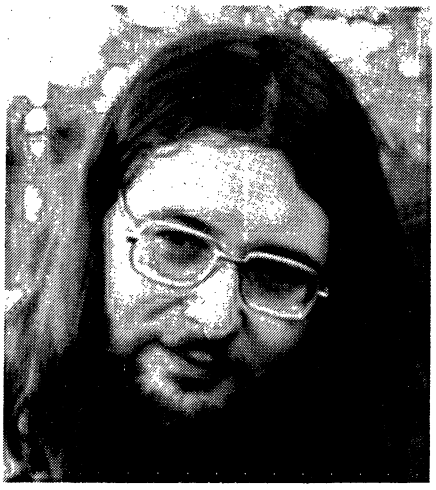

Drug Offence Law in Australia: If it looks silly and vicious, if it sounds silly and vicious and if it has silly and vicious results then . . .

By M.R. Goode

INTRODUCTION

The debate concerning criminal laws with respect to the nonmedical use of drugs in Australia, if it may be generously dignified as a debate, has generally turned on questions of the relationship between law and morality, the use of the criminal law and its sanctions as a mere symbol of alleged social disapproval, the harmfulness of particular drugs, and the role of public opinion in the formulation and enforcement of the criminal law. Such *formal* enquiries as have been held in Australia have, with the odd exception, addressed these questions in a desultory fashion, if at all, perhaps because, as the exceptions have concluded, whatever the merits of the case on these central matters of principle, reform based on *defensible* social policy is in fact impossible in the present feverish social and political climate. The truth of this proposition was made evident by the offhand dismissal by the South Australian Labor Government of even the most marginal, compromise reforms recommended by the Sackville Royal Commission.

Sadly, this paper is not concerned, even peripherally with these questions. It *is* concerned to show that, whatever the resolution of these questions, and however well intentioned, the present legislation designed to control the so-called "drug menace" seriously contravenes almost every basic assumption, principle or rule underlying the general criminal process developed by that process for the protection of the liberty of the citizen from arbitrary State interference and the protection of the innocent from unjust prosecution and conviction. This paper is also concerned to show that these contraventions are indefensible. It appears that legislators, judges and the public have little or no idea of the truth of these propositions.

1. The Law Shall Be Certain, So That Every Citizen Shall Know In Advance The Legality Of Intended Behaviour.

This general principle is important and easily understood. There is evident injustice in a criminal law which is so vague that one cannot predict whether or not certain behaviour is criminal. Judicial interpretation would then closely resemble retrospective legislation. This principle is a central component of the 'rule of law"; for such vagueness leads to governance by men (or women) rather than governance by law.

That drug laws seriously breach this principle cannot be denied. Bray C. J. commented:

" It is an understatement to compare the Narcotic and Psychotropic Drugs Act 1934–1976 to a patchwork guilt. It is more like a repatched patchwork guilt."[1]

More recently, Jacobs J. stated:

"The Act has been so often amended without reprinting, that it is exceedingly difficult to obtain a clear picture of the present scope of the legislation and the regulations and proclamations made thereunder, and to fit all the amendments, some of which are to say the least obscure, into a coherent code . . . [The Act] is in a form which must be unintelligible to many people . . ."[2]

Specific examples abound. The word "occupier" is of totally "uncertain" meaning;[3] section 235 of the *Customs Act* has been an example of appalling obscurity for some time, and recent amendments are even more complex;[4] and Brown has revealed "substantial indeterminancy" in the notion of "supply".[5] The best example is, however, the ubiquitous notion, "possession", offences of which catch the vast bulk of drug offenders.

All criminal offences based on possession as a penalized status are statutory. In the creative period of the common (criminal) law, judges declined to penalize any possession on the grounds that it comprised insufficient *actus reus* and was incapable of definition.[6] When it assumed the creative role, the legislature had no such scruples. Forced to define the indefinable, judges commonly say that the meaning of possession depends upon the context in which it is to be applied, the purpose for which it is to be applied, upon all the circumstances of the case or any combination of these.[7] An American judge was moved to remark:

"The rhetorical legerdemain compounded in this area of the law invokes abstractions which appear more designed to achieve a particular result in an individual case than to stabilize and formalize a workable index of objective standards . . . Both prosecutor and defendant's attorney present their cases with the unfortunate knowledge that the law of constructive possession is what we will say it is in our next opinion."[8]

The demonstrable result is that the *actus reus* of possession is arbitrary, capricious, and unintelligible. Examples abound. Brown contrasts *Warneminde*[9] and *Barron* v. *Valdmanis*[10] to the former's disadvantage.[11] The defects, however, run beyond demonstrable inconsistency. It is submitted that the flexibility of definition is often used to convict defendants whom judges

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believe, no matter the law, *ought* to be convicted, for whatever idiosyncratic reason.

In *Rodriguez*[12] the accused faced two counts of possession of heroin for the purpose of sale. The accused and another were victims of a motorcycle accident in which the accused was injured and hospitalized and his companion killed. The police discovered that the accused's helmet contained 24 capsules of heroin, and that of his companion 25 capsules of heroin. The first count of possession related to his possession of his capsules at that time. The police made no mention of their discovery, and the second count related to alleged possession of the same heroin about a month later, when the accused came out of hospital and reclaimed both helmets from the police. Possession is a continuing crime. Hence, absent a break in possession, the accused's original possession would continue throughout, and only one count could be upheld. Nevertheless, a majority in the British Columbia Court of Appeal held that the two possessions of the accused were interrupted by the possession of the police and therefore two convictions were proper. Thus, when the police discover a cache it comes into their possession and when they permit another to handle the cache for the purposes of arresting him or her, they lose possession to that other. This result was duplicated, again in order to convict, by the South Australian Supreme Court in *Boyce*.[13]

Yet test the matter another way. In *Van Swol*,[14] the accused was charged with a possession offence against the *Customs Act*.

Opium was found by police in a teachest owned by a girlfriend of the accused on the balcony of a flat jointly occupied by them. Leaving aside for the moment the question of whether the accused could properly be found to be in possession at all, the accused argued, for technical reasons relating to the specific wording of the particular offense, that his possession was terminated by the possession of the police when they found the cache. The argument, if successful, could have led to acquittal, but it was rejected on the ground that police custody in the course of a search lacks "the intention to exercise dominion and control which is necessary for the acquisition of possession!"[15]

The question involved in these cases has two steps. First, do the police gain possession when they discover a cache? If not, *Van Swol* is right and *Rodriguez* is wrong. It is submitted, however, that the correct view is that police do gain possession. It is inane to suggest that the police do not intend to exercise dominion and control over the cache. The police have no intention of allowing anyone to exercise control over the cache *exclusive* of their control. Their factual control is equally absolute. Second, does the accused regain possession when the police allow custody in a trap? If the police do not have possession, then it is submitted that the accused cannot have possession and hence *Rodriguez* and *Boyce* are wrong. Possession requires *exclusive* control or joint control. It would be nonsense to argue that the police and the accused are in joint possession. Equally, how can the accused's physical custody be said to be exclusive of the police control?[16] To say, as in *Boyce*, that possession subject to immediate termination is still a possession begs the question whether it *is* ever a possession. To analogize a child's possession in the presence of a powerful thief misses the point that in *Boyce*, the analogous ruffians have possession and merely wait for an acquisition of custody as an excuse to beat the child. It is submitted that all three cases are wrongly decided. It should be noted that the result in each was against the accused. Resolution of these problems may well depend upon whether the result will exculpate an accused.

Possession offences permit conviction on the flimsiest of circumstantial evidence.[17] The flexibility of definition, dependent as it is on the facts of each case, permits *ad hoc* judicial conviction for serious offences based, not on the definition of possession, but the way in which the prosecution may prove it. Again, examples abound, but *Twining v. Samuels*[18] will serve.

In that case, the accused was charged with possession of medicinal opium. The evidence for the prosecution seems to have amounted to:

a) the accused was observed by two police officers through a window to be holding a syringe in the company of five other people. There was no evidence of testing or analysis of this syringe despite the accused's story that he injected a legal drug to relieve nausea.
b) when arrested, the accused had a fresh puncture mark on his left arm. There was no evidence of a blood or urine analysis.
c) the police found a bottle containing "medicinal opium" (later found to be a solution of morphine) on a table in the kitchen of the house. There was no evidence of fingerprints on the bottle, and there was no evidence as to whether the accused was an occupier of the house, a guest or a visitor.
d) the police alleged that the accused admitted handling the bottle and injecting himself with part of its contents which he knew to be an illicit drug. The accused steadfastly denied the admissions.

The accused was convicted on this evidence, despite a lack of evidence of any control of the bottle, either joint or exclusive. Essentially, possession here meant evidence of proximity and hence access, evidence of past use of the drug and the fact that the court thought that the accused was lying.[19] The first two factors are hardly evidence beyond reasonable doubt of exclusive control, and the third is a battle that an accused will rarely win, it begs the question, and it firmly places the onus on the accused to exculpate himself or herself if he or she has been found in proximity to a drug to which he or she could possibly have access. These observations lead inexorably to discussion of at least two other fundamental freedoms: the presumption of innocence, to be discussed later, and the notion of guilt by association.

2. The Criminal Liability of A Citizen Shall Be Determined Upon the Behaviour of That Citizen and Not The Mere Proximity of That Citizen To Another's Wrongdoing.

The principle formulated above represents an attempt to define the injunction against finding guilt by association. The principle, as such, will not be found in any Bill of Rights. The point is, however clear and fair and, despite waverings in the early 1950s with respect to membership of the Communist Party, is reflected in, for example, the law of criminal complicity.[20] Overbroad statutory proscriptions in the area of drug offences provide a number of examples of the breach of this principle, but, once again, the possession offence provides the classic example.

The breach of principle is most obvious in Canada by reason of a unique definition of possession by statute thus:

" . . . where one of two or more persons with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed in the custody and possession of each and all of them."[21]

Insofar as this definition extends possession *beyond* the requirement of control it is, at least in theory, wider than common law.[22] Thus in *Fuller*[23] an accused was convicted of possessing L.S.D. in the control of another in the same apartment, in *Beaulne*[24] an accused was convicted of possession for the purpose of trafficking on evidence that he was present in an apartment of another with trafficking apparatus revealing the *other's* fingerprints *only* and that he fled on the arrival of police, and in *M*,[25] a juvenile was convicted of possession for the purpose of trafficking on evidence that she was present in another flat with four others while two of the others were in the course of cooking cannabis.

Despite the *legal* difference, however, there can be no cause for confidence that Australian courts would not convict

in such situations, particularly in light of such decisions as *Twining v. Samuels*. There can be no doubt that the common law has extended "possession of narcotics" to cover "possession of the location of narcotics".[26] That extension would still fall short of the Canadian cases (and *Twining*) if, as in *See v. Milner*,[27] the court insists that the accused be proven to have *exclusive* right to possession of the location and control of the location where the drugs were found. But that was not so in *Twining, Van Swol* or *Wallace*.[28] Consider also *Carling v. O'Sullivan*, in which Napier J. held that, where there is a permissible inference that the accused are engaged upon a common design, it is an equally permissible inference that possession by one to the knowledge of another is possession by both.[29] Thus, while in law, Australian common law of possession does not go so far as in Canada in imposing guilt by association, nevertheless, the crime of possession may merely amount to being in the wrong place at the wrong time,[30] with legal definition becoming moot.

3. There Is A Legal Presumption In Favour Of Mens Rea; That Is, A Citizen Shall Not Be Convicted Of A Crime Unless He Or She Knows The Essential Facts Constituting The Crime.

The technical notion of *mens rea* is not easy to describe or explain, but, essentially, it states that an accused can be found guilty of a crime only if he or she knew, for example, that he or she possessed the drug or that it was a drug. More generally, *mens rea* concerns the normative premises for just punishment. Where, as in the drug area, the courts are faced with statutory offences, then the question whether or not the statute requires *mens rea* is a matter of interpretation. The accepted formula for that process states that the court must presume that the prosecution must prove *mens rea* unless that presumption is displaced by a consideration of *both* the words and the subject matter of the offence.[31] Let it be said at once that this seemingly simple process has produced a maze of contradictory opaque decisions. But in the interpretation of the offences contained in the *Customs Act* the New South Wales Court of Appeal in particular has achieved a new level of an absolutely indefensible erosion of basic principle.

Although, in passing, the Victorian Supreme Court in *Van Swol* seemed to imply that *mens rea* was required for conviction of a *Customs Act* offence,[32] the matter was considered anew in *Bush* without reference to that dictum. In *Bush*, the New South Wales Court of Appeal decided that the presumption in favour of *mens rea* had been rebutted so that the Crown need only prove that the accused intended to exercise dominion and control over the general area in which the drug actually was found.[33] If the accused alleged that he or she did not know the drug was there, or that he or she did not know that it was a drug, then the accused must prove that on the balance of probabilities; and that such lack of knowledge was reasonable. *Bush* was subsequently upheld by a specially convened court in *Rawcliffe*,[34] and in the subsequent decisions of *Malas*,[35] *Kennedy*[36] and *Kayal*.[37] The New South Wales interpretation of the *Customs Act* provisions was followed in Queensland by the Court of Appeal in *Gardiner*,[38] and McGregor J. has applied it to the A.C.T. *Public Health (Prohibited Drugs) Ordinance in Zeccola v. Barr*[39] and *See v Milner*.[40]

It is submitted that these decisions are clearly wrong and should be overruled by the High Court or, less probably given the closed minded hysteria of legislators, by Parliament. The presumption in favour of *mens rea* represents the legal recognition of the need for moral justice. It should not be lightly displaced, particularly in the context of serious offences, for it preserves the individual's freedom from public condemnation and punishment unless the Crown can prove that individual was *at fault*. The legal formula requires consideration of both the words and the subject matter of the offence. Let us now look briefly at each.

a) Subject matter.

It is under the rubric of "subject matter" that courts consider matters of social and legal policy. The ingenuous objective consideration of the role, utility and rationality of the offence in question. That observer would be disappointed. In the first place, there is consistent reference by the courts to the need for liability without fault in the light of fervent community disquiet and agitation at the enormous evil threatening to sweep the country like an epidemic.[41] (Any drug is always threatening to sweep like an epidemic.) This is irrelevant nonsense. How do judges know what is or what is not a matter of grave concern to everyone, or what policy is supported, let alone understood, by the community whoever they may be? Who are "responsible" members of the community? Those who agree with judicial prejudices? Even supposing the answers to those questions can be found, the fear of the "drug problem" carries no implications for defensible attitudes toward a question of fundamental criminal law policy. Why should irrational, indefensible prejudice about a barely understood question determine the resolution of a different question and a different policy?

Also unfortunately common in these cases is the argument that it is necessary for the full and proper enforcement of the offence that it shall impose, to some extent, liability without fault. The point made is that it would be an impossible task for the Crown to prove *mens rea*, and many would escape the legislative net.[42] There is an embarrassing wealth of answers to this argument.

i. the argument is a selfserving assertion. It is based on no evidence at all.
ii. the argument is irrationally selective. No reasons are or can be given to explain why the argument is valid in its application to some offences and not to others, such as murder, rape and robbery.
iii. the argument turns out to be untrue. *Mens rea* is required in South Australia, New Zealand, Canada, the United States and, to some extent, England. Those countries do not have a "drug pedlars' charter". Moreover, in both *Bush* and *Rawcliffe*, the court had no difficulty in finding that the accused had full knowledge.
iv. the argument simply amounts to a removal of a vital issue of fact from the jury and places it in the hands of a judge. As shall be seen below, this is a predominant characteristic of the *Customs Act* provisions. As Dixon J. pointed out in *Thomas*,[43] the imposition of liability without fault is grounded in a fear that juries will acquit those whom judges think ought to be convicted. It is quite astonishing that judges arrogate this function from juries while also arguing that their decision is based on community disquiet and resentment.
v. the argument may also be based on the inarticulate fear that the criminal process would be unable to deal with all offences prosecuted in contested.[44] The irrelevance of culpability simplifies the fact finding process. It is submitted that if the State creates offences which deem a large number of people associated in any way with substances deemed to be undesirable to be guilty of a serious offence, the State has an obligation to provide adequate facilities to decide justly whether or not those charged are guilty.
vi. even if taken at face value, the argument amounts to the victory of expediency over justice, and ends over means.

Lastly, and incredibly, it is commonly argued that there is no likelihood of innocent persons being found in possession of a substance without knowing what they have.[45] In short, and remembering the width of the possession concept described above, anyone associated with drugs is deemed in fact to know where those drugs are and what these drugs are. The logic of such an argument bears its own refutation. As Willis points out, apart from the lack of evidence to support such wild pre

judicial supposition:

"... physical possession of a narcotic drug will nearly always be accompanied by knowledge of the nature of the drug; yet ... they have then determined that 'possession' does not include the element of knowledge ... The interpretation they have given to "possession" thus exludes an element they believe in fact is present." [46]

The three classes of subject matter reasons offered in these cases are manifest nonsense. There are also sins of omission. It is clear that the legal formula in question here requires consideration of the legal and social consequences of conviction. These matters have received only token reference or no reference at all. The legal penalty under the *Customs Act* now carries a maximum of life imprisonment.[47] In real terms, *Malas* concerned a sentence of eight years, *Gardiner* ten years, and *Kennedy* twenty years. The *Customs Act* contains draconian forfeiture provisions.[48] An alien may well be deported. The social penalties may included loss of job, difficulty in foreign travel, and strong social stigma and humiliation. These factors point strongly to the requirement of *mens rea.*

b) words

The key words in *most Customs Act* offences are "possession" and "without reasonable excuse". It is acknowledged, even in the cases under consideration, that "possession" implies the minimal requirement of an intention to exercise dominion and control over the place where the drug was found. That, however, is usually easy to prove.[49] The difficult question is whether the word connotes knowledge by the accused *either* that the object existed (or was present) or that the object was a drug *or both*. In New Zealand, the United States and Canada, the answer has been both. In England, the answer depends upon interpretation of the difficult decision in *Warner*. In general, however, the majority view appears to be that if the accused has possession, and the intention described above, the jury is *entitled* to infer either or both types of knowledge must be proven beyond reasonable doubt by the Crown, but, as a matter of evidential fact, the jury *may* (or may not) find that onus discharged in the absence of explanation.

The High Court of Australia has yet to take a position on this question. Unhappily, it refused leave to appeal from both *Bush* and *Rawcliffe* apparently because in each case, the offender was found to have both types of knowledge.[50] This fact detracts from statements in the New South Wales Court of Appeal that the High Court refused leave to appeal in *Rawcliffe* knowing that that decision was one by a specially convened court to clarify and make certain the law.[51] The only other indication is *Williams*,[52] in which the High Court considered whether a person could be convicted under Queensland legislation of possession of a quantity of cannabis leaf too minute to be measurable. Their unanimous answer was in the negative but, as is unhappily usual, for no majority reason.

The New South Wales Court of Appeal was forced to reconsider *Bush* and *Rawcliffe* after *Williams*. In short, if found that Gibbs and Mason JJ., with whom Jacobs J. agreed, acquitted the accused because such a conviction could not rationally have been intended; that Murphy J. acquitted the accused because he applied the maxim *de minimis non curat lex*; and that Aickin J. *alone* acquitted the accused on the ground that he acked the *mens rea* required by possession.[53] With respect, selective quotation may produce that result, but careful reading may produce another. Aickin J. decided the case on the ground that possession required *at least* knowledge of the existence of the drug. Murphy J. decided the case on two *alternative* grounds; *de minimis and* the fact that possession requires knowledge by the accused that he has the thing possessed. Gibbs and Mason JJ., (and by inference Jacobs J.) decided, it is true, that it would be irrational to convict, but because: "if it were otherwise, countless examples might be given of circumstances in which innocent persons might be found guilty of an offence, without knowing that they were in possession of the drug or plant in question."[54] It appears that nothing short of explicit overruling will prevent this wilful repression.

Bush, and its ilk, also rested upon the phrase "without reasonable excuse," which the courts decided indicated a legislative intent to exclude knowledge in favour of *reasonable* mistake.[55] There is, in theory, a difference between justification and excuse, but even in the improbable event that the legislature had taken account of that distinction, it is by no means clear that denial of knowledge *is* an excuse. Nevertheless, the courts have held that *any* defence or justification is encompassed by excuse and must, therefore, be reasonable.[56] It is difficult to believe that Parliament intended to revise the entire criminal law by implication. Moreover, as Willis points out, such an interpretation renders s. 233B(1A)–(1C) redundant and contradictory.[57] Lastly, the English courts decided a very similar question the opposite way.[58]

It is difficult to disagree with the opinion of Roden J. that, on this issue, "... different positions have been taken on a matter of fundamental principle."[59] This complex issue can hardly be done justice in a few words, but it is submitted that the presumption in favour of *mens rea* expressing the need for a finding of subjective moral and responsibility and culpability, has been significantly eroded in drug legislation, so that a plea of mistake must be reasonable to exculpate. That a heavy onus lies upon the accused to prove reasonable mistake is a related issue and will be discussed below. However, judicial recourse to a presumption of culpability reveals in this area an aversion to difficult policy issues of responsibility and a callousness toward difficult moral and social issues of fairness, justice and dessert. As Fletcher remarks:

"We require *mens rea* as an essential criterion for criminal liability, not because we suppose that metal states are essential to criminality, but because we realize intuitively that the condemnatory sanctions should apply only to those who are justly condemned for their conduct. And men are not justly condemned and deprived of their liberty unless they are personally culpable in violating the law." [60]

4. The Law Has At Least One "Golden Thread"; It is the Duty Of The Prosecution To Prove The Guilt Of The Accused Beyond Reasonable Doubt.

The principle that an accused is presumed innocent until proven guilty beyond reasonable doubt is commonly known, and has been accepted as the cornerstone of the common law criminal justice system by the highest judicial tribunals. It is simple to demonstrate that the law against nonmedical drug use has virtually eliminated that principle. It is not simple to demonstrate the full horror which has resulted.

Some instances of the contravention of this principle have been noted above. In discussion of the way in which the hopelessly vague, overbroad possession offences may be proven, it was pointed out that in fact, if the accused is found anywhere near the location of a drug, he or she will need to exculpate himself or herself. For example, in *Zeccola v. Barr*, police officers in a car hailed the accused, a juvenile, at 2 am. in a public place. The accused fled. The Crown case was that the accused was observed to throw away a package which, when recovered by the police, contained cannabis. The accused denied that he threw anything away, and also denied certain admissions attributed to him. The accused alleged that the cannabis had been dishonestly produced by the police to justify the arrest. Commenting that: "The fact of the good character of the appellant should have perhaps less weight in this type of case than it might in others," McGregor J. convicted.[61] It is submitted that proof beyond reasonable doubt is hardly satisfied by resolution of a credibility issue between two police officers and a sixteen year old.

The fate of the presumption in favour of *mens rea* was discussed above in the context of the Customs Act offences. It should now be pointed out that, not only must the mistaken innocent belief of the accused be reasonable, but also that the accused must prove that reasonable mistaken belief on the balance of probabilities.[62] This result follows from the conclusion that mistake is a "reasonable excuse", for those words are qualified by "proof whereof shall lie upon him". Thus, the accused must prove his or her reasonable mistaken belief to convince the tribunal of fact that, *more probably than not,* he or she is innocent. If the probabilities are equal, the accused fails. Moreover, it is clear from *Kennedy* that the credibility onus and the mistake onus support each other so that what may normally be prejudicial comment from the bench adverse to the accused on credibility will not be prejudicial where the accused bears the legal onus of proof.[63]

The position of onus with respect to *mens rea* and mistake in State drug offences is more uncertain. State legislation does not contain the magic words "reasonable excuse (proof whereof shall lie upon him)." The policy choices remain the same, but the *way* in which policy choices are channelled through common law rules of interpretation differ. In South Australia, some offences are prefaced by the word "knowingly"; hence the Crown must prove full knowledge beyond reasonable doubt for those offences. Moreover, the South Australian Courts have decided that, wherever the presumption in favour of *mens rea* is rebutted so that the mistaken belief must be reasonable, then, in the absence of statutory words to the contrary, the accused need only raise a reasonable doubt as to that matter.[64] The onus *does* shift to the accused, but it is comparatively light. At the other extreme, the Queensland Court of Appeal has recently indicated that under its legislation, all excuses, including reasonable mistake, must be proven by the accused on the balance of probabilities.[65] Doubt as to the position in other States is principally attributable to the failure of the High Court to indicate whether the common law reasonable mistake of fact defence places the onus on the accused on the balance of probabilities, or merely to raise a reasonable doubt,[66] and considerable legal equivocation as to the effect of various statutory provisions defining or deeming possession in various ways.[67] It is submitted however that the result under offences in State legislation will be to place some onus upon the accused in contravention of the presumption of innocence. The real uncertainty merely concerns the *degree* to which the ordinary principles of criminal justice will be infringed.

Those contraventions of the basic principle in question are mere bagatelle by comparison to the effect of both State and *Customs Act* provisions designed to deem trafficking behaviour from "proven" user behaviour. Although there are differences of detail,[68] the general scheme is composed of two provisions. First, there is an offence which may be generally described as "possession of drugs for the purpose of trafficking in them" and which attracts trafficking offence status and maximum penalty. It should be noted that this offence piles attempt upon attempt, for the possession is preparatory to trafficking and the trafficking is preparatory to use. The second step is a "deeming" provision, which provides that, where an accused is found to be in possession of more than an arbitrarily prescribed quantity of drugs, he or she shall be deemed to be in possession for the purpose of trafficking unless he or she can prove the contrary on the balance of probabilities.

The justification for this elaborate and substantial contravention of the presumption of innocence is the usual nonsense: the necessity for effective law enforcement. Consider the speech of R.C. De Garis in the South Australian Legislative Council:

"Without this provision it would be almost impossible to obtain a conviction for drug trafficking: it would be almost impossible to separate the drug trafficker from the drug user . . . The only way to strengthen the ability of authorities to detect and convict a drug trafficker is to include a reverse onus of proof provision."[69]

There is not a jot of defensible policy in this assertion or its ilk. Indeed, the Sackville Royal Commission, as yet unheeded, recommended repeal of the deeming provision.[70] There are a number of compelling reasons for this.

(i) The argument is simply not true. The Sackville Royal Commission could find no evidence that the provision caught dealers who would otherwise escape. Moreover, at the policing level, entrapment is demonstrably effective. At the level of legal theory, examination of the law reveals that judges and juries have no difficulty in inferring trafficking or an intent to do so,[71] often on weak evidence, and often on the same specious ground, namely, that direct evidence of dealing activity is nigh impossible to produce. Commonly, there is no deeming provision in the United States, and prosecutors do not want one. The possible effect of the deeming provision will be to transform a user into a dealer by providing a purpose which never existed. The resulting crime statistics will, however, reflect favourably on law enforcement.

(ii) The deeming provision operates upon possession of more than a prescribed amount of a drug, on the assumption that, if a person possesses that quantity, it is safe to conclude that he or she intends to deal in it. There are obvious and severe difficulties with that proposition, ranging from the observation that, such is the infinite variety in human motives and behaviour, the inflexible legislative enshrining of an invariable inference sufficient to convict is inherently arbitrary and unjust, to the contention that the prescribed amount is a particularly infelicitous criteria upon which to focus because there is no normal user possession amount of a drug and, even if there were, quantification would be reliant upon hearsay and myth to a greater degree than is comfortable. Moreover, those setting the amount are least likely to know what an allegedly normal user amount may be. On a more practical level, the amounts actually specified are simply too low to justify the inference, particularly in light of the consequences of its application. To presume intent to traffic upon possession of more than 100 gms. of leaf cannabis is irrational, unacceptably blurs the distinction between user and dealer, and seems more aimed at the small scale local distributor than the dealers at the top of the chain whom, the public is constantly reassured in rhetoric, the law is designed to reach. It is of general significance to note that, in the United States, these laws would be unconstitutional and hence invalid because there is *insufficient rational connection* between the proven fact, possession of an amount, and the presumed fact, intent to traffic.[72] If the law educates, these irrational laws will miseducate judges and laymen in that irrationality to the severe detriment of the formulation of defensible social policy.

(iii) The "needs of effective law enforcement" argument was also used to justify rebuttal of the presumption in favour of *mens rea*. It may thus be seen that the needs argument is invariably made and considered in isolation from context, and that the needs argument is insatiable; it proceeds one upon the supposed bootstraps of the last. The arguments made above concerning the *mens rea* question are equally applicable in this context.

(iv) It should be noted that the deeming provision attaches to the *whole* of the quantity found. Although it is arguable that the offence and deeming provision should apply only where the *sole* purpose of possession is for sale,[73] that has not been the case in practice in which the most incidental and contingent intentions have suffered for "purpose". That being so, it would surely be more sensible if the accused was deemed to be in possession for the purpose of trafficking of the quantity *in excess* of the arbitrary user amount.

The reverse onus provisions in the *Customs Act* require particular consideration. The scheme there is that the deeming provision is a matter of selecting the appropriate sentencing range only. The present provisions distinguish between first, "the commercial dealer" who attracts a maximum of life imprisonment, second, "the trafficker" who attracts a maximum of 25 years or $100,000 or both or, in the case of leaf cannabis, 10 years or $4,000 or both and third, "the user", who attracts a maximum of 2 years or $2000 or both. Upon conviction, the offender falls into the appropriate sentencing category according, principally, to the quantity of drugs concerned in the offence. In the case of the "commercial category", there are certain provisions making the offender's past record relevant.[14] Otherwise quantity is solely determinative. In the case of a commercial quantity, the presumption is *absolutely conclusive*. The offender has no recourse at all. By a process of tortuous drafting, however, an offender may escape the trafficable quantity category if he or she can prove, on the balance of probabilities,[15] that the offence was not committed for *any* purpose *related to* the sale of, or other commercial dealing in, those narcotic goods."[16]

This heinous, oppressive, indefensible piece of legislative bloody mindedness is even worse if that is possible than first appears. It is clear from *Fischer* that:

"Here the character of the possession of the prisoner was determined by factors to which he was not a party, and was not altered by his intention or knowledge . . . this approach is consonant with the scheme of the Act. He who has such a quantity in his possession does not escape the added sanction merely by showing his lack of personal involvement other than pure physical possession."[17]

Thus, it is utterly impossible for the accused to escape the higher penalty unless he or she can prove that the offence was committed *solely* for noncommercial purposes.

Thus, the *Customs Act* provisions combine the imposition of an onus to disprove contemplated behaviour, so widely defined, with the relative impossibility of proving the negative proposition. These provisions not only share the general defects of deeming provisions discussed above, but they also have some unique problems arising from the unusual and draconic practice of disguising a determination of substantive culpability and responsibility under the facade of determining the sentencing range appropriate to an already convicted offender. At least two such problems have surfaced to date.

The first problem concerns the reversal of onus of proof with respect to the proof of mistake. It arises in the sentencing process and is beautifully apparent to Roden J., dissenting, in *Kennedy*:

"The offence of which the appellant was convicted, . . . includes no mental element of significance, certainly no 'culpable' mental element. . . . The fact that an accused may seek to set up ignorance as a 'reasonable excuse,' and thus as a defence, does not mean that where that is done, as here, a conviction negatives such ignorance and thus establishes such knowledge. The conviction merely says that the professed ignorance has not been proved, or if it has, the jury does not regard it as a reasonable excuse. Conviction is consistent with a real doubt or complete uncertainty as to whether the person convicted had any knowledge that the substance in question even existed. If the sentence is to reflect the degree of culpability, that makes the sentencer's task a difficult one indeed . . . It would be for the judge after conviction to decide in each case whether a convicted 'possessor' should be dealt with as a knowing participant in the handling of imported heroin or as one who may be an accidental violator of the law. It is difficult to resist the conclusion that one effect of this is to transfer from jury to judge the task of determining what in a very real sense is the guilt or innocence of an accused person."[18]

It is thus clear that, whatever the law may say about the onus of proof with respect to *culpable* behaviour, a judge, faced with the legal fact that the accused has been *deemed* culpable, may well also be faced with a case in which he or she must sentence the accused on the basis of guilt but *not culpability*.[19] Such a situation is bizarre.

The second problem in sentence is similar, and concerns the presumption of trafficking based solely on the amount of drugs involved in the offence. Where an offender is found to be in possession of more than the arbitrarily specified quantity, and the offender fails to prove, for whatever reason, lack of any commercial purpose, the offender thus falls within the sentencing range appropriate to traffickers. Nevertheless, the sentencing judge, in determining the appropriate penalty within that range, may well be of the opinion that, although he or she could not *prove* it, the offender was not involved in trafficking. Thus, in both *King*[20] and *Herzsfeld*,[21] the sentencing judge was required to apply the trafficking sentence range on the basis that the accused was not a trafficker. Such a situation is also bizarre, and will arise because the specified amounts are ludicrously low.[22]

It should so far be clear that the legislation designed to deter the nonmedical use of drugs seriously infringes the presumption of innocence in a number of ways. The full horror of the situation only becomes apparent when it is realized that all these onuses are *cumulative*. Take the case of the unfortunate Mr Kennedy.

Kennedy boarded a Qantas flight in London on a journey to Sydney. He had with him a blue suitcase which had a combination lock and a pair of locks secured by keys. When the flight left Kuala Lumpur, it took with it a man named Carter and his *identical* blue suitcase which contained 9.893 kilos of 45% pure heroin. Sydney customs officers became aware of the heroin when a trained dog reacted to the suitcase. At the luggage carousel, Carter examined both blue suitcases and their tags and removed the innocent one. Shortly afterward, Kennedy approached the heroin suitcase, examined the tag, and then picked up the case. He was apprehended and asked to open the suitcase. Of course, the combination Kennedy used to open Carter's lock was ineffective. Kennedy then denied that it was his case.

On the evidence to this point, Kennedy is clearly in *factual* possession of the suitcase and its contents. He attempted to leave the airport with the suitcase in his grasp. A majority in the Court of Appeal held that the accused also had an intention to exercise exclusive dominion and control over the suitcase. Roden J. dissented. In his opinion, this case was distinguishable from *Bush* and *Rawcliffe* because here, the accused was not proven to have intended to exercise dominion and control over the Kuala Lumpur suitcase. His proven intention related to the innocent London suitcase. In the other cases, the accused was not mistaken as to the container, merely as to the contents thereof. It is submitted that Roden J. is correct. Kennedy was not, on proof beyond reasonable doubt, intending to exercise dominion and control over the suitcase he had in his grasp. His Honour commented appropriately, that the majority decision further reduces the mental element required for the offence.[24] The message of the majority decision is, however, clear. If the Crown can prove that an accused picked up any container which in fact contains drugs, the Crown has proven all that is necessary for guilt of a very serious offence. Now the accused must prove innocence to escape.

It will be noted that, the intention issue apart, the *fact* of possession was hardly a difficult issue in *Kennedy*. A slight change of facts will change that. Let it be supposed that Kennedy was apprehended after Carter picked up the Kuala Lumpur suitcase. Suppose further that the Kuala Lumpur suitcase is alone on the carousel, and that Kennedy is arrested as he goes over for it. This change of facts does not alter the intention problem, but is Kennedy in actual posses-

sion? Can he be said to be in control of the location in which the drug is found? In marginal possession situations, as discussed above, the accused may face his or her *first* onus in fact at this point.[85]

Kennedy's principal defence was, of course, that he did not know that there was heroin in the suitcase. In the normal run of cases that may not be so. In the first place, the heavy onuses placed upon the accused in this situation are a very powerful weapon in the hands of the prosecution to coerce a plea bargain even from the innocent. In the second place, it may be recalled that the accused also faces a heavy onus on sentence under the *Customs Act* provisions. If an accused fails to prove that he or she did not know what was in the suitcase, it is difficult to assert with credibility thereafter that he or she possessed the drug for personal purposes only. An innocent accused, appreciating this dilemma, may well decide to admit guilt and stake all upon the sentencing issue. However, in Kennedy's case, the amount of the drug involved rendered such a strategy futile.

The question of mistake thus posed the first legal onus for Kennedy. He could not meet the challenge. From the report, it may be deduced that the damaging evidence was Crown evidence tending to show collusion between Carter and Kennedy by showing that they were, at least, acquainted. This was done by a variety of evidence proving unsuccessful attemps by each to contact the other by telephone calls between London and Malaysia. Whether this would have convinced a jury beyond reasonable doubt one will never know, but it was enough in the event to prevent Kennedy proving mistake on the balance of probabilities.

Finally, the convicted offender faces the same onus on the question of the appropriate penalty. The enormous amount involved in the case rendered that exercise moot. It is, perhaps, interesting to note that Carter was sentenced to six years and Kennedy twenty years. A ground of the appeal, however, points to a dilemma faced by all offenders in this type of case, Kennedy maintained his innocence throughout, based on his alleged mistake, which mistake he failed to prove. He was sentenced on the basis that he was the principal actor in the scheme bringing in the heroin for his own benefit. The majority found this proper, because the offender declined to give any explanation of his possession and because of the telephone evidence. Street C.J. concluded:

> "There is in fact no evidence which would point to any other finding. The case is not one where a sentencing judge, being faced with equivocal evidentiary material, should proceed on the version most favourable to the convicted person. There is no equivocation in the fact of the appellant's possession of this heroin or the part he played in engaging for it to be imported. In the absence of any suggestion in the evidence to the contrary, he can properly be regarded for the purpose of sentence as a principal."[86]

But if the appellant had given evidence as to his role, that would necessarily involve an admission that his previous denial of knowledge was a lie. The effect of this upon his credibility would render the evidence pointless and his presence in the witness box dangerous. Moreover, there is no legal reversal of onus on the question of the offender's role in the offence. The reversal of onus covers only the very broad question of *any* role related to commercial activity. The onus of proof on circumstances of aggravation at sentence is normally upon the Crown although the extent of the onus is open to some doubt. So here there is yet *another* onus placed upon the accused which, *exhypothesi* cannot be satisfied. The only general conclusion which can be drawn from all of this is that, if you are a tourist, make sure you recover your own bag because if you make a mistake, the odds are that you will be gaoled so fast that it will make your head swim and your eyes water. It is difficult to conceive of more vicious infringements of "the golden thread"

5. Where An Enactment Imposes A Penalty For A Criminal Offence A Person Against Whom It Is Sought To Enforce The Penalty Is Entitled To The Benefit Of Any Doubt Which May Arise In The Construction Of The Enactment.

This general principle is embedded in the criminal law, and is of great importance to it. Arguably, the presumption of innocence and the presumption in favour of *mens rea* are both specific instances of its operation. With the enormous growth of legislatively created offences overlaying the judicially developed system of common law crime, judges faced with increasing encroachment upon their traditional role and the new problem of interpreting statutory criminal law, developed the principle that, in case of doubt and ambiguity, the interpretation most in accord with the preservation of the liberty of the subject ought to be preferred.

The principle appears in various forms, but the general idea is clear, and has featured in some notable decisions. In the drug offence area, as one may by now suspect, it has had a chequered career. For example, while Murphy J. in *Yager* assigned great importance to it,[87] the principle was denied application in the area by the Victorian Court in *Van Swol*.[88] The usual method for disposing of the principle, employed in *Van Swol* for example, is to deny that there is an ambiguity in the point at issue. In the drug offence area, these denials invariably ring hallow.

If ambiguity cannot be denied, a second strategy is to resolve it by resorting to a "purpose" approach. In judicial hands, this has resulted in a willingness to suspend basic principles of freedom in the name of suppressing a supposed epidemic of drug use similar to that discussed and criticized above.[89] Thus, ambiguities are often resolved by reference to an evident legislative intention to catch everyone at any cost. While that may well have been the legislative purpose, it may not be permitted to obscure the fact that what the legislature means and what it says may be two entirely different things, and the equally important fact that the principle operates to interpret ambiguities "strictly", "naturally" or "literally"[90], but, in any event, exclusive of a purposive approach. It should be recognized that this is clearly a very conservative approach. It denys judicial policy making and it is protective of the common law judicial tradition against legislative encroachment. It is, perhaps, ironic that it operates to protect what now could be described as liberal interests. The irony appears due to the fact that, in their diehard enthusiasm to catch everyone, the legislature has made some irrational decisions.

For example, Australian drug offence law is in many areas dominated by the legislative assumption that all drugs used recreationally, (except tobacco and alcohol of course) are of equal harm and danger[91], and that the level of harm and danger is that which includes heroin. *Customs Act* offences apply to "narcotic goods", the South Australian Act applies to "drugs to which the Act applies". The legislative assumption is obviously silly, and is bound to cause problems. The obvious extreme is cannabis and so, after a rather lengthy battle, Australian drug legislation was amended to distinguish, for the purpose of penalty in some cases between cannabis and other drugs. It appeared at face value that the concession made by the cannabis proponents to intransigence was to leave concentrated cannabis, notably hashish, in the heroin category, despite the obvious irrationality of so doing.

The consequences of this are beautifully illustrated by the South Australian cases of *Findner*[92] and *Tunis v. Fingleton*.[93] In Findner, the accused was found in possession of heroin and hashish. His story was that he intended to sell the hashish to pay for his heroin habit. The formal problem in the case was whether he ought to be sentenced for possession of hashish for the purposes of sale on the basis of the cannabis tariff or the

heroin tariff. Under South Australian legislation, the cannabis concession in sentence had been accompanied by a legislative redefinition of "Indian hemp" and a consequent introduction of a statutory definition of "hashish" as a drug to which the Act applies.[94] The actual concession applied a lower maximum penalty only to "Indian hemp or any other prescribed drug or plant."[95] It is clear from the redefinition that Indian hemp and hashish are mutually exclusive, so the accused could only argue that hashish is some other "prescribed drug". Counsel for the defence argued that that term was ambiguous on point, that therefore the general presumption should apply so as to favour the liberty of the subject and that therefore the term "prescribed drug" included hashish. Clearly, the point at issue in a policy sense was simply the fact that hashish is so close to cannabis leaf as to be naturally indistinguishable.

All depended upon the demonstration that there was an ambiguity in the term "prescribed drug". The term was not legislatively defined. Legoe J. carefully considered the proposition that the phrase referred to drugs prescribed by chemists,[96] and rejected the idea because his opinion was that the phrase had been inserted for the purpose of adding new drugs to the cannabis equivalent tariff.[97] Of course, the appellant could not show that hashish had been added; indeed no drug has been added.

The appellant had then argued that, since the only other use of "prescritpion" under the Act had been the prescription by regulation of minimum quantities of drugs for the purposes of the deeming provision discussed above, the term "prescribed drugs" would refer to *all* drugs to which the Act applied and hence the heroin tariff would have no operation at all. The argument, if accepted, would lead to the inclusion of hashish in the lower tariff; if not accepted, for example because heroin would also be in the lower tariff, it would at least demonstrate an ambiguity in the phrase which should be interpreted in favour of the accused.

It is hardly surprising that Legoe J. found this line of reasoning unpalatable. His Honor, without offering any reasons beyond the natural and ordinary meaning of the legislation and that there was, therefore, no occasion for the application of the principle under discussion. His Honor remained of the view that the legislature intended hashish to fall under the higher tariff, and that "prescribed drugs" was a phrase intended to confer power to add drugs to the cannabis level. The legislature had conceded the case of cannabis leaf and had decided to preserve its option to implement other similar decisions without the need for legislation. Subsequently, the full court in *Vivian*[98] reached the same conclusions, referring to the obvious intention of the legislature to distinguish leaf from hashish and to reclassify drugs to the lower tariff by regulation. It is submitted, however, that three considerations reveal substantial difficulties with that view.

First, the term "prescribed drug" is not defined. If it is to mean drugs prescribed by regulation, then it must either be a reference to a regulation making power, or it must mean that by those words *alone*, the legislature intended to confer such power. As to the latter, it is surely unlikely that such words confer, of themselves, such a power. As to the former, the Act refers to the power to deal with "new drugs" and "prohibited drugs" but by proclamation not regulation.[99] Moreover, although the general regulation making power in the Act is cast in the usual broad terms, there must be considerable doubt whether it authorizes such a function.[100]

That doubt is exacerbated by a further matter. If the proper view is that cannabis leaf attracts one tarriff and any other drug to which the Act presently applies the other tariff, then the phrase "prescribed drug" could only refer to drugs presently uncontrolled, for otherwise, the regulations would have the effect of amending the legislation.[101] If correct, this view would considerably weaken the proposition that the effect of the phrase is a saving clause allowing regulatory flexibility in classifying drugs for the purposes of penalty. Moreover, such a conclusion would render less likely Legoe J's opinion that the regulation making power is implicit in the phrase itself: a proposition he described as a "shaky platform".[102]

The third consideration relates to the actual sentencing process rather than selection of the appropriate tariff. Even if it is concluded that, as a matter of law, hashish is to be considered as equivalent to heroin, the reality of selecting the actual sentence is very different. In *Findner*, Legoe J. finally adjourned the matter for sentence, on the ground that appropriate sentence depended in part upon "The composition and strength of the drug, and an *authoritative and reliable* description of its likely effects" and that he had no evidence or that point.[103] The result of such an injury could only show that hashish is a compacted version of cannabis leaf, the T.H.C. content of which varies from *relatively* high to below that of leaf. In short, in prescribing sentence, Legoe J. will be faced with the fact that the interpreted legislative position is indefensible, and will be compelled to sentence on that basis.[104] A similar effect has been observed above in the context of sentencing for breaches of the *Customs Act*. Both results are bizarre.

Thus, despite a finding of clear legislative intent, there exists considerable doubt as to what the legislature has actually done. The comparison to *Findner* and *Vivian* is *Tunis v. Fingleton*. The accused was charged with two counts, possession of hashish and possession of Indian hemp, convicted, and sentenced to fines of $350 and $250 respectively. Those are charges under 5(1) of the South Australian Act, which covers what may broadly be termed "use offences". The concession in penalty with respect to cannabis leaf applies only to offences under 5(2) of the Act, which covers what may broadly be described as "trafficking offences". The magistrate sentenced on the basis that hashish was more dangerous than cannabis leaf; hence the $100 differential. An appeal was taken on the ground of manifestly excessive penalties, an important part of which was objection to the discrimination between cannabis leaf and hashish. The objection was based on a lack of T.H.C. analysis of the hashish involved, and reliable and accurate expert evidence that the T.H.C. content of leaf and hashish overlapped so much as to be an unreliable factor of discrimination. The magistrate accepted that evidence, which was not disputed on appeal, concluding that the essential difference between leaf and hashish was the degree of concentration of T.H.C. in any equal sample. If that were the true reason for legislative discrimination, then the logical course would be implementation of a policy based upon a size/concentration ratio, perhaps because those drugs of high concentration are easier to hide.[105] However, whatever the result of that dispute on the facts, the magistrate felt that he was bound to discriminate between leaf and hashish because of the general legislative policy evidenced by the classification of hashish with heroin in the provisions for the sentencing of "traffickers".

On appeal, therefore, Jacobs J. was faced with the question whether the legislative determination of the appropriate sentencing range for hashish in the context of the "trafficking" offences carried over to sentencing for the "use" offences by implication. His Honor concluded that it did not, holding:

"If that had been parliament's intention, I think it might have been expected to say so, in explicit terms. It expressly did not say so in 5(1) and 14(1), and even if 5(2) (a) [*sic.* 5(2a)] does give rise to such a presumption, it cannot be an irrebuttable presumption . . . Here, the only evidence, if it can be so called, was all the other way . . . therefore . . . the imposition of a higher monetary penalty for possession of this hashish was not justified . . ."[106]

It is worthy of note that His Honor, in coming to this conclusion, could find no meaning for the term "prescribed

drug"; for the first two reasons set out above, he could not accept the proposition accepted in *Findner* and *Vivian*. In that light, His Honor's conclusion is, in present context, significant:

"I would not, however, wish my decision in this case to be interpreted as misplaced leniency for a drug offender . . . it is . . . a fundamental principle that where there is ambiguity or uncertainty in a penal statute, that ambiguity or uncertainty should be resolved in favour of the subject; and I can only repeat my concern that the numerous and repeated amendments to this legislation appear, if anything, to have increased, rather than reduced, its ambiguity and uncertainty".[107]

That ambiguity and uncertainty is not assisted by the fact that, at present in South Australia, there are different rules determining the appropriate tariff for hashish for "use" offences to those governing "trafficking" offences.

These cases not only illustrate the mess that legislative irrationality and over-enthusiasm may cause, but also that the courts occasionally, in frustration, resort to the "liberty principle" to resolve that mess. The general principle is not totally ignored, but at present, its role is slight, and prone to be overwhelmed by draconic judicial assessment of the legislative purpose which is commonly used to demonstrate that, despite all appearances, there is really no ambiguity at all upon which the principle may operate. It has been suggested that such an approach is invalid. As the above discussion of the notion of possession has shown, the law in this area is full of vague and over-extended concepts. Present law resolves those ambiguities against the accused; the "liberty principle" demands that they should be resolved against the State.

6. Some Other Rights and Freedoms

It should not be thought that the judicial and legislative destruction of rights, freedoms and principles protective of individual liberty from arbitrary State intrusion is limited to those discussed above. Consider the further examples of the right to individual privacy, the right to freedom of expression, the right to remain silent, and the right to trial by jury.

(a) privacy

The general "right" to individual freedom and privacy is not absolute, but is subject to the power of the State to intervene for the public weal. However, as the Sackville Royal Commission pointed out, that interference should be based on convincing reasons, and should employ the least intrusive controls.[108] There can be no doubt that Australian drug law falls far short of that standard. Indeed, with the expansion of a constitutional guarantee of privacy in the United States, there have been a number of decisions holding that to prohibit the possession of cannabis is unconstitutional as an irrational intrusion into private conduct.[109]

b) freedom of expression

A number of aspects of drug laws limit freedom of expression in totally unacceptable ways. For example, the publication of manuals on how to cultivate cannabis has been published in Canada as constituting the offence of counselling or inciting another to commit an offence whether or not the recipient of the counselling was influenced by it,[110] and there is no reason to suspect that such a result would not follow in Australia. The South Australian legislation contains a special offence providing that anyone who publishes any advertisement to the effect that he or she will supply a drug, or which *promotes* or *encourages* the use of any drug to which the Act applies is guilty of an offence unless the advertisement is circulated only to legally qualified medical practitioners, dentists or veterinary surgeons.[111] Thus activists may not freely agitate for reform, yet multinational drug companies are free to promote such drugs as thalidomide or valium to those who prescribe them. Moreover, as the Sackville Royal Commission pointed out, the South Australian Classification of Publications Board has classified a growing number of publications dealing with cannabis as restricted, apparently on the jurisdictional ground that these publications deal with "drug addiction" "in a manner that is likely to cause offence to reasonable adult persons."[112] In the case of cannabis, both grounds are, at best, tenuous. It is highly likely that, in the United States, all of these controls would be unconstitutional restrictions upon the right to freedom of expression.[113]

c) remaining silent

The right to remain silent refers to the privilege against self incrimination which permeates the criminal process. It has been seriously breached in Australian drug laws. For example, the consistent placing of two or even three onuses upon an accused, detailed above, *compels* the accused to explain. Moreover, the *Customs Act*, incredibly, provides that it is an offence for any person to fail to disclose to an officer on demand any knowledge in his possession or power concerning offences against the Act.[114]

d) trial by jury

Section 80 of the Australian Constitution, in one of its rare attempts to provide constitutionally based protections against deprivation of protective rights, provides that the trial on indictment of any Commonwealth offence shall be by jury. It was argued in *King*[115] that the sentencing provisions in s235 of the *Customs Act*, discussed above, must be interpreted so as to provide that the decision as to the purpose of the offender's offence should be taken by a jury. The Victorian Full Court rejected the argument, holding that the phrase "the Court" in s.235 refers to the judge alone, and that this interpretation is not in contravention of the Constitution, because s.80 is concerned with the *trial* of offences, and s. 235 is solely directed to the sentencing process.

That, in essence, has also been the response of the New South Wales and Queensland Courts of Appeal.[116]

The argument on the constitutional point has been eloquently put by Willis,[117] and it is not intended to repeat his analysis here beyond two observations based on the opinion that the judicial response has been inadequate. In the first place, it is obviously unreal to simply assert that s. 235 is concerned with sentence not guilt. In a real, as opposed to formal sense, s. 235 concerns crucial issues of guilt. On the judicial view, it would be possible for the Commonwealth to enact that any person *charged* with possession of drugs shall be deemed guilty of an offence and then providing for a sentence of absolute discharge if the accused proves, for example, no possession. The judicial interpretation makes a mockery of the constitutional guarantee. Secondly, could it not be argued that to confer a right of trial by jury confers a right to trial as well as to a jury? I doubt that the hearing under s. 235 could be dignified as a trial. It is submitted that the *Customs Act* provisions do deny the constitutional right to trial by jury.

8. Conclusion

"The views expressed in Bush's case are not intellectually disrespectable . . . " (sic)[118]

There are a number of lessons to be learned from this sorry tale beyond the obvious conclusion that present Australian drug laws seriously, unconscionably and indefensibly breach general principles and assumptions underlying the criminal process which are designed to protect the individual from unjustified conviction and deprivation of liberty. For example, it is evident that few judges have perceived their role to be, at least in part, the guardian of the liberty of the individual, and many have joined the orgy of legislative repression and injustice. There is a lesson for Australians in this. How easily are our freedoms and liberties destroyed by, in this case, a quasi medical pogrom,[119] with hardly more than a whimper of protest. This area may well be the paradigm case for entrenched constitutional protections.

Discussion above has not addressed the broader policy questions concerning the appropriate social response, if any, to the non-medical use of any drugs, from cannabis to heroin. It is concerned to demonstrate that, when the social costs of present policy are debated, the costs in terms of social justice should be considered alongside such matters as the price of law enforcement and the necessity for the use of undesirable police practices. Too often, the costs of substantive injustice are forgotten and ignored. There is the occasional exception; in *Williams*, for example, the High Court refused to permit the conviction of an accused for possession of a quantity of cannabis measurable in micrograms. Gibbs and Mason J.J. commented:

"Even though the statute is aimed at a social evil if it is ambiguous or silent upon a particular point it is permissible to construe the statutory provision so as to avoid an unfair or unjust result".[120]

Even such general statements are too rare in this area. Legislators and judges would do well to heed the words of Professor Fletcher.

"Yet so long as we think of law as the pursuit of policices, we are inclined to think the probable consequences of our decision ought to mediate our sense of justice to the individual accused. The instrumentalist bias of our times thus converts the doing of justice into one among many policies, to be weighed and assessed along with the value of . . . [the policy of "stamping out" drug use] . . . most . . . find it hard to conceive of justice or compassion as an imperative, a demand to which we must respond without a view to the overall costs of our response."[121]

If Australia must retain a policy on drug use which is heavily and primarily reliant upon coercive intervention via the criminal process, then let the criminal process function as a whole, and not selected parts of it. If the proponents of repression are correct, which seems improbable, it will quickly appear that the normal protections will operate to free many of the guilty and the policy of reliance upon the criminal process will be in tatters. If that does happen, however, it does not necessarily mean that there is anything wrong with the criminal process. It is far more likely that there is something wrong with the policy of using it to "stamp out" drug use. Moreover, if there really is something wrong with the criminal process, that something should be the subject of general reform, not just reform in the drug offence area sheltering behind the empty rhetoric of expediency. It is not without significance that, in the United States, the National Commission on Marijuana and Drug Abuse, the American Bar Association, the National Conference of Commissioners on Uniform State Laws, the National Advisory Commission on Criminal Justice Standards and Goals, to name just a few, have recommended variations on the decriminalization of possession of marijuana for personal use *based on* the need to restore and preserve the integrity of the criminal process, the need to strike a defensible balance between appropriate social policy and the need for justice, and the general need for criminal law reform.[122]

This paper, then, has a limited purpose. The author is aware of its defects:

". . . in a repressive society, partial reforms that advance the possibility of apparently less restrictive behavioural codes become integrated into the social totality, become functional to its continued existence, and hence themselves become repressive. . . . To the extent that such proposals see [drug] use as a free choice and either minimize or suppress from view the degree to which involvement with narcotics reflects the profound inequality that characterizes the [Australian] social structure they serve to protect the prevailing order from criticism. To the extent that such proposals would advance the integration of narcotics-using behaviour into the social totality they would provide yet another mechanism for blunting the disaffection of the under class".[123]

Perhaps. It is, in that light, comforting to think that the possibility of even partial reform in Australia is, at best, remote. Moreover, it is never edifying for theorists to rely upon the continued suffering of others in order to exacerbate social disunity. Reform, no matter how remote, must be humanitarian, and it must be based on the imperatives of social justice.