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BOOK REVIEW

MARIJUANA—THE NEW PROHIBITION. By JOHN KAPLAN.* New York and Cleveland: World Publishing Company. 1970. xii + 387 pages. \$7.95.

STEVEN L. LARSON**

In 1969, the State of California's Joint Legislative Committee to Revise the Penal Code fired its six reporters shortly after they had submitted a Preliminary Tentative Draft on Marijuana. Their sin was recommending the abolition of penalties for adult marijuana use. Their replacement was a prosecutor from the Attorney General's office.

In *Marijuana—The New Prohibition*, John Kaplan, a Professor of Law at Stanford University and one of those reporters, has taken the case for the legalization of marijuana to the public. His thesis is that the criminalization of marijuana, like the prohibition of alcohol in the Twenties, is doing far more harm than good. His belief is that if a majority of Americans are convinced of that fact, the law will be changed. There is growing evidence that the public, through its elected representatives, will change the law, perhaps even sooner than Professor Kaplan had anticipated.¹

Marijuana—The New Prohibition is, in essence, a brief for the legalization of adult marijuana use. Its primary concern is the wisdom of current marijuana laws. Its value, however, lies as much in its straightforward, informed discussion of marijuana use by college age adults as it does in its analysis of current marijuana laws.

For Kaplan, the issue in the debate over the legalization of marijuana is not whether marijuana use is moral, immoral, beneficial or dangerous. Nor is the issue whether society should attempt to legislate morals or good judgment. The issue, as he frames it, is a pragmatic one: do the costs of our marijuana laws outweigh their benefits?

Framed in that way, the case for the legalization of marijuana is difficult to prove. Lawyers and social scientists have only recently begun to explore "law" with anything approaching scientific methodology. Few people will agree on what the specific "costs" and "benefits" of any given law are,

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1. In New York State, for example, Governor Rockefeller has recently proposed reducing first offenses involving the possession of a small quantity of marijuana from a misdemeanor to a non-criminal violation punishable by a maximum 15 days in jail. N.Y. Times, March 24, 1971, at 1, col. 3 (city ed.). A bill has been introduced in the New York State Assembly calling for a marijuana licensing program. A. 4944, 194th Sess. (1971).

much less what values those "costs" and "benefits" should be assigned. Until we learn a great deal more than we know at present about the way the criminal sanction works, cost-benefit analysis of criminal laws can be little more than guesswork. Nevertheless, most of Kaplan's observations have a ring of truth about them. By relating those observations to commonly accepted ideas about the "costs" and alleged non-benefits of Prohibition, Kaplan fashions a persuasive argument.

Kaplan begins by describing the "ordinary" effects of marijuana, the objective and subjective effects that he aptly characterizes as bearing the "same relation to the dangers of marijuana use as the social drink at a cocktail party bears to all of the pathological effects of alcoholism."² This discussion provides a basis for understanding why so many otherwise normal, law abiding, young adults risk arrest to use the drug and why they seem to be able to do so with few ill effects.

Next, Kaplan addresses himself to the familiar arguments advanced in support of the proposition that adult marijuana use should be a crime. He begins with the argument that marijuana causes its users to commit violent crimes. He destroys that myth by showing that not only was there never any evidence to support it, but also that what little evidence there is suggests that marijuana is associated with passivity, not aggression. He then turns to the argument that marijuana can cause psychotic reactions, hallucinations, and unpredictable behavior; the argument that chronic use causes drug dependence, mental illness, brain damage, and "dropping out"; and the argument that experience with marijuana causes one to progress to the use of more harmful drugs. In all, Kaplan devotes almost one-half of this important book to a careful exposition of those arguments, a description of the evidence supporting or refuting them, and a reasoned evaluation of the weight to which they are entitled. His discussion is thorough and precise. Where current knowledge is limited, as it is with respect to the consequence of long-term marijuana use, Kaplan says so. Where the evidence is more complete, as it appears to be in the case of the relationship between the use of marijuana and addiction to hard drugs,³ Kaplan skillfully rebuts the traditional arguments.

Having made a convincing case that relatively little harm is associated with moderate marijuana use, and that the social consequences of excessive or chronic use are probably a good deal less than in the case of alcohol, Kaplan suggests that even if that were not the case, the benefits of the current marijuana laws are minimal because they "are no longer fulfilling their function of deterrence sufficiently to make them worthwhile. . . ."⁴ As evidence, Kaplan points to the widespread use of marijuana by college

2. P. 52.

3. Pp. 232-60.

4. P. 316.

BOOK REVIEW

age adults and to studies indicating that those who have not tried the drug have not done so for reasons other than the fact marijuana is illegal.

Regardless of the validity of the studies he cites, and the fact that an ever-growing number of Americans have at least tried marijuana, Kaplan's discussion of deterrence, and consequently his entire analysis of "benefits," is seriously flawed. Kaplan equates the deterrent effect of the law with its success in discouraging people from ever using the drug. That is a mistake. It overlooks the possibility that our current laws may well influence the frequency with which people use marijuana, the way in which they use marijuana, or perhaps even their attitudes and behavior while under the influence of marijuana. Kaplan ignores, for example, the possibility that many users use the drug more sparingly, and perhaps more wisely, than they would if its use were not illegal. Similarly, although Kaplan recognizes that the effects of the drug are a function of the personality and mood of the user, as well as the social setting, he does not consider the possibility that the private, secretive use he describes as "normal" contemporary use of the drug is the product of our current laws. More importantly, his analysis of deterrence does not address itself to the question whether current laws affect the behavior of persons under the influence of marijuana. He ignores, for example, the possibility that the criminalization of marijuana has some effect on the frequency with which people drive cars while under the influence of the drug. Not that there is much concrete evidence to support the hypothesis that our marijuana laws have such an effect. The point is that there is not much concrete evidence refuting that hypothesis either.

With regard to the other half of the analysis, the "cost" of current marijuana laws, Kaplan's analysis also invites criticism. He concludes that the "costs of the marijuana laws are so high it would be hard to visualize benefits great enough to balance them."⁵ Admittedly the financial costs of apprehending and processing violators are high.⁶ So, too, are the social costs in terms of the effects on an individual of an arrest and possibly a conviction for possession of marijuana.⁷ But Kaplan is not content to rest his case there. Instead, he argues that the most costly aspects of our current marijuana laws are the fact they alienate marijuana users "from both the rule of law and our democratic society. . . ."⁸ As a basis for that conclusion he reasons:

In part because marijuana-users . . . do not rationalize their use of the drug as an aberrant event unrelated to their total personality, it becomes especially unhealthy for their society to declare

5. P. 21.

6. Pp. 28-29.

7. Pp. 30-32.

8. P. 36.

them serious criminals. It is obvious that when any society criminalizes such a large percentage of its young people, it raises very serious social problems. We do not know whether those who violate such serious criminal laws will thereby become more likely to violate others. It may or may not be true that the second crime comes easier—though it is perhaps no coincidence that the Prohibition era and the present are two of the most lawless periods of our history. It is hard to see, however, how a realization that one has committed what is officially a very serious crime can fail to engender at least a somewhat more generalized lack of respect for both the law and the society that has so defined his action.⁹

Is it true that young people who use marijuana are alienated “from both the rule of law and our democratic society?” Or are they merely disrespectful of some adult values and institutions that are hardly essential to either rule of law or a democratic society? If the latter is true, is it necessarily a cost? In any event, what evidence is there of a causal relationship between the marijuana laws and this alienation or disrespect?

The same questions can be raised with regard to Kaplan’s argument that another important cost of our current marijuana laws is their adverse effect on our educational efforts to reduce drug abuse. His theory is that marijuana laws interfere with the entire process of drug education.¹⁰ His assumption is that “drug educators” and “formal drug-education programs”¹¹ can reduce drug abuse. Unfortunately, there is simply no basis for making that assumption. We do not know whether we can reduce drug abuse through formal education programs.

The flaws in Kaplan’s cost-benefit analysis of the marijuana laws detract less from the conclusion that we should abolish penalties for adult marijuana use, or at least drastically reduce those penalties, than they do from the conclusion that we should make marijuana legally available,¹² as we do alcohol. Given current knowledge, we can no longer justify criminalizing persons whose only offense is using marijuana. That does not go far enough to please Kaplan. For him, only by making marijuana legally available will we eliminate the costs in terms of alienation and adverse effect on education inherent in criminalizing distribution of the drug. Nor is Kaplan particularly troubled by the possible costs of such legalization.

If marijuana were legally obtainable . . . the additional number who could purchase it—those presently deterred by the law or

9. P. 33.

10. P. 37.

11. *Id.*

12. There is an important difference between abolishing penalties and making marijuana legally available. In the former, sanctions would be removed from consumption of the drug, while legal liabilities would still be imposed upon the distributor. In the latter, some provision would be made for legal distribution of the drug.

BOOK REVIEW

those so "straight" as to be unable to find a connection today—would be not only those least likely to abuse the drug, but also those least likely to enjoy the euphoria and feelings of lessened control that the drug produces. . . .

In all probability, then, under a licensing system a much larger number of people will have tried the drug once or twice and then given it up because they did not like its effects; a somewhat larger number will use the drug regularly; and, in most of the nation, the number of marijuana abusers will not increase significantly. . . .¹³

. . . .

. . . Even if the licensing of marijuana did increase the abuse of that drug by the very young, this would be more than counter-balanced by the reduction in abuse of more dangerous drugs such as amphetamines, barbiturates, LSD, and in some relatively small areas, heroin.¹⁴

In light of our present limited knowledge of the costs and benefits of making marijuana legally available, doing more than merely abolishing penalties for adult marijuana use is, at this time, unwarranted. Before going further, we need a far more sophisticated analysis of the costs and benefits of legalizing marijuana than that provided in *Marijuana—The New Prohibition*.

13. P. 342.

14. P. 344.

