, examined several additional works,[68] and stated: "It appears that the use of marijuana, as it is presently used in the United States today, does not constitute a public health problem of any significant dimensions."[69]

The state offered several justifications for upholding the statute in question, including the assertions that marijuana is a psychoactive drug, that it is not a harmless substance, that heavy use has concomitant risk, that it is capable of precipitating a psychotic reaction at least in individuals predisposed towards such a reaction, and that its use adversely affects the user's ability to operate an automobile.[70] The only significant risk in the use of marijuana, which the court found to be established to a reasonable degree of certainty, was the effect of marijuana intoxica-

63. *Id.* at 17, 18 (emphasis added).
64. U.S. CONST. amend. I, III, IV, V. *See* note 54 *supra.*
65. No. 1156 (Alas., May 27, 1975) at 20.
66. *Id.* at 21. The word "this" would appear to refer back to the preceding sentence in which the court spoke of a right to privacy under Alaska's Constitution. But having found a comparable federal right, it would seem that the court was speaking with reference to such federal right as well. Of course, the Alaska court's pronouncements as to the federal right are but persuasive authority.
67. No. 1156 (Alas., May 27, 1975) at 22.
68. *Id.* n. 43.
69. *Id.* at 27.
70. *Id.* at 32.

tion on driving.[71] The court discounted the assumption that the State has the authority to protect the individual from his own folly—that is, the State can control activities which present no harm to anyone except those using them.[72] Instead, the court adopted the general proposition that:

> [T]he authority of the state to exert control over the individual extends to activities of the individual which affect others or the public at large as it relates to matters of public health or safety, or to provide for the general welfare.[73]

The court concluded by deciding that, given the effect of marijuana on driving, the individual's right to possess or ingest marijuana while driving would be subject to prohibition. However, given the relative insignificance of marijuana consumption as a health problem in today's society, the potential harm generated by drivers under the influence of marijuana, standing alone, does not create a close and substantial relationship between the public welfare and the control of the ingestion or possession of marijuana in the home for personal use. "Thus, *there is no adequate justification for the State's intrusion into the citizen's right to privacy by its prohibition of possession of marijuana by an adult for personal consumption in the home.*"[74]

A Right to Privacy Specifically Enumerated in the Illinois Constitution

The Supreme Court of Alaska, in *Ravin*, apparently based its decision on both a federal and state right to privacy. The Alaska court's interpretation of the federal right to privacy would not, of course, be mandatory authority outside of Alaska. Rather, such a pronouncement would only be persuasive authority. The Illinois Supreme Court has made no such pronouncements regarding its interpretation of the federally created right to privacy. But in construing the fourth amendment of the United States Constitution,[75] the search and seizure provision, the Illinois Supreme Court has indicated its belief that the purpose of the fourth amendment is to protect individuals from unwarranted intrusions into their privacy and to guard the privacy of the person in his home.[76] Having voiced to this extent its concern for the privacy of the individual in the home, it would seem to require little stretching for the Illinois Supreme Court

71. *Id.* at 33.
72. *Id.*
73. *Id.* at 35. *But see* Borras v. State, 229 So. 2d 244, 246 (Fla. 1969), *cert. denied*, 400 U.S. 808.
74. No. 1156 (Alas., May 27, 1975) at 39, 40 (emphasis added).
75. U.S. CONST. amend. IV.
76. People v. Abrams, 48 Ill. 2d 446, 271 N.E.2d 37 (1971); People v. Bussie, 41 Ill. 2d 323, 243 N.E.2d 196 (1968).

to embrace the concept of a federal right to privacy, based on *Griswold* and its progeny as elucidated in *Ravin.*

The significance of the *Ravin* decision in Illinois is not limited to the possible impact of the court's conceptualization of the federal right to privacy. The *Ravin* decision also turned on the fact that the right to privacy is specifically enumerated in Alaska's Constitution.[77] There is likewise a specific right to privacy enunciated in the Illinois Constitution.[78] While the provision is placed in the context of the search and seizure provisions, it quite clearly states the right of people to be secure in their homes against unreasonable invasions of privacy.[79] The Committee Report of the Constitutional Bill of Rights Committee should prove illustrative of what type of privacy the Committee intended:

> [T]he Committee concluded that it was essential to the dignity and well being of the individual that every person be guaranteed by a *zone of privacy* in which his thoughts and highly personal behavior were not subject to disclosure or review. The new provision creates a *direct right to freedom from such invasions by government or public officials.*[80]

Given this constitutionally enumerated right of privacy, particularly in the home, it would appear that the State may well impinge such right by the Cannabis Control Act, which makes it illegal for the individual to possess marijuana in the privacy of his home. If this is so, the question next arises whether there is a compelling state interest to justify such intrusion.

People v. McCabe: What Does the Illinois Supreme Court Think of Marijuana?

In *People v. McCabe*[81] the Illinois Supreme Court held that the inclusion of marijuana in the Narcotic Drug Act,[82] rather

77. *See* note 56 *supra.*

78. ILL. CONST. art. I, § 6 (1970). The section provides:

The people shall have the right to be secure in their persons, houses, papers, and other possessions against unreasonable searches, seizures, invasions of privacy, or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized.

79. *Id.*

80. ILL. ANN. CONST. art. I, § 6, commentary at 317-18 (Smith-Hurd 1971) (emphasis added). Note the similarity in language ("zone of privacy") between this provision of the Illinois Constitution and the majority opinion of Mr. Justice Douglas in *Griswold.* That this zone of privacy is not limited to the home has been recognized in several Illinois cases: Illinois State Employees Assoc. v. Walker, 57 Ill. 2d 512, 315 N.E.2d 9, *cert. denied,* 95 S. Ct. 642 (1974); People v. Reddock, 13 Ill. App. 3d 296, 300 N.E.2d 31 (1973); Stein v. Howlett, 52 Ill. 2d 570, 289 N.E.2d 409 (1972); People v. Harden, 6 Ill. App. 3d 172, 284 N.E.2d 716 (1972); People v. Brooks, 51 Ill. 2d 156, 281 N.E.2d 326 (1972).

81. 49 Ill. 2d 338, 275 N.E.2d 407 (1971).

82. Act of July 11, 1957, ch. 38 § 22-1 *et. seq.,* [1957] Ill. Laws 2569 (repealed 1971).

than in the Drug Abuse Control Act,[83] was a constitutionally invalid classification.[84] This classification was found to be arbitrary and therefore violative of both the Illinois and United States Constitutions.[85] The thrust of the opinion was that, having set up a hard-soft drug dichotomy, the Illinois Legislature could not arbitrarily assign a particular drug to one certain category.[86] Because it was a classification that was under attack, the court chose to utilize the "rationality test;" if any state of affairs could reasonably be conceived which would justify the classification, it would be upheld.[87] The court proceeded "not to determine scientific questions, but to judge whether the data presently available provides [*sic*] a reasonable basis for the described classification of marijuana."[88]

Upon consideration of the materials and data presented, the court made certain observations and drew certain conclusions as to the attributes of marijuana. While the issue was the inclusion of marijuana in the Narcotic Drug Act, and the test applied was the "rationality test," the court made virtual findings of fact as to the characteristics of marijuana. One such finding was that almost all authorities agree that marijuana is not a narcotic or addictive in the sense which these terms are precisely used.[89] By this the court meant that marijuana use does not involve tolerance, physical dependence, or the withdrawal syndrome, and the court so stated.[90] The court further found that physical ill

83. Act of August 17, 1967, ch. 111½, § 801 *et. seq.*, [1967] Ill. Laws 3195 (repealed 1971).

84. 49 Ill. 2d at 350, 275 N.E.2d at 414; *cf.* People v. Elwell, 54 Mich. App. 306, 220 N.W.2d 770 (1974). *But see* Sherman v. State, 89 Nev. 84, 506 P.2d 417 (1973); Gaskin v. State, 490 S.W.2d 521 (1973); Locke v. State, 168 Tex. Crim. R. 49, 329 S.W.2d 873 (1959).

85. 49 Ill. 2d at 349, 350, 275 N.E.2d at 414. ILL. CONST. art. I, § 2 (1970); U.S. CONST. amend. XIV, § 1.

86. 49 Ill. 2d at 350, 275 N.E.2d at 414; *see* Comment, *People v. McCabe: Marijuana and Equal Protection,* 66 Nw. U.L. REV. 829, at 838 (1972).

87. 49 Ill. 2d at 340, 275 N.E.2d at 409.

88. *Id.* at 342, 275 N.E.2d at 409.

89. *Id.* at 345, 275 N.E.2d at 411. *Accord,* State v. Zorres, 78 Wash. 92, 475 P.2d 109 (1970); People v. Sinclair, 387 Mich. 91, 115, 194 N.W.2d 878, 887 (1972). People v. Sinclair was a case substantially similar to *McCabe*, the same type of statutory classification of marijuana with "hard drugs" was attacked as being unconstitutional. In addition to the conclusions drawn about marijuana which parallel those found in *McCabe*, the court in *Sinclair* also found that marijuana does not lead to chronic psychosis, and that long term use in moderate doses had no harmful effects. 387 Mich. at 111, 112, 194 N.W.2d at 885, 886.

90. 49 Ill. 2d at 345, 275 N.E.2d at 413. *Accord, In re* Jones, 35 Cal. App. 3d 531, 110 Cal. Rptr. 765 (1973) (J. Brown dissenting). This case involved a petition for writ of habeas corpus, the petitioner asserting that his sentence for a first offense of selling marijuana constituted cruel and unusual punishment. In addition to conclusions similar to those in *McCabe*, Justice Brown was persuaded that present evidence does not establish a causal relationship between marijuana use and the antimotivational syndrome and that there is no evidence to suggest that mari-

effects from marijuana use are, so far as is known, relatively moderate, and that marijuana use does not lead to opiate (heroin) addiction or to aggressive or criminal behavior.[91]

In *McCabe* the Illinois Supreme Court, having found no rational basis for the classification in issue, held that the inclusion of marijuana in the Narcotic Drug Act was arbitrary and deprived the defendant of equal protection of the law.[92] Recall that in *McCabe* the court set out "not to determine scientific questions, but to judge whether the data presently available provides [*sic*] a reasonable basis for the described classification of marijuana."[93] If the Illinois Supreme Court were to presently pass on the question, not as an exercise in determining scientific questions, would the court find that the data presently available provide a reasonable basis for finding a compelling state interest in prohibiting the possession and ingestion of marijuana by an individual in the privacy of his home?

CONCLUSION

The question is whether the Illinois Cannabis Control Act violates a right to privacy guaranteed by either the Illinois or United States Constitution. Inherent in the resolution of this question are numerous other issues. It would appear to be well settled law that when state action infringes upon a constitutional or fundamental liberty, the state must show a compelling, and not merely a legitimate or rational interest, to sustain such action. Is there such a right to privacy which encompasses the right to use marijuana in the privacy of the home? May such a federal right be discerned, through *Griswold* and its progeny, emphasizing a zone of privacy about the home? Aside from such a federal right, would not the language of the Illinois Constitution[94] clearly guarantee a right to privacy and freedom from intrusion in the home?

Given such a right, is there truly a compelling state interest in the prohibition of marijuana use in the privacy of the home? With the observations made in *McCabe*, and with other data presently available, is the Illinois Supreme Court about to conclude, as did the Alaska court in *Ravin*, that the use of marijuana does not constitute a public health problem of any significant

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juana use in humans affects fetal development. 35 Cal. App. 3d at 546, 547, 110 Cal. Rptr. at 775, 777.

91. 49 Ill. 2d at 345, 275 N.E.2d at 413. *Accord*, 35 Cal. App. 3d at 548, 549, 551, 110 Cal. Rptr. at 775-77; 387 Mich. at 111, 112, 194 N.W.2d at 885.

92. 49 Ill. 2d at 351, 275 N.E.2d at 414.

93. *See* note 88 *supra*.

94. *See* note 78 *supra*.

dimensions?[95] And what of the state's interest (is it compelling?) in controlling activities of the individual which present no harm to anyone except *possibly* those enjoying them? Is the authority of the state to control the individual limited to those activities of the individual which are related to the public's health, safety, or general welfare and adversely affect others or the public at large?[96]

As was stated earlier, until recently the right of the state to proscribe marijuana use appeared to be virtually unchallengeable. The issue, it would seem, rather than being well settled, now grows more viable. The opinion in *Ravin* is unquestionably a first in this area of the law. It remains to be seen whether in years to come it will prove exemplary of the mainstream of judicial thought.

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95. *See* note 69 *supra.*
96. *See* note 73 *supra.*