OHIO
CRIMINAL SENTENCING COMMISSION
Chief Justice Maureen O'Connor, Chair • Sara Andrews, Director

TO: Ohio Criminal Sentencing Commission Members & Advisory Committee

FROM: Sara Andrews, Director

DATE: October 19, 2015

RE: History of Marijuana Laws in Ohio and supplemental interesting reports

Consistent with the Commission's core values to provide relevant and useful informational summaries and reports, we are pleased to share this timely summary informative publication. We are poised for the outcome of the Ohio Marijuana Legalization Initiative, which is an Ohio initiated constitutional amendment on the ballot for November 3, 2015. The measure, Issue 3, proposes to legalize the limited sale and use of marijuana and create 10 facilities with exclusive commercial rights to grow the drug. Issue 3 will be accompanied on the ballot by Issue 2, which was added by state lawmakers concerned that the amendment would grant a monopoly to the facilities.[1] If Issue 3 succeeds, we will quickly undertake the many revisions to sentencing and other relevant sections of the Ohio Revised Code, in the meantime, these reports are provided for informational, contextual, educational, historical and notably neutral purposes for wide-range audience.

The project consists of:

1. Timeline of major changes in Ohio's laws regarding marijuana
2. A 1967 report from the Ohio Legislative Service Commission on our drug laws
3. The text of the 1932 Uniform State Narcotics Act and an older law review – in two parts
4. A 50 state overview of marijuana laws

I trust the project will be informative and appreciate the support, hard work and collaboration of the Supreme Court of Ohio Law Library.

[1] Ballotpedia, http://ballotpedia.org/Ohio_Marijuana_Legalization_Initiative,_Issue_3_(2015), accessed 10-19-2015

History of Marijuana Laws in Ohio

December 17, 1914 Harrison Narcotics Tax Act
First law at federal level to criminalize non-medical use of drugs. The Harrison Act applied only to opium, morphine and its various derivatives and derivatives of the coca leaf, like cocaine.

April, 1923 110 v. 417 (SB 22, 85th General Assembly) To Conform Ohio Narcotic laws with the Federal Narcotics Laws
Ohio law to amend GC 12672, 12672-1 and 12673 for regulation, possession and sale of cocain, eucaine, morphine, etc. (NOT MARIJUANA) Permits necessary; prescription and record; penalty. Does not apply to doctors, etc.

May 1927 112 v. 187 (HB 422, 87th General Assembly) Relative to the regulation of habit forming drugs.
Ohio law to amend GC 12672 for regulation, possession and sale of cocain, eucaine, morphine, cannabis, marijuana, etc. Permits necessary; prescription and record; penalty. Does not apply to doctors, etc.

1932 Uniform State Narcotics Act
The Uniform Narcotic Drug Act, adopted by the National Conference of Commissioners on Uniform State Laws in 1932. Concern about the rising use of marijuana and research linking its use with crime and other social problems created pressure on the federal government to take action. Rather than promoting federal legislation, the Federal Bureau of Narcotics strongly encouraged state governments to accept responsibility for control of the problem by adopting the Uniform State Narcotic Act.

June 1935 116 v. 491 (91st General Assembly) Defining and relating to narcotic drugs and to make uniform the law with references thereto
Ohio adopts the Uniform Narcotic Drugs Act.

August 2, 1937 Marijuana Tax Act (PL 75-238)
Congress passed the Marijuana Tax Act. The statute effectively criminalized marijuana, restricting possession of the drug to individuals who paid an excise tax for certain authorized medical and industrial uses. Repealed 1970.

October 1, 1953 Ohio Revised Code becomes effective GC 12672-1 et seq to 3719.01 et. Seq.

September 16, 1970 133 v. HB 874 (108th General Assembly) To Prevent Drug Abuse by Young Persons by Instructing them in its Evils, to revise and expand existing drug laws to meet changing patterns of drug abuse, and to provide for the treatment and rehabilitation of drug dependent persons.
Moved cannabis from narcotic drug (3719.01) to Hallucinogen (3719.40)

September 16, 1955 126 v. 178 (101st General Assembly) Relative to the manufacture, sale and possession of narcotic drugs

Increased mandatory penalties were adopted in 1955, upon recommendation of a Citizen's Narcotics Advisory Committee under leadership of the Ohio Attorney General.

October 27, 1970
The federal government—through the Controlled Substances Act (CSA; P.L. 91-513; 21 U.S.C. §801 et. seq.)—prohibits the manufacture, distribution, dispensation, and possession of marijuana.

August 22, 1975 signed 1975 HB 300 (effective July 1, 1976) Drug Abuse and Controlled Substances Act
Governor Rhodes signs into law Am. Sub. H.B. 300 (effective July 1, 1976), which makes sweeping changes to Ohio's drug abuse prevention and control laws. This is designed to complement the federal Controlled Substance Act (PL 91-513).

June 20, 1980 SB 185 (113th General Assembly) Created a controlled substances therapeutic research program
Created a program run by the Ohio Department of Health to study the therapeutic uses of marihuana, bill set an expiration date on program four years after the effective date of bill.

March 23, 1981 SB 378 (113th General Assembly)
Prohibit the sale to juveniles of paraphernalia for the use of marihuana

June 23, 1982 HB 108 (114th General Assembly)
Created laws regarding trafficking and aggravated trafficking of marihuana

April 11, 1990 HB 215(118th General Assembly)
Increase the penalty for certain drug offenses that involve the sale, furnishing or administration of a controlled substance when committed on school premises, in a school or within 1000 feet of a school premise

August 22, 1990 SB 258 (118th General Assembly)
Increased fines for drug offenses

November 2, 1992 Sub. HB 591 (119th General Assembly)
To increase penalties for trafficking in marihuana

July 30, 1993 Sub HB 377 (120th General Assembly)
Require suspension of drivers license for any person convicted of a drug offense under federal or state law

June 28, 1996 SB 269 (121st General Assembly)
Conform certain newly enacted laws to new sentencing/corrections law--S.B. 2.

July 1, 1996 SB 2 (121st General Assembly)
Regarding Criminal Sentencing Commission recommendations.

July 1, 1996 HB 125 (121st General Assembly)
Relative to violations of the drug offenses laws.

June 20, 1997 SB 2 (122nd General Assembly)
To eliminate the "medical purposes" affirmative defense to the offense of possession of marihuana.
http://archives.legislature.state.oh.us/bills.cfm?ID=122_SB_2

July 29, 1998 HB 122 (122nd General Assembly)
To prohibit the preparation of drugs for sale.
http://archives.legislature.state.oh.us/BillText122/122_HB_122_ENR.pdf

March 23, 2000 SB 107 (123rd General Assembly)
To clarify and modify certain provisions of the Controlled Substance Law and Drug Abuse Law, to modify the felony sentencing law as modified by these acts.
http://archives.legislature.state.oh.us/BillText123/123_SB_107_ENR.pdf

February 13, 2001 HB 528 (123rd General Assembly)
To expand the drug trafficking offenses to also include a prohibition against certain acts related to the shipment, transportation, delivery, or distribution of a controlled substance for sale or resale.
http://archives.legislature.state.oh.us/BillText123/123_HB_528_ENR.pdf

January 1, 2004 HB 490 (124th General Assembly)
To implement the recommendations of the Criminal Sentencing Commission pertaining to misdemeanor sentencing generally; to make other changes in the criminal law, including changes in the law regarding matter harmful to juveniles.
http://archives.legislature.state.oh.us/BillText124/124_HB_490_ENR.pdf

August 11, 2004 SB 58 (125th General Assembly) METH LABS - PROHIBIT EXPOSING CHILDREN
To increase the penalties for certain drug offenses if the offense is committed in the vicinity of a school or in the vicinity of a juvenile and to expand the offense of endangering children to prohibit allowing children to be within the vicinity of certain drug offenses.
http://archives.legislature.state.oh.us/BillText125/125_SB_58_EN_N.pdf

August 17, 2006 SB 8 (126th General Assembly) DRUG TESTING

To prohibit the operation of a vehicle or vessel if a statutorily specified concentration of amphetamine, cocaine, cocaine metabolite, heroin, heroin metabolite [morphine], heroin metabolite [6-monoacetyl morphin], L.S.D., marihuana, marihuana metabolite, methamphetamine, or phencyclidine is present in the operator's blood or urine, subject to certain exceptions and to extend the time within which a chemical test of an arrested person's whole blood, blood serum or plasma, breath, or urine must be taken in order for the results of the test to be admissible as evidence.
http://archives.legislature.state.oh.us/BillText126/126_SB_8_EN_N.pdf

September 30, 2011 HB 86 (129th General Assembly) CRIMINAL SENTENCING REVISIONS
To revise some of the penalties for trafficking in marihuana or hashish and for possession of marihuana, cocaine, or hashish.
http://archives.legislature.state.oh.us/BillText129/129_HB_86_EN_N.pdf

September 28, 2012 SB 337 (129th General Assembly) COLLATERAL SANCTIONS
To make the use or possession with purpose to use drug paraphernalia with marihuana a minor misdemeanor.
http://archives.legislature.state.oh.us/BillText129/129_SB_337_EN_N.pdf

Ohio Legislative Service Commission
David A. Johnston, Director
Columbus, Ohio
March, 1967

DRUG ABUSE CONTROL

Staff Research Report No. 86

Research Staff
Sara R. Hunter, Consultant

TABLE OF CONTENTS

Columbus Blank Book Company
Columbus, Ohio 43207
1967
Bound by the State of Ohio

INTRODUCTION

In forty-seven states, including Ohio, anti-narcotic legislation is modeled after a Uniform State Narcotic Act. Recently, many states have been re-examining their laws governing narcotics and other dangerous drugs and have been considering proposals to control highly publicized abuses of non-narcotic drugs.

Pending federal legislation also indicates that the efficacy of current measures to control the narcotic crime rate is being questioned. Moreover, Congress enacted legislation in 1965, effective February 1, 1966, to extend the authority of the Food and Drug Administration over depressant, stimulant, and hallucinogenic drugs by applying to such drugs the pre-existing patterns of regulation in the Federal Food, Drug, and Cosmetic Act and prohibiting their unlawful manufacture and distribution.

This study examines three major problems in Ohio. In general, these problems reflect areas of national concern.

1. Mounting evidence of violation of laws proscribing illicit traffic in marihuana and non-prescription medications with narcotic content, especially among teenagers and young adults.
2. The apparent failure of severe penal measures to eliminate drug abuse.
3. Reports of increased experimentation with highly dangerous drugs not specifically encompassed by present laws.

Evaluation of success or failure of current legislative trends is difficult because of inadequate data.

Drugs may be categorized in various ways. Ohio law recognizes three classifications: the narcotics, barbiturates, and "other dangerous drugs." Federal law establishes specific controls upon the manufacture of and traffic in narcotic drugs in the United States Code, and sets up a pattern of regulation applicable to all drugs under the Food, Drug, and Cosmetic Act. Under both federal and state law, marihuana is defined as a narcotic, although such definition has been questioned.

Great disparities exist, under both state and federal legislation, in the penalty structure applicable to the unlawful use, possession, and traffic in narcotic drugs and that applicable to all other dangerous drugs. Patterns in narcotic legislation are fairly well fixed. Limiting legal drug supplies and applying the threat and fact of long-term mandatory sentences have characterized past narcotic legislation. Although the approach has received widespread endorsement, its critics have not been silent. Respectable legal, medical, and sociological opinion condemns mounting penalties as ineffective and inhumane. Their arguments merit notice as states consider new steps to solve problems created by the increasing abuses of other dangerous drugs.

I. TYPES OF DRUGS INVOLVED

Drugs are often classified according to their effect on the central nervous system. They may be termed "depressant," "stimulant," or "hallucinogen." The depressants include heroin and other opium derivatives, cocaine, and barbiturates. Ohio law defines marihuana as a narcotic. It is alternately categorized in the literature as narcotic, stimulant, or hallucinogen. Common stimulants are drugs of the amphetamine type, such as Benzedrine. Currently, the best known hallucinogen is LSD (sometimes referred to as LSD-25, an abbreviation for lysergic acid diethylamide).

DEPRESSANTS

Opiates

"Narcotic," by dictionary definition, refers to a drug that dulls the senses and induces sleep. Ohio law defines narcotic drugs as "coca leaves, opium, isonipecaine, amidone, isoamidone, ketobemidone, cannabis, and every substance not chemically distinguishable from them and every drug to which the federal laws relating to narcotic drugs may apply." Under Ohio law, opium includes morphine, codeine, and heroin, as well as compounds, manufactures, salts, derivatives, or preparations of opium.

Federal law defines the term "narcotic drug" as opium, isonipecaine, coca leaves, and opiates; a compound, manufacture, salt, derivative, or preparation thereof; or a substance chemically identical thereto. "Opiate" is defined as any drug proclaimed by the Secretary of Health, Education, and Welfare to have been found to have an addiction-forming or addiction-sustaining liability similar to that of morphine or cocaine.

When reference is made to opiates and "opiate-type" drugs or "hard narcotics," opium, morphine, and heroin are the drugs under discussion. The species of poppy, *Papaver somniferum*, produces raw opium from which the first of the opiate alkaloids, morphine, was derived early in the nineteenth century. Most accounts report that there was little discussion about opium use in this country until after the Civil War. Morphine was used to relieve pain of the wounded, and, allegedly, so many wounded soldiers became addicted to the effects of morphine that morphine addiction became known as the "army disease" or "soldiers' disease." The unregulated sale of patent medicines with a narcotic base is also blamed for the increased incidence of addiction during the late nineteenth and early twentieth centuries, and opium smoking was introduced at about the same time by Chinese immigrants on the west coast.

Morphine has been defined as "the predominant active principle of opium." Its value in medicine has been described as two-fold: (1) for reduction or obliteration of perceived pain; (2) for the relief of anxiety associated with pain.

Opiates, morphine, and morphine-like pain relievers play an extremely important role in the practice of medicine because of their ability to counteract severe pain or to reduce tension generated by the anticipation of severe pain. But some people, for reasons still being explored, come to prefer the mental euphoria created by these drugs to an existence without them. Their "desire for relief of presumed mental pain is so intense that acquisition of the drug and its regular uninterrupted use become motivating forces in their existence."[1] Chronic use produces addiction, characterized by psychological and physical dependence, and tolerance — the need for increased dosages. According to the literature, the medicinal average dose of morphine is one-fourth grain or, in cases of acute pain, one-half grain. Tolerance—the need for increased amounts—builds up to the point where addicted persons may use as much as ten grains, or more, three times a day.

Heroin is classified as a "semi-synthetic derivative" of opium. According to most literature, when the term "addiction" is used without qualification, the tacit assumption is that heroin is the drug in question. Heroin has been the principal item of illicit drug commerce in the United States. Originally introduced as a non-addicting morphine substitute, it has become the subject of the most stringent federal controls. The limited amounts available on the illicit market are cut with milk sugar, talcum powder, or other diluting agents, so that most samples seized reportedly contain only 3 to 5 per cent of the drug. Heroin is said to be preferred to morphine because it is

three times as powerful, worth three times as much, and can be more easily diluted.

Codeine derives from morphine. In the Chemists' terms it is a "methylated morphine." Its chief medical use has been as a respiratory depressant. A common use of codeine is in cough extracts to relieve dry, irritating cough. The addiction potential of codeine is not considered to be high. In the United States, codeine is available only on narcotics prescription. Liquid preparations (such as cough syrups) containing not more than specified amounts of codeine per ounce are available upon signature. Coedine in stronger preparation is available only on perscription. Although these liquid preparations are abused, the abuse is termed "of little significance with respect to the general drug abuse problem."[2] The chief danger in taking overdoses of cough syrup containing codeine is not addiction to codeine, but progression to experimentation with more potent agents.

According to definitions in the *Report of the Ad Hoc Panel on Drug Abuse, hydrocodone* (Hycodan, Dicodid) and *oxycodone* (Percodan) are related to codeine chemically, but do not occur naturally. They are prepared by a sequence of chemical transformations from *thebaine*, another opium alkaloid.

> Both drugs in their pure form are under full narcotics control, but some of their compounds, limited in the quantity of opiate ingredient and containing other agents, are available for oral prescription. The abuse liability of these solid preparations is currently being reviewed. Liquid preparations of hydrocone, containing not more than one-sixth grain of hydrocone per fluid ounce, were available, like similar codeine preparations, through over-the-counter sale for cough relief. This exempt status has been revoked because of outbreaks of abuse of these preparations in a number of areas.

Paregoric, or camphorated opium tincture, is another preparation. Its reported abuse, along with that of some prescription-exempt cough syrups, has caused some drug law enforcement officials in Ohio to favor removal of the prescription exemption. Abusers travel from drugstore to drugstore to obtain the small quantity available on signature only. Some boil off the alcohol and inject the residue intravenously; others take it orally in large quantities. The Panel termed its effects "not profound" and its appeal primarily to "down-and-outers."

Dilaudid (*dihydromorphinone*) is another morphine deriative. Abuse of this drug was not found to be extensive.

Some consideration has been given to requiring prescriptions for exempt preparations (Kentucky has initiated such legislation). An alternative, to advise pharmacists on methods of checking repeated purchases, has been preferred by some because prescription would raise the cost of medicines to non-abusers.

In addition to derivatives of opium such as morphine, and semi-synthetic derivatives such as heroin, narcotics include totally synthetic substances with opiate-like effects. Meperidine, commonly called demerol, is an example of such a synthetic. Addiction to demerol is said to be generally related to its prescription for therapeutic use and misconceptions about its addiction-inducing qualities.

Methadone is another common synthetic. In research studies in New York, methadone hydrochloride has been used extensively in projects for treating heroin addicts. In the view of some physicians and psychiatrists who have worked with the drug, methadone holds great promise for heroin addicts because it allows achievement of optimal dosage level without subsequent need to increase the amount, is long acting (necessitating only a single dose per day), is effective orally, and has produced no deleterious psychological or physical effects.

The literature suggests that apart from use begun for relief of pain under the supervision of a physician, psychological make-up is the main force that causes one person to take up drugs while another avoids them. An explanation of addiction by the Surgeon General of the United States, as reported by an Interdepartmental Committee on Narcotics, in 1956, follows:

> The second and by far the larger group (of addicts) represents those in whom addiction is a manifestation of some abnormality of character or attitude. These addicts often say that they became addicted after having been introduced to the drug by their companions. For these people, the drug fills an emotional need, giving them a feeling of security, of being able to meet the realities and frustrations of life with more equinimity than they could otherwise muster. They

usually suffer from any one of the types of character or personality disorders and have mental and emotional inadequacies that we classify as psychoneurotic, psychopathic, or more rarely, psychotic. These characteristics are not limited to narcotic addicts, they are found also in the chronic alcoholic and the barbiturate addict. In all of these addictions, the underlying emotional problem is likely to be similar. In fact, some narcotic addicts are first alcoholics, and turn to narcotic drugs as a second addiction.

In the 1920's, intensive study of addiction problems was undertaken by Dr. Lawrence Kolb, a Public Health Service officer trained in psychiatry. Kolb's analyses are still respected and frequently cited.

Kolb postulated that opiates initially induce different subjective effects in different personalities. Normal and neurotic persons, he said, did not experience any positive senation—only the relief of physical pain or emotional stress that he called "negative pleasure." "Psychopathic personalities, on the other hand, experienced a sense of exaltation, called positive pleasure. As tolerance and dependence developed, 'positive' pleasure disappeared until the addict took the drug only to stave off symptoms of abstinence."[3]

For many years, the Psychiatric Clinic of the Criminal Division of the Supreme Court for New York County has given psychiatric examinations to persons convicted of felonies. A substantial portion (25 to 30 per cent) have been chronically addicted to opiate drugs such as heroin. Emmanual Messenger, Psychiatrist in Charge, and Arthur Zitren, Director, Psychiatric Division of Bellevue Hospital, New York City, report that probably half of all drug addicts arraigned for felonies in New York City between 1954 and 1960 showed various types of psychopathic personalities, and that the remainder were considered to show, at least initially, lesser types of character and behavior disorders. According to this report, personality defects were predominantly in the fields of ethical and moral laxity and social responsibility.[4]

An Interim Report of the Narcotic Drug Study Commission of the New Jersey Legislature (1965) points out that a recognized medical benefit of narcotic drugs is the calming effect in the presence of severe pain. This characteristic of opiates is also the one sought by people who have been described as drug-abuse prone. They welcome the state of indifference about facing emotional problems and the dreamy state of well-being that replaces anxieties. Unfortunately, the compulsive craving to stay "high" leads to physical dependence, apparently the result of adaptive reactions of the cells of the central nervous system which come to require the drug to function normally. Withdrawal of the drug produces extreme discomfort. Symptoms mentioned as classic in the New Jersey report include: nervousness, restlessness, and anxiety; nausea; vomiting; diarrhea; running nose and eyes; perspiration; and aching, twitching muscles in the back and legs.

The Report of the Ad Hoc Panel on Drug Abuse describes the withdrawal syndrome:

> When narcotics such as morphine are withheld from a physically dependent person, a well-defined withdrawal syndrome results. This includes yawning, tearing, sweating, pupillary dilatation, abdominal cramps, muscle aches, and hot and cold flashes. The peak reaction is reached after 48 hours and includes violent vomiting and diarrhea, fever, and marked hyperactivity. Symptoms start to decline about the 72nd hour, and most objective signs are gone usually in 7 to 10 days.
>
> Subjective symptoms may remain, however, for as long as 6 months, particularly when recalled by psychic stress or exposure to (though not necessarily administration of) more narcotic. The Panel has been unable to find any studies which demonstrate conclusively whether these symptoms are psychogenic or are, in fact, manifestations of a residual physiological or pathologic change. The prolonged withdrawal necessary for babies born of addicted mothers indicates that more than suggestibility may be involved in the symptoms reported by the addict long after his detoxification and for which he again feels the need of relief through his well-established pattern of drug administration.

Cocaine

Cocaine, a local anesthetic, is a derivative of leaves of a South American plant, *Erythroxylum coca*. Although it is included in federal and state narcotic laws, cocaine is not a narcotic. Cocaine stimulates the central nervous system, producing excitement and euphoria. According to one authority, cocaine addiction is now rarely seen since synthetic products with similar analgesic

properties have replaced the uses of alkaloids from the coca leaf.[5] Its value as a relief for fatigue was once more universally recommended than it is today.

The abuse of cocaine is for the purpose of inducing intense mental exhilaration. Tolerance does not develop to cocaine. Effects become increasingly intense. Tactile, visual, and auditory hallucinations with paranoid delusions are said to be the results of cocaine abuse. Cocaine is most frequently used in conjunction with a depressant, such as heroin or morphine, as a "speedball."

Marihuana

Marihuana, one of the most controversial drugs of the statutory narcotic classification, has many nicknames which go in and out of fashion in various sections of the country. Commonly recognized terms are "pot," "goof butt," "grass," "reefer," "stick," "stink weed," and "tea." Unlike the drugs discussed above, marihuana serves no therapeutic purposes.

This drug is made from the flowering tops of the female species of an Indian hemp plant, known as *Cannabis sativa.* Its origin has been traced to Central Asia or China where, according to authorities, its pain-relieving qualities were recognized nearly 3000 years before Christ. Accounts report its use in ancient India, Persia, and Turkey. A specially cultivated and harvested, highly refined grade of *cannabis,* called *hashish,* and its resin, was reportedly brought to the Middle East by the Moslems and to Europe by returning Crusaders.

Accounts of it report that it was first brought into the United States in large quantities around 1910 by Mexican laborers. Its use reportedly increased greatly after the Volstead Act (prohibition).

Marihuana sold in the United States is made by drying the top leaves, flowering tops, and seed pods of the plant to obtain a product resembling smoking tobacco. It is often smoked with a mixture of tobacco.

Although the terms *ganja, bhang,* and *hashish* are sometimes used interchangeably with the terms *marihuana* or *cannabis,* marihuana is recognized as much less powerful. *Bhang* properly refers to the uncultivated hemp plant which is both smoked and drunk in India. *Ganja is the* common name of a potent hemp plant which is ordinarily brewed and drunk as *ganja tea* (in the West Indies, for example). In some areas, it is used as a home remedy of sorts. Its use is supported Biblically. Concentrated resin from the female hemp plant is *hashish,* which bears a relationship to marihuana equivalent to that of pure alcohol to beer.[6]

Discrepancies in attitudes toward marihuana control and conflict between supporting claims is greater than for any other drug. Effects from its use have been described by some as exhilaration, loss of inhibitions, a changed sense of time, and other psychological effects extravagantly praised by users. According to some medical literature, the active alkaloid in *cannabis, tetrahydracannabinal,* acts as a depressant on the central nervous system. Marihuana has been favorably compared with alcohol in stimulating appetitite rather than dulling it, in not being habit forming to the degree that alcohol is, and in not producing deleterious bodily effects such as cirrhosis of the liver.

The theory that marihuana acts as a potent sexual stimulant or aphrodesiac has been strongly disputed. Some have claimed that it destroys will power, erases the line between right and wrong, incites the user to immorality, fills him with an irrepressible urge to commit violent crimes, and leads to insanity.

The probability of graduation from marihuana to heroin or cocaine is presently regarded as its greatest danger and is cited to justify harsh penalties for its possession and traffic. Many argue that a large number of heroin users were first initiated to marihuana's effects, but others vigorously respond that only a small percentage of people who at one time or another experiment with marihuana progress to the hard narcotics.

Much anti-marihuana literature terms the drug "addiction-inducing" in spite of voluminous medical and sociological commentary to the contrary. Expert testimony at the Neuro-Psychiatric Institute, held by the New Jersey Narcotic Drug Commission, referred to marihuana as belonging to a borderline group and explained that it continues to be a very poorly understood drug. "The active agent in it has never really been identified. . . . It does, however, produce a great deal of mental disorganization and it does serve as an entree to more serious kinds of addiction."

Ohio Law classifies *cannabis* as a narcotic drug and defines it as:

> All parts of the plant *cannabis sativa*, whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin, but not including the mature stocks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stocks except the resin extracted therefrom, fiber, oil or cake, or the sterilized seed of such plant which is incapable of germination.

Barbiturates

Barbiturates are sedative drugs medically useful to calm tense and excitable patients. Commonly known barbiturates includes phenobarbital, amobarbital, butabarbital, and pentabarbital. Barbiturate sedation is often prescribed for people with organic maladies where anxiety is adversely affecting the functioning of some body organs. In excessive amounts, however, barbiturates act as intoxicants. "Yellow jackets," "red devils," and "blue heaven" are slang terms for rapid-acting barbiturates taken for disinhibiting effects. When barbiturates are used for purposes of intoxication, users can become physically dependent upon them.

The New Jersey Narcotic Drug Commission reports that, as is true in alcoholism, barbiturate abusers suffer from emotional disturbances. The literature suggests a difference between the barbiturate-prone abuser and one who is attracted to heroin or the "hard narcotics." However, during "panics' when black market heroin is in short supply, narcotic addicts reportedly endure the period with the help of barbiturates. The New Jersey report also points out that some psychiatrists believe barbiturate users differ from heroin addicts in "acting out" solutions to problems in aggressively violent behavior. Barbiturate-induced release of impulsive behavior is blamed for the large number of suicides and suicide attempts under the influence of such drugs.

According to findings of the New Jersey Narcotic Drug Study Commission, people who have been drinking alcohol are especially prone to suffer from a drug's depressant effects on the brain centers that control breathing and blood pressure. The combined effects of alcohol and relatively small doses of depressant drugs have resulted in death from respiratory and circulatory failure.

Frequent abuse of barbiturates can lead to physical dependence, and abrupt withdrawal can result in serious illness or death. Nervousness, restlessness, twitching and tremors, seizures, hallucinations, disorientation and delirium are among the classic symptoms described in connection with barbiturate withdrawal. Circulatory collapse is mentioned as a cause of death in such instances.

In 1965, the New Jersey Narcotic Drug Commission held a hearing at the New Jersey Neuro-Psychiatric Institute to secure the opinions of research specialists in the field of medical pharmacology. Clinical pharmacologists (defined at the Institute as people interested in the treatment of diseases, the understanding of drugs, and other realities of therapy) and researchers in psycho-pharmacology (the study of drugs which affect mental processes) testified at length in regard to their findings concerning barbiturates and amphetamines. Several cases of addiction to barbiturates and goof-balls (amphetamine-barbiturate combinations) were described. The experts agreed that barbiturate addiction is a more serious problem than narcotics addiction. Not only are there probably more barbiturate users, but the effects of abrupt withdrawal are dire—"*grand mal* seizure and eventually if it isn't stopped, coma and death."

Other Non-Narcotic Depressants

Practices such as glue sniffing are related to a study of drugs. From time to time, arrests made in connection with glue sniffing are reported in this state. Apparently these are made under general delinquency statutes or municipal ordinances because there is not proscription of glue sniffing *per se* in the Ohio code.

Apparently, glue sniffing may be considered a serious problem and not a passing fad. In California, where a number of cities and counties have passed ordinances prohibiting the use of model airplane glue or other chemicals for the purpose of intoxicating effects, a study was made by the Juvenile Probation Department of Santa Clara County (San Jose), California when sniffer referrals increased under violation of the state juvenile court law.

One hundred cases were closely followed, and a group counseling program was established to educate and rehabilitate minors found psychologically dependent on the practice. The youngsters involved, considered to be candidates for further delinquent activity, showed many of the basic personality characteristics of alcoholics and drug addicts. According to a report of the study entitled "Portrait of a Glue Sniffer," these included low I.Q., weak personality structure, lack of interest in life, low motivation, and physical awkwardness.[7]

Drug Addiction in Youth is one of an International Series of Monographs on Child Psychiatry. In a chapter entitled "Inhalation of Commercial Solvents: A Form of Deviance Among Adolescents," discussion is devoted to adolescent practices of sniffing glue, gasoline, paint thinner, lighter fluid, cleaning agents, and other solvents. "The physiological symptoms are such that early detection is fairly easy and involved medical treatment is rarely needed," say its authors. But for "core abusers" some form of psychiatric treatment is required, with confinement "a distinct possibility." And a warning is voiced:

> If "glue sniffing" or a similar practice is allowed to develop into a much publicized form of deviance on a par with heroin or barbiturate addiction with accompanying legal restrictions on the supply, it might well serve to lower the age at which these addictions begin by forcing abusers to resort to and support a criminal sub-culture. . . . Such a sub-culture once established would allow much easier passage of all types of narcotics into and out of the huge suburban areas surrounding our major cities.[8]

Some communities and even some states have attempted to meet the problem of glue sniffing by legislation proscribing its improper use. In New York, "No person shall for the purpose of causing a condition of intoxication, inebriation, excitement, stupefaction, or the dulling of his brain or nervous system, intentionally smell or inhale the fumes from any glue containing a solvent having the property of releasing toxic vapors or fumes."[9] Exception is made for the inhalation of anesthesia for medical and dental purposes. Possession and sale for illegal use are also prohibited. Violation of the New York glue sniffing law is a misdemeanor.

STIMULANTS

Many stimulants are drugs of the amphetamine type. Some stimulants—amphetamine, dextroamphetamine, and methamphetamine—are used in the treatment of many medical and psychiatric conditions. The stimulants are extremely useful in treating fatigue and to combat a variety of mild depressive states, caused by menopause and chronic organic diseases. According to the literature, amphetamines, because of their alerting action, are used to treat narcolepsy—a neurological condition in which a patient is subject to sudden fits of sleepiness— and in conjunction with psychotherapy in the treatment of alcoholism. Amphetamines also meet a recognized need in medically supervised weight reduction programs.

Amphetamine sulfate—first synthesized in 1927—served orginally as an improved substitute for ephedrine, a drug used for asthma. Under the trade name *Benzedrine* it was reportedly first sold in 1932 as a nasal inhalant, but another drug was later substituted after discovery of the practice of chewing the inside wick for the "high" that it produced. Benzedrine in pill form was made available through prescription.

While small quantities of amphetamine result in increased alertness and wakefulness and act to mildly elevate mood, giving persons in need of it more energy and a brighter outlook, the emotionally disturbed who persistently use amphetamines in excessive quantities for euphoric effects may suffer toxic psychoses. Excess use leads to nervousness, insomnia, tremor, irritability, hypertension, weight loss, and in some cases psychoses and hallucinations, according to testimony received by the Senate Committee on Labor and Public Welfare of the 89th Congress.

Amphetamines are termed non-addicting in a substantial body of the scientific literature describing their abuse. Such a statement is generally followed by an explanation that they do not produce physical dependence and that withdrawal is consequently not followed by an abstinence syndrome. Others say that tolerance does develop, however, and that doctors now think that some abusers are able to take extremely large doses without severe physical damage of a permanent nature. But according to expert testimony given at the New Jersey Institute:

> While they are taking these large doses, they behave in a way quite dangerous. They

become psychotic; they have ideas of persecution; they have hallucinations, and they may act in a very irrational and destructive way.

The use of the word "addiction" as a physiological term has been questioned. The Committee on Dependence-Producing Drugs, of the World Health Organization, prefers the term "drug dependence" and would abandon a former distinction between addiction and habituation. This position arises in part from a growing concern by the experts over inadequate controls of the non-narcotics. A 1965 WHO bulletin discusses characteristics of drug dependence of certain types — barbiturate-alcohol, for one; amphetamine type for another. Characteristics of drug dependence of the amphetamine type according to this bulletin are: (1) variable psychic dependence; (2) absence of physical dependence but severe mental and physical depression upon withdrawal; and (3) slow development of a considerable degree of tolerance to many effects, such as nervousness, sleeplessness, and psychotoxic effects such as hallucinations and delusions.

A point brought out at the First National Institute on Amphetamine Abuse, held at Southern Illinois University, is that amphetamine abuse is not limited to this country. According to at least one Institute participant, past control procedures based on import bans of specific chemical substances hold little hope for the control of drug dependence.

At this Institute, the view was repeatedly expressed that illicit manufacture of amphetamines is on the increase. Dr. Maurice H. Seevers (Ph.D., M.D., Professor and Chairman, Department of Pharmacology, University of Michigan Medical School) pointed out that total amphetamine production is greatly in excess of proper medical need, perhaps by a factor of 10 or more. Estimates suggest, he said, that in the United States 70 tablets are produced yearly for every man, women, and child. Yet he cautioned that stimulants have less logical value in medicine than depressants because hyperactivity is a more acute American problem than its opposite.

Testimony before the Senate Committee on Labor and Public Welfare of the 89th Congress in 1964 was similarly alarming. It revealed that American drug companies annually produce five and three-fourths billion capsules of barbiturates and four billion tablets of amphetamine drugs. This is in addition to an unknown quantity of tranquilizing and other drugs, subject to abuse, that find their way into the black market. Based on quantities of these drugs seized in illegal channels, the Commissioner of the Food and Drug Administration estimates that the volume of illegally sold psychotoxic drugs equals and might actually exceed amounts sold legally in the nation's drug stores.

Authorities testifying before the Committee expressed great concern over the apparent increase in amphetamine abuse by young people "for kicks." One reporter points out that such users are ignorant of the hazards involved. The illicit use of narcotics, like heroin, is held down by a widespread knowledge even among juveniles of the horrors of addiction and by the continuing enforcement of stringent laws against the narcotics traffic. Other classes of drugs are not popularly regarded as harmful and controls over illicit distribution are weak.[10]

HALLUCINOGENS

The hallucinogenic drugs are referred to as: (1) psychotomimetic (because of their capacity to mimic mental illnesses called psychoses), (2) psychodysleptics (meaning distorting of mental functionings), or (3) psychedelic (a term preferred by their exponents for their alleged ability to expand consciousness and increase awareness).

This class includes psilocybin (derivative of the Mexican sacred mushroom), dimethyltryptamine (DMT), and lysergic acid diethylamide (LSD-25) which is synthesized from ergot, a fungus that occasionally develops in rye and other grasses. Three varieties of morning glory seeds are also labeled psychedelic. Marihuana, too, is frequently categorized as an hallucinogen, although legally it is defined and controlled as a narcotic drug. In further breakdowns of the hallucinogen class, morning glory seeds, nutmeg, and marihuana have been described as mild members of the class; mescaline, psilocybin, and DMT as moderately potent; and LSD as most potent. On March 29, 1966, the New York County Medical Society released a narcotic subcommittee report which termed marihuana a mild hallucinogen and called for re-examination of statutes which punish its use too harshly while distribution and sale of the potent hallucinogens (especially LSD) are inadequately punished.

According to most reports, "hallucinogen" is actually a misnomer. Although hallucinations are

occasionally reported, the uniqueness of this group of drugs, according to authorities, is that a relative lack of confusion accompanies profound mental changes. A *Life* magazine account explains: "A stick may become a writhing snake, for example, and though the person (under LSD) may be frightened by the snake, he realizes that it is not a real snake but an illusory one."

Hallucinogens have been simply defined as drugs which affect the central nervous system to cause the user to have a distorted sense of reality. The discovery of LSD's qualities was reportedly accidental. A research chemist who had developed it in 1938 ingested a small amount five years later and became dizzy and delirious. He later reported fantastic images of extraordinary vividness, accompanied by a kaleidoscopic play of colors under its pleasantly inebriating effects.

What has been called an "explosion of interest" in hallucinogens occurred at about this time. Actually, similar drugs had been around for hundreds of years, and their use for visionary experiences is reportedly ancient. When, in 1953, sacred mushrooms were discovered, for example, their use by Mexican natives for this purpose was traced back four centuries. The use of peyote by American Indians of the Southwest was part of a native religious cult which survives today in what is called the Native American Church.

Medical and scientific interest was aroused. And what was believed to be a revolutionary breakthrough in the study of schizophrenia came from a discovery that the drug's effects remarkably resembled symptoms of this most serious of all mental illnesses.

In 1960, two research psychologists, Timothy Leary and Richard Alpert, began experiments with psilocybin as a consciousness - expanding agent. This project, carried out under the auspices of the Harvard Center for Research in Personality, involved testing the drug on maximum-security prisoners. Progress reports were enthusiastic. One report allegedly claimed that of 36 people who had taken the drug 20 had been on parole for an average of eight months and that only 25 per cent, rather than the usual 50 per cent, were sent back to prison. In addition to this research project, however, Leary and Alpert conducted their own investigations outside the university, using volunteers and themselves as subjects. Critics of their activities charged that the program was run irresponsibly with insufficient attention to permanent injuries to individuals using the drug, and that Leary and Alpert were unqualified to do the research because they were also using the drugs. The program was discontinued, and Leary and Alpert became separated from Harvard.

At about this time the two psychologists helped form the International Federal for Internal Freedom (IFIF) through private donations, and their research continued with psilocybin and LSD. IFIF recruited members for $10 among people "willing to work to increase the individual's knowledge and control of his own nerovus system." Membership of 3,000 was claimed by 1963. IFIF-sponsored utopian-living experiments were undertaken in 1962—one a highly publicized but short-lived "program of study, retreat, recreation, and experimentation in the expansion of consciousness" in Mexico.

So began what is popularly termed the "psychedelic culture." In the last year and a half, hardly a periodical has failed to carry at least one feature article discussing the phenomenon. A piece in the July 10, 1966, *New York Times Magazine* is representative. It is "Offerings at the Psychedelicatessen," and describes the psychedelic discotheque and its use of slides, multiple movies on vinyl screens, electronic music, stroboscopic lights, Indian raga music, and rock and roll to mimic the LSD experience. Pschedelic art featuring patterns of Oriental mysticism, jewelry that radiates colors of the spectrum, even its voice —a quarterly called the *Psychedelic Review*—are but a few of the trappings of the avant-garde drug scene discussed in this article.

Nature of LSD

What then are the pro's and con's concerning general use of the hallucinogens like LSD in non-medically-supervised settings? Although Timothy Leary has publicly promoted a moratorium on LSD among his followers in recent months, his earlier praise of the drug is prolific. Expounding the values of psychedelic drugs, Leary and his collaborators speak of a transcendence of mind, making possible new realms of insight, the liberation from certain terrors, and the capacity to meet man's deepest yearnings and potentials. LSD and related agents, say its proponents, cause sensory awareness and the attainment of higher levels of consciousness. They liken the experience to a short cut to that stage of enlightenment Zen Buddhists and eastern mystics seek through medi-

tation. Many pages have been devoted to the religious import of LSD by its enthusiasts.

Many popular magazines described a "trip" (to "inner space") under the influence of "acid." While some reports tell of envisioning crystal palaces, witnessing cascades of color beyond description, seeing sounds and hearing sights, feeling infinite love and joy, sensing a heightened creativity, and realizing a glorious state of selflessness and at-oneness with the universe, other accounts relate the terrors of "bad trips" where visualized encounters with death ended any desire to make further chemical explorations.

Sidney Cohen, M.D., Chief, Psychosomatic Service, Wadsworth V. A. Hospital, an LSD authority, explains:

> LSD does a number of things to the brain. One of these is that, in large amounts, the discriminating, critical capacity is lost. The ability to observe oneself, to evaluate the validity of one's ideas and swift flowering fantasies, is lost. The strangest illusions seem overpoweringly true. Colors are more so, things are more so and assume meanings far beyond their ordinary connotation. All this happens because of the loss of the ability to evaluate and scrutinize.

Asked why some people have horrible LSD experiences, Coshen replied, in part:

> Some individuals find it difficult to "let go" of their ego controls and lose themselves . . . A hectic struggle between the drug and the intellect ensues. In addition to those who should not take LSD (he later enumerates the immature, borderline or latent psychotics, and children) almost all of us have . . . repressed, buried, hurtful memories. When these happen to be unleashed they can be overwhelmingly frightening and produce a disintegration of mental functioning, fearful symbolic visions, and a tortured LSD eternity.

LSD is a colorless, odorless substance. It is made from two components—lysergic acid and diethylamide—and requires only a single heat reaction to synthesize. It is popularly asserted that, given the acid, LSD is relatively easy to make for anyone with a working knowledge of chemistry. However, lysergic acid is reportedly not manufactured in the United States, so far as is known. For several years, the F.D.A. has been checking on drug purchases. Both lysergic acid and LSD are believed to be involved in a large part of black market trade.

Investigators of the use of psychedelic drugs have reported that LSD is so potent that the average dose is one three-hundredth of an ounce. This figure derives from an assumption that a standard dose is 100 micrograms. This means that an eyedropper full is sufficient for approximately 5,000 doses of such intensity.

The effects from oral ingestion of 100 to 150 micrograms have been described as involving the following:

> Stage I—Lasts for one-half to three-fourths of an hour after ingestion. It is characterized by slight nausea, anxiety, dilatation of pupils.
>
> Stage II—An experience lasting for one to eight hours. It may consist of illusions, hallucinations, and delusions, impairment of time orientation, confusional states with dream-like revivals of past traumatic events, alteration of sensory perception, motor coordination, mood and personality.
>
> Stage III—Recovery consisting of "waves of normality alternating with waves of abnormality."
>
> Stage IV—Fatigue or tension during the following day.

LSD is currently being illegally peddled in three forms: sugar cubes, capsules, and vials containing highly diluted solutions. According to a statement by the Attorney General of California to the Senate Judiciary Committee of that state on March 15, 1966, the current street price varies from $5 to $10 per cube, capsule, or 1 cc vial.

Therapeutic Claims

Over 1,000 articles about lysergic acid diethylamide have appeared in medical world literature since the discovery of its hallucinogenic properties. According to Dr. Leszek Ochota, with the investigational drug branch of the Food and Drug Administration, "significant contributions to elucidation and treatment of some mental disorders with the help of LSD have been made by European and American physchiatrists." A number of accounts relate hope for chronic alcoholics with a combination of the drug and psychotherapy. "Another clinical indication for administration of LSD," reports Dr. Ochota, "has been intractable pain, mostly in patients with terminal cancer." Not only has the LSD produced longer

pain-alleviating effects than the morphine derivatives, but it has made felt pain more endurable, as if, according to one comment quoted as typical, "the pain is here, but I'm somewhere else—nothing really belongs to you, not even your pain."

LSD has been employed by psychiatrists to produce "model psychoses." Research grants from the National Institute of Mental Health are currently sponsoring projects to explore the relationship between the effects of the drug and mental illness. Successes and failures have been reported concerning the use of lysergic acid diethylamide as a psychotherapeutic agent. The mechanism by which it affects body chemistry is still largely unclear and much research remains to be undertaken to establish definitive information about its effects and uses.

References

1. *Report of the Ad Hoc Panel on Drug Abuse*, based on Proceedings of a White House Conference on Narcotic and Drug Abuse, September 27-28, 1962.
2. Ibid.
3. "Clinical Research on Addiction in the United States," a paper presented by Harris Isbell to the Symposium of the Public Health Service at Bethesda, Maryland, March 27-28, 1958.
4. Emmanual Messenger, "Statistical Study of Criminal Addicts," *Crime and Delinquency*, July, 1965.
5. "Comments on Public Policies Relating to Narcotic Drug Addiction Problems," a paper presented by Walter Treadway to the Symposium of the Public Health Service at Bethesda, Maryland, March 27-28, 1958.
6. Alfred Lindesmith, *The Addict and the Law*, (Bloomington, Indiana, 1965), p. 224.
7. Published in *Crime and Delinquency*, XI (October, 1965), p. 394.
8. Donald C. Crug, Jacob Sokol, and Ingvar Nylander, *Drug Addiction in Youth*, International Series of Monographs on Child Psychiatry, Vol. III, edited by Ernest Harms (Pergamon Press, 1965), p. 37.
9. New York Penal Law (McKinney's Consolidated Laws of New York, Ann. Book 39, Pt. 2, sec. 1747-b, Suppl. 1965).
10. Helen B. Shaffer, "Psychotoxic Drugs," *Editorial Research Reports* (January 27, 1965).
11. Richard Alpert and Sidney Cohen, *LSD* (New York, 1966), p. 28.

II. EXISTING LEGISLATION

State and federal legislation has established control over marihuana, and narcotic, barbiturate, and other "dangerous drugs." This control has been approached through application of legal sanctions to all offenders of drug abuse laws. The term "other dangerous drugs" might be extended to include the new drugs, such as the hallucinogens, or it may be necessary to enact special laws or regulations to control the possible abuse of those drugs.

FEDERAL LAW

Although several states enacted laws to control the use and distribution of narcotics during the second half of the nineteenth centry, most accounts of American narcotics legislation begin with a discussion of the federal Harrison Act of 1914.[1] Although it had been preceded by acts which levied high duties upon opium, taxed its domestic manufacture, and restricted its importation, the Harrison Act has been termed the first effective control measure. It is said to have resulted from United States commitments at the Hague Convention of 1912 where this country urged governments to take steps to control internal traffic in and the use of narcotic drugs. This law and its early judicial interpretations initiated a policy which is still the basis of present drug control programs.

The Harrison Narcotic Act was enacted as a revenue measure, and the statute appears in sections 4701 through 4736 of Title 26 of the United States Code. The Treasury Department is designated as the enforcement agency.

Section 4701 imposes a tax of one cent per ounce on narcotic drugs produced or imported in the United States and sold or removed for consumption or sale, payable by the importer, manufacturer, producer, or compounder—i.e., the first domestic handler.

Section 4702 allows the Secretary of the Treasury to find that a pharmaceutical preparation containing a narcotic drug combined with other ingredients either: (1) possesses no addiction-forming or addiction-sustaining liability or possesses such qualities to an insufficient degree to warrant application of the law, or (2) does not allow the recovery of the narcotic drug with such relative simplicity and degree of yield as to create a risk of improper use.

The excise tax is imposed upon narcotic drugs as defined in section 4731: opium, isonipecaine, coca leaves and opiates; compounds, manufactures, salts, derivatives, or preparations of the foregoing; substances chemically identical to the foregoing. The term "opiate" includes any drug as defined in the Federal Food, Drug, and Cosmetic Act that is found by the Secretary of the Treasury ". . . after due notice and opportunity for public hearing to have an addiction-forming or addiction-sustaining liability similar to morphine or cocaine. . . ."

Except for the dispensing of narcotic drugs to a patient by a practitioner "in the course of his professional practice only" and the sale, dispensing, or distribtuion of narcotic drugs by a dealer to a consumer in pursuance of a practitioner's prescription, sale or transfer of narcotic drugs is unlawful except in pursuance of a written order of the recipient on an official form supplied by the Treasury Department.

Although neither the Harrison Act nor later legislation said anything about addicts or addiction, the federal courts were called upon to interpret this phrase in a series of cases involving physicians who dispensed drugs. They held, in effect, that the sale or dispensing of narcotic drugs to a drug addict by a doctor merely for the purpose of gratifying his addiction is not "in the course of his professional practice only." These rulings have been criticized for substituting judicial for medical opinion on the question of medical care and for limiting professional discretion in the practice of medicine.

Payment of the exercise tax must be evidenced by stamps affixed to the package or container. No person may purchase, sell, dispense, or distribute narcotic drugs unless he does so in or from the original stamped package, and possession of narcotic drugs in unstamped containers is "prima facie evidence of a violation."

Persons in vocations involving the handling of narcotic drugs—including importers, manufacturers, producers, wholesale dealers, pharma-

cists, practitioners, and persons engaged in research, instruction, or analysis—must register annually with the Treasury Department and pay an occupational tax graduated from $1 to $24 per year. Registrants are required to keep records, make them available to law enforcement officers, and file returns as required by the Secretary of the Treasury.

Traffic in narcotic drugs without registration is a separate offense, independent of failure to register. The transportation of narcotic drugs in interstate commerce by persons not registered is prohibited except for employees and agents of registrants within the scope of their employment or agency and government officials, warehousemen, and common carriers acting within the scope of their duties. Possession of narcotic drugs by unregistered and unexempted persons is "prima facie evidence" of liability for the tax.

The Marihuana Tax Act of 1937 established similar controls over marihuana. The Act requires registration and payment of a graduated occupational tax by all persons who import, manufacture, produce, compound, sell, deal in, dispense, prescribe, administer, or give away marihuana. Like the occupational tax applicable to narcotics, it ranges from $1 to $24 per year. Transfer of marihuana is limited to that made on the authority of official order forms. A tax is levied on all transfers of marihuana at the rate of $1 per ounce or fraction thereof if the transfer is made to a taxpayer registered under the Act, or at the rate of $100 per ounce if the transfer is made to a person not a taxpayer registered under the Act. The tax is paid by the transferee at the time of securing the order form. Proof that any person had marihuana and failed to produce the order form required to be retained is presumptive evidence of guilt.

Exceptions from the order form and transfer tax requirements are made for dispensing to a patient by a qualified practitioner in the course of his professional practice only, and in sales upon prescription. Such exceptions have been labeled obsolete. American doctors no longer use extracts of marihuana for therapeutic purposes. The term *cannabis* has been eliminated from the United States Pharmacopoeia.[2] Any person who is a transferee is required to pay the transfer tax.

The act of trafficking in marihuana without registration and the act of transportating marihuana without registering (unless exempted, as under the general narcotic sections) are separate crimes.

The Narcotic Drugs Import and Export Act of 1922, often referred to as the Jones-Miller Act, was another major step in narcotics control by the federal government. Its provisions appear in Title 21 of the United States Code. An earlier act had restricted opium imports.[3] The Jones-Miller Act extended the prohibitions against opium imports to other narcotics, including morphine, coca leaves, and their derivatives. Title 21 limits the amount of narcotic drugs which may be lawfully imported to such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds necessary for medical and legitimate uses. As the result of amendments in 1924, it prohibits the importation of crude opium for the manufacture of heroin. The importation of opium prepared for smoking is also specifically prohibited.[4]

The penalty for unlawfully importing or receiving, concealing, buying, selling, or facilitating transportation, concealment, or sale is imprisonment for not less than five nor more than twenty years and a maximum fine of $20,000. Subsequent offenses are punishable by a minimum sentence of ten years and a maximum sentence of forty years, plus a $20,000 fine.

A similar penalty is provided for smuggling marihuana. Persons over the age of eighteen who knowingly sell or furnish, or conspire to furnish or cause to be furnished to a person under eighteen heroin unlawfully imported may be fined not more than $20,000 and shall be imprisoned for life or for not less than ten years, unless the jury directs a death sentence.

The Narcotic Drug Import and Export Act also established the Federal Narcotics Control Board, composed of the Secretary of State, Secretary of the Treasury, and Secretary of Commerce, and made the Treasury Department responsible for administration of its provisions. The Board was abolished in 1930 when the Bureau of Narcotics in the Treasury Department was created to cooperate with states in the suppression of the illicit drug trade and to centralize all authority and information within one bureau.

In 1942 Congress passed the Opium Poppy Control Act which prohibits production of the opium poppy in the United States except under license of the Secretary of the Treasury.[5] The license is conditioned upon determination of the necessity of supplying medical and scientific needs

for opium and opium products. No license has been issued under this statute.

In 1951 legislation known popularly as the Boggs Amendment increased penalties for persons violating federal narcotic and marihuana laws, precluded suspension of sentence or probation on second and subsequent offenses, and made conspiracy to violate the narcotic laws a special offense. It substituted for the old ten-year maximum a schedule of sentences for repeated offenders as follows:

First offense.	Not less than two years nor more than five years.
Second offense.	Not less than five years nor more than ten years with probation and suspension excluded.
Subsequent offenses.	Not less than ten years nor more than twenty years with probation and suspension excluded.[6]

In 1955, congressional investigation of the illicit narcotic traffic, smuggling, addiction, and treatment, was conducted by subcommittees under the chairmanship of Price Daniel, of the Senate Committee on the Judiciary, and Hale Boggs, of the House Ways and Means. Penalties were subsequently increased and made even more inflexible by the exclusion of parole in cases of a selling offense and second or subsequent possession offenses. As established by the Narcotic Control Act of 1956, they are as follows:

First possession offense.	Not less than two nor more than ten years, with probation and parole permitted.
Second possession or first selling of narcotics or marihuana.	Not less than five nor more than twenty years, with probation, suspension, and parole excluded.
Third possession or second selling and subsequent offenses.	Not less than ten years nor more than forty years with probation, suspension, and parole excluded.[7]

All of the above penalties carry, in addition, a maximum $20,000 fine. Exclusion of drug offenders from federal parole laws means that they must serve two-thirds of their sentences. Most other federal prisoners are eligible for release under supervision after serving one-third of their sentences.[8]

In a recent indictment of United States narcotic laws and policies, Alfred R. Lindesmith, author of *The Addict and the Law*, severely criticizes the inflexibility of these provisions and their limitations upon judicial power to mitigate sentences in accordance with circumstances. Long sentences had been given before 1951, he points out, by the imposition of consecutive sentences on multiple counts or charges. He argues:

> Contentions that judges were to blame for the rise of addiction rates after the war because they were too lenient with peddlers are unsupported by any real evidence. The present mandatory minimum for big peddlers is only five years. What he is given beyond that figure rests upon the discretion of the judge, as it did before 1951. The effective limitation upon judges now applies mainly to the sentencing of small offenders and addicts, where the minimum sentences of 2, 5, and 10 years have real meaning. The greatly increased average sentence of today is largely the result of the increased mandatory minimum prison terms which must be imposed upon these minor violators, who constitute the bulk of those convicted.[9]

The 1956 Narcotic Control Act banned possession of heroin and required persons possessing heroin to surrender it to the Secretary of Treasury with 120 days. All heroin not surrendered was declared contraband, subject to seizure and forfeiture to the United States without compensation.

Despite the legislative attempts to rid the country of heroin (prohibitions on its manufacture, increased penalties for traffic therein, and the contraband measure) heroin is generally referred to as the major opiate. According to a recent United States Treasury Department Bureau of Narcotics publication (1960), 89 per cent of the addict population use heroin; 11 per cent use marihuana or the synthetic demerol or methadone; less than 1 per cent use cocaine.

In 1960, Congress enacted the Narcotics Manufacture Act to authorize the Secretary of the Treasury to establish quotas limiting the manufacture of natural and synthetic narcotics on the basis of medical and scientific need, and to license narcotic manufacturers.[10]

The Secretary of the Treasury is the cabinet officer charged with responsibility for investigat-

ing offenses and regulating lawful imports and exports. He acts through the Commissioner of Narcotics, who is the chief officer of the Federal Bureau of Narcotics, and is required to cooperate with the states in the suppression of the abuse of narcotic drugs in their respective jurisdictions. He is authorized: (1) to cooperate in the drafting of such legislation as may be needed; (2) to arrange for the exchange of information concerning the use and abuse of narcotic drugs, and for cooperation in the institution and prosecution of cases; (3) to conduct narcotic training programs for local and state narcotic enforcement personnel; and (4) to maintain a division of statistics and records.

Federal law has been lauded for its success as a regulatory measure. Its most vocal critics concede that narcotic drugs lawfully imported and consigned to registered distributors and dispensers rarely go astray, even in minute quantities, but they assert that it does not cope with the enormous flow of smuggled drugs distributed to addict consumers without entering legal channels. They argue that thousands of addicts and small time peddlers have been arrested for violating the Harrison Act or state laws which parallel it, but traffic has prospered and the overlords are rarely brought to account.

The Uniform State Narcotic Act was proposed in a number of states in 1932. Since that date, the model act has provided the basis for legislation in forty-seven states, Puerto Rico, and the District of Columbia. The laws of California and Pennsylvania have been called comparable in scope and effectiveness to the uniform law. Only New Hampshire has a narcotic law not considered by many to be equal in scope.

The Uniform State Law is similar to the Harrison Act, but provides a licensing system for narcotic manufacturers and wholesalers. Like the federal law, the Uniform State Law limits the prescribing and dispensing of narcotics by a physician to that necessary for the exercise or practice of his profession.

The first comprehensive federal food and drug law was passed, in 1906, to prevent the manufacture, sale, or transportation of adulterated, misbranded, poisonous, or deleterious foods, drugs, medicines, and liquors, and for regulating the traffic of such products. This act subjected such articles to seizure and confiscation when found in interstate commerce. Protection of the consumer was largely achieved by the provisions of the Act prohibiting the introduction of adulterated articles into interstate commerce.

However, under the 1906 Act, a drug manufacturer was free to manufacture a new drug at will. Sanctions could be imposed only if the drug was later proved to be adulterated. According to a recent analysis of the drug safety problem, the need for legislation to require drug safety clearance was dramatically introduced in 1937 by the marketing, without proper screening, of a sulfanilamide elixir which, because of its high toxicity, took more than 100 lives. This tragedy led to the enactment of the Federal Food, Drug and Cosmetic Act of 1938, requiring that a new drug be cleared for safety before marketing, and increasing penalties, redefining seizure authority, conferring the power to enjoin violations, and giving factory inspection authority to enforcement representatives. Thus under section 355 of Title 21 of the United States Code (which originated in the 1938 legislation), no new drugs may be introduced into interstate commerce unless an application filed with the Secretary of Health, Education and Welfare is in effect with respect to such drug. References in Ohio law to the federal new drug procedures still refer to section 505 of the federal act, which is the number of the present section under which 355 was originally enacted. It has been codified and amended several times since 1938.

That portion of the Federal Food, Drug and Cosmetic Act applicable to drugs is presently found in section 351 to 360a of Title 21 of the United States Code. Amendments made in 1962 by Public Law 87-781 (popularly known as the Kefauver-Harris Drug Amendments of 1962) and in 1965 by Public Law 89-74 (the Drug Abuse Control Amendments of 1965) are of particular interest in this study. The Drug Amendments of 1962 established requirements for adequate controls in the manufacture of drugs and required drug clearance for effectiveness as well as safety. Other significant changes occurred in drug clearance procedures, certification of antibiotics, reporting of adverse reactions, imposing certain requirements on prescription drug advertisements, extension of factory inspection provisions, provisions for a mechanism for the standardization of drug names, and registration of drug manufacturers. A description of pertinent drug sections in Title 21 follows:

Proper labeling is required and the statement, "Warning—May be Habit Forming," must

be attached to a drug which is for use by man and which contains any quantity of narcotic or hypnotic substance, alpha eucaine, barbituric acid, betaeucaine, bromal, *cannabis*, cabromal, chloral, coca, cocaine, codeine, heroin, marihuana, morphine, opium, paraldehyde, peyote, or suphonmethane or chemical derivatives of the foregoing that are designated as habit forming by the Secretary of Health, Education, and Welfare. A drug is considered misbranded if these provisions are violated or if it was manufactured or processed in an establishment in any state not duly registered under section 360, a section added by the 1962 Amendments.

Prescription is required for the dispensing of a drug intended for use by man which: (1) contains certain narcotic and other substances or substances designated by regulation as "habit forming" (under section 352), (2) is not safe except under the supervision of a licensed practitioner because of its potentiality for harmful use, or (3) is limited to use under the professional supervision of a licensed practitioner under procedures for the introduction of new drugs into interstate commerce, discussed below. The act of dispensing a drug contrary to these provisions is considered an act which results in the drug being misbranded while held for sale. Drugs subject to this provision are considered misbranded if at any time prior to dispensing their label fails to bear the statement "Caution: Federal law prohibits dispensing without prescription."

No new drugs may be introduced into interstate commerce unless an application filed with the Secretary of Health, Education, and Welfare is in effect with respect to such drug. Required to be submitted as a part of such application are: (1) full reports of investigations showing effectiveness and safety; (2) components of the drug; (3) full statement of its composition; (4) description of methods used in and facilities and controls used for manufacturing, processing, and packing of the subject drug; (5) such samples of the drug and component articles as the Secretary requires; and (6) proposed labeling specimens. If the Secretary finds, after notice and an opportunity for hearing, that investigations and reports submitted with the application do not include adequate tests of drug safety, that the drug is unsafe, that manufacturing methods are inadequate, that he has insufficient information to determine safety, that there is a lack of substantive evidence that the drug will have a purported effect, or that based on fair evaluation of all material facts its labeling is false or misleading, he must disapprove the application.

Application approval must be withdrawn upon finding that scientific data shows the drug to be unsafe, that new evidence shows it to be so, that on the basis of new information there is a lack of substantive evidence that the drug will have a purported effect, or that the application contains an untrue statement. The Secretary may also withdraw application approval for failure to maintain required records or to make required reports.

The law requires maintenance of records and submission of reports of clinical experience and other data (that the Secretary may prescribe) pertaining to a drug for which an approval of application is in effect. Such records must be made accessible to government employees to copy and verify.

Drugs intended solely for investigational use by experts qualified to investigate the drug's safety and effectiveness are exempted. Exemptions are conditioned on the submission of preclinical tests adequate to justify proposed clinical testing, signed agreements from investigators assuring adequate supervision, records and reports resulting from investigational use of such a drug. Where exemption is made for drugs to be used solely for investigational use, the exempting regulations must be conditioned upon certification by experts so using the drugs to the manufacturer or sponsor of the investigation that they will inform any human beings to whom such drugs are being administered, or their representatives, that they are being used for investigational purposes and that they will obtain consent except where not feasible or where, in their professional judgment, it is contrary to the best interests of such human being.

Annual registration is required of establishments that "manufacture, prepare, propagate, compound, or process" drugs, and that are "wholesaling, jobbing, or distributing . . . any depressant or stimulant drug." The 1962 Drug Act established registration requirements. The depressant and stimulant drug registrations were added by the Drug Abuse Control Amendments of 1965 which established special federal controls over depressant, stimulant, and hallucinogenic drugs, and increased the police authority of Food and Drug Administration inspectors.

Drug manufacturers registered under the law in effect prior to February 1, 1966, must supplement existing registrations to indicate that they are engaged in making depressant or stimulant drugs. Not required to register are: (1) pharmacies operating under local law and not manufacturing or processing drugs for sale other than dispensing upon prescription by physicians at retail; (2) physicians licensed to prescribe or administer drugs and who manufacture, compound, or process "solely for use in the course of their professional practice;" (3) persons who manufacture, compound, or process drugs solely for research, teaching, or chemical analysis and not for sale; (4) and others exempted by regulation upon a finding that registration is not necessary for the protection of the public health. Registered establishments are subject to inspection at least once every two years.

The Drug Abuse Control Amendments of 1965 imposed more stringent controls on stimulent, depressant, and hallucinogenic drugs. The new law, which went into effect February 1, 1966, begins with a declaration by Congress that these drugs need not move across state lines to be subject to its regulation. Finding "widespread illicit traffic . . . affecting interstate commerce . . ." and a threat to the public health and safety from the unsupervised use of such drugs, Congress declared in section 2 of this federal Act "that in order to make regulation and protection of interstate commerce in such drugs effective, regulation of intrastate commerce is also necessary" because of the difficulties of determining place of origin and consumption and because regulation of interstate but not intrastate commerce "would discriminate against and adversely affect interstate commerce in such drugs."

Drugs covered by this Act are determined by section 3. This section adds to the F.D.C.A. definitions a definition of depressant or stimulant drug as: (1) one which contains barbituric acid of its salts or a derivative therefrom which has been been designated under federal law as habit forming; (2) one which contains amphetamine or its salts or a substance designated as habit forming by the Secretary of Health, Education, and Welfare because of its stimulant effect on the central nervous system; and (3) one containing a substance designated by regulation as having a "potential for abuse" because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect. Narcotic drugs are specifically excluded. The designation by regulation of the Secretary of Health, Education, and Welfare of drugs other than barbiturates and amphetamines requires formal rule-making procedures (including hearing and judicial review) and consultation of an *ad hoc* scientific advisory committee.

The Secretary has designated lysergic acid and lysergic acid amide as drugs covered by the Drug Abuse Control Amendments of 1965, along with mescaline and its salts, peyote, and psilocybin. The regulation excepts peyote where employed in a "non-drug use in bona fide religious ceremonies of the Native American Chuch," but requires persons supplying the product to the Church to register and maintain appropriate records of receipts and disbursements.

This legislation prohibits the manufacturing, compounding, or processing of any depressant or stimulant drug except by: (1) registered drug manufacturers, compounders, and processors (under procedures described above), and their suppliers; (2) registered wholesale druggists supplying prescription drugs to pharmacies, hospitals, clinics, public health agencies, physicians, or laboratories or research or educational institutions; (3) pharmacies, hospitals, clinics, and public health agencies operating in conformance with local law regulating pharmacy and medicine; (4) practitioners licensed by law to prescribe or administer depressant or stimulant drugs while acting in the course of their professional practice; (5) persons who use such drugs in research, teaching, or chemical analysis and not for sale; (6) government employees in the course of official duties; and (7) certain employees of the above excepted classes acting in the course of their employment. No other person (except common carriers and warehousemen) may sell, deliver, or otherwise dispose of any depressant or stimulant drugs.

The Amendments of 1965 prohibit the possession of depressant or stimulant drugs (embracing hallucinogenic drugs as described above) except by the seven classes of persons and establishments authorized to handle such drugs for the purposes stated and except by an individual for his personal use, use by a member of his household, or administration to an animal owned by him or a member of his family.

The 1965 law further requires every person engaged in manufacturing, compounding, processing, selling, delivering, or otherwise disposing of depressant or stimulant drugs to prepare an

initial inventory, to keep accurate and complete records of manufacture, receipts and distribution of such drugs, and to maintain these records for three years. It authorizes the inspection and copying of the required records as well as the inspection of vehicles, premises, equipment, and materials bearing on whether a violation of law has occurred with respect to stimulant or depressant drugs. Inspectors may take samples of such drugs. Record keeping and inspection provisions do not apply to a licensed practitioner with respect to depressant or stimulant drugs received, prepared, processed, administered, or dispensed by him unless he regularly engages in dispensing such drugs to patients for which they are charged.

No prescription for a depressant or stimulant drug may be filled or refilled more than six months after the date of its issuance, and no refillable prescription may be refilled more than five times. However, prescriptions may be renewed, in writing or orally (if reduced to writing and filed by the pharmicist), by the prescribing practitioner and then again refilled to the same extent as an original prescription. The Secretary of Health, Education, and Welfare is empowered to exempt by regulation any depressant or stimulant drug when he finds that its regulation is not necessary for the protection of the public health. The law requires him to exempt by regulation any combination of depressant or stimulant drugs with other drugs where the combination does not have the effects upon the central nervous system at which the law is aimed, and to exempt drugs which may be sold over the counter without prescription under provisions of the basic F.D.C.A.

Section 301 of the F.D.C.A. enumerates prohibited acts. The section, codified as section 331 of Title 21 (and as amended in 1962 and 1965) prohibits:

1. Introduction or delivery into interstate commerce of adulterated or misbranded foods, drugs, devices, or cosmetics.
2. Their adulteration or misbranding in interstate commerce.
3. Their receipt and delivery in adulterated or misbranded state.
4. The introduction or delivery into interstate commerce of any article in violation of temporary permit controls (applicable to food) or in violation of procedures for the introduction of new drugs.
5. Refusal to permit access to records of interstate shipment of food, drugs, devices, or cosmetics or to make records or reports required under procedures for the introduction of a "new drug."
6. Refusal to permit entry and inspection of certain establishments in which foods, drugs, devices, and cosmetics are manufactured or held.
7. Manufacture of adulterated or misbranded foods, drugs, devices, and cosmetics.
8. The giving of certain false guarantees regarding good faith in receiving or delivering such articles.
9. Certain false use of identification devices required under law, doing of certain acts which cause a drug to be counterfeit, or the sale, dispensing, or holding for sale or dispensing of a counterfeit drug.
10. Misuse of trade secret information.
11. Certain acts resulting in adulteration or misbranding of foods, drugs, devices, or cosmetics in interstate commerce.
12. Representing or suggesting in labeling or advertising that approval of a new drug application is in effect or that the drug complies with new drug introduction procedures.
13. Violation of laws governing the coloring of margarine.
14. The use in sales promotion of any reference to a report or analysis furnished under inspection procedures.
15. In the case of prescription drugs, failure of the manufacturer, packer, or distributor to maintain or transmit to requesting practitioners true and correct copies of all printed matter required to be included in the drug package.
16. Failure of drug manufacturers and processors and depressant or stimulant drug wholesalers, jobbers, or distributors to register with the Secretary of Health, Education, and Welfare.
17. Relative to stimulant or depressant

drugs: manufacturing, processing, or compounding, except by registered drug firms for legal distribution; distributing such drugs to persons not licensed or authorized to receive them; possession of stimulant or depressant drugs except as authorized by law; failure to prepare, obtain, or keep required records, and to permit inspection and copying of such records; refusal to permit entry or inspection as authorized; filling or refilling prescriptions for these drugs in violation of law.

The penalty for violation of any of these prohibitions is imprisonment for not more than one year or a fine of not more than $1000, or both. If the violation is committed after a previous conviction has become final, or is made with intent to defraud or mislead, the violator is subject to imprisonment for not more than three years or a fine of not more than $10,000, or both.

The penalty for selling, delivering, or otherwise disposing of a stimulant or depressant drug to a minor under 21 by a person who has attained the age of 18 is: for a first offense, imprisonment for not more than two years or a fine of not more than $5000, or both; for subsequent offenses, imprisonment for not more than six years or a fine of not more than $15,000, or both.

Section 10 of Public Law 89-74, not codified, provides that none of its provisions shall: (1) displace state legislation not inconsistent with it, (2) authorize the manufacture, disposal, or possession of drugs contrary to state law, nor (3) prevent enforcement of criminal penalties under state law for acts made criminal by its provisions.

Among the available documents of legislative history of the Drug Abuse Control Amendments of 1965 is a committee report of the Senate Committee on Labor and Public Welfare. Hearings before the Committee in 1964 showed that of the approximately nine billion barbiturate and amphetamine tablets being produced annually in the United States, 50 per cent were being distributed through illicit channels. The Committee heard testimony of the tremendous profits being realized from illegal traffic. Barbiturates and amphetamines having a retail value of approximately $670 were said to sell in illicit channels for $250,000.

On January 15, 1963, President Kennedy established a President's Advisory Commission on Narcotic and Drug Abuse. This Commission met regularly throughout 1963. It reviewed a considerable quantity of literature and material which had been presented at the first White House Conference of Narcotic and Drug Abuse in Washington in September, 1962, and received written recommendations of more than 100 expert consultants.

The President's Commission made twenty-five recommendations.[11] The 1965 legislation which increased controls over the distribution of barbiturates and amphetamines, and other drugs having a similar effect on the central nervous system is in keeping with a determination by the Commission that it is not advisable to bring under control drugs not presently covered. Congress adopted the Commission's position that other classes of drugs should be brought under control on a case by case basis by the Secretary of Health, Education, and Welfare, under standards prescribed by the legislation.

While the President's Advisory Commission urged federal control of the depressant and stimulant drugs, it cautioned that they are medically valuable. The law follows a Commission recommendation that any new regulation covering the manufacture, sale, and distribution of these drugs should not parallel the form of regulation under federal narcotic laws, requiring all transfers to be registered on Treasury forms. The Commission urged that regulation based on keeping inventory records should be tried before resorting to the use of special registration forms.

OHIO LAW

Ohio Narcotics Law

Sections 3719.01 through 3719.22 of the Revised Code contain the Ohio law on narcotic drugs. The Uniform Act was adopted in this state in 1935. Since that time, several amendments have been made. Increased mandatory penalties were adopted in 1955, upon recommendation of a Citizen's Narcotics Advisory Committee under leadership of the Ohio Attorney General. Penalties, not set by the model act, are established by section 3719.99 of the Revised Code. Many provisions in Ohio law reveal its similarity to and relationship with the federal law. For example, of the definition of "narcotic drugs" includes, in addition to specific drugs

enumerated, "every drug to which the federal laws relating to narcotic drugs may apply."

Annual licensing of narcotic manufacturers and wholesalers by the State Board of Pharmacy is required, and Ohio law limits the sale and dispensing of narcotic drugs by licensed manufacturers and wholesalers to specific recipients and requires transfers be made "pursuant to an official written order," which under the definitions section means on a form prescribed by the federal commissioner of narcotics. Similarly, compliance with federal law respecting requirements governing use of a special official written order constitutes compliance with state law.

Sections 3719.05 and 3719.06 establish regulations for the prescription, dispensing, and administering of narcotic drugs. Written prescriptions must meet certain requirements set forth in the section and must bear the full name, address, and registry number under federal law of the person prescribing. Section 3719.07 requires the maintenance of records by practitioners where dosages exceed enumerated amounts of particular drugs in any 48-hour period and by manufacturers, wholesalers, pharmacists, and others "required by federal law to keep records." Section 3719.08 sets labeling requirements which manufacturers and pharmacists must meet.

The knowing use of certain places for illegal keeping, dispensing, or administering of narcotic drugs is punishable by a fine of $10,000 and imprisonment for 2 to 15 years for a first offense, 5 to 20 years for a second offense, and 10 to 30 years for a third or subsequent offense.

General enforcement provisions, as opposed to offenses under Ohio law, are found in sections 3719.11 through 3719.15 of the Revised Code. Forfeiture and disposition of drugs is required where lawful possession is not established or title is not ascertainable. The law also provides for forfeiture of a vehicle, boat, or aircraft used by a person violating the Ohio narcotic laws. The Code allows revocation of the license or registration of a manufacturer, wholesaler, practitioner, pharmacist, or nurse convicted of a violation of such laws, and suspension of a license or registration of an addicted practitioner, nurse, pharmacist, manufacturer, or wholesaler until satisfactory proof is offered that he is no longer addicted.

Enforcement officers may inspect prescriptions, orders, and records. Common carriers or warehousemen, public officers and employees carrying out official duties, and the temporary incidental possession of narcotics by employees or agents of persons entitled to possession are exempted from possession and control provisions. Section 3719.15 excepts the application of the narcotics law to the administering, dispensing, or selling of medicinal preparations containing not more than designated amounts of particular narcotics and that contain, in addition, one or more non-narcotic active medicinal ingredients, certain pharmaceutical preparations in solid form, preparations for external use where the narcotic is not readily extractable, and preparations designated under federal laws as "Class M" products.

"Class X" and "Class M" products are defined in title 26 of the Code of Federal Regulations (the term "Class M" is not defined in Ohio law.) "Class X" products are preparations possessing a greater risk of improper use than those preparations classified "Class M" products.

Prohibitions and penalties provided by Ohio narcotic legislation appear below.

Possession. Possession of narcotic drugs by unauthorized persons in amounts exceeding a prescribed pharmacological potency unless obtained by prescription and in the original container is a specific offense. As in the federal law, this section declares possession under its terms presumptive evidence of intent to violate its provisions.

The penalty for possession of narcotic drugs is a maximum fine of $10,000 and imprisonment for not less than 2 nor more than 15 years. Second offenders are subject to the fine and a sentence of 5 to 20 years; third and subsequent offenders are subject to the fine and a 10 to 30 year sentence.

Possession for sale. Possession of narcotic drugs for sale is prohibited except in accord with law. A 10 to 20 year sentence is provided for a first offense, a 15 to 30 year sentence for a second offense, and a 20 to 40 year sentence for a subsequent offense.

Sale. The sale of narcotic drugs except in accord with law is outlawed and is punishable by a minimum sentence of 20 years, maximum sentence of 40 years, regardless of the number of offenses.

Inducement. Inducing another unlawfully to administer or to use narcotic drugs is punishable by a sentence of 10 to 20 years for a first

offense, and a sentence of 25 to 50 years for a second offense. Second offenders are denied the benefit of probation.

Administering to a minor. Violation of the provision prohibiting unlawful dispensing or administering to a minor receives the most severe penalty—imprisonment for not less than 30 years nor more than life, without benefit of probation.

The law prohibits employing a minor unlawfully to transport, dispense, or produce a narcotic drug. Violation is punishable by a sentence of 10 to 25 years for a first offense and 25 to 50 years for a second offense, with probation denied a second offender.

Inducement of a minor. Violation of the section prohibiting inducing a minor to violate the narcotic drug law, or inducing a minor to use narcotic drugs except in accord with a prescription, is punishable by a sentence of 10 to 20 years for a first offense and a sentence of 25 to 50 years for a second offense. Second offenders are denied the benefit of probation.

Conspiracy to violate the sections on possession, or offenses involving minors is punishable by imprisonment for 10 to 20 years for a first offense, 15 to 30 years for a second offense, and 20 to 40 years for a subsequent offense. Any conviction under this conspiracy provision results in a denial of probation.

Violation of the provisions prohibiting stealing narcotic drugs, obtaining them from one physician while undergoing treatment with another, and having carnal knowledge of another person known to be under the influence of narcotic drugs, are subject to the following penalties: for a first offense, maximum fine of $10,000 plus a 2 to 15 year sentence; for a second offense, the same fine plus a 5 to 20 year sentence; for subsequent offenses, the same fine plus a 12 to 20 year sentence.

Other prohibitions. The law prohibits the dispensing or sale of exempted preparations if the person knows or can by reasonable diligence ascertain that it will provide a person or animal within a 48-hour period with more than the designated amounts of certain narcotic drugs and prohibits obtaining or attempting to obtain more than one exempted preparation within 48 consecutive hours. This prohibition does not apply to "Class M" products.

The altering of an exempt preparation by evaporation or other means to increase the concentration of a narcotic drug is prohibited, and altered preparations with concentration greater than specified under the exemption section are classified as narcotic drugs.

Obtaining or attempting to obtain narcotic drugs by fraud, forgery, concealment of a material fact, use of false name or address and false representations is prohibited, and information communicated to a practitioner in an effort to procure unlawfully a narcotic drug is declared not privileged.

The law prohibits: (1) knowingly making false statements in a prescription, order, report, or record; (2) false or forged prescription or official written order; (3) affixing a false or forged label.

The penalty for a violation of the above provisions is a maximum fine of $10,000 and imprisonment (a) for 2 to 5 years for a first offense; (b) for 5 to 10 years for a second offense; and (c) for 10 to 20 years for third and subsequent offenses.

Possession of a hypodermic syringe or needle by an unauthorized person is an independent offense, punishable by a fine up to $500 or imprisonment for 1 to 5 years for a first offense, and by a minimum fine of $200, maximum fine of $1000 or 1 to 5 years for subsequent offenses.

The State Board of Pharmacy and all officers and prosecuting attorneys are designated as enforcement agents for the narcotics and barbiturates laws. The law bars prosecution of a person acquitted or convicted under the federal narcotic laws of the same act charged under state law. The law places on the defendant the burden of proving that he comes under exceptions and exemptions in the law. Enforcement officers are authorized to enter and search a room or other place where a violation of law is believed to exist and to arrest without warrant any person found to be violating laws relating to traffic in narcotics.

Ohio Pure Food and Drug Law

Ohio's Pure Food and Drug law is patterned after the federal Act.

Ohio law defines *drug* as:

1. Articles recognized in the official United States pharmacopoeia, official homeopathic pharmacopoeia of the United

States or official national formulary, or any supplement to any of them.

2. Articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals.
3. Articles, other than food, intended to affect the structure or any function of the body of man or other animals.
4. Articles intended for use as a component of any such articles. . . .

The term *new drug* is defined as:

1. Any drug the composition of which is such that such drug is not generally recognized among experts qualified by scientific training and experience to evaluate the safety of drugs, as safe for use under the conditions prescribed, recommended, or suggested in the labeling thereof.
2. Any drug the composition of which is such that such drug, as a result of investigation to determine its safety for use under such conditions, has become so recognized but which has not, otherwise than in such investigations, been used to a material extent or for a material time under such conditions.

These definitions parallel definitions found in the federal act, except that the federal act defines "new drugs" as drugs not evaluated regarding safety *and* effectiveness.

Revised Code section 3715.52 prohibits the following acts with respect to drugs:

1. Manufacture, sale, or delivery of adulterated or misbranded drugs.
2. Their adulteration or misbranding.
3. Their receipt in commerce in adulterated or misbranded state.
4. The sale or delivery of a new drug in contravention of law.
5. False advertisement.
6. Refusal to permit entry, inspection, or sample taking by the Director of Agriculture or Board of Pharmacy.
7. False guaranties and undertakings.
8. Removal or disposal of a detained or embargoed article.
9. Acts resulting in misbranding.
10. Forgery, counterfeit, simulation or false representation of identification devices.
11. Certain misrepresentations concerning new drugs.
12. Sale or other delivery at retail without a prescription of any drug which under federal or Ohio law can be sold only on prescription.
13. Revealing trade secrets.

The Director of Agriculture and the Board of Pharmacy have enforcement powers under the Ohio Pure Food and Drug law. Either may enjoin violations of law under the Revised Code, section 3715.53.

Articles believed to be adulterated or misbranded may be embargoed and condemned. If found by a municipal or county court to be adulterated or misbranded, the embargoed article may be ordered destroyed or corrected.

The Attorney General, prosecuting attorney, or city attorney to whom the Director of Agriculture or Board of Pharmacy reports any violations of law may cause proceedings to be instituted and prosecuted. Before any violation is reported, the person against whom such a proceeding is contemplated must be given notice and an opportunity for hearing. A written notice or warning may be given whenever the Director or Board believes that it will serve the public interest.

Revised Code section 3715.63 establishes the standards by which a drug or device is to be determined to be adulterated. Revised Code section 3715.64 applies to the misbranding of a drug or device. Both of these sections follow the federal law closely. The label must contain a warning of the habit forming nature of a drug. The Public Health Council, a seven member body appointed by the Governor, is empowered to designate substances as habit forming under regulations proposed by the Director of Agriculture. A provision similar to the federal one declares a drug misbranded unless dispensed by prescription if it is: (1) one which is not safe for use except under the supervision of a physician, dentist, or veterinarian or (2) is "limited by an effective application under section 505 of the 'Federal Food, Drug and Cosmetic Act' to use under professional supervision."

Revised Code section 3715.65 governs the sale and delivery of new drugs. It provides that

"(n)o person shall sell, deliver, offer for sale, hold for sale, or give away any new drug unless an application with respect thereto has become effective under section 505 of the 'Federal Food, Drug and Cosmetic Act.'"

Section 505 of the federal act, referred to in the two preceding paragraphs has been codified as section 355 of Title 18 of the United States Code and is discussed above. Sale or delivery of a new drug which is not subject to the federal act may not be sold until an application filed with the State Director of Agriculture is in effect regarding such drug. As under federal law, an application must be accompanied by reports of investigations, drug components, composition, manufacturing methods, samples, and labeling specimens. Where applications are submitted to the Secretary of Health, Education, and Welfare under federal law, reports of investigations showing effectiveness and safety are required under 1962 amendments thereto. Submission of investigation reports is required to show only whether or not the drug is safe for use. As in the federal law, proceedings for the introduction of new drugs require notice and an opportunity for a hearing. Exception is made for a drug intended solely for investigational use by experts qualified by scientific training and experience to investigate the safety in drugs, providing the drug is plainly labeled, "For investigational use only." Exempting regulations under federal law are subject to a number of conditions discussed above and not included in the state procedure.

The Director of Agriculture is empowered to adopt regulations governing drug labeling requirements. The authority to adopt regulations for the enforcement of other provisions in the Pure Food and Drug Law is vested in the Public Health Council, provided that they are first proposed for adoption by the Director of Agriculture or the State Board of Pharmacy. Regulations adopted must conform insofar as practicable with regulations promulgated under the federal act.

The Director of Agriculture or the Board of Pharmacy has authority to enter and inspect establishments and to secure samples and examine them for violations of law. Either may publish reports summarizing judgments, decrees, and court orders and disseminate information in the interest of public health and protection of consumers from fraud.

Under a general penalty provision, applying to a violation of sections 3715.52 through 3715.72 of the Revised Code, a violator is subject to a fine of not less than $100 nor more than $300 for a first offense. For subsequent offenses he is subject to a fine of not less than $300 nor more than $500 or imprisonment for not less than 30 nor more than 100 days, or both.

Barbiturate Law in Ohio

Sections 3719.23 to 3719.29 of the Revised Code regulate barbiturate traffic in this state. Section 3719.23 defines the term "barbiturate" as "the salts and derivatives of barbituric acid, also known as *malonyl urea*, having hypnotic or somnifacient action, and compounds, preparations, and mixtures thereof."

Section 3719.24 of the Revised Code proscribes the unlawful possession and delivery of barbiturates and the failure to meet requirements of law respecting barbiturate stocks and transactions. Only pharmacists and practitioners may deliver barbiturates. Barbiturate delivery by a pharmacist must be upon an original prescription. The label affixed to the barbiturate container must bear the name and address of the owner of the delivering establishment, the date the prescription was filled, the prescription number, the name of the practitioner, the name and address of the patient, or if for an animal, its species, and directions for use. Barbiturate delivery by a practitioner must be in the course of his practice, and the label must contain directions for use, his name and address, and the name and address of the patient, and if prescribed for an animal, a statement indicating the species of the animal.

The pharmacist who fills a prescription for barbiturates must file and retain a record of the prescription. Refilling a barbiturate prescription is prohibited unless so designated on the prescription.

Possession of a barbiturate is prohibited unless the possessor obtained it on prescription, from a practitioner, or from a person licensed by the laws of any other state to prescribe or dispense it. The law also prohibits fraud, deceit, misrepresentations, or subterfuge as well as forged or altered prescriptions and the use of false statements to obtain or to attempt to obtain a barbiturate.

Penalties for the unlawful possession or traffic in barbiturates are in sharp contrast to penalties prescribed for narcotic drug violations. All barbiturate offenses are punishable by a fine

of not more than $500 or imprisonment for not more than one year, or both. Barbiturate offenses, by not calling for imprisonment for a period of more than one year, are misdemeanors under Ohio law.

Prohibitions against delivery or possession of barbiturates where for use in the usual course of business or practice, do not apply to the following: pharmacists; practitioners; persons who procure barbiturates for disposition by or under the supervision of pharmacists or practitioners employed by them, or for the purpose of lawful research, teaching, or testing and not for resale; hospitals for lawful administration by practitioners; manufacturers and wholesalers; and carriers and warehousemen. Such excepted classes of persons must keep records of barbiturate stocks and transactions and allow inspections by officers and employees designated by the State Board of Pharmacy.

The State Board of Pharmacy is authorized to promulgate necessary regulations for the administration and enforcement of the Ohio barbiturate law.

Dangerous Drug Law, 1962

The Dangerous Drug Law was enacted in 1961 and became effective January 1, 1962. Sponsored by the State Board of Pharmacy, its purpose was to bring all dangerous drug distributors under the control of the Board and to give the Board effective enforcement powers. The law regulates "dangerous drugs" defined as drugs which under either federal law (Federal Food, Drug, and Cosmetic Act or the Federal Narcotic Law) or state law (Ohio Pure Food and Drug, narcotics, or barbiturates laws) may be dispensed only upon prescription, drugs that contain narcotics exempted by the Ohio narcotic drug law or to which it does not apply, or drugs which are injectable.

In a statement in support of the legislation before its enactment, the Board pointed out that the laws then in existence dealing with drug distribution were promulgated at a time when the only persons concerned at the retail level were physicians and pharmacists. In the meantime, the statement continued, an extremely diverse distribution pattern for dangerous drugs had developed, much of which was illegal but not specifically dealt with by state pharmacy laws. The sale of amphetamines as pep pills or reducing tablets to truck drivers, teen-agers, and others, by truck stops, gasoline service stations, and aides in industrial first aid rooms were mentioned as illustrative of practices that the Board was powerless to regulate without legislation conferring specific powers over *all* distributors of dangerous drugs.

A relatively new law, the Dangerous Drug Act, gives the Board control over the location of drug distribution points, and has solved some of the problems confronting the Board.

Under this law only registered wholesale distributors may possess for sale, sell, distribute, or deliver dangerous drugs at wholesale. Registered wholesalers may distribute dangerous drugs only to practitioners, other registered wholesale distributors, drug manufacturers, licensed terminal distributors, and carriers or warehousemen, for carriage or storage. Licensed terminal distributors (pharmacies, hospitals, nursing homes, laboratories) may possess for sale or sell dangerous drugs at retail, and only at the establishment described in the license.

Unlawful possession for sale, distribution, or delivery is punishable by a fine of not less than $50 nor more than $100 for a first offense and not less than $100 nor more than $300 for a subsequent offense. Possession of dangerous drugs by any person other than a practitioner, registered wholesale distributor, or licensed terminal distributor in an amount exceeding 150 times the recommended dosage is presumptive evidence of a violation of law.

A person desiring to be registered as a wholesale distributor must file an application with the State Board of Pharmacy and meet qualifications of a registrant under section 4729.53 of the Revised Code. These include: (1) submission to jurisdiction of the Board and of state laws; (2) designation of agents; (3) adequate safeguards against unlawful distribution of the drugs; (4) safeguards to prevent the recurrence of any previous violations of federal and state drug laws.

Similarly, a person desiring to be licensed as a terminal distributor must file application and meet qualifications set forth in section 4729.55 of the Revised Code. A terminal distributor of dangerous drugs is defined as a person, other than a practitioner, engaged in retail sales of dangerous drugs, or a person, other than a wholesale distributor or pharmacist, who has dangerous drugs other than for his own use. The term includes pharmacies, hospitals, nursing homes, laboratories, and others who procure dangerous drugs for sale or distribution under the supervision of

a pharmacist or practitioner. Each such license describes not more than one establishment where the licensee may engage in dangerous drug sales, and the applicant must furnish proof of: (1) proper equipment; (2) employment of a pharmacist or practitioner; (3) adequate safeguards to prevent unlawful distribution; (4) adequate safeguards to prevent the recurrence of any previous violation of federal or state law or rules or regulations of the board. Both the wholesale registration and retail license require the payment of an initial and annual fee of ten dollars. Grounds for revocation, suspension, or refusal to renew registration certificates and licenses are provided.

The State Pharmacy Board is required to maintain a register of all registration certificates and licenses and periodically to publish or make available to registered and licensed distributors lists of persons licensed by the Board and persons whose registration certificates or licenses have been suspended, revoked, surrendered, or not renewed.

A purchaser of dangerous drugs is required to furnish to a registered wholesale distributor a certificate that he is licensed as a terminal distributor (except in the case of practitioners, other registered wholesalers, carriers and warehousemen for purposes of carriage or storage only, and drug manufacturers). The wholesaler, in turn, must furnish to the purchaser the number of his registration certificate. Failure to furnish such certificates and registration numbers constitutes a presumption that the law has been violated, but if the wholesaler receives a certificate from the purchaser, he is not considered a violator, and if the purchaser receives a registration number from the wholesaler, he is not considered a violator.

The code proscribes the use of fraudulent registration certificates and certificates of license and the use of fraud or deceit to obtain dangerous drugs. The penalty for its violation is a fine of $100 to $300 for a first offense, and a fine of from $300 to $500 for a subsequent offense. Registration certificates and licenses must be surrendered to the Board of Pharmacy wherever registrants or licensees cease operations.

The Board of Pharmacy is charged with the duty of enforcing the dangerous drug law, not only through its registration and licensing powers, but also through investigations and the filing of complaints for prosecutions. The Attorney General, a prosecuting attorney, or a city attorney must institute appropriate action without delay whenever violations are reported by the Board. The Board may seek an injunction in a court of common pleas to halt further violations.

Summary Comparison

Possession, possession for sale, sale, and the sale of narcotics to a minor by an adult are four separate offenses under Ohio law. All carry severe penalties. The penalty for a first possession offense is a fine and 2 to 15 years imprisonment. The maximum imprisonment under federal law for the same offense is 10 years. Ohio is not alone in applying rigorous penalties to narcotics violators. A 10 year maximum for first possession offenders is also the rule in New York, Michigan, Illinois, and California.

Possession for sale is a separate offense under Ohio law, carrying a 10 year minimum, 20 year maximum imprisonment penalty for first offenders. Possession for sale in New York, one of the few states that recognizes such an offense as a separate one, carries a 5 to 15 year sentence for a first offense.

Illegal sale of narcotics or marihuana under federal law is punishable by a 5 to 20 year sentence for a first offense and 10 to 40 year sentence for a second and subsequent selling offense. Such sales under Ohio law are punishable by a 20 to 40 year sentence, regardless of the number of offenses. A 20 year mandatory minimum penalty for first selling offenses is appreciably higher than the 5 year minimum prescribed by federal law. New York, California, and Pennsylvania follow the federal law by imposing a 5 year sentence on first sale offenders, while Illinois subjects first sale offenders to a 10 year minimum and Michigan, to a 20 year minimum.

Sales to minors uniformly carry heavy penalties. The minimum under Ohio law is 30 years; the maximum is life. The heaviest penalty under federal law permits 10 years to life imprisonment and, at the discretion of the jury, the death penalty for sale or transfer of heroin by a person over 18 to a person under that age. Sales to minors under New York law carry a 7 to 15 year sentence, although any third narcotic felony conviction calls for 15 years to life, without suspension or probation.

Substantial contrast is apparent between control provided by federal statutes over the

manufacture, sale, and other distribution of narcotic drugs and marihuana and that provided for other dangerous drugs. The Federal Food, Drug, and Cosmetic Act requires only that other dangerous drugs be labeled as habit forming, be dispensed by prescription, and that manufacturers and wholesalers of such drugs register with the Department of Health, Education, and Welfare. The Secretary of that Department administers the regulatory powers of the F.D.C.A. through the Commissioner of Food and Drugs.

Many variations exist among the states which have adopted the narcotics code, but the theme of heavy penalties with restrictions upon shortened sentences is common.

A study of seven jurisdictions by the American Bar Foundation, published in 1962 as *Narcotics and the Law*, by William B. Eldridge, is a valuable source of comparative material. The areas covered are New York, Illinois, California, and Michigan (which account for three-fourths of the known addicts in the United States) and New Jersey, Ohio, and Missouri.

The author of this study, points out that the recent surge of objection to the system that prevails in most states prompted the Foundation to attempt a resolution of the question of the effectiveness of the present narcotic policies. The laws of these seven states were examined along with whatever statistical information could be gathered from the states in question. Few states, however, could supply much data on the state's experience with narcotic drug control, other than annual reports of the Federal Bureau of Narcotics. Eldridge reports, for example, that the only data received from Ohio were copies of annual reports from city police departments to the Federal Bureau.

The report is of value for its detailed description of laws in all states. Results of the study indicate a direction for future efforts. Eldridge points out that

> . . . an assessment and evaluation of the correctness of the present legal approaches to narcotics problems would be very difficult until a substantial portion of the suggested medical research has been completed. The thrust of the proposed legal research is toward the drafting of a new act to implement the findings of medical research. Without the data which the medical studies would reveal, it seemed both presumptive and unpropitious to undertake research having new legislation as its goal.[12]

References

1. 38 Stat. 785, U.S.C.A. 4701 et seq.
2. Prepared by a committee of the United States Pharmacopoeia Convention, Inc. All drugs are required by state and federal law to meet standards of strength, quality, and purity set forth in the official *Pharmacopoeia of the U.S.* or in the official *National Formulary*, prepared by the Comm. on National Formulary of the American Pharmaceutical Assn.
3. Opium Exclusion Act. 35 Stat. 614 (1909).
4. 43 Stat. 657.
5. 56 Stat. 1045.
6. 65 Stat. 767 (1951).
7. 70 Stat. 567 (1956).
8. 18 U.S.C.A. 4202.
9. Alfred R. Lindesmith, *The Addict and the Law*, (Bloomington, Indiana, 1965), p. 27.
10. 74 Stat. 55 (1960).
11. Final Report, November, 1963.
12. W. B. Eldridge, Narcotics and the Law, published by the American Bar Assn. (New York University Press, 1962), p. 45.

III. MEDICAL VERSUS PUNITIVE APPROACHES

Proponents of severe penalties for all offenders of drug abuse laws argue that illegal traffic in drugs can be most effectively curbed if medical and psychiatric treatment are afforded only after enforcement and deterrent aspects of the law have been satisfied. Other authorities argue that if an addicted person could get drugs legally, he would not have to turn to criminal activities and that rehabilitation goals could be met if addicts were required to undergo treatment to obtain drugs legally.

VIEWS OF THE CRITICS

Although public approval of the pattern of existing narcotic drug regulation has been widespread, critics have not been silent. William B. Eldridge speaks of a "recent surge of objection . . . by competent, sincere, and conscientious people."[1] Distinguished scholars in the fields of law, medicine, sociology, psychiatry, penology, and related fields have produced a veritable seige of books and articles in both popular and professional journals on the subject of narcotic law reform. The general public is being made increasingly aware of this voice of dissent. Jonah S. Goldstein, a judge in New York City for 25 years, calls for legislative reform "because we drive sick people to crime with our narcotics laws." Judge Goldstein cites an article, headlined "New Crime Wave Expected," which asserts that a seizure of heroin in port by federal narcotics agents would raise prices on the black market and cause addicts to commit robberies to pay the increased price. Judge Goldstein asks, "What kind of police protection is it — what kind of law is it — that turns a great triumph of law enforcement into the cause of a crime wave?"[2]

Moreover, mandatory hospitalization through civil commitment statutes, (discussed near the end of this chapter) finds no favor with the judge. If addiction were curable, he argues, such a plan might have merit, but he asserts that even 2 per cent is an optimistic cure claim (his assertion is supported in scientific journals). One physician, qualified by years of experience with addicts as a medical officer in the United States Public Health Service explains:

> The physiological and psychological basis, background, etiology, the individual personality characteristics, and the circumstances of his addiction are such that throughout an addict's life we would expect him to be constantly subject to the possibility of relapse to drugs, just as he was perhaps especially susceptible to finding them attractive in the first place. . . . It would be a constant problem with him to keep away from drugs in the same way it is for an alcoholic to keep away from alcohol.

In the past decade, Goldstein's thesis that legal distribution of drugs would destroy the black market and reduce the crime rate has been expounded in innumerable legal, sociological, and medical journals and has pervaded a large number of interdisciplinary conferences on the problems of addiction.

In 1955 the American Bar Association and the American Medical Association appointed a joint committee on narcotic drugs to explore the problem of addiction. American Bar Association members included Rufus King, then head of the Criminal Law Division of the A.B.A., Judge Edward J. Dimock, United States District Court Judge in New York City; and Attorney Abe Fortas (now Supreme Court Justice). Similarly distinguished members of the medical profession, Dr. Robert H. Felix, of the National Institute of Mental Health; Dr. Isaac Starr, of the University of Pennsylvania; and C. Joseph Stetler, of the American Pharmaceutical Manufacturers Association, represented the American Medical Association. Judge Morris Ploscowe was appointed director of studies, and the work of the Committee was supported financially by the Russell Sage Foundation.

This Committee completed an interim report in 1958, and a final report in 1959, both of which have been combined in one volume entitled *Drug Addiction: Crime or Disease,* published by the Indiana University Press in 1961. In an introduction, Alfred R. Lindesmith, professor of sociology at Indiana University, long time student of the narcotics problem, and author of several works on the subject summarizes the dispute:

On the question of how to deal with drug addiction there are two opposing schools of thought. The Federal Bureal of Narcotics and its supporters regard addiction to narcotic drugs as an activity that is properly subject to police control. With the growth of addiction in the United States since World War II, increasingly severe penalties have been incorporated into both federal and state laws, and the distinction between the peddler of drugs and the user of them has grown smaller and smaller. The advocates of this punitive approach argue that crimes committed by addicts are a direct result of the drug; they also contend that most addicts were criminals before they became addicted.

Critics of this view regard addiction as a disease, or something akin to it, for which punishment is inappropriate. They argue that many addicts become criminals in order to get money to buy drugs, since there is no way in which they can obtain them legitimately and the cost of illegal procurement is high. This state of affairs, they contend, encourages the spread of addiction among criminals and juvenile delinquents who have any access to drug peddlers. From this point of view, drug addiction is primarily a problem for the physician rather than for the policemen, and it should not be necessary for anyone to violate the criminal law solely because he is addicted to drugs. This necessity might be avoided by a system of clinics for treating addicts or by adopting the British practice of permitting physicians to prescribe legal drugs in cases of addiction. Such measures, it is argued, would also remove the stigma of criminality for addiction and, at the same time, would aid materially in undermining the illicit traffic.[3]

In these two paragraphs, **Mr. Lindesmith** succinctly states the controversy which has raged for some years regarding the basic question of solving the drug problem in this country. In this brief statement of the opposing schools of thought, he identifies major areas of dispute—the relationship of crime to addiction, the role of the physician, and community control over the distribution and possession of narcotics.

Critical of the use of criminal sanctions to deal with a health problem, the Interim Report of the Joint Committee discusses at length the conflict between penal sanction and the therapeutic approach. The physician's difficulty, according to the Report, is that he has no way of knowing before he attempts to treat and/or prescribe drugs to an addict whether his activities will be condemned or condoned. "He does not have any criteria or standards to guide him in dealing with drugs addicts," writes Judge Ploscowe, "since what constitutes bona fide medical practice and good faith depends upon the facts and circumstances of each case. . . ." Judge Morris Ploscowe was Director of the Narcotic Drugs Control Study, for the Russell Sage Foundation. A deplorable result, say the critics, is that most doctors are willing to treat an addict.

The use of drugs in programs of withdrawal outside of hospitals or penal institutions has been strongly discouraged in the United States, although King and others have stated that such outpatient treatment is employed regularly in some European countries. Unfortunately, they claim, procedure in the United States rests upon the theory that the addict will not cooperate and will seek other sources of drugs while supposedly under the jurisdiction of his physician. No allowance is made for individual motivation, degree and length of drug use, skill of the physician, or the particular doctor-patient relationship.

King asserts in another portion of the report that many other Western countries with backgrounds similar to our own have done better with the problem, and that the chief reason is that medical science, in lieu of law enforcement, has retained an authoritative relationship to the addict and to the problem of community control. Examples of the practices and experiences of some of these countries make up a major portion of the Interim Report.

Several papers presented at the National Narcotics Conference at the University of California at Los Angeles in April, 1963, were in accord with this attitude. Recent policy statements by the New York Academy of Medicine have similarly encouraged participation of the private physician in the treatment of addicts. They have recommended the establishment of appropriate medical administrative procedures for the supervision and control of medical practice where appropriate drugs may be used within a treatment program.

Recommendations of the President's Advisory Commission on Narcotic and Drug Abuse made in November, 1963, included the following:

1. That penalty provisions of federal narcotics and marihuana laws which now

prescribe mandatory minimum sentences and prohibit probation or parole be amended to fit the gravity of the particular offense so as to provide a greater incentive for rehabilitation.

2. That federal regulations be amended to reflect the general principle that the definition of legitimate medical use of narcotic drugs and legitimate medical treatment of the narcotic addict are primarily to be determined by the medical profession.
3. That the Bureau of Prisons establish special treatment for confirmed narcotic and drug abusers within the federal prison system.
4. That the federal civil commitment statute be enacted to provide an alternative method of handling the federally convicted offender who is a confirmed narcotic or marihuana user.

The Federal Bureau of Narcotics opposes proposals for ambulatory treatment of drug addicts and has issued a great deal of material dealing with the failure of narcotic clinics during the 1920's. The F.B.N. disagrees with the suggestion that legalized distribution might lower crime rates. In a 1960 report it cites a commentary written in 1921: "The vice that causes degeneration of the moral sense and spreads through social contact, readily infects the entire community, saps its moral fiber and contaminates the individual members one after another, like the rotten apple in a barrel of sound ones."

Dr. Lawrence Kolb, former superintendent of the federal hospital at Lexington, assistant surgeon general in charge of the Division of Mental Hygiene (forerunner of the N.I.M.H.), and special consultant to the United States Public Health Service, participated in the Symposium on the History of Narcotic Drug Addiction Problems held at Bethesda, Maryland, in 1958. The Symposium was sponsored by the Public Health Service, National Institutes of Health, and National Institute of Mental Health. He forcefully stated his view of the relationship between crime and addiction when he said:

> There is only one reason to regulate heroin and other opiates. The reason is the physical dependence, because of which habitual users have severe withdrawal symptoms when the drugs are withheld. This is an important thing to protect people from, *but the assumption that these drugs cause deterioration and crime is utterly unfounded.* To send persons to the penitentiary for 10 or 15 years for possessing one heroin tablet, as some of the "educated judges" . . . have done, is a tragic thing that must eventually end just as witch burning eventually ended. The witches are now treated in mental hospitals, but we needed laws for this just as we need laws to regulate addiction.

According to Lindesmith, *the general objectives of legislative reform should be:*

1. Prevention of the spread of addiction and numerical reduction in addicts.
2. Curing current addicts.
3. Eliminating their exploitation.
4. Reducing the crime rate associated with drug use.
5. Reducing the availability of addicting drugs.
6. Fair and just treatment of addicts.[4]

Law enforcement agencies, however, have assumed the task of defending present policies and programs. An example of this effort is the published reply by an advisory committee of the Federal Bureau of Narcotics to the Report of the American Bar Association-American Medical Association Joint Committee. This 186 page document containing comments upon the Report attacks both the findings of the Joint Committee and its "prejudiced" report. Malachi L. Harney, Superintendent, Division of Narcotic Control, State of Illinois, calls the report "not quite honest," and continues:

> Since it is obvious that there can be no objective discussion in this report, we must then look at it as we would if we had a report from Khruschev on the merits of the American capitalistic system or [if] we had asked Nasser to give us a full discussion on the merits of the Egyptian-Israeli dispute. Perhaps there are some things of merit which accidentally have been brought up in the discussion.

Mr. Harney, former assistant to the United States Commissioner of Narcotics for sixteen years, also participated in the Public Health Symposium at Bethesda, Maryland, on March 27 and 28, 1958. There he said:

Let us assume that this is essentially a medical problem. . . . We have no sure cure for addiction as yet; no specific drugs or chemical as far as I know. . . . Our hospitals can take credit for salvaging many addicts. Despite that, I still insist that the best cure for narcotic addiction is for it not to occur. I think the best medicine is to try to control and stamp out the causative substance, illicit opium. It is sound medicine, I suggest, to contain the addicts who spread the know-how and the way of life of narcotic addiction. Quarantine is one of the oldest and soldidest procedures in public health. There can be many variations on the theme of "Typhoid Mary."

Generally it is the addict who translates to the neophyte as a great experience the abuse of a chemical that would otherwise be so much harmless dust. If we want to eliminate this health hazard promptly, we must work toward a program where we will quickly and surely take the addict out of society, place him in a drug-free environment, and then cautiously let him back into circulation with a string attached. To what we have been able to do for him medically while he is confined, we add what supervision and aftercare can contribute. That supervision and aftercare will be more realistic because of the string attached. The rehabilitation of the addict is a worthwhile and necessary concern. Marginal and doubtful as he usually is, as a fellow human being he is entitled to the best effort we can give him. But since the best cure for narcotic addiction is for it never to occur, our chief and most practical concern must be for the nonaddict contemporary of the addict. To him we owe the principal responsibility. For his safety and well being, we must cure or segregate the addict. The mere existence of an aggressive program of this nature should discourage the possible neophyte. If properly carried out, it should do much to diminish the "fad factor" of drug addiction.

The 1963 Interim Report of the Narcotic Drug Study Commission of the New Jersey Legislature includes testimony of addicts that was taken by the Commission in its probe for information to evaluate the drug problem in that state. Many case histories cite difficulties in refraining from drugs, even after withdrawal is accomplished. According to the Report, one addict reported that after serving fifteen years in the state prison, he refrained from smoking cigarettes during the last six months of his sentence in order to have enough money to buy a "fix" on the first day of his release. A number of similar accounts describe relapse immediately following release from confinement.

Eldridge counsels that relapse should be recognized as predictable and accepted as much as it is in many chronic diseases. "In any case," he suggests, "relapse rate does not necessarily have a bearing on the consideration of medical methods to solve the drug problem and should not be used as a barrier to continuous efforts to improve and humanize methods of dealing with the addict problem."[5]

Some critics of narcotics control measures in the United States have lauded foreign practices as more humane and more effective. The report of the Joint Committee of the American Bar Association and the American Medical Association on Narcotic Drugs, in 1958, includes as Appendix B an extensive appraisal of British and selected European narcotic drug laws, regulations, and policies. Descriptions of the British approach to narcotics control, where addicts have access to drugs from medical practitioners, have been the subject of many popular magazine articles and newspaper and television features. Spokesmen for the medical approach credit British practices for the existence of a negligible black market in drugs in Great Britain and for an infinitesimal addict population in contrast to United States estimates.

Great Britain's original Dangerous Drugs Laws followed the United States enactment of the Harrison Act by six years. The regulatory patterns are similar. Everyone handling dangerous drugs must register, obtain a license, and keep records. Under regulations governing distribution, pharmacists must preserve prescriptions and record all sales. Pharmacy records are inspected periodically. Doctors, too, must keep records and are subject to questioning by a medical inspector from the Ministry of Health if they dispense or prescribe unusual amounts.

Under a regulation exempting classes of persons from the ban on possession of dangerous drugs, a medical practitioner is authorized "so far as may be necessary for the practice or exercise of his said profession . . . to be in possession of and to supply drugs." Under a Home Office Ruling entitled, "The Duties of Doctors and Den-

tists under the Dangerous Drugs Act and Regulations," the authority of a doctor or dentist to possess and to supply dangerous drugs is limited by the following language:

> In no circumstances may dangerous drugs be used for any other purpose than that of ministering to the strictly medical or dental needs of his patients. The continued supply of dangerous drugs to a patient solely for the gratification of addiction is not regarded as "medical need."

In 1926 a committee of doctors appointed for advice on bona fide ministrations to addicts published "Precautions" for practitioners. This document discussed the position of a practitioner when using morphine or heroin in the treatment of addicts. Morphine or heroin may properly be administered to addicts, advised this Committee (The Rolleston Committee), in the following circumstances:

> (a) where patients are under treatment by the gradual withdrawal method with a view to cure; (b) where it has been demonstrated, after a prolonged attempt at cure, that the use of the drug cannot be safely discontinued entirely on account of the severity of the withdrawal symptoms produced; (c) where it has been similarly demonstrated that the patient, while capable of leading a useful and relatively normal life when a certain minimum dose is regularly administered, becomes incapable of this when the drug is entirely discontinued.

Practitioners are advised to see addict patients frequently. The report stresses the unreliability of patients, and doctors are cautioned in case of loss of control over the patient to obtain a second opinion. Apparently incurable cases, in which severe withdrawal symptoms are observed on complete discontinuance after prolonged attempted cure, or in which the patient is unable to lead a relatively normal life without a minimum dose, are recognized as justifying indefinite administrations. "In all such cases the main object must be to keep the supply of drugs within the limits of what is strictly necessary."

Rufus King, in his Appendix to the Interim Report of the Joint Committee of the American Bar Association and American Medical Association points out: "Thus it came to be recognized and established many years ago that the addict in British society remained the addict patient; he never became, as in ours, the addict criminal."

The British Home Office maintains files of addicts receiving drugs because they are addicted to them. Current reports indicate that this number approximates five hundred. Because this information is compiled from data supplied by pharmacists and doctors and from inspection of pharmacies, the official figures have been criticized for not revealing hidden addiction.

The Federal Bureau of Narcotics dismisses as propaganda claims made for the British system of drug control. It has argued that, in the first place, the British apply narcotic law controls pretty much the same as is done in the United States. There is not in fact any such thing as a "British system," assert experts in the Bureau's reply to the Joint Committee Report. Moreover, they argue, low cultural susceptibility to narcotics on the part of the British people explains in part the vast difference in illicit traffic. They point to dissimilarities in racial composition, attitudes, cultures, philosophies, and income as key factors in the difference.

The position taken by the Federal Bureau of Narcotics and its supporters is that the British program of free drug availability is not responsible for minimizing addiction, but rather that it is the result of the insignificance of the British narcotic problem. Lindesmith and followers condemn as illogical the denial of a British system and at the same time call it a result of sociological differences. Edward Schur's recent treatment of *Narcotic Addiction in Britain and America* (Indiana University Press, 1962) similarly concludes with a strong indictment of American practices and support for the thesis that compulsory confinement has helped to create a large criminal class in this country.

Some recent popular reports on drugs in Britain suggest that proposals for legislative reform are receiving consideration. The account of "Britain's Rx for our Drug Addicts" in the August 13, 1966, issue of *Saturday Evening Post*, for example, tells of American addicts who have gone to England because of ready accessibility of drugs. Alarm over a disturbing rise in the numbers of young addicts whose life is little more than existence on daily rations of cocaine and heroin has reportedly led to recent recommendations for referral of addicts to a central authority, the establishment of special treatment centers, compulsory detention when necessary, and confining the power to prescribe narcotics to the treatment center staff. The article asserts that

if such recommendations were adopted the debate over medical versus police role in drug control might be resolved in terms of multiple approaches to the problem of narcotic addiction in both countries.

The Federal Bureau of Narcotics is a strong proponent of heavy penalties for buying and selling narcotic drugs. In a 1960 publication, citing the penalty structure of the Narcotic Control Act of 1956, the Bureau supported penalties of 5 to 20 years for a first offense, and 10 to 40 for a second or subsequent offense. They noted: "Very few offenders will take a chance on such severe odds. When they got a light sentence of six months or a year, they had called it a 'vacation.' They had made piles of money and didn't mind coasting for a while."

The President's Advisory Commission did not agree that addicts should be subject to such harsh penalties. Its 1963 report reasoned that "it is difficult to believe that a narcotic addict who is physically and psychologically dependent on a of marihuana will think of the penalty that awaits him if he is caught possessing it." The weakness of the deterrence position, in the Commission's view, "is proved every day by the fact that the illicit traffic in narcotics and marihuana continues."

Proponents of present laws point to Ohio as exemplary of their effectiveness.

At the 1958 Public Health Service Symposium at Bethesda William F. Tompkins, Assistant Attorney General, explained his view:

> The State of Ohio, for instance, had enacted legislation in 1955, providing for more drastic penalties, including a 20-year minimum penalty for the unlawful sale of narcotics. It may be stated that after the imposition of such penalties in the Ohio courts, illicit peddling in that State has become exceedingly rare.

A Federal Bureau of Narcotics Publication of 1960 states:

> One of the most clearcut case examples of the value of dealing sternly with narcotic law violators is found in what happened in Ohio. Some tributes to this project may have been somewhat overdone. But all that is needed is to state the facts.
>
> Ohio's narcotic laws several years ago had weaknesses and loopholes. As a result violations were greater than in nearby states. But in 1953 a strong campaign started in Ohio to cut down drastically on its illicit traffic in narcotics. . . . In 1955 the State Legislature passed a strong law calling for a 2 to 10 year prison sentence for possession of narcotics illegally. The penalty for such possession with intent to sell became 10 to 40 years — and for actual sale, 20 to 40 years.
>
> This broke the back of the narcotics racket in Ohio. Of course, some of the racketeers moved their dirty trade into more easygoing states. But in Ohio, important narcotic violations dropped 80 per cent. The Bureau of Narcotics was able safely to reduce its agents in Ohio from 20 down to 3, and to transfer the surplus personnel to other areas where the need was more acute.

Some critics of the Bureau have questioned figures used to buttress the statements made about Ohio. Others have emphasized the difficulty of evaluating the success of current programs because of limited data.

PROGRAMS OF CONTROL

Drug use has become a way of life for some groups in the United States. The postwar drug crime rate has been characterized as epidemic in proportions. Taking drugs has become for some persons a means of protest and revolt.

Many have estimated that nowhere in the Western world are there as many young addicts as there are in the United States. Alfred Lindesmith points out that it is in this country that the so-called "addict subculture" and the drug-using juvenile gangs have become especially prominent.

A *New Yorker* magazine feature subtitled "Junk" in the March 27, 1965, issue reported at length upon such a gang and an experiment conducted by Mobilzation for Youth, in which a group of nine young men, ranging in age from 18 to 21 and supervised by two social workers, embarked upon a program aimed at breaking the herion habit. Following detoxification in the narcotics ward of Manhattan General Hospital for seven of them, and detoxification in jail for two, the group lived at a camp in the Catskills for six weeks.

The program called for keeping the group together after this experience for vocational training and finding jobs. The life story of these young

men presented by the report was one of poverty, gang life, and early delinquency on New York's lower East Side. According to the account, by the time the boys had reached 13 or 14 they were alternating wine binges with marihuana binges. Says the report, "Marihuana is probably even easier for lower East Side children to buy than wine, for the seemingly paradoxical reason that the people who sell it, unlike liquor dealers, are entirely outside the law."

The "Report at Large" feature in which this account appeared detailed condtions and frustrations that brought each of the nine to the Catskills camp and to group life following their "spiritual detoxification." Its postulates concerning addiction in an environment such as New York's East Side indicate the futility of narrow approaches to the drug problem in large urban centers. According to the reporter, who stayed with the project and had many conversations with its individual participants, a fair estimate of the number of addicts in New York City is fifty thousand. Of these, he asserts, "many are known to the police and many more could be identified easily by anyone who merely walked through certain neighborhoods and looked at the people in them."

The report describes drug addiction in New York as an epidemic of a "virulently infectious disease," and argues that it is not confined to neighborhoods characterized by poverty, discrimination, and despair. The writer asserts that such sociological explanations cannot account for "infection" of adolescents in upstate affluent communities of the state.

"Junk" describes the progression (as reported to the writer by the nine subjects) from heroin sniffing to subcutaneous injection (skin popping) to intravenous injection (mainlining). For about four years, these individuals had devoted most of their time to being heroin addicts. Their reportedly small habit cost from $5 to $15 per day to maintain. Stealing, hustling, and scheming—working only if desperate—were the ways in which they managed to maintain it.

The program of detoxification and rehabilitation described in this account was based on the theory that because use of heroin in this case was a group activity, the subjects might be able to abstain as a group. A similar principle is being used by Synanon (addicts anonymous) which, in a manner similar to Alcoholics Anonymous, strives for group abstention and uses former addicts to help newcomers to the program.

Unfortunately, this project failed its final goal. The group abstained with relative ease while in camp, but after returning to their own neighborhoods, all but one subject ultimately became readdicted.

The article suggests that a successful approach to permanent rehabilitation has not been found; it also suggests that the debate over whether drug addiction among unhappy, uncertain adolescents in areas of poverty should be handled as a crime or disease is only part of the picture. Recent publicity about drug rings on state campuses and locker searches for marihuana in the high school of a wealthy Cleveland suburb (culminating in arrests of both adult sellers and juvenile pot purchasers) also indicates the need for prompt action to better define the problem in Ohio cities and to evaluate the results of present patterns of regulation.

Facilities for the treatment of drug addicts until recent years have been limited to insitutions operated by the federal government at Lexington, Kentucky and Fort Worth, Texas. The Secretary of Health, Education, and Welfare is empowered to provide for treatment and discipline of addicted persons who have been convicted of offenses against the United States, and for admission of narcotic addicts who voluntarily seek admission. Treatment consists of substituting methadone for heroin, gradually decreasing dosage to the point of no drug intake, and counseling addicts to prepare them for life outside the institution.

According to a United States Public Health Service report, of the approximately 35,000 patients who had been treated since 1935, fewer than half had returned. Unfortunately, no one knows what happens to those who do not. The best information available, according to this source, is provided by a follow-up study of 1900 New York residents who were discharged between July, 1952, and December, 1955. More than 90 per cent became readdicted—generally, within six months.[6]

Other reports have been more pessimistic. An estimate of .2 per cent has been reported as the percentage of voluntary patients who remain free of drug use after leaving the Public Health Service Hospital at Lexington. The 1963 Report of the President's Advisory Commission on Nar-

cotic and Drug Abuse pointed out that since the federal government cannot keep voluntary patients against their will, they can leave without restriction.

Civil Commitment

In 1963 Massachusetts enacted legislation following the pattern adopted by New York and California for treatment and rehabilitation of drug addicts.[7] These two states, which experience the bulk of the narcotics problem, were the first to adopt a broad program for the civil commitment of drug users. California initiated the new approach to addiction in June, 1961. The New York law, commonly referred to as the Metcalf-Folker Act, was passed in March, 1962.[8]

The purpose of a civil commitment law is to provide for addicts a program of hospital confinement under security, and an after-care, outpatient rehabilitative program. That portion of the New York act of 1962 known as " The Arrested Narcotic Addict Commitment Act" specifies that an arrested addict, whether charged with narcotic or non-narcotic crime, can convert criminal proceedings to civil hospital commitment. Decisions of medical personnel govern release of the addict to the aftercare outpatient program.

Under New York law the period of hospitalization and aftercare combined is not to exceed three years for a person convicted of a misdemeanor, or five years for a person convicted of a felony. At the discretion of the medical authorities, criminal charges may be dismissed earlier. Should the Department of Mental Hygiene find that the addict cannot be helped further, medically, he may be returned to the criminal courts where the criminal charge will be reactivated. Provision is made for revival of charges against escapees from the program.

In California, commitment is authorized only after conviction. New York law provides for commitment after criminal charges are brought but before trial. In both states the successful completion of the rehabilitation program can be a substitute for criminal sentence.

Massachusetts law makes rehabilitation centers available not only for commitments from criminal courts but for probation and parole cases as well. Procedures for involuntary civil commitment of persons convicted of crimes are also included.

All three states include separate provisions for admittance of persons not charged with a crime.

Both state laws, as well as pending federal legislation on the same subject and many similar measures under consideration in other states, make certain exclusions from the law. In Massachusetts, for example, the civil commitment procedures do not apply to: (1) addicts who have been committed to the program on three previous occasions; (2) addicts previously convicted on two or more felonies; (3) persons before the court on the charge of a crime allegedly committed while on bail pending trial on a felony; (4) persons charged with possession where the amount of narcotics involved is "so substantially greater than would be necessary to supply the defendant's own narcotic habit that he appears to be primarily involved in illegally trafficking in drugs for profit rather than seeking money solely to help support his own narcotic habit"; (5) instance where the court in its discretion refuses to apply the procedure because "it is not in the interest of justice."

The merits of some of these exclusions have been debated. Some have argued that to deny the proceedings to some of the above is to deny help to people most in need of it.

The United States Supreme Court may be said to have given impetus to civil commitment statutes by dicta in a 1962 decision which invalidated a California statute declaring addiction a crime. In a ruling that the statute was unconstitutional and in violation of the 8th and 14th Amendments because it prescribed cruel and unusual punishment, the court added:

> In the interest of discouraging violation of such laws, or in the interest of the general health or welfare of its inhabitat, a State might establish a program of compulsory treatment for those addicted to narcotics. Such a program of treatment might require periods of involuntary confinement. And penal sanctions might be imposed for failure to comply with compulsory treatment procedures.[9]

This language was cited by the California Supreme Court in a 1963 opinion denying a petition for *habeas corpus* by a petitioner seeking discharge from confinement in a rehabilitation center for the treatment of narcotic drug addicts. The court held that the California commitment statute was "civil" in nature and not invalid as

imposing cruel and unusual punishment, as depriving petitioner of the equal protection of the laws, or as being vague and indefinite.[10] The United States Supreme Court denied *certiorari* on June 17, 1963.

The arguments against civil commitment have not been ignored, however. Francis A. Allen, Professor in the Law School and School of Social Services Administration at the University of Chicago, warns that such statutes may turn out to be incapacitative rather than rehabilitative as a result of the lack of adequate facilities and personnel. Inferior conditions of detention coupled with the manipulation of title by calling proceedings civil rather than criminal may result in severe deprivation of civil rights.[12]

State civil commitment statutes may receive a boost from Congress. H.R. 9167 is a federal narcotic addict rehabilitation act which passed the House of Representatives of the 89th Congress on June 1, 1966. This bill, according to a House Judiciary Committee Report, was introduced pursuant to recommendations of the Department of Justice and the Treasury Department. In subcommittee hearings of July 14, 1965, Attorney General Katzenbach stated that for too long the law has stressed punitive solutions to the narcotics problem and has neglected medical and rehabilitative measures.

On March 8, 1965, in a special message to Congress on crime, President Johnson noted, "Drug addiction is a double curse. It saps life from the afflicted. It drives its vicitims to commit untold crimes to secure the means to support their addiction."

As passed by the House, Title 1 of H.R. 9167 authorizes federal district courts, at the time of a narcotic addict's first appearance as a defendant or thereafter at the discretion of the court, to offer the defendant the election of civil commitment for treatment for up to 36 months. The provisions apply to any person charged with a federal crime except: (1) persons charged with a crime of violence or with unlawfully importing or selling a narcotic drug, (2) persons against whom a prior felony charge is pending, (3) persons convicted of two or more felonies, and (4) persons civilly committed for narcotics treatment on two or more occasions.

Title I also provides for dismissal of the pending criminal charge upon successful completion of treatment, but resumption of prosecution upon unsuccessful completion. It authorizes aftercare treatment, such as home visits, for those released.

Under Title II, federal district courts may commit convicted persons to the custody of the Attorney General for treatment, if adequate facilities are available, for up to ten years. Title II excludes the same persons as those excluded in Title I except addicts convicted of selling narcotics for the sole purpose of obtaining thier own narcotics. Conditional release after six months and supervisory care during such release are authorized.

Title III eases restrictions upon persons convicted of violations of law involving marihuana. It directs the Board of Parole to review the sentence of any prisoner who, before enactment of the legislation, was ineligible for parole because of conviction of marihuana violations and it authorizes the parole of such persons.

The House Judiciary Committee, in recommending H.R. 9167, said:

> The procedures provided by the bill . . . do not essentially change the authority being exercised by law enforcement officials or the courts in dealing with persons charged with criminal offenses or convicted of such offenses. Rather, the bill provides alternatives which provide a needed flexibility in the law. The practical effect . . . is that strict punishment can be meted out where required to the hardened criminal, while justice can be tempered with judgment and fairness in those cases where it is to the best interest of society and the individual that such a course be followed.

To avoid the dismal return rate of Lexington, the bill provides that after an individual has elected civil commitment, is found qualified and likely to be rehabilitated, and is civilly committed by the court, he must finish the treatment directed by the Surgeon General (now the Secretary of Health, Education, and Welfare) or the civil commitment will be terminated and the criminal proceedings resumed.

A civil commitment statute patterned after New York legislation was introduced in the Ohio General Assembly in 1965, but was not adopted. Some drug experts in Ohio feel that a need for such legislation has not been demonstrated. Many

authorities point out the difficulty of uncovering reliable evidence about the adequacy of present laws.

This report suggests that an important prerequisite to a study of the drug situation in Ohio is some means of evaluating our present programs. The national predominance of the question lends weight to the advisability of uncovering the kinds of information necessary for such an evaluation. Chapter IV indicates the need for data concerning marihuana and drugs, such as LSD, which are not now under control.

References

1. W. B. Eldridge, *Narcotics and the Law*, published by the American Bar Assn. (New York University Press, 1962), p. 47
2. Jonah £ .Goldstein, "Give Drugs to Addicts So We Can Be Safe," *Saturday Evening Post*, (July 30, 1966), p. 12.
3. Alfred D. Lindesmith, "*The Addict and the Law*," (Bloomington, Indiana ,1965), p. 17.
4. Lindesmith, p. 29.
5. Eldridge, p. 33.
6. "Narcotic Drug Addiction," U.S. Dept. of Health, Education, and Welfare, Mental Health Monograph No. 2 (U.S. Government Printing Office, 1963), p. 11.
7. Mass. General Laws, Chapter III A.
8. New York Mental Hygiene Law (McKinney's Consolidated Laws of New York, Ann. Book 34A. secs. 200-216).
9. *Robinson v. California*, 370 U.S. 660 (1962).
10. *In re De La O*, 59 C. 2d 128, 378 P. 2d 793 (1963).
11. 374 U.S. 856.
12. A paper presented at the April, 1965, National Narcotic Conference at the University of California at Los Angeles.

IV. TWO SPECIAL PROBLEMS: MARIHUANA AND DRUGS NOT PRESENTLY CONTROLLED

Many authorities feel that marihuana does not induce addiction and that it should be controlled separately from the opiates and other addiction-inducing drugs. LSD and other drugs not presently under specific regulation present urgent problems. Most literature supports the view that such drugs should be used only under medical supervision. Additional research is necessary to determine the medical value of such drugs.

MARIHUANA

Violations of long-standing laws proscribing illicit traffic in and use of marihuana and other dangerous drugs are apparently on the increase. Newspapers regularly headline marihuana scandals, and any casual news reader receives the impression that the use of marihuana in college communities is widespread. The evidence—books on the subject, popular magazine features, newspaper accounts—is principally conjectural because the prevalence of drugs is difficult to measure by statistical methods.

The assumption that drug taking is becoming increasingly popular among American adolescents, although not verifiable, persists, bolstered by accounts of student interviews such as those presented in Richard Goldstein's recent work, *One in Seven: Drugs on Campus,* and Jeremy Larner's account of "The College Drug Scene" which appeared in the November, 1965, issue of *The Atlantic Monthly.* Feature articles on the subject appeared in 1965 and 1966 in such periodicals as *Life, Time, Newsweek, The Saturday Evening Post, New York Times Magazine Section, Nation, New Republic, Good Housekeeping,* and *McCalls. Mademoiselle* magazine, in 1965, discussed "The Drug Puzzle: Student Use of Drugs," and even *Seventeen,* a teen-age magazine, featured "Drugs: A Student Report" in its September, 1966, issue.

According to many of these accounts, drugs are readily available, and every contemporary student must make up his mind about whether to "explore inner space" with LSD or "turn on" with marihuana. They assert that in today's affluent society, the use of marihuana is no longer confined to the so-called "jazz set" or "bohemian" college students. Students arrested at high schools in Cleveland Heights and Shaker Heights in December, 1966, were reportedly from "nice families."

The major centers of experience are reportedly the colleges and high schools. Allegedly, on certain campuses such as the University of California at Berkeley, the availability of drugs is no secret. The Federal Bureau of Narcotics is reportedly aware of a marihuana problem on fifty college campuses and has a number of them "under surveillance."

Most students questioned at the Berkeley campus by Richard Goldstein estimate that over half the students at the school will have tried marihuana by graduation. Students questioned on the University of Wisconsin campus expect 10 to 15 per cent of the university's students to have tried marihuana at least once during their four years. Legislators, law enforcement officials, doctors, and educators are concerned about Goldstein's assertion that "it seems no exaggeration to claim, after interviews with students from more than fifty campuses, that at least 15 per cent of all college students in the United States will have smoked a marihuana cigarette at some time during their four years at a university. And few see anything wrong with it."

Evidently, the designation of marihuana as an illegal drug has not served as a deterrent. Certainly, the attractiveness of forbidden activities and the questioning of taboos have long been recognized as a part of the college experience. Larner claims that modern students reject alcohol, feel superior to the middle class value system that promotes its use, and are contemptuous of the claim that "pot" leads to heroin.[1]

Alfred R. Lindesmith, in Chapter 8 of *The Addict and the Law,* poses a question: "The Marihuana Problem—Myth or Reality?" Arguing that because marihuana is not addiction-inducing and does not produce tolerance or withdrawal distress, he concludes that the problem of controlling its

use is much different from that presented by the opiates and their equivalents. A 1945 report of Mayor LaGuardia's Committee on Marihuana stressed the relative triviality of effects from its use, and is often cited by proponents of relaxation of marihuana prohibitions. The investigators were medical doctors, psychiatrists, and social workers who included volunteer inmates at a local penitentiary in their study. Often cited is the committee's conclusion that:

> The marihuana users, accustomed to daily smoking for a period of from two and a half to sixteen years showed no abnormal system functioning which would differentiate them from the non-users. There is definite evidence in this study that the marihuana users were not inferior in intelligence to the general population and that they had suffered no mental or physical deterioration as a result of their use of the drug.

Comparing *cannabis* to alcohol and distinguishing between drug addiction and habituation have been the subjects of a great deal of psychiatric literature in the past ten years. A recent review of such literature in the *Bulletin of Narcotics* of the Department of Economic and Social Affairs, Division of Narcotic Drugs, United Nations, is representative.[2] The *Bulletin* cites a World Health Organization committee's classification of *cannabis* as an addiction-inducing drug, in 1955, and the committee's subsequent distinction, in 1957, between addiction and habituation. This distinction seems to most authorities to contradict the 1955 classification.

Addition, according to the 1957 Expert Committee, is characterized by: (1) an overpowering desire or need (compulsion) to continue the drug; (2) tendency to increase dosage; (3) psychic (psychological) and generally physical dependence on the effects of the drug; and (4) a deterimental effect on the individual and society. Habituation, according to the same report, is characterized by: (1) the absence of true compulsion, (2) absence of physical dependence, (3) little tendency to increase dosage, and (4) by use of the drug for pleasurable sensations, not relief of feelings from its absence. This review indicates that the majority of papers hold that *cannabis* is habit forming under this distinction, and that they deny addiction-producing effects.

In 1956 the United Nations Commission on Narcotic Drugs noted that, in the world picture, marihuana consumers number in the millions. Table I indicates total world seizures of *cannabis* drugs between 1934 and 1960. The question of whether the increase shown is the result of improved enforcement and reporting or increased consumption and traffic remains unanswered.

TABLE 1

TOTAL WORLD SEIZURES OF CANNABIS DRUGS*
(to the nearest thousand kilograms)

Year	Amount	Year	Amount
1934	23,000	1948	89,000
1935	203,000	1949	39,000
1936	16,000	1950	134,000
1937	26,000	1951	237,000
1938	13,000	1952	301,000
1939	29,000	1953	436,000
1940	90,000	1954	161,000
1941	43,000	1955	1,331,000
1942	15,000	1956	298,000
1943	23,000	1957	552,000
1944	4,000	1958	341,000
1945	21,000	1959	670,000
1946	24,000	1960	832,000 - incomplete
1947	19,000		

*Including *bhang*, *chivas*, *ganja*, *hashish*, and marihuana.

Source: "A Note on the Problem and the History of International Action," *U.N. Bulletin on Narcotics*, Vol. XIV, No. 4, October-December, 1962.

International control of hemp products has fluctuated. Control was complicated by early attempts to define "Indian hemp" in a manner acceptable to countries where its use is sanctioned by social and religious customs. The Convention on Narcotic Drugs, adopted March 30, 1961, subjects *cannabis, cannabis* resin, and extracts and tinctures of *cannabis* to all measures of control and reporting and includes it in undertakings by party nations to adopt control measures because of dangerous properties of the covered drugs.

Between indictment and unqualified endorsement of present marihuana control laws is a position urging modification but opposed to legalization of the drug on the same basis as alcohol. Recommendations were coupled with a warning in remarks by Dr. Donald B. Louria, Chairman of the New York County Medical Society's narcotics subcommittee. While his committee urges a recodification of the narcotic laws, and is critical of the fact that minor experimentation with marihuana carries the same mandatory minimum sentences as opiates, Dr. Louria urges its classification as an hallucinogen in lieu of a narcotic.

Lindesmith theorizes:

> The long history of the use of marihuana, the spread of the practice throughout the world in the face of determined and sometimes fanatical opposition, and the persistence of the practice once it is established—all suggest that the smoking of marihuana will continue in the United States for some time to come. The practical question seems to be one of minimizing and controlling the practice while avoiding the extreme tactics of prohibitionists. A comprehensive, impartial, public inquiry into the matter, based on the assumption that marihuana is *not* the same as heroin, might help to bring about a more sober and rational approach to an indulgence which merits some concern but which is far less serious than is presently suggested by the harsh inflexibility of current laws.[3]

DRUGS NOT PRESENTLY CONTROLLED

In May, 1966, a United States Senate subcommittee was formed to consider programs for dealing with the use of lysergic acid diethylamide.[4] Commissioner Goddard, of the Food and Drug Administration, explained at hearings of this subcommittee that the only legal supplies of LSD in the United States are held by the National Institute of Mental Health and twelve investigators who have been given permission to continue testing the drug. At the time of the report, four persons had been convicted for traffic in LSD, and forty-nine cases were under investigation.

A month earlier, the F.D.A. sent letters warning administrators of over 2,000 colleges and universities of increased student use of hallucinatory and stimulant drugs. Urging their cooperation in attacking the "insidious drug activity," Dr. Goddard warned especially of the use of hallucination-inducing drugs such as LSD, mescaline, and psilocybin. Even Timothy Leary, exponent of LSD's consciousness-expanding qualities, sent a statement to the Government Operations subcommittee announcing a self-imposed moratorium on LSD use and expressing the view that it should be used only at special "psychedelic centers" and under government surveillance.

A report from the University of California at Los Angeles discusses the dangers of the use of LSD without medical supervision. The report (by J. Thomas Ungerleider, M. D., Duke D. Fisher, M. D., and Marielle Fuller) is based on seven months' experience with patients in the University Hospital Psychiatric Service. The report stated that:

> The symptoms, diagnostic categories, and general characteristics of patients in 70 cases of adverse reactions to lysergic acid diethylamide tartarate (LSD) are varied. Psychiatric side effects ranged from depressive reaction to psychotic states. In all cases LSD ingestion occurred separately and apart from medical-experimental and psychiatric therapeutic models of LSD usage. Findings based on these cases and from observations made on LSD users in the community indicate that widespread use of LSD is a cause for concern.[5]

According to this report, LSD may be taken in three settings: (1) controlled experimental administration to compare drug-induced psychoses with schizophrenic psychoses; (2) therapeutic use to increase awareness and facilitate insight during psychotherapy or for treatment of specific disorders such as alcoholism; or (3) in a non-medical setting. In the seventy cases studied, usage had not had any medical aspects. Subjects studied had obtained the drug from illegal sources.

Of the 70 patients, 25 were diagnosed as psychotic. Fifteen received a diagnosis of neurotic, 13 were found to have "character disorders."

Seven were addicts, and 8 received miscellaneous diagnoses. Seven of the group had at some time been hospitalized as psychiatric patients, 19 had had previous outpatient care, 13 had no history of inpatient or outpatient psychiatric care (no data was available on the remaining 31). Occupations of the 70 included: unemployed—24; student—16; artist—3; business—10; housewife—3; drug pusher—1; no data—13.

Symptoms presented, and the number of occurrences, follow. Some patients presented more than one symptom.

Hallucination	20	
Anxiety	17	
Depression	15	
Suicidal	10	(5 attempts)
Paranoid	10	
Confused	14	

In addition to specific findings, this report made some general observations about the incidence of LSD cases. At the Psychiatric Emergency Room and Admitting Office of the Neuropsychiatric Institute of the U.C.L.A. Medical Center prior to September, 1965, approximately one case associated with LSD ingestion was seen every other month. From September, 1965, to April 1, 1966, the incidence of cases increased to between five and fifteen per month, to the point where they represented 12 per cent of all cases seen by the psychiatric emergency service. No decrease was seen after the federal law went into effect on February 1, 1966. A similar but less extensive increase was reported in other Los Angeles hospitals.

The group studied was composed predominantly of single, Caucasian males, with an average age of 21. Symptoms which first began following LSD ingestion were found in some instances to recur months later in their original intensity without further LSD ingestion. On the basis of weekly group sessions, authors of this report had the impression that bad experiences were common with or without a guide or "the right environment." (According to Timothy Leary, the most important aspect of the setting in which LSD is used is "the behavior, understanding, and empathy of the person or persons who first administer the drug and who remain with the taker for the period that the drug is in effect." Alpert and Leary have stated that previous "transcendent experience" may qualify one to guide a novice through an LSD session.)

In a sample case discussed in the *A.M.A. Journal* report, a 22-year-old male had become psychotic approximately 24 hours after taking LSD. Although he had used the drug once before without difficulty, on the second occasion he experienced both auditory and visual hallucinations which Chlorpromizine (used successfully for reversing effects in some cases) failed to reduce. His condition required six weeks of care.

Asked about the possible effect of restrictive legislation on the use of psychedelics, Sidney Cohen, noted authority on the use and abuse of LSD, warned:

> Some opponents of legislation against the psychedelics object because it will drive the black market underground or into the hands of organized crime. It is there now. Manufacturers and sellers are making fortunes. They also speak of an educational program rather than prohibitive laws. I have spoken for hours to people who had been in great difficulties after LSD. Some would never go near the stuff again, but my efforts to educate others have not been very encouraging. Education is for the future, the problem is in the present.[6]

APPROACHES TO CONTROL

Legislation in Other States

Several states have already acted to control LSD. The Nevada Legislature, in a 1966 Special Session, enacted Senate Bill No. 17, to add a new section to the chapter of the Nevada Revised Statutes relating to poisons and dangerous drugs. The section restricts use or possession of lysergic acid, LSD, DMT, any salt or derivative of any of them, or any compound physiologically similar in its effect on the central nervous system (excluding peyote). Use or possession is limited to: (1) manufacturers licensed by the Food and Drug Administration, (2) licensed pharmacies, (3) licensed physicians or osteopaths, or (4) research by a licensed psychologist or university faculty member qualified to investigate safety and effectiveness of such drugs.

Under the Act pharmacies, physicians, and osteopathic physicians who receive or administer any such drug must keep records thereof for a period of three years and open them for inspection by any peace officer or health officer of the state or equivalent federal officer. A first violation of the new law is declared to be a gross misdemeanor; a subsequent violation is declared a

felony, and is punishable by not less than one nor more than ten years imprisonment.

A New York law enacted in 1965 prohibits the possession, sale, exchange, or giving away of hallucinogenic drugs or preparations by other than registered manufacturers or licensed physicians who hold licenses from the state commissioner of mental hygiene. The term "hallucinogenic drugs" is defined as stramonium, mescaline or peyote, lysergic acid diethylamide, and psilocybin, or salts, derivatives, or compounds thereof. A violation is punishable by imprisonment for not more than one year or a fine of not more than $500, or both. But if a violation is committed after conviction of such person has become final, the penalty prescribed is two years or a fine of $1,000, or both.

In 1966 the state of Virginia enacted a drug abuse control act which, like the federal law, applies to depressant or stimulant drugs and includes in the definition any drug found to have an hallucinogenic effect. The law prohibits the manufacture or possession of such drugs except by manufacturers licensed under state law or registered under federal law and their suppliers; licensed wholesale druggists; pharmacies; hospitals and public health agencies; practitioners; persons who use them in research, teaching, or analysis; and government employees. Persons other than these and common carriers or warehousemen may possess depressant or stimulant drugs only on prescription of a practitioner.

The penalty for violation of the new drug abuse control amendments is a maximum fine of $1,000 or a jail term not exceeding twelve months, or both. A subsequent violation of unlawful manufacture, sale, or possession carries a penalty of not more than $10,000 or imprisonment in the state pentitentiary for not more than three years, or both. Sale, delivery, or disposition of a depressant or stimulant drug to a minor is punishable by a maximum fine of $5,000 or imprisonment in the state pentitentiary for not more than two years, or both, for a first offense, and a maximum fine of $15,000 or six years imprisonment, or both, for a subsequent offense.

An addition to the California Health and Safety Code approved by the Governor on May 27, 1966, amends the restricted dangerous drug act of that state to specify that the provisions of that act do not authorize the possession or furnishing by prescription of LSD or DMT, including their salts and derivatives, or any compounds, mixtures, or preparations which are chemically identical with such substances.

The Narcotics Drug Study in New Jersey led to the passage of two bills in that state in 1966. One amends the state narcotic law by conforming it to federal narcotics legislation. The other measure, Assembly Bill No. 548, complements and supports the federal law, enacted as the Drug Abuse Control Amendments of 1965, by affording comparable regulatory authority to state health and law enforcement officials with respect to depressant, stimulant, and hallucinogenic drugs.

The new law follows closely the federal law in the definition of terms. The federal law authorizes control of additional drugs upon their designation by the Secretary of Health, Education, and Welfare as having a potential for abuse because of their depressent, stimulant, or hallucinogenic effect. The 1966 New Jersey law includes a similar provision and extends controls over these additional drugs if the record of their actual abuse within the state demonstrates a threat to public health. The Commissioner of the State Department of Health has the authority to so designate drugs by regulation.

The methods of control and provisions for exemption are comparable to federal law and are designed to control abuse while permitting the continued legitimate distribution and use of essential pharmaceutical preparations.

Provisions requiring the registration of narcotic drug manufacturers and wholesalers were amended to extend to the manufacturing, compounding, processing, wholesaling, jobbing, or distribution of stimulant and depressant drugs. Requirements similar to the federal law for inventory and record keeping of transactions involving such drugs were added to appropriate sections of the New Jersey statutes. Unlawful possession of such drugs results in their being misbranded and therefore subject to embargo under the New Jersey food and drug act.

Federal Policy

Officials of the Federal Food and Drug Administration have opposed proposals to outlaw possession of LSD and related agents. Objections to restrictive legislation of this sort at this time have been fourfold: (1) that such a move would automatically put a large number of college students in the category of criminals; (2) that it would tend to encourage underground activity and

make finding and treating of psychotic effects more difficult; (3) that it could adversely affect the supply of the drug for legitimate research purposes, a result that has already been noted because of the amount of notoriety surrounding the drug; (4) that existing authority to regulate the manufacture and sale of LSD and lysergic acid is sufficient.

Mr. Weems Clevenger, of the United States Food and Drug Administration, described this agency's plans for a two-pronged approach to enforcement of the new federal law controlling stimulants, depressants, and hallucinogens. This approach depends upon two divisions: (1) a criminal investigative staff to prevent illicit diversion of drugs from legal channels, and (2) a Division of Drugs Studies and Statistics to formulate a method of communication with the individual drug user by seeking a better understanding of the addict's problem. "As to enforcement," he said, "we intend to collect the necessary evidence to remove contraband, and to file criminal charges against individuals responsible for diversion."[7]

THE SITUATION IN OHIO

Police officials in major Ohio cities were asked by a Legislative Service Commission questionnaire to report the number of their narcotic and dangerous drug arrests over a period of years and to express their opinions concerning the adequacy of the Ohio narcotic drug law and laws controlling barbiturates and other dangerous drugs. Six of the eight departments replying to this questionnaire found the narcotic laws generally satisfactory, but made varying comments upon Ohio laws to regulate other dangerous drugs.

One termed unrealistic the provision in the Ohio dangerous drug law requiring possession of 150 times the normal daily dosage in order for the presumption of possession for sale to arise.

Another called for increasing the penalty for violation of the prohibition against unlawful purchase for resale, possession for sale, or sale of dangerous drugs. Violation is now punishable by a fine of not less than $100 nor more than $300 for a first offense, and a fine of not less than $300 nor more than $500 for a subsequent offense. This reply suggested that the dangerous drugs definitions section should include the hallucinogens, such as LSD, and make possession, sale, manufacturing, or trafficking in these drugs a felony.

A third reply expressed the view that Ohio should have a severe law banning possession or sale of LSD. He cited the Nevada and California laws and a proposal under consideration in Michigan as models. Reporting one arrest in 1965 concerning LSD, the Chief of the Intelligence and Security Division of Youngstown noted that the charge had been unlawful possession of a dangerous drug, under the unlawful possession prohibition which carries a maximum penalty of $300 fine.

One official finds Ohio laws concerning barbiturates adequate, but suggested the possible need for legislation pertaining to amphetamines. Another felt that the whole set of statutes covering barbiturates and other dangerous drugs should be reviewed because of present drug abuse. Particularly the illegal sale of any dangerous drug or the furnishing of any dangerous drug to a minor, he stated, should be a felony carrying a suitable penalty.

Only Cleveland and Toledo could report total arrests involving barbiturates and other dangerous drugs, and in Toledo figures were available only for the years 1961 through 1965. Arrests reported in Cleveland for the period from 1955 through 1965 reveal no particular trend. Arrests involving narcotics and drug confiscations, as reported by police officials surveyed, are reported in Chapter V of this report.

This report makes no estimate of the extent of LSD use in this state. Periodic reports of drug abuse, such as the recent report of drugs in the high schools of Cleveland suburbs, have involved "LSD substitutes" and have alarmed local officials.

Possible sources for information might be hospitals which would be willing to supply information on a voluntary basis. Because court records are not separately compiled for any current purpose, LSD cases could only be located by hours of search in court dockets. For larger dockets, even this procedure would not be feasible. Federal statistics may be forthcoming, but their reliability may depend upon state cooperation in the collection of data. Improved methods of data collection by the state could aid in determining the extent of the problem in Ohio.

References

1. Jeremy Larner, "The College Drug Scene," *Atlantic Monthly* (November, 1965), p. 127.
2. H. B. M. Murphy, "The Cannabis Habit," *Bulletin on Narcotics*, XV. No. 1 (published by the Dept. of Economic and Social Affairs, Div. of Narcotic Drugs, United Nations, March 1963), p. 15.
3. Alfred R. Lindesmith, *The Addict and the Law* (Bloomington, Indiana, 1965). pp. 241-242.
4. Reported in the *Journal of the American Medical Association*, August 8, 1966.
5. A subcommittee of the Senate Committee on Government Operations, May, 1966.
6. Richard Alpert and Sidney Cohen, *LSD* (New York, 1966), p. 78.
7. A public hearing before the New Jersey Legislature, May 4, 1966.

V. THE NEED FOR IMPROVED DATA COLLECTION

Research into the nature of addiction and existing patterns of drug distribution, coupled with a uniform system of reporting at the local level, could facilitate the establishment of drug control programs and provide means for evaluating their effectiveness.

Narcotics and the Law, by William Butler Eldridge, is the result of an American Bar Foundation study directed toward a limited exploration of the field of narcotic drug laws. It was prompted by the consideration of the subject by the Joint Committee of the American Bar Association and American Medical Association discussed earlier. The project involved a study of the laws and regulations, examination of literature, and an attempt to assemble statistical information from the states of Illinois, Michigan, Ohio, New Jersey, Missouri, California, and New York.

The book is a valuable source of recent information about the laws and practices in these selected states and provides an over-all evaluation and assessment of the American system. This work stresses, as does much of the literature, the misconceptions and insufficiency of information about drug control. The following indictment from the book is particularly pertinent to Ohio:

> The lack of accurate, complete, and fully-revealing statistics and data on the administration and effect of drug control policies in the United States is at one time understandable and astonishing. . . . The paucity of data is even more astonishing in the light of the many unqualified claims made in the name of severe mandatory sentences. Unfortunately, there is available much more opinion than fact.

A similar conclusion was reached at the April, 1963, National Narcotics Conference at the University of California at Los Angeles, where nationally known narcotics experts represented a variety of professions. Major papers presented at the Conference agreed with Francis A. Allen's views on the costs and consequences of current measures being applied in the narcotics area. He asserted that:

> . . . one of the most serious deficiencies of the American legislative process is the failure to provide machinery for the routine collection of data adequate for evaluation of existing regulatory measures and the consideration of new proposals. Nowhere are the consequences of these deficiencies more serious than in the area of narcotic control.

Several states have already recognized the importance of collecting statistical data on drug abuse. Since July 1, 1959, the Bureau of Criminal Statistics in the California Department of Justice has reported upon narcotic arrests, both in terms of types of arrests and number of persons arrested. Charted information is available regarding age, sex, criminal records (both general and narcotics criminal records), and particular offenses involved.

In 1954 a Commission on Narcotic Control was created in New Jersey. This Commission consists of five members appointed by the Governor, and is required by law to engage in continuous study of the laws of the state relating to narcotic drugs. Since its creation, it has annually reported the results of such studies along with recommendations.

New Jersey law requires that all persons who have been convicted of committing a narcotic offense must register with the Chief of Police of the municipality in which they reside or remain for more than 24 hours, or with the nearest state police office if no chief is employed. Another statute requires the clerks of all courts to report to the state police Bureau of Identitfication the sentence or disposition in every case of an offense against the narcotic laws. Data collected contains information on the social background, physical description, last narcotic offense of each person, and data on arrest history.

The compilation of data available enabled the New Jersey Drug Study Commission of the New Jersey Legislature to analyze the social characteristics of addicts and to survey the pattern of drug abuse in the state over an eleven-year period. Its Interim Report for 1963 contains the result of such analysis of the addicts who registered during this period. Among variables selected were sex, age, marital status, race, occupation and employment status at the time of registration, residence patterns, kinds of drugs

involved, types of offenses prior to violating the narcotic laws, and disposition upon conviction. Admittedly, the statistics compiled deal only with narcotic offenses which result in conviction. Nevertheless, New Jersey has been cited for having taken an important step by providing for the collection of data relevant to an assessment of its laws. It may provide a means of evaluating present policies at some future date and emphasize the need for even more comprehensive information.

In 1953 the Federal Bureau of Narcotics began to make a count of drug addicts in the United States, using information submitted to the Bureau by local law enforcement officials. The Bureau annually publishes a report entitled *Traffic in Opium and Other Dangerous Drugs*, which annually shows by state the number of newly reported addicts and the total reported active addict population as calculated by the Bureau. The manner in which this annual census is arrived at is not explained in the annual report. Newly reported addicts are apparently added to the total given for the previous year end, but some are apparently dropped. The national addict population as of December 31, 1963, was reported as 47,489. New addicts totalling 7,456 were reported in 1964. However, the addict population as of December 31, 1964, was reported as 48,535. The discrepancy between the reported number of active addicts (48,535) and the sum of the previous year's total and new addicts (47,489 and 7,456, or 54,945) is evidently explained by the elimination of addicts who have not remained active.

The annual report for 1963 states:

> Of the active addicts on December 31, 1963, 15,178 (31.3 per cent of the total) were first reported before 1959 and have remained active since. This "hard core" apparently constitutes the major part of the increment of addicts over 30 years during the last few years. The number under 30 has decreased during those years.

Criticizing an apparent assumption made by the Bureau that if an addict is using drugs he will be apprehended within five years, Alfred R. Lindesmith argues:

> . . . if the addict is not reported it is assumed that he is in prison, that he is dead, or that he has quit his habit—hence that he is no longer an "active addict. . . ."
>
> One does not know . . . whether an addict counted in 1953 and sent to prison for eight years would be counted as a "new addict" or a recidivist" if his name turned up again in 1961 long after it had been removed from the active list. Also, when the survey began in 1953 certainly there were many old-time addicts who must have appeared on the Bureau's list as "new addicts" and there must surely be persons of this sort showing up each year. The fact that an individual is listed as a "new addict" in the survey therefore has no necessary relationship whatever to the duration of his addiction or to his age, and the Bureau's annual totals of new addicts tell us nothing whatever about the rate at which people are becoming addicted.[1]

Lindesmith is not the only commentator to attack Bureau figures as imprecise. Eldridge argues that even if one accepts the scope of federal data for what it is—a source of comparison of activity in different states and chronological fluctuations — the lack of standard reporting methods casts doubt upon reliability of the information compiled.

The President's Advisory Commission on Narcotic and Drug Abuse, in 1963, noted that an obvious weakness inherent in such figures is that since their source is law enforcement officials, they may simply reflect changes in police activity. Moreover, Eldridge points out that the national figures are deficient because of the lack of uniform standards used to guide local reporting agencies. According to his correspondence and conversations with state and local officials, no method of standardization is furnished. In some instances, he reports, officials have erroneously included arrests for hypodermic paraphanalia, although such cases were to have been excluded. He adds that the federal report form excludes arrests and convictions in which federal officers participated, but does not define the term "participates." Other materials, according to Eldridge, showed that the breakdown actually referred to charges, not arrests. Variance in procedures regarding inclusion of cocaine and marihuana was also noted.

Ohio is a favorite subject in Federal Bureau of Narcotics publications. The Bureau's reply to the Report of the Joint Committee of the A.B.A. and A.M.A., as well as the 1958 and 1960 F.B.M. pamphlets on narcotic addiction, show by chart a reduction in active addicts reported in Ohio and other states in the years 1956 and 1958. The

F.B.N. cites these figures as demonstrative of the effectiveness of increased penalties under the Narcotic Control Act of 1956.

In Ohio, for example, the chart shows drug addicts reported in the year 1956 as 92, and in 1958 as 37. Lindesmith, however, contends that the Bureau's own figures may be used to create an opposite impression if other years are selected for comparison.[2] The number of addicts reported for 1959, for instance, was 31, and for 1960, the number reported was 59—an increase of 90 per cent.

Eldridge also questions the Bureau's use of figures.[3] He asserts that if narcotics *arrests* in Ohio are compared for 1956 and 1958, the result is as follows:

Year	Addicts Reported	Arrests
1956	92	364
1958	37	328

Nor are meaningful conclusions possible from examination of figures regarding Ohio in the federal report for the year ending December 31, 1964. New narcotic addicts reported in this state for the period 1960 through 1964 are:

Year	Addicts Reported
1960	59*
1961	66
1962	67
1963	105
1964	43

*Report shows that most addicts are addicted to codeine or paregoric.

Although, as noted, the figures and method of increase of penalties in 1955 indicates a decrease. gathering information have beeen questioned, the figures support authorities' claims that the addiction problem in Ohio is not as great as it was before the increase in penalties. New addicts reported to the Federal Bureau of Narcotics from 1954 through 1964 are shown in Table II.

TABLE II

NEW ADDICTS REPORTED TO THE FEDERAL BUREAU OF NARCOTICS

YEAR	NEW ADDICTS	YEAR	NEW ADDICTS
1954	308	1960	59
1955	328	1961	66
1956	92	1962	67
1957	70	1963	105
1958	38	1964	43
1959	31		

A. Gilmore Flues, Assistant Secretary of the Treasury under President Eisenhower, delivered an address at the 82nd Annual Meeting of the Ohio State Bar Association on May 10, 1962. Mr. Flues reported the number of "recorded addicts" on December 31, 1961, as 46,798 in the nation and 336 in Ohio. Although he used the term "recorded addicts," apparently referring to figures published in the Federal Bureau of Narcotics Annual Report, Mr. Flues pointed out that another 15,000 addicts may not be listed and that figures do not include marihuana. Generally, this last fact is insufficiently stressed. Information about fluctuations in marihuana violations in this state is not available from any source.

The Bureau of Research and Statistics of the Ohio Department of Mental Hygiene and Correction publishes judicial criminal statistics for the state. These publications annually reveal activity of the criminal courts in Ohio by offense charged, although they do not show particular offenses nor the length of sentences imposed.

The 1963 volume of Ohio Judicial Criminal Statistics shows the following drop in criminal cases filed involving violations of the narcotic drug laws:

Year	Violations
1956	272
1957	240
1958	197
1959	155
1960	277
1961	225
1962	239
1963	216

The report termed the table from which these figures were taken an excellent indicator of the volume of crime occurring. With respect to evaluating the data, this report pointed out:

> Although several offenses have declined considerably over the years, one that should be mentioned in particular, since it has been stressed several times in the past in this series of annual reports, is narcotic drug law filings. Although the 210 cases filed in 1963 was about 23 per cent fewer than the number filed in 1956, there has been no precipitous trend downward in narcotic drug filings.

According to Ohio Judicial Criminal Statistics for 1964, criminal cases filed involving narcotics rose to 316.

Police departments in eight major cities of Ohio were asked to supply data concerning drug arrests and drug confiscations. Results were disappointing. Reports on narcotic drug arrests were inconclusive, and very little information was available concerning arrests on charges involving other dangerous drugs.

This report serves as background—a first step in the consideration of a problem that although not demonstrable in absolute figures is evident because of the publicity it receives. Better statistical data is essential, and first-hand testimony of people close to the problem in Ohio could further contribute to the knowledge necessary to important policy considerations.

References

1. Alfred R. Lindesmith, *The Addict and the Law* (Bloomington, Indiana, 1965), p. 240.
2. Lindesmith, p. 118.
3. William B. Eldridge, *Narcotics and the Law*, published by the American Bar Assn. (New York University Press, 1962), p. 78.

Uniform Laws Annotated
Uniform Narcotic Drug Act 1932
as Last Amended in 1958

Unif.Narcotic Drug Act Refs & Annos
Currentness

Editors' Notes

TABLE OF JURISDICTIONS WHEREIN ACT HAS BEEN ADOPTED

Jurisdiction	Laws	Effective Date	Statutory Citation
Arkansas [1]	1937, No. 344		A.C.A. §§ 20-64-201 to 20-64-225.

PREFATORY NOTE

2001 Main Volume

The Uniform Narcotic Drug Act, adopted by the National Conference of Commissioners on Uniform State Laws in 1932, is an act which has received the study of the committee in charge and many experts for the past five years.

It is difficult for one not familiar with the subject to understand how many different organizations and associations have an interest in the provisions of this act. The fact was recognized in drafting that a social problem, as well as an economic question, was involved, and that the act must protect those using narcotic drugs legally, as well as provide punishment for those using such drugs illegally. Manufacturers, wholesalers, retailers, apothecaries, doctors, dentists, interns and attendants had to be protected in their legitimate use of the substances known as narcotic drugs. The idea was never absent, however, that those who were protected in the use of drugs by the act might in some cases use such drugs illegally. The committee also had to learn something of the medical effects of opium, coca leaves, cannabis and their derivatives, in order better to frame an act that would be enforceable.

Provisions in regard to addiction and search and seizure were omitted from this act, so that each state might provide its own method for the care and cure of addicts, and methods by which drugs used in illegal traffic might be forfeited. In consideration of the subject of addiction, it was evident that each state, in order to care for its addicts, must expend quite a large amount of money for hospital service. The subject of addiction and its cure, however, is so important that no state should delay in making immediate and thorough study of this great social problem. As each state now has in its laws some provisions for search, seizure and forfeiture, it was deemed best that each state provide such methods for search, seizure and forfeiture as would best harmonize with its constitution and laws already enacted.

The committee took into consideration the fact that the federal government had already passed the Harrison Act [26 U.S.C.A. former § 2550 et seq.] and the Federal Import and Export Act [21 U.S.C.A. former § 171 et seq.]. Many persons have assumed that the Harrison Act was all that was necessary. The Harrison Act, however, is a revenue producing act, and while it provides penalties for violation, it does not give the states themselves authority to exercise police power in regard to seizure of drugs used in illicit trade, or in regard to punishment of those responsible therefor. Every provision which would cause duplication of records was omitted from the act, and a section was inserted providing against double jeopardy.

Great care had to be exercised not to violate the provisions of any treaties between the United States and foreign countries in regard to traffic in narcotic drugs.

The demand for uniform state legislation on this subject was very extensive. It was argued that the traffic in narcotic drugs should have the same safeguards and the same regulation in all of the states. This act is recommended to the states for that purpose.

SUPPLEMENTARY PREFATORY NOTE WITH RESPECT TO AMENDMENTS ADOPTED IN 1942

2001 Main Volume

In amending the Act the Conference added subdivisions (13) and (14) of Section 1 of the Act. The reason for adding these amendments appears in the "Supplementary Comment of 1942" which appears after Section 1. The Conference also amended subd. (2)(b) of Section 5 and subd. (5) of Section 5. The reasons for these amendments appear in the "Comment of 1942," which appears after Section 5. The Conference also amended Section 8 of the Act, the reasons therefor being set forth in the "Comment of 1942" which appears after Section 8.

The Conference also amended subd. (5) of Section 9 of the Act as originally drafted by adding at the end of the first sentence of subd. (5) of Section 9 the language "and the proportion of resin contained in or producible from the plant Cannabis Sativa L." The reason for this amendment was to make subd. (5) of Section 9 conform to subd. (14) of Section 1.

Footnotes

1 Note that Arkansas has adopted and retains the major provisions of both the Uniform Narcotic Drug Act and the Uniform Controlled Substances Acts. See the General Statutory Note, post.

Uniform Laws Annotated
Uniform Narcotic Drug Act 1932
as Last Amended in 1958 (Refs & Annos)

Unif.Narcotic Drug Act § 1

§ 1. Definitions.

Currentness

The following words and phrases, as used in this act, shall have the following meanings, unless the context otherwise requires:

(1) “Person” includes any corporation, association, copartnership, or one or more individuals.

(2) “Physician” means a person authorized by law to practice medicine in this state and any other person authorized by law to treat sick and injured human beings in this state and to use narcotic drugs in connection with such treatment.

(3) “Dentist” means a person authorized by law to practice dentistry in this state.

(4) “Veterinarian” means a person authorized by law to practice veterinary medicine in this state.

(5) “Manufacturer” means a person who by compounding, mixing, cultivating, growing, or other process, produces or prepares narcotic drugs, but does not include an apothecary who compounds narcotic drugs to be sold or dispensed on prescriptions.

(6) “Wholesaler” means a person who supplies narcotic drugs that he himself has not produced nor prepared, on official written orders, but not on prescriptions.

(7) “Apothecary” means a licensed pharmacist as defined by the laws of this state and, where the context so requires, the owner of a store or other place of business where narcotic drugs are compounded or dispensed by a licensed pharmacist; but nothing in this act shall be construed as conferring on a person who is not registered nor licensed as a pharmacist any authority, right, or privilege, that is not granted to him by the pharmacy laws of this state.

(8) “Hospital” means an institution for the care and treatment of the sick and injured, approved by [Insert here proper official designation of state officer or board] as proper to be entrusted with the custody of narcotic drugs and the professional use of narcotic drugs under the direction of a physician, dentist, or veterinarian.

(9) “Laboratory” means a laboratory approved by [Insert here proper official designation of state officer or board] as proper to be entrusted with the custody of narcotic drugs and the use of narcotic drugs for scientific and medical purposes and for purposes of instruction.

(10) “Sale” includes barter, exchange, or gift, or offer therefor, and each such transaction made by any person, whether as principal, proprietor, agent, servant, or employee.

(11) “Coca leaves” includes cocaine and any compound, manufacture, salt, derivative, mixture, or preparation of coca leaves, except derivatives of coca leaves which do not contain cocaine, ecgonine, or substances from which cocaine or ecgonine may be synthesized or made.

(12) “Opium” includes morphine, codeine, and heroin, and any compound, manufacture, salt, derivative, mixture, or preparation of opium, but does not include apomorphine or any of its salts.

(13) “Cannabis” includes all parts of the plant Cannabis Sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin; but shall not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

(14) [Alternate 1] “Narcotic drugs” means coca leaves, opium, cannabis, and every other substance neither chemically nor physically distinguishable from them, and any other drugs, the importation, exportation or possession of which is prohibited, regulated or limited under the Federal Narcotic Laws, as existent on the date of the event to which this statute is to be applied.

(14) [Alternate 2] “Narcotic drugs” means coca leaves, opium, cannabis, and every other substance neither chemically nor physically distinguishable from them; and any other drugs the importation, exportation or possession of which is prohibited, regulated or limited under the Federal Narcotic Laws presently in force and effect or any other drug which is defined as a narcotic drug by order of the (State Commissioner of Health). In the formulation of definitions of narcotic drugs, the (State Commissioner of Health) is directed to include all drugs which (he) finds are narcotic in character and by reason thereof are dangerous to the public health or are promotive of addiction-forming or addiction-sustaining results upon the user which threaten harm to the public health, safety or morals. In formulating these definitions, the (State Commissioner of Health) shall take into consideration the provisions of the Federal Narcotic Laws as they exist from time to time, and shall amend the definitions so as to keep them in harmony with the definitions prescribed by the Federal Narcotic Laws, so far as is possible under the standards established herein and under the policy of this Act.

(15) “Federal Narcotic Laws” means the laws of the United States relating to opium, coca leaves, and other narcotic drugs.

(16) “Official Written Order” means an order written on a form provided for that purpose by the United States Commissioner of Narcotics, under any laws of the United States making provision therefor, if such order forms are authorized and required by federal law, and if no such order form is provided, then on an official form provided for that purpose by (Insert here proper official designation of state officer or board).

(17) “Dispense” includes distribute, leave with, give away, dispose of, or deliver.

(18) “Registry number” means the number assigned to each person registered under the Federal Narcotic Laws.

Credits

As amended in 1942, 1952, and 1958.

Editors' Notes

COMMENT (1942)

2001 Main Volume

When the Uniform Law was being drafted by the Conference of Commissioners on Uniform State Laws, certain optional provisions were inserted as footnotes to the regular text for consideration in the event the State Legislature wished to extend the plan of narcotic drug control to cannabis. Thus the first of these optional provisions represented a definition of cannabis as the dried flowering or fruiting tops of the pistillate (female) plant, Cannabis Sativa L., etc. At that time it was assumed that the dangerous drug principle of the plant was limited to the flowering tops of the female plant. Subsequently, however, it has been definitely established that this dangerous drug principle is contained also in the leaves or foilage of both the female and male plants of cannabis. Consequently when the Federal Marihuana Tax Act of 1937 was enacted, there was contained in Section 1(b) [26 U.S.C.A. § 3238, now § 4761] an all-inclusive definition of marihuana (cannabis) which in effect exempts from the operation of the law only the matured stalks of the plant, the devitalized seed and seed products. It is obvious that in order to be effective as a drug control measure, the Uniform State Narcotic Law should be made to apply to all the potentially dangerous parts of the cannabis plant, and to accomplish this purpose, the revised definition of cannabis, in conformity with the definition in the Federal Law, [26 U.S.C.A. § 3238, now § 4761] has been prepared and has been inserted in the text.

COMMENT (1952)

2001 Main Volume

This suggested revision of Section 1(14) of the Uniform Narcotic Drug Act would add to the definition of “narcotic drugs” covered by the act, any drugs to which the Federal laws on the subject now apply, and any drug which may be found by the State Commissioner of Health or other competent state officer to have an addiction-forming or addiction-sustaining liability.

This amendment has been proposed by the Bureau of Narcotics of the U.S. Treasury Department as a result of the discovery and development in recent years of various synthetically produced drugs which create or sustain drug addiction. The Narcotics Bureau recommends enactment of this amendment by the several states in order that the provisions of their narcotic drug laws may cover the same drugs covered by Federal laws and also to provide a means by which additional synthetics may be added from time to time as their discovery and development may make necessary.

No states have enacted legislation exactly similar to this proposed amendment. However, the following twenty-five states and one territory have adopted amendments to their narcotic drug laws which apply to one or more of the synthetics, indicating the growing awareness of the need for covering synthetic drugs which have been or in the future may be released commercially: Alabama, California, Colorado, Connecticut, Florida, Georgia, Illinois, Iowa, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New York, North Dakota, Oregon, Pennsylvania, South Carolina, South Dakota, Vermont, Virginia, Wisconsin and the Territory of Alaska.

COMMENT (1958)

2001 Main Volume

The first suggested revision of Section 1(14) of the Uniform Narcotic Drug Act, as amended, would add to the definition of "narcotic drugs" covered by the Act any drugs to which the Federal Laws on the Subject now apply or to which such Federal Laws might prove applicable at the time of the occurrence of any event to which this statute may be applied. In other words, such an amendment would apply to the laws of the United States presently in force and effect or such laws as the same are or may hereafter be modified or changed.

The second [alternative] suggested revision of Section 1(14) is made in order to avoid, if possible, constitutional questions in those states where the adoption of Federal Laws and regulations to be imposed in the future would be regarded as an unconstitutional delegation of legislative authority. If the governmental agency in charge is authorized to keep the definitions of the law in harmony with Federal enactments concerning narcotics, presumably the constitutional difficulty will be eliminated. Cf. U.S. v. Howard, 77 S.Ct. 303, 352 U.S. 212, 1 L.Ed.2d 261.

LAW REVIEW AND JOURNAL COMMENTARIES

Cannabis, a forensic--medical review. John J. Cohrssen and Carl M. Lieberman. 24 Sw.L.J. 446 (1970).
Criminal law reform--1971. 45 Fla.B.J. 405 (1971).
Dangerous drug legislation in the United States: Recommendations and comments. Michael P. Rosenthal. 45 Tex.L.Rev. 1037 (1967).
Death penalty for unlawful sale of narcotics to minors. 6 U.Fla.L.Rev. 247 (1953).
Drug abuse prevention and control act of 1970. Thomas G. Sharpe, Jr. 34 Tex.B.J. 397 (1971).
Drugs and the law. T.C. Clark. 18 Loy.L.Rev. 243 (1971-1972).
Governmental enforcement powers in the regulation of the drug industry. S. David Blinn. 245 Sw.L.J. 500 (1970).
Narcotic conviction and the youthful offender. Michael A. Curtis. 5 Ariz.B.J. 5 (1969).
Narcotic drug laws of Missouri. Roy F. Proffitt. 17 Mo.L.Rev. 252 (1952).
See, also, the Law Review and Journal Commentaries following section 101 of the Controlled Substances Act (1994) in Volume 9, Part II of Uniform Laws Annotated.

LIBRARY REFERENCES

2001 Main Volume

Drugs and Narcotics 41, 42.

Statutes 179.

Westlaw Topic Nos. 138, 361.

C.J.S. Drugs and Narcotics §§ 2 to 5, 117 to 119, 123, 128.

C.J.S. Statutes §§ 306, 309.

Notes of Decisions (190)

Unif. Narcotic Drug Act § 1, ULA NARC DRUG § 1

End of Document

Uniform Laws Annotated
Uniform Narcotic Drug Act 1932
as Last Amended in 1958 (Refs & Annos)

Unif.Narcotic Drug Act § 2

§ 2. Acts Prohibited.

Currentness

It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug, except as authorized in this act.

Editors' Notes

LIBRARY REFERENCES

2001 Main Volume

Drugs and Narcotics 61 to 70.

Westlaw Topic No. 138.

C.J.S. Drugs and Narcotics §§ 156, 158 to 160, 162 to 182, 187, 189 to 191, 193, 196 to 197, 231.

Notes of Decisions (2767)

Unif. Narcotic Drug Act § 2, ULA NARC DRUG § 2

End of Document

Uniform Laws Annotated
Uniform Narcotic Drug Act 1932
as Last Amended in 1958 (Refs & Annos)

Unif.Narcotic Drug Act § 3

§ 3. Manufacturers and Wholesalers.

Currentness

No person shall manufacture, compound, mix, cultivate, grow, or by any other process produce or prepare narcotic drugs, and no person as a wholesaler shall supply the same, without having first obtained a license so to do from the [Insert here proper official designation of state officer or board].

Editors' Notes

LIBRARY REFERENCES

2001 Main Volume

Drugs and Narcotics 12.1, 13, 42, 46, 68.1, 69, 75.

Westlaw Topic No. 138.

C.J.S. Drugs and Narcotics §§ 2 to 6, 31 to 38, 40 to 41, 117 to 119, 122 to 125, 128, 158 to 159, 163, 165, 173 to 174, 178 to 179, 181 to 182, 193.

Unif. Narcotic Drug Act § 3, ULA NARC DRUG § 3

End of Document

Uniform Laws Annotated
Uniform Narcotic Drug Act 1932
as Last Amended in 1958 (Refs & Annos)

Unif.Narcotic Drug Act § 4

§ 4. Qualification for Licenses.

Currentness

No license shall be issued under the foregoing section unless and until the applicant therefor has furnished proof satisfactory to [Insert here proper official designation of state officer or board].

(a) That the applicant is of good moral character or, if the applicant be an association or corporation, that the managing officers are of good moral character.

(b) That the applicant is equipped as to land, buildings, and paraphernalia properly to carry on the business described in his application.

No license shall be granted to any person who has within five years been convicted of a willful violation of any law of the United States, or of any state, relating to opium, coca leaves, or other narcotic drugs, or to any person who is a narcotic drug addict.

The [Insert here proper official designation of state officer or board] may suspend or revoke any license for cause.

Editors' Notes

LIBRARY REFERENCES

2001 Main Volume

Drugs and Narcotics 12.1, 14, 42, 46.

Westlaw Topic No. 138.

C.J.S. Drugs and Narcotics §§ 2 to 5, 30 to 38, 40 to 41, 117 to 119, 122 to 125, 128 to 130, 133, 158, 163, 173 to 174.

Unif. Narcotic Drug Act § 4, ULA NARC DRUG § 4

End of Document

Uniform Laws Annotated
Uniform Narcotic Drug Act 1932
as Last Amended in 1958 (Refs & Annos)

Unif.Narcotic Drug Act § 5

§ 5. Sale on Written Orders.

Currentness

(1) A duly licensed manufacturer or wholesaler may sell and dispense narcotic drugs to any of the following persons, but only on official written orders:

(a) To a manufacturer, wholesaler, or apothecary.

(b) To a physician, dentist, or veterinarian.

(c) To a person in charge of a hospital, but only for use by or in that hospital.

(d) To a person in charge of a laboratory, but only for use in that laboratory for scientific and medical purposes.

(2) A duly licensed manufacturer or wholesaler may sell narcotic drugs to any of the following persons:

(a) On a special written order accompanied by a certificate of exemption, as required by the Federal Narcotic Laws, to a person in the employ of the United States Government or of any state, territorial, district, county, municipal, or insular government, purchasing, receiving, possessing, or dispensing narcotic drugs by reason of his official duties.

(b) To a master of a ship or a person in charge of any aircraft upon which no physician is regularly employed, or to a physician or surgeon duly licensed in some State, Territory, or the District of Columbia to practice his profession, or to a retired commissioned medical officer of the United States Army, Navy, or Public Health Service employed upon such ship or aircraft, for the actual medical needs of persons on board such ship or aircraft, when not in port. *Provided:* Such narcotic drugs shall be sold to the master of such ship or person in charge of such aircraft or to a physician, surgeon, or retired commissioned medical officer of the United States Army, Navy, or Public Health Service employed upon such ship or aircraft only in pursuance of a special order form approved by a commissioned medical officer or acting assistant surgeon of the United States Public Health Service.

(c) To a person in a foreign country if the provisions of the Federal Narcotic Laws are complied with.

(3) Use of Official Written Orders. An official written order for any narcotic drug shall be signed in duplicate by the person giving said order or by his duly authorized agent. The original shall be presented to the person who sells or dispenses the narcotic drug or drugs named therein. In event of the acceptance of such order by said person, each party to the transaction shall preserve

his copy of such order for a period of two years in such a way as to be readily accessible for inspection by any public officer or employee engaged in the enforcement of this act. It shall be deemed a compliance with this subsection if the parties to the transaction have complied with the Federal Narcotic Laws, respecting the requirements governing the use of order forms.

(4) Possession Lawful. Possession of or control of narcotic drugs obtained as authorized by this section shall be lawful if in the regular course of business, occupation, profession, employment, or duty of the possessor.

(5) A person in charge of a hospital or of a laboratory, or in the employ of this state or of any other state, or of any political subdivision thereof or a master of a ship or a person in charge of any aircraft upon which no physician is regularly employed, or a physician or surgeon duly licensed in some State, Territory, or the District of Columbia, to practice his profession, or a retired commissioned medical officer of the United States Army, Navy, or Public Health Service employed upon such ship or aircraft who obtains narcotic drugs under the provisions of this section or otherwise, shall not administer, nor dispense, nor otherwise use such drugs within this state, except within the scope of his employment or official duty, and then only for scientific or medicinal purposes and subject to the provisions of this act.

Credits
As amended in 1942.

Editors' Notes

COMMENT (1942)

2001 Main Volume

Under subd. (2)(b) of Section 5 of the Uniform Narcotic Drug Act, as originally drafted, the master of a ship, or a person in charge of any aircraft (upon which no physician is employed) may obtain narcotics for actual medical needs of persons on board such ship or aircraft when not in port, upon a special order form provided by a commissioned medical officer or acting assistant surgeon of the United States Public Health Service. The master of the ship or person in charge of aircraft cannot so obtain narcotics when a physician is employed upon the ship or aircraft. The physician can only obtain narcotics for use on board ship or aircraft in an irregular manner; that is, pursuant to an official order form issued by the collector of internal revenue under which the narcotics can be delivered only to the registered address indicated thereon, which may be a considerable distance from the port. The proposed amendment authorizes the sale of drugs by a manufacturer or wholesaler to a physician or retired commissioned medical officer of the United States Army, Navy or Public Health Service employed upon such ship or aircraft in pursuance of a special order form which had been procured from a commissioned medical officer or acting assistant surgeon of the United States Public Health Service.

The proposed amendment of subd. (5) of Section 5 of the Uniform Narcotic Drug Act authorizes the administering or dispensing of the narcotics obtained in pursuance of the special order form approved by the commissioned medical officer or acting assistant surgeon of the Public Health Service only on board the vessel or aircraft.

LIBRARY REFERENCES

2001 Main Volume

Drugs and Narcotics 13, 16, 42, 46, 68.1, 75.

Westlaw Topic No. 138.

C.J.S. Drugs and Narcotics §§ 2 to 6, 31 to 38, 40 to 41, 45 to 47, 49, 117 to 119, 122 to 125, 128, 158, 163, 165, 173 to 174, 178, 181 to 182.

Unif. Narcotic Drug Act § 5, ULA NARC DRUG § 5

Uniform Laws Annotated
Uniform Narcotic Drug Act 1932
as Last Amended in 1958 (Refs & Annos)

Unif.Narcotic Drug Act § 6

§ 6. Sales by Apothecaries.

Currentness

(1) An apothecary, in good faith, may sell and dispense narcotic drugs to any person upon a written prescription of a physician, dentist, or veterinarian, dated and signed by the person prescribing on the day when issued and bearing the full name and address of the patient for whom, or of the owner of the animal for which, the drug is dispensed, and the full name, address, and registry number under the Federal Narcotic Laws of the person prescribing, if he is required by those laws to be so registered. If the prescription be for an animal, it shall state the species of animal for which the drug is prescribed. The person filling the prescription shall write the date of filling and his own signature on the face of the prescription. The prescription shall be retained on file by the proprietor of the pharmacy in which it is filled for a period of two years, so as to be readily accessible for inspection by any public officer or employee engaged in the enforcement of this act. The prescription shall not be refilled.

(2) The legal owner of any stock of narcotic drugs in a pharmacy, upon discontinuance of dealing in said drugs, may sell said stock to a manufacturer, wholesaler, or apothecary, but only on an official written order.

(3) An apothecary, only upon an official written order, may sell to a physician, dentist, or veterinarian, in quantities not exceeding one ounce at any one time, aqueous or oleaginous solutions of which the content of narcotic drugs does not exceed a proportion greater than twenty per cent of the complete solution, to be used for medical purposes.

Editors' Notes

LIBRARY REFERENCES

2001 Main Volume

Drugs and Narcotics 16, 47, 68.1, 75.

Westlaw Topic No. 138.

C.J.S. Drugs and Narcotics §§ 6, 45 to 47, 49, 126 to 127, 158, 163, 165, 178, 181 to 182.

Notes of Decisions (6)

Unif. Narcotic Drug Act § 6, ULA NARC DRUG § 6

End of Document

Uniform Laws Annotated
Uniform Narcotic Drug Act 1932
as Last Amended in 1958 (Refs & Annos)

Unif.Narcotic Drug Act § 7

§ 7. Professional Use of Narcotic Drugs.

Currentness

(1) Physicians and Dentists. A physician or a dentist, in good faith and in the course of his professional practice only, may prescribe, administer, and dispense narcotic drugs, or he may cause the same to be administered by a nurse or intern under his direction and supervision.

(2) Veterinarians. A veterinarian, in good faith and in the course of his professional practice only, and not for use by a human being, may prescribe, administer, and dispense narcotic drugs, and he may cause them to be administered by an assistant or orderly under his direction and supervision.

(3) Return of Unused Drugs. Any person who has obtained from a physician, dentist, or veterinarian any narcotic drug for administration to a patient during the absence of such physician, dentist, or veterinarian, shall return to such physician, dentist, or veterinarian any unused portion of such drug, when it is no longer required by the patient.

Editors' Notes

LIBRARY REFERENCES

2001 Main Volume

Drugs and Narcotics 46, 61, 76, 78.

Westlaw Topic No. 138.

C.J.S. Drugs and Narcotics §§ 2 to 5, 119, 122, 124 to 125, 156, 158 to 160, 162 to 165, 173 to 174, 183 to 185, 187, 193, 195, 214 to 217.

Notes of Decisions (25)

Unif. Narcotic Drug Act § 7, ULA NARC DRUG § 7

End of Document

Uniform Laws Annotated
Uniform Narcotic Drug Act 1932
as Last Amended in 1958 (Refs & Annos)

Unif.Narcotic Drug Act § 8

§ 8. Preparations Exempted.

Currentness

(a) Except as otherwise in this Act specifically provided, this Act shall not apply to the following cases:

(1) Administering, dispensing or selling at retail any drug subject to this Act under any circumstances that the (State Commissioner of Health or other competent state officer) determines, after reasonable notice and opportunity for hearing, not to be dangerous to the public health, or promotive of addiction-forming or addiction-sustaining results upon the user, or harmful to the public health, safety or morals, and by order so proclaims. In arriving at his determination, the (State Commissioner of Health or other competent state officer) shall consult with the Bureau of Narcotics of the Treasury Department of the United States and give due weight to its investigations and determinations;

(2) Administering, dispensing, or selling at retail any medicinal preparation that contains in one fluid ounce, or if a solid or semi-solid preparation, in one avoirdupois ounce, not more than one grain of codeine or of any of its salts, nor more than one-sixth grain of dihydrocodeinone or any of its salts. The exemptions authorized by this subsection are subject to the following conditions: (a) that the medicinal preparation administered, dispensed, or sold, contains, in addition to the narcotic drug in it, some drug or drugs conferring upon it medicinal qualities other than those possessed by the narcotic drug alone; and (b) that the preparation is administered, dispensed, and sold in good faith as a medicine and not for the purpose of evading the provisions of this act.

(b) Nothing in this section shall limit the quantity of codeine or of any of its salts that may be prescribed, administered, dispensed, or sold, to any person or for the use of any person or animal, when it is prescribed, administered, dispensed, or sold, in compliance with the general provisions of this act.

Credits
As amended in 1942, 1952, and 1958.

Editors' Notes

COMMENT (1942)

2001 Main Volume

Section 8 of the Uniform Narcotic Drug Act in its original form exempts from the general requirements of that law preparations which contain certain small proportions of narcotics, putting all other preparations in the prescription class. This provision may now be deemed too liberal in view of existing world conditions. Every effort should be made to conserve the quantity of narcotics on hand for legitimate medical purposes. Persons addicted to the use of narcotics who do not have a medical need therefor had had increasing difficulty in obtaining a supply of narcotics from illicit sources. As a result they have turned to druggists and are

obtaining their narcotic dosage through the purchase of narcotic preparations conditionally exempted from the operation of the Uniform Act by Section 8 thereof. There has been a large increase in the number of cases reported against druggists for violation of the Federal narcotic law. The majority of these cases indicate that the druggists were selling preparations conditionally exempted from the provisions of the law to persons who do not have a medical need for the same. Many of the reports indicate that the druggists were wilfully violating the law for monetary gain only, as evidenced in part by the large volume sold, while in other cases the violation could be considered as resulting from negligence rather than wilfullness. For example, many addicts are obtaining large quantities of paregoric by going from one pharmacy to another and not entering one apothecary the second time until they have covered all pharmacies at which the preparation is obtainable. In this manner their names do not appear so often on the records of any one pharmacy. They often obtain paregoric on more than one occasion on the same date from the same pharmacy, usually, however, from different employees thereof, sometimes by the use of the same name, but more often by giving fictitious names.

The proposed revision should have the effect of conserving the supply of opium and opium derivatives on hand as well as drastically reducing the possibility of sale of the narcotic-containing preparations for abusive use. It will be noted that the revision still permits the sale, without written prescription, of preparations containing not more than one grain of codeine to the ounce as this classification includes many commonly-used cough preparations concerning which there has been no evidence of abusive use.

COMMENT (1952)

2001 Main Volume

The Uniform Narcotic Drug Act was amended by the National Conference of Commissioners on Uniform State Laws in 1942 in such a manner as to restrict the sale of narcotic drugs, without prescription, to preparations containing not more than one grain of codeine to the ounce (Section 8) since this classification includes many commonly-used cough preparations concerning which there had been no evidence of abusive use. Thus the dispensation of the more dangerous drugs such as opium, morphine, and heroin and sales of preparations such as paregoric were made subject to sale by prescription.

The Federal Bureau of Narcotics recommends that dihydrocodeinone, a comparatively new codeine derivative found useful in the treatment of cough, be added to the exempt classification but only to the extent of $^{1}/_{6}$ -grain of dihydrocodeinone to the ounce because this drug is about six times as potent as codeine and, reputedly, more dangerous than codeine with reference to addiction liability.

No states have adopted the proposed amendment in its entirety. However, eleven states--Colorado, Iowa, Kentucky, Louisiana, Minnesota, Montana, North Dakota, Oregon, South Dakota, Vermont, Wisconsin and Alaska--have acted to limit the exemption to preparations containing not more than one grain of codeine to the ounce; and five states--Arkansas, Maryland, Nebraska, Rhode Island, and Tennessee--while not enacting the amendment have deferred to the principle by restricting the exempt classification in other ways.

COMMENT (1958)

2001 Main Volume

The above amendment [adding subd. (a)(1)] is suggested to circumvent in so far as possible any difficulty which may arise as to changing exemptions from time to time.

LIBRARY REFERENCES

2001 Main Volume

Drugs and Narcotics 45.1, 46, 66, 68.1.

Westlaw Topic No. 138.

C.J.S. Drugs and Narcotics §§ 2 to 5, 119, 122 to 125, 158, 163, 172 to 174, 178, 181 to 182, 187, 197, 269.

Notes of Decisions (12)

Unif. Narcotic Drug Act § 8, ULA NARC DRUG § 8

End of Document

Uniform Laws Annotated
Uniform Narcotic Drug Act 1932
as Last Amended in 1958 (Refs & Annos)

Unif.Narcotic Drug Act § 9

§ 9. Record to be Kept.

Currentness

(1) Physicians, Dentists, Veterinarians, and Other Authorized Persons. Every physician, dentist, veterinarian, or other person who is authorized to administer or professionally use narcotic drugs, shall keep a record of such drugs received by him, and a record of all such drugs administered, dispensed, or professionally used by him otherwise than by prescription. It shall, however, be deemed a sufficient compliance with this subsection if any such person using small quantities of solutions or other preparations of such drugs for local application, shall keep a record of the quantity, character, and potency of such solutions or other preparations purchased or made up by him, and of the dates when purchased or made up, without keeping a record of the amount of such solution or other preparation applied by him to individual patients.

Provided : That no record need be kept of narcotic drugs administered, dispensed, or professionally used in the treatment of any one patient, when the amount administered, dispensed, or professionally used for that purpose does not exceed in any forty-eight consecutive hours (a) four grains of opium, or (b) one-half of a grain of morphine or of any of its salts, or (c) two grains of codeine or of any of its salts, or (d) one-fourth of a grain of heroin or of any of its salts, or (e) a quantity of any other narcotic drug or any combination of narcotic drugs that does not exceed in pharmacologic potency any one of the drugs named above in the quantity stated.

(2) Manufacturers and Wholesalers. Manufacturers and wholesalers shall keep records of all narcotic drugs compounded, mixed, cultivated, grown, or by any other process produced or prepared, and of all narcotic drugs received and disposed of by them, in accordance with the provisions of subsection 5 of this section.

(3) Apothecaries. Apothecaries shall keep records of all narcotic drugs received and disposed of by them, in accordance with the provisions of subsection 5 of this section.

(4) Vendors of Exempted Preparations. Every person who purchases for resale, or who sells narcotic drug preparations exempted by Section 8 of this act, shall keep a record showing the quantities and kinds thereof received and sold, or disposed of otherwise, in accordance with the provisions of subsection 5 of this section.

(5) Form and Preservation of Records. The form of records shall be prescribed by the [Insert here proper official designation of state officer or board]. The record of narcotic drugs received shall in every case show the date of receipt, the name and address of the person from whom received, and the kind and quantity of drugs received; the kind and quantity of narcotic drugs produced or removed from process of manufacture, and the date of such production or removal from process of manufacture; and the record shall in every case show the proportion of morphine, cocaine, or ecgonine contained in or producible from crude opium or coca leaves received or produced and the proportion of resin contained in or producible from the plant Cannabis Sativa L. The record of all narcotic drugs sold, administered, dispensed, or otherwise disposed of, shall show the date of selling, administering, or dispensing, the name and address of the person to whom, or for whose use, or the owner and species of animal for which the drugs were sold, administered or dispensed, and the kind and quantity of drugs. Every such record shall be kept for a period of

two years from the date of the transaction recorded. The keeping of a record required by or under the Federal Narcotic Laws, containing substantially the same information as is specified above, shall constitute compliance with this section, except that every such record shall contain a detailed list of narcotic drugs lost, destroyed, or stolen, if any, the kind and quantity of such drugs, and the date of the discovery of such loss, destruction, or theft.

Credits
As amended in 1942.

Editors' Notes

COMMENT (1942)

2001 Main Volume

The Conference amended paragraph (5) by adding to the second sentence therein "and the proportion of resin contained in or producible from the plant Cannabis Sativa L." The reason for this amendment was to make said paragraph conform to paragraph (14) of section 1.

LIBRARY REFERENCES

2001 Main Volume

Drugs and Narcotics 47, 75.

Westlaw Topic No. 138.

C.J.S. Drugs and Narcotics §§ 126 to 127, 165.

Notes of Decisions (12)

Unif. Narcotic Drug Act § 9, ULA NARC DRUG § 9

End of Document

Uniform Laws Annotated
Uniform Narcotic Drug Act 1932
as Last Amended in 1958 (Refs & Annos)

Unif.Narcotic Drug Act § 10

§ 10. Labels.

Currentness

(1) Whenever a manufacturer sells or dispenses a narcotic drug, and whenever a wholesaler sells or dispenses a narcotic drug in a package prepared by him, he shall securely affix to each package in which that drug is contained a label showing in legible English the name and address of the vendor and the quantity, kind, and form of narcotic drug contained therein. No person except an apothecary for the purpose of filling a prescription under this act, shall alter, deface, or remove any label so affixed.

(2) Whenever an apothecary sells or dispenses any narcotic drug on a prescription issued by a physician, dentist, or veterinarian, he shall affix to the container in which such drug is sold or dispensed, a label showing his own name, address, and registry number, or the name, address, and registry number of the apothecary for whom he is lawfully acting; the name and address of the patient or, if the patient is an animal, the name and address of the owner of the animal and the species of the animal; the name, address, and registry number of the physician, dentist, or veterinarian, by whom the prescription was written; and such directions as may be stated on the prescription. No person shall alter, deface, or remove any label so affixed.

Editors' Notes

LIBRARY REFERENCES

2001 Main Volume

Drugs and Narcotics 11, 16, 45.1.

Westlaw Topic No. 138.

C.J.S. Drugs and Narcotics §§ 2 to 10, 29 to 30, 33, 39 to 40, 45 to 47, 49, 119, 122 to 123, 158, 163, 269.

Unif. Narcotic Drug Act § 10, ULA NARC DRUG § 10

End of Document

Uniform Laws Annotated
Uniform Narcotic Drug Act 1932
as Last Amended in 1958 (Refs & Annos)

Unif.Narcotic Drug Act § 11

§ 11. Authorized Possession of Narcotic Drugs by Individuals.

Currentness

A person to whom or for whose use any narcotic drug has been prescribed, sold, or dispensed, by a physician, dentist, apothecary, or other person authorized under the provisions of Section 5 of this act, and the owner of any animal for which any such drug has been prescribed, sold, or dispensed, by a veterinarian, may lawfully possess it only in the container in which it was delivered to him by the person selling or dispensing the same.

Editors' Notes

COMMENT

2001 Main Volume

It is recommended by the committee that each state provide its own method of search, seizure, and forfeiture, of narcotic drugs.

LIBRARY REFERENCES

2001 Main Volume

Drugs and Narcotics 62.1, 76, 78.

Westlaw Topic No. 138.

C.J.S. Drugs and Narcotics §§ 158, 166, 175, 183 to 185, 187, 193, 195, 214 to 217.

Notes of Decisions (8)

Unif. Narcotic Drug Act § 11, ULA NARC DRUG § 11

End of Document

Uniform Laws Annotated
Uniform Narcotic Drug Act 1932
as Last Amended in 1958 (Refs & Annos)

Unif.Narcotic Drug Act § 12

§ 12. Persons and Corporations Exempted.

Currentness

The provisions of this act restricting the possessing and having control of narcotic drugs shall not apply to common carriers or to warehousemen, while engaged in lawfully transporting or storing such drugs, or to any employee of the same acting within the scope of his employment; or to public officers or their employees in the performance of their official duties requiring possession or control of narcotic drugs; or to temporary incidental possession by employees or agents of persons lawfully entitled to possession, or by persons whose possession is for the purpose of aiding public officers in performing their official duties.

Editors' Notes

LIBRARY REFERENCES

2001 Main Volume

Drugs and Narcotics 76.

Westlaw Topic No. 138.

C.J.S. Drugs and Narcotics §§ 158, 183 to 184, 195, 215 to 216.

Notes of Decisions (1)

Unif. Narcotic Drug Act § 12, ULA NARC DRUG § 12

End of Document

Uniform Laws Annotated
Uniform Narcotic Drug Act 1932
as Last Amended in 1958 (Refs & Annos)

Unif.Narcotic Drug Act § 13

§ 13. Common Nuisances.

Currentness

Any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or any place whatever, which is resorted to by narcotic drug addicts for the purpose of using narcotic drugs or which is used for the illegal keeping or selling of the same, shall be deemed a common nuisance. No person shall keep or maintain such a common nuisance.

Editors' Notes

LIBRARY REFERENCES

2001 Main Volume

Drugs and Narcotics 76, 78.

Nuisance 62.1.

Westlaw Topic Nos. 138, 279.

C.J.S. Drugs and Narcotics §§ 158, 183 to 185, 187, 193, 195, 214 to 217.

C.J.S. Nuisances § 58.

Notes of Decisions (2)

Unif. Narcotic Drug Act § 13, ULA NARC DRUG § 13

End of Document

Uniform Laws Annotated
Uniform Narcotic Drug Act 1932
as Last Amended in 1958 (Refs & Annos)

Unif.Narcotic Drug Act § 14

§ 14. Narcotic Drugs to be Delivered to State Official, Etc.

Currentness

All narcotic drugs, the lawful possession of which is not established or the title to which cannot be ascertained, which have come into the custody of a peace officer, shall be forfeited, and disposed of as follows:

(a) Except as in this section otherwise provided, the court or magistrate having jurisdiction shall order such narcotic drugs forfeited and destroyed. A record of the place where said drugs were seized, of the kinds and quantities of drugs so destroyed, and of the time, place, and manner of destruction, shall be kept, and a return under oath, reporting said destruction, shall be made to the court or magistrate and to the United States Commissioner of Narcotics, by the officer who destroys them.

(b) Upon written application by the State [Commissioner of Public Health], the court or magistrate by whom the forfeiture of narcotic drugs has been decreed may order the delivery of any of them, except heroin and its salts and derivatives, to said State [Commissioner of Public Health], for distribution or destruction, as hereinafter provided.

(c) Upon application by any hospital within this State, not operated for private gain, the State [Commissioner of Public Health] may in his discretion deliver any narcotic drugs that have come into his custody by authority of this section to the applicant for medicinal use. The State [Commissioner of Public Health] may from time to time deliver excess stocks of such narcotic drugs to the United States Commissioner of Narcotics, or may destroy the same.

(d) The State [Commissioner of Public Health] shall keep a full and complete record of all drugs received and of all drugs disposed of, showing the exact kinds, quantities, and forms of such drugs; the persons from whom received and to whom delivered; by whose authority received, delivered, and destroyed; and the dates of the receipt, disposal, or destruction, which record shall be open to inspection by all Federal or State officers charged with the enforcement of Federal and State narcotic laws.

Editors' Notes

LIBRARY REFERENCES

2001 Main Volume

Drugs and Narcotics 191, 198.

Westlaw Topic No. 138.

C.J.S. Drugs and Narcotics §§ 138 to 144, 150, 155.

C.J.S. Searches and Seizures § 220.

Unif. Narcotic Drug Act § 14, ULA NARC DRUG § 14

End of Document

Uniform Laws Annotated
Uniform Narcotic Drug Act 1932
as Last Amended in 1958 (Refs & Annos)

Unif.Narcotic Drug Act § 15

§ 15. Notice of Conviction to be Sent to Licensing Board.

Currentness

On the conviction of any person of the violation of any provision of this act, a copy of the judgment and sentence, and of the opinion of the court or magistrate, if any opinion be filed, shall be sent by the clerk of the court, or by the magistrate, to the board or officer, if any, by whom the convicted defendant has been licensed or registered to practice his profession or to carry on his business. On the conviction of any such person, the court may, in its discretion, suspend or revoke the license or registration of the convicted defendant to practice his profession or to carry on his business. On the application of any person whose license or registration has been suspended or revoked, and upon proper showing and for good cause, said board or officer may reinstate such license or registration.

Editors' Notes

LIBRARY REFERENCES

2001 Main Volume

Drugs and Narcotics 14, 15.

Westlaw Topic No. 138.

C.J.S. Drugs and Narcotics §§ 30, 40 to 44, 129 to 131, 133.

Unif. Narcotic Drug Act § 15, ULA NARC DRUG § 15

End of Document

Uniform Laws Annotated
Uniform Narcotic Drug Act 1932
as Last Amended in 1958 (Refs & Annos)

Unif.Narcotic Drug Act § 16

§ 16. Records Confidential.

Currentness

Prescriptions, orders, and records, required by this act, and stocks of narcotic drugs, shall be open for inspection only to federal, state, county, and municipal officers, whose duty it is to enforce the laws of this state or of the United States relating to narcotic drugs. No officer having knowledge by virtue of his office of any such prescription, order, or record shall divulge such knowledge, except in connection with a prosecution or proceeding in court or before a licensing or registration board or officer, to which prosecution or proceeding the person to whom such prescriptions, orders, or records relate is a party.

Editors' Notes

LIBRARY REFERENCES

2001 Main Volume

Drugs and Narcotics 47.

Records 55.

Westlaw Topic Nos. 138, 326.

C.J.S. Drugs and Narcotics §§ 126 to 127.

C.J.S. Records § 101.

Notes of Decisions (1)

Unif. Narcotic Drug Act § 16, ULA NARC DRUG § 16

End of Document

Uniform Laws Annotated
Uniform Narcotic Drug Act 1932
as Last Amended in 1958 (Refs & Annos)

Unif.Narcotic Drug Act § 17

§ 17. Fraud or Deceit.

Currentness

(1) No person shall obtain or attempt to obtain a narcotic drug, or procure or attempt to procure the administration of a narcotic drug, (a) by fraud, deceit, misrepresentation, or subterfuge; or (b) by the forgery or alteration of a prescription or of any written order; or (c) by the concealment of a material fact; or (d) by the use of a false name or the giving of a false address.

(2) Information communicated to a physician in an effort unlawfully to procure a narcotic drug, or unlawfully to procure the administration of any such drug, shall not be deemed a privileged communication.

(3) No person shall wilfully make a false statement in any prescription, order, report, or record, required by this act.

(4) No person shall, for the purpose of obtaining a narcotic drug, falsely assume the title of, or represent himself to be, a manufacturer, wholesaler, apothecary, physician, dentist, veterinarian, or other authorized person.

(5) No person shall make or utter any false or forged prescription or false or forged written order.

(6) No person shall affix any false or forged label to a package or receptacle containing narcotic drugs.

(7) The provisions of this section shall apply to all transactions relating to narcotic drugs under the provisions of Section 8 of this act, in the same way as they apply to transactions under all other sections.

Editors' Notes

LIBRARY REFERENCES

2001 Main Volume

Drugs and Narcotics 47, 71.

Westlaw Topic No. 138.

C.J.S. Drugs and Narcotics §§ 126 to 127, 161, 200.

Notes of Decisions (75)

Unif. Narcotic Drug Act § 17, ULA NARC DRUG § 17

End of Document

Uniform Laws Annotated
Uniform Narcotic Drug Act 1932
as Last Amended in 1958 (Refs & Annos)

Unif.Narcotic Drug Act § 18

§ 18. Exceptions and Exemptions Not Required to be Negatived.

Currentness

In any complaint, information, or indictment, and in any action or proceeding brought for the enforcement of any provision of this act, it shall not be necessary to negative any exception, excuse, proviso, or exemption, contained in this act, and the burden of proof of any such exception, excuse, proviso, or exemption, shall be upon the defendant.

Editors' Notes

LIBRARY REFERENCES

2001 Main Volume

Drugs and Narcotics 78, 102.1, 106, 107, 194.1, 195.

Westlaw Topic No. 138.

C.J.S. Drugs and Narcotics §§ 148 to 149, 151 to 152, 163, 185, 187, 190, 193, 214, 217, 225 to 226, 229 to 237.

Notes of Decisions (47)

Unif. Narcotic Drug Act § 18, ULA NARC DRUG § 18

End of Document

Uniform Laws Annotated
Uniform Narcotic Drug Act 1932
as Last Amended in 1958 (Refs & Annos)

Unif.Narcotic Drug Act § 19

§ 19. Enforcement and Cooperation.

Currentness

It is hereby made the duty of the [Insert here proper official designation of state officer or board], its officers, agents, inspectors, and representatives, and of all peace officers within the state, and of all county attorneys, to enforce all provisions of this act, except those specifically delegated, and to cooperate with all agencies charged with the enforcement of the laws of the United States, of this state, and of all other states, relating to narcotic drugs.

Editors' Notes

LIBRARY REFERENCES

2001 Main Volume

Drugs and Narcotics 30.1, 41, 45.1.

Westlaw Topic No. 138.

C.J.S. Drugs and Narcotics §§ 2 to 5, 101 to 104, 118 to 119, 122 to 123, 158, 163, 269.

Notes of Decisions (2)

Unif. Narcotic Drug Act § 19, ULA NARC DRUG § 19

End of Document

Uniform Laws Annotated
Uniform Narcotic Drug Act 1932
as Last Amended in 1958 (Refs & Annos)

Unif.Narcotic Drug Act § 20

§ 20. Penalties.

Currentness

Any person violating any provision of this act shall upon conviction be punished, for the first offense, by a fine not exceeding ( ) dollars, or by imprisonment in (jail) for not exceeding ( ), or by both such fine and imprisonment, and for any subsequent offense, by a fine not exceeding ( ) dollars, or by imprisonment in (state prison) for not exceeding ( ), or by both such fine and imprisonment.

Editors' Notes

LIBRARY REFERENCES

2001 Main Volume

Drugs and Narcotics 24, 29, 133.

Westlaw Topic No. 138.

C.J.S. Drugs and Narcotics §§ 101 to 103, 107 to 111, 113, 268 to 282.

Notes of Decisions (351)

Unif. Narcotic Drug Act § 20, ULA NARC DRUG § 20

End of Document

Uniform Laws Annotated
Uniform Narcotic Drug Act 1932
as Last Amended in 1958 (Refs & Annos)

Unif.Narcotic Drug Act § 21

§ 21. Effect of Acquittal or Conviction under Federal Narcotic Laws.

Currentness

No person shall be prosecuted for a violation of any provision of this act if such person has been acquitted or convicted under the Federal Narcotic Laws of the same act or omission which, it is alleged, constitutes a violation of this act.

Editors' Notes

LIBRARY REFERENCES

2001 Main Volume

Criminal Law 92.

Drugs and Narcotics 73.1.

Westlaw Topic Nos. 110, 138.

C.J.S. Criminal Law §§ 157, 166.

C.J.S. Drugs and Narcotics §§ 186 to 205, 207 to 209, 211 to 214, 218 to 223, 280 to 281.

Notes of Decisions (6)

Unif. Narcotic Drug Act § 21, ULA NARC DRUG § 21

End of Document

Uniform Laws Annotated
Uniform Narcotic Drug Act 1932
as Last Amended in 1958 (Refs & Annos)

Unif.Narcotic Drug Act § 22

§ 22. Constitutionality.

Currentness

If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

Editors' Notes

LIBRARY REFERENCES

2001 Main Volume

Statutes 64(6).

Westlaw Topic No. 361.

C.J.S. Statutes § 93.

Notes of Decisions (2)

Unif. Narcotic Drug Act § 22, ULA NARC DRUG § 22

End of Document

Uniform Laws Annotated
Uniform Narcotic Drug Act 1932
as Last Amended in 1958 (Refs & Annos)

Unif.Narcotic Drug Act § 23

§ 23. Interpretation.

Currentness

This act shall be so interpreted and construed as to effectuate its general purpose, to make uniform the laws of those states which enact it.

Editors' Notes

LIBRARY REFERENCES

2001 Main Volume

Statutes 226.

Westlaw Topic No. 361.

C.J.S. Statutes §§ 306, 358 to 361.

Notes of Decisions (2)

Unif. Narcotic Drug Act § 23, ULA NARC DRUG § 23

End of Document

Uniform Laws Annotated
Uniform Narcotic Drug Act 1932
as Last Amended in 1958 (Refs & Annos)

Unif.Narcotic Drug Act § 24

§ 24. Inconsistent Laws Repealed.

Currentness

All acts or parts of acts which are inconsistent with the provisions of this act are hereby repealed.

Editors' Notes

LIBRARY REFERENCES

2001 Main Volume

Drugs and Narcotics 11, 42.

Statutes 158 to 160.

Westlaw Topic Nos. 138, 361.

C.J.S. Drugs and Narcotics §§ 2 to 10, 29 to 30, 33, 39 to 40, 117 to 119, 123, 128.

C.J.S. Statutes §§ 286 to 288.

Unif. Narcotic Drug Act § 24, ULA NARC DRUG § 24

End of Document

Uniform Laws Annotated
Uniform Narcotic Drug Act 1932
as Last Amended in 1958 (Refs & Annos)

Unif.Narcotic Drug Act § 25

§ 25. Name of Act.

Currentness

This act may be cited as the Uniform Narcotic Drug Act.

Editors' Notes

LIBRARY REFERENCES

2001 Main Volume

Statutes 211.

Westlaw Topic No. 361.

C.J.S. Statutes § 306.

Unif. Narcotic Drug Act § 25, ULA NARC DRUG § 25

End of Document

Uniform Laws Annotated
Uniform Narcotic Drug Act 1932
as Last Amended in 1958 (Refs & Annos)

Unif.Narcotic Drug Act § 26

§ 26. Time of Taking Effect.

Currentness

This act shall take effect [Insert here statement of time when the act is to take effect].

Editors' Notes

LIBRARY REFERENCES

2001 Main Volume

Statutes 250.

Westlaw Topic No. 361.

C.J.S. Statutes § 389.

Unif. Narcotic Drug Act § 26, ULA NARC DRUG § 26

End of Document

VIRGINIA LAW REVIEW

VOLUME 56 OCTOBER 1970 NUMBER 6

THE FORBIDDEN FRUIT AND THE TREE OF KNOWLEDGE: AN INQUIRY INTO THE LEGAL HISTORY OF AMERICAN MARIJUANA PROHIBITION

Richard J. Bonnie & Charles H. Whitebread, II***

Mr. Snell. *What is the bill?*

Mr. Rayburn. *It has something to do with something that is called marihuana. I believe it is a narcotic of some kind.*

Colloquy on the House floor prior to passage of the Marihuana Tax Act.

*Assistant Professor of Law, University of Virginia. B.A., 1966, Johns Hopkins University; LL.B., 1969, University of Virginia.

**Assistant Professor of Law, University of Virginia. A.B., 1965, Princeton University; LL.B., 1968, Yale University.

We wish to express our sincere appreciation to the students who assisted us in the preparation of the tables at Appendix A. Because the drug statutes of the several states are particularly confusing and difficult to find, and because so many jurisdictions have recently changed their drug laws, the preparation of the chart required long, tedious work which so many were kind enough to perform. To them, our most sincere thanks.

We should like to thank especially Michael A. Cohen, John F. Kuether, W. Tracey Shaw, Alan K. Smith, and Allan J. Tanenbaum, all students at the University of Virginia School of Law, whose research assistance and tireless effort were invaluable.

We are particularly indebted to Professor Jerry Mandel who supplied us with much of the raw data used in the historical case studies in this Article. In his excellent article on drug statistics in the *Stanford Law Review, Problems with Official Drug Statistics,* 21 STAN. L. REV. 991 (1969), Professor Mandel suggested in a footnote that someone should attempt a history of the passage of anti-marijuana legislation. We have followed his suggestion and earnestly hope that our product will fill this gap.

A modified and expanded version of this Article will be published in book form in the spring of 1971.

PAGE

TABLE OF CONTENTS

I. INTRODUCTION

LAW may be rooted in fiction as well as fact. Indeed, a public policy conceived in ignorance may be continuously reaffirmed, ever more vehemently, so long as its origins remain obscure or its fallacy unexposed. Yet once a spark of truth ignites the public opinion process, the authority of time will not stay the flames of controversy. In stable times the policy may soon be reversed or modified to comport with reality. In volatile times, however, a single controversy may lose its urgency. Fueled by flames generated by related public issues, the fire may spread; truth may again be consumed in the explosive collision of competing cultural ideologies.

So it has been with marijuana.[1] Suppressed for forty years without significant public attention, the "killer weed" has suddenly surfaced as the preferred euphoriant of millions of Americans. Hardly a day passes without public exposure to propaganda from one side or the other. Hardly a day passes without arrests of newsworthy figures for violations of marijuana laws. Before legislatures and courts, the law is attacked and defended with equal fervor. Sociological, medical and

[1] Throughout its tumultuous history, the common name of the cannabis drug has been spelled in numerous ways—marihuana, meriguana, mariguana, marijuana. We will use the last spelling because it appears most often in modern publications and conforms more nearly to the Spanish.

police testimony regarding the drug's effects is delivered feverishly to an attentive public.

Yet, apart from some expedient peripheral actions, little has been done. Detailed studies have been commissioned, but there has been no significant reconsideration of basic assumptions. Because the marijuana issue has become ensnared in broader social polemics, it has been stalemated. Stability and change, defiance and repression, hippieism and middle-Americanism, "law and order" and protest politics define the cultural milieu of which the marijuana issue is viewed as but a symptom.

This Article is motivated by twin concerns: that the flagrant disregard of marijuana laws bespeaks a growing disenchantment with the capacity of our legal system rationally to order society, and that the assimilation of the marijuana issue into larger social conflicts has consigned the debate to the public viscera instead of the public mind. Through a historical analysis of the marijuana laws we hope to refocus the debate. An understanding of the origins of the laws might modulate the challengers' hostile accusations and at the same time promote in legislators an awareness of their own responsibility.

For the purposes both of description and evaluation, law is inseparable from the process by which it is adopted and the values it manifests. Accordingly, our history focuses both on the public policy formation process and on evolving patterns of our culture. With respect to policy formation, marijuana's legal history is a significant illustration of the interaction of the public opinion, legislative and judicial processes, and, in a broader sense, the relation between folkways and stateways. With respect to its value-content, the evolution of marijuana policy reflects quite precisely emerging cultural attitudes toward pluralism, privacy and individual pursuit of pleasure in an increasingly mechanized and depersonalized technological society.

II. The Antecedents: Criminalization of Narcotics and Alcohol

The restrictive public policy with respect to marijuana, initiated in the late twenties and thirties and perpetuated to the present day, has never been an isolated phenomenon. At each stage of its development marijuana policy has been heavily influenced by other social issues because the drug has generally been linked with broader cultural patterns. Particularly at its inception, nationwide anti-marijuana legis-

lation and its fate in the courts were inseparably linked with the earlier anti-narcotics and prohibition experiences. In fact, the facility with which marijuana policy was initiated is directly related to the astoundingly sudden and extreme alteration of public narcotics and alcohol policy between 1900 and 1920.

In 1906 there were only three dry states, and judicial precedent abounded for the proposition that the right to possess alcohol for private consumption was an inalienable right. Yet, by 1917, twenty states had enacted prohibitionary legislation and most others were contemplating it. Two years later the eighteenth amendment and the Volstead Act had been enacted, and it was a federal crime to possess alcohol even for the purpose of drinking it within the home. Similarly, in 1900 only a handful of states in any way regulated traffic in narcotic drugs—opium, cocaine, morphine and heroin—even though all but heroin had been available for a decade or more. Yet, by 1914, all states had enacted some type of prohibitionary legislation, and the national government had enacted the Harrison Narcotic Act.

There were many major differences between the temperance and anti-narcotics movements. The temperance movement was a matter of vigorous public debate; the anti-narcotics movement was not. Temperance legislation was the product of a highly organized nationwide lobby; narcotics legislation was largely ad hoc. Temperance legislation was designed to eradicate known evils resulting from alcohol abuse; narcotics legislation was largely anticipatory.

On the other hand, there were striking similarities between the two movements. Both were first directed against the evils of large scale use and only later against all use. Most of the rhetoric was the same: These euphoriants produced crime, pauperism and insanity. Both began on the state level and later secured significant congressional action. Both ultimately found favor with the courts, provoking interchangeable dissenting opinions.

We do not propose to unearth new truths about the events of this period. However, we do believe that a familiarity with the political and judicial response to the alcohol and narcotics problems is essential to an understanding of the eventual suppression of marijuana. We believe further that an understanding of the relation between public opinion and any sumptuary law is germane to a discussion of the predicament of current marijuana legislation. Finally, since much of the current debate about marijuana is focused on its harmful effects as

compared with those of narcotics and alcohol, the evolution of public policy in those areas is particularly material.

A. A Review of the Temperance Movement

Although aggressive prohibition campaigns had been mounted in every state in 1851-69,[1] and again in 1880-90,[2] in 1903 only Maine (1884), Kansas (1880) and North Dakota (1889) were completely dry states.[3] Ernest Cherrington, the chronicler *par excellence* of the Prohibition movement, blamed the failure of the first thrust in part on the intervention of the slavery question, which siphoned the moral fervor of the people from the temperance movement.[4] The failure of the second campaign he attributed to the inability of the prohibition activists to compete politically with growing liquor interests that dominated state and local governments.[5]

By 1906, however, the progress of the anti-saloon arm of the temperance movement in local option contests[6] and the adoption of alcohol prohibition by the people of Oklahoma in a provision of their constitution ratified upon admission to statehood[7] signalled a new crusade for state prohibitionary legislation. The Oklahoma vote so "electrified the moral forces of other states" [8] that by 1913 six additional states had enacted statewide prohibition, and half of the remaining states were contemplating action.[9]

Perhaps the most significant development during this period occurred on the national level. The Supreme Court had earlier declared the police powers of the states, under which state prohibition laws were enacted, impotent to prevent importation of liquor from a wet state, of which there were still many, into a dry state and to stay the sale and delivery of such liquor to the buyer while in the original package.[10]

---

[1] E. CHERRINGTON, THE EVOLUTION OF PROHIBITION IN THE UNITED STATES OF AMERICA 135-45 (1920) [hereinafter cited as CHERRINGTON].

[2] *Id.* at 176-84.

[3] *Id.* at 180-81; Safely, *Growth of State Power Under Federal Constitution to Regulate Traffic in Intoxicating Liquors*, 3 IOWA L. BULL. 221, 222 (1917).

[4] CHERRINGTON 139.

[5] *Id.* at 181-82.

[6] *Id.* at 280.

[7] *Id.* at 280-81.

[8] *Id.* at 281.

[9] *Id.* at 284.

[10] Leisy v. Hardin, 135 U.S. 100 (1890).

After a congressional attempt to deal with this decision in 1890 aborted in the courts,[11] the buyer of liquor shipped in interstate commerce still had the right to receive and therefore to use such liquor. But in 1913 Congress, by the Webb-Kenyon Act,[12] filled the gap by prohibiting *the shipment* of liquor from one state to another to be used in violation of the laws of the latter; dry states could thus enforce their prohibition laws against imported liquor.[13] The mere passage of this law, according to Cherrington, committed Congress to a policy that recognized the liquor traffic as an outlaw trade and indicated congressional desire to assist the dry states.[14]

By November 1913, the tide had decidedly turned. More than half the population and 71 percent of the area of the United States were under prohibitionary laws.[15] Accordingly, the Fifteenth National Convention of the Anti-Saloon League of America unanimously endorsed immediate passage of National Constitutional Prohibition, whereupon the National Temperance Council was formed to combine the forces of the various temperance organizations toward this end.[16]

By April 4, 1917, when a joint resolution was introduced in the Senate proposing an amendment to the Constitution prohibiting the manufacture, sale or transportation of intoxicating liquors within the United States for beverage purposes,[17] eighty percent of the territory of the United States was dry.[18] Adopted by the constitutional majorities of both houses on December 18, 1917, the eighteenth amendment was ratified by the thirty-sixth state on January 16, 1919, and became effective on January 16, 1920.[19] The Volstead Act,[20] passed on October 28, 1919, pursuant to section 2 of the eighteenth amendment, outlawed

11 Four months after *Leisy* Congress enacted the "Wilson Law," designed to make all intoxicating liquors subject "upon arrival" to the laws of the state into which they were sent. Act of Aug. 8, 1890, ch. 728, 26 Stat. 313. In Rhodes v. Iowa, 170 U.S. 412 (1898), however, the Supreme Court held that "upon arrival" meant *after delivery* to the consignee. Thus the right to receive the liquor and the attendant enforcement problems remained.

12 Act of Mar. 1, 1913, ch. 90, 37 Stat. 699.

13 The Act was upheld in Clark Distilling Co. v. Western Md. Ry., 242 U.S. 311 (1917).

14 CHERRINGTON 285-86.

15 *Id.* at 320.

16 *Id.* at 321-22.

17 *See* H.R. Doc. No. 722, 71st Cong., 3d Sess. 5 (1931) [hereinafter cited as WICKERSHAM COMMISSION].

18 *Id.*

19 *Id.* at 8.

20 Act of Oct. 28, 1919, ch. 85, 41 Stat. 305.

possession of intoxicating liquor and therefore went significantly beyond the amendment itself.

The National Commission on Law Observance and Enforcement (the Wickersham Commission) attributed the passage of the eighteenth amendment not to public opposition to use of intoxicating beverages,[21] although this was indeed the view of many of the leaders of the movement, but rather to antipathy to three major related evils: excessive consumption, political corruption and licensed saloons.[22] Excessive use increased with the commercialization of production and distribution, and the expansion of saloons. Public resentment against the corrupting influence of the large liquor dealers in local politics, especially in the larger cities, tended to focus public attention on removing a cancer from the body politic. Finally, the institution that most strongly aroused public sentiment against liquor traffic was the licensed saloon, itself the symbol of intemperance and corruption. Owned or controlled by the large brewers or wholesalers, centers of political activity, homes of commercialized vice, the saloons were the *bêtes noires* of middle-American public opinion.

Because public opinion was largely opposed only to the socio-political consequences of massive liquor traffic, the enforcement of total abstinence under the eighteenth amendment became increasingly difficult. By 1931 it was an accepted fact that the upper and middle classes were "drinking in large numbers in quite frank disregard of the declared policy" of the Volstead Act.[23]

---

[21] In 1904 Ernst Freund had noted, quoting from an article on "personal liberty" in the *Cyclopedia of Temperance and Prohibition:*

> Even the advocates of prohibition concede that the state has no concern with the private use of liquor. "The opponents of prohibition misstate the case by saying that the state has no right to declare what a man shall eat or drink. The state does not venture to make any such declaration. . . . It is not the private appetite or home customs of the citizen that the state undertakes to manage, but the liquor traffic. . . . If by abolishing the saloon the state makes it difficult for men to gratify their private appetites, there is no just reason for complaint."

E. FREUND, POLICE POWER 484 (1904).

[22] WICKERSHAM COMMISSION 6-7.

[23] *Id.* at 21. In 1929 President Hoover had devoted a major part of his inaugural address to the "disregard and disobedience" of the eighteenth amendment. He attributed to the ordinary citizen "a large responsibility" for a "dangerous expansion in the criminal elements." Attempting to generate moral support for the law, he chastised the citizenry:

> No greater national service can be given by men and women of goodwill—who, I know, are not unmindful of the responsibilities of citizenship—than that they should, by their example, assist in stamping out crime and outlawry by refusing participation in and condemning all transactions with illegal liquor. Our whole

The difficulties of securing compliance in such circumstances were aggravated by an inadequately designed enforcement strategy,[24] public resentment of the lawless tactics of prohibition agents,[25] and the lack of any sustained attempt at public education.[26] For twelve years, however, millions of dollars were spent by federal and state governments in a fruitless effort to secure compliance with the law. Contemporary legal observers were particularly incensed by the dilution of constitutional protections, especially those provided by the fourth amendment, which was sanctioned by the courts in response to the "felt needs" of securing compliance through enforcement alone.[27]

Although many plans were advanced for changing the prohibition laws to mitigate the lawlessness rampant during this period, as late as

---

system of self-goverument will crumble either if officials elect what laws they will enforce or citizens elect what laws they will support. The worst evil of disregard for some law is that it destroys respect for all law. For our citizens to patronize the violation of a particular law on the ground that they are opposed to it is destructive of the very basis of all that protection of life, homes and property which they rightly claim under laws.

INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES 227 (Gov't Printing Off. 1969). The President's sermon fell on deaf ears.

24 President Hoover also noted in his inaugural address:

Of the undoubted abuses which have grown up under the eighteenth amendment . . . part are due to the failure of some States to accept their share of the responsibility for concurrent enforcement and the failure of many State and local officials to accept the obligation under their oath of office zealously to enforce the laws.

INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES 277 (Gov't Printing Off. 1969). *See generally* WICKERSHAM COMMISSION 10-20, 22-43.

25 WICKERSHAM COMMISSION 44-46.

26 *Id.* at 48.

27 The Wickersham Commission noted:

Some advocates of the law have constantly urged and are still urging disregard or abrogation of the guarantees of liberty and of sanctity of the home which had been deemed fundamental in our policy. . . . High-handed methods . . . even where justified, alienated thoughtful citizens, believers in law and order. Unfortunate public expressions by advocates of the law . . . deprecating the constitutional guarantees involved, aggravated this effect. Pressure for lawless enforcement, encouragement of bad methods and agencies of obtaining evidence, and crude methods of investigation and seizure on the part of incompetent or badly chosen agents started a current of adverse public opinion in many parts of the land.

Id. at 46.

Many legal commentators thought that the courts, manned by "fanatically dry" judges, succumbed to these pressures, especially in the fourth amendment area. *See, e.g.*, F. BLACK, ILL STARRED PROHIBITION CASES (1931), where the author criticizes, among other cases, Olmstead v. United States, 277 U.S. 438 (1928) (upholding wiretapping), and Carroll v. United States, 267 U.S. 132 (1925) (upholding warrantless search of automobile).

1931 even its most vigorous opponents felt that repeal of the eighteenth amendment was politically unfeasible.[28] By 1932, however, public opinion had become so inflamed that the Democratic National Convention included repeal in the party platform.[29] Proposed by Congress on February 20, 1933, the twenty-first amendment was ratified by the thirty-sixth state on December 5, 1933.

B. Anti-Narcotics Legislation to 1914

For our purposes, the major feature of temperance history is the responsiveness of the political process to public opinion. Whether or not a majority of Americans ever favored prohibition and whether or not the thrust of public opinion was ever accurately assessed, the public opinion *process* was attuned to the question for half a century. The alleged evils of alcohol abuse were matters of public knowledge; the proper governmental response was a subject of endless public debate; enactment and repeal of Prohibition were attended by widespread public participation.

In contrast, the early narcotics legislation was promulgated largely in a vacuum. Public and even professional ignorance of the effects of narcotic drugs contributed both to the dimensions of the problem and the nature of the legislated cure. The initial legislation was attended by no operation of the public opinion process, and instead generated a new public image of narcotics use. Only after this creation of a public perception occurred did the legislative approach comport with what we shall call latent public opinion.

1. Narcotics Use at the Turn of the Century: A Growing Problem

Although estimates have varied widely regarding the number of persons regnlarly using cocaine, opium, morphine and heroin during the pre-criminalization period, a sufficiently accurate figure can be drawn from a composite of contemporary surveys[30] conducted between 1878 and 1924.[31] Estimates range from 182,215 (1884) to 782,118 (1913). We

[28] F. BLACK, *supra* note 27, at 149-50.

[29] R. CHILDS, MAKING REPEAL WORK 12 (1947).

[30] The earliest surveys employ a methodology much less sophisticated than those conducted after 1914. The later studies, however, suffer from a time lag which inevitably detracts from accuracy. In any event, taken together, these surveys adequately describe the contours of the phenomenon under consideration.

[31] The earliest attempt at a compilation of addiction figures was undertaken by O. Marshall in 1878. Marshall, *The Opium Habit in Michigan*, 1878 MICH. STATE BD. OF

can safely estimate that there were between one-quarter and one-half million Americans addicted to narcotics around the turn of the century, comprising at least one percent of the population.[32]

This rather large addict population included more females than males,[33]

HEALTH ANN. REP. 61-73. From questionnaires sent to doctors, Marshall found 1,313 users of opium or morphine and concluded therefrom that there were 7,763 addicts in the state. Dr. Charles Terry later concluded that, if Marshall's figures were representative, total incidence of addiction in the United States in 1878 was 251,936. C. TERRY & M. PELLENS, THE OPIUM PROBLEM 15 (1928) [hereinafter cited as TERRY & PELLENS]. Marshall was unable fully to take into account the fact that the incidence of drug abuse in the cities was much higher than that in the rural areas he studied; accordingly, his figures probably underestimate the extent of addiction in the state.

In a similar study of Iowa in 1884, J. M. Hull found 5,732 addicts which, if representative, would reflect a national addict population of 182,215. Hull, *The Opium Habit,* 1885 IOWA STATE BD. OF HEALTH BIENNIAL REP. 535-45, *quoted in* TERRY & PELLENS 16-18.

In 1900 the author of a Vermont study sent 130 questionnaires to various druggists in an attempt to determine the monthly sales of various drugs. His 116 replies indicate that 3,300,000 doses of opium were sold every month, or enough for every person in Vermont over the age of 21 to receive 1½ doses per day. Grinnel, *A Review of Drug Consumption and Alcohol as Found in Proprietary Medicine,* 23 MEDICO-LEGAL J. 426 (1905), *quoted in* TERRY & PELLENS 21-23.

Perhaps the best pre-1914 estimate was made by Dr. Charles Perry who, as Health Officer of Jacksonville, Florida, compiled data for that city in 1913. He found that 541 persons, or .81% of the city's population, used opium or some preparation thereof in 1913. Nationwide, this incidence would be 782,118. 1913 JACKSONVILLE, FLA., BD. OF HEALTH ANN. REP., *quoted in* TERRY & PELLENS 25.

A researcher in 1915 found 2,370 registered addicts in Tennessee and put the national addict population at between 269,000 and 291,670. Brown, *Enforcement of the Tennessee Anti-Narcotic Law,* 5 AM. J. PUB. HEALTH 323-33 (1915), *quoted in* TERRY & PELLENS 27-29.

The first post-Harrison Act study, and perhaps the most reliable of all research during this period, was done by Lawrence Kolb and A. G. DuMez of the United States Public Health Service. Utilizing previously computed statistics together with information regarding the supply of narcotics imported into the United States, these authors concluded the addict population never exceeded 246,000. KOLB & DUMEZ, THE PREVALENCE AND TREND OF DRUG ADDICTION IN THE UNITED STATES AND FACTORS INFLUENCING IT 1-20 (39 Public Health Reports No. 21) (May 23, 1924).

At the same time the Narcotic Division of the Prohibition Unit of the IRS estimated that there were more than 500,000 drug addicts in America. Narcotic Division of the Prohibition Unit, Bureau of Internal Revenue, Release (May 4, 1924), *quoted in* TERRY & PELLENS 42 n.25.

For more recent estimates of drug addiction in America, see W. ELDRIDGE, NARCOTICS AND THE LAW 49-103 (2d rev. ed. 1967); A. LINDESMITH, THE ADDICT AND THE LAW 99-134 (1965); ARTHUR D. LITTLE, INC., DRUG ABUSE AND LAW ENFORCEMENT A1-21 (1967).

[32] *But see* M. NYSWANDER, THE DRUG ADDICT AS A PATIENT 1-13 (1956) (the author suggests that perhaps 1 to 4% of American adult population was addicted in 1890).

[33] Of the 1,313 addicts in Marshall's Michigan study, 803 were females and only

more whites than blacks,[34] and was confined neither to particular geographical regions nor to areas of high population concentration.[35] Its most significant characteristic was its predominantly middle-class composition.[36] Such attributes contrast starkly with the overwhelmingly black, lower-class male addict population that today inhabits our major urban centers.

Nineteenth century narcotics addiction was generally accidental. It is widely believed that medical addicts far outnumbered "kicks" or "pleasure" addicts.[37] Medical addiction stemmed from many sources. The first was overmedication. Civil War hospitals used opium and morphine freely and many veterans returned addicted to the drugs.[38] Overmedication continued long after peace had been restored, due to the ready availability of these drugs with and sometimes without prescription. Since physicians were free to dispense these drugs as painkillers, persons given morphine first for legitimate therapeutic purposes often found themselves addicted.[39] This problem was exacerbated by the absence of restrictions upon druggists in refilling prescriptions containing extensive amounts of morphine and other opiates[40] and by the introduction of the hypodermic syringe.[41] The danger of overmedication increased in 1884 when cocaine was first introduced into the prac-

510 males. TERRY & PELLENS 11. In the Florida study, there were 228 men and 313 women. *Id.* at 25. Of the 2,370 registered addicts in the Tennessee study, 784 were men and 1,586 women. *Id.* at 27. A modern observer has concluded that there were at least as many and probably twice as many women addicts as men. O'Donnell, *Patterns of Drug Abuse and Their Social Consequences*, in DRUGS & YOUTH 62, 64 (J. Whittenborn ed. 1969). For the last thirty years, male addicts have probably outnumbered female addicts by four or five to one. *Id.*

[34] Of the 228 men included in the Florida study, 188 were white and 40 black; of the women 219 were white and 94 black. TERRY & PELLENS 25. At that time the white and black populations in Jacksonville were equal. Of those covered in the Tennessee study, 90% were white. *Id.* at 28.

[35] The Michigan, Iowa and Vermont studies covered primarily rural areas.

[36] *See, e.g.*, Eberle, *Report of Committee on Acquirement of Drug Habits*, AM. J. PHARMACY, Oct. 1903, at 474-88. "While the increase is most evident with the lower classes, the statistics of institutes devoted to the cure of habitues show that their patients are principally drawn from those in the higher walks of life." *Id.*, *quoted in* TERRY & PELLENS 23.

[37] *See, e.g.*, O'Donnell, *supra* note 33, at 64.

[38] TERRY & PELLENS 69.

[39] Stanley, *Morphinism*, 6 J. CRIM. L. & CRIMINOLOGY 586, 588 (1915).

[40] See the resolution of the Narcotics Control Association of California, 13 J. CRIM. L. & CRIMINOLOGY 126-27 (1922), calling for stricter laws regulating prescriptions and prescription order forms.

[41] TERRY & PELLENS 66.

tice of medicine, and again in 1898 when an advance in German chemistry produced heroin, a partially synthetic morphine derivative.[42] For a time recommended as a treatment for morphine addiction,[43] heroin was also widely used for medicinal purposes.

A second source of accidental addiction was the use and popularity of patent medicines. Exotically labeled elixirs were advertised as general cures for ills ranging from snake bite to melancholia. By containing up to thirty or forty percent morphine or opiates by volume, most patent medicines fulfilled their cure-all promises. However, a heavy price was exacted for such cures. In the absence of a requirement that contents be printed on the label, many an unsuspecting person became addicted without ever knowing the medicine that worked so well contained dangerous narcotics.[44]

Thus, careless prescription, incessant dispensation and hidden distribution of harmful drugs, the addictive effects of which were unknown until too late, fostered a large addict population which continued to increase in the early twentieth century. The increase in narcotics consumption, and therefore addiction, is well illustrated by the fact that 628,177 pounds of opiates were brought into this country in 1900, three times the amount imported thirty years earlier.[45] Governmental and medical default explains the innocent nature of nineteenth century narcotics addiction and therefore its predominantly middle-class, nationwide character.

Not all addiction was accidental and private. It has been suggested that both medical knowledge and governmental regulation occurred only when each narcotic drug achieved a significant degree of "street" use. Our research supports this thesis, especially when "street" use is identified with the poor and with racial minorities. For example, opium, the drug first determined addictive and first identified with "pleasure" use, was the earliest prohibited. Legislation was first passed in the west coast states with newly immigrated Chinese populations among whom its use was prevalent. Heroin early achieved a widespread nonmedical or "street" use, especially in large urban centers among lower-class males.[46]

---

42 Brill, *Recurrent Patterns in the History of Drug Dependence and Some Interpretations*, in DRUGS AND YOUTH 18 (J. Whittenborn ed. 1969).

43 TERRY & PELLENS 76-82.

44 *See* S. ADAMS, THE GREAT AMERICAN FRAUD (1913).

45 TERRY & PELLENS 44.

46 *Id.* at 84-87.

Nevertheless, addiction, even to opium,[47] was predominantly involuntary until 1900. Professional attention was not focused directly on "street" use until after two developments had significantly reduced the possibility of medical addiction. First, the passage of the Pure Food and Drug Act[48] in 1906 led to the demise of the patent medicine industry, one of the primary causes of medical addiction. The labelling requirements of the Act, coupled with the later regulation of the production and distribution of the opiates, protected the public from the dangers of ignorance and virtually put the patent medicine industry out of business.[49] Second, the discovery of new nonaddictive pain killers and anesthetics reduced the likelihood of post-operative addiction since physicians no longer needed to rely so heavily on morphine and opium preparations to reduce and control pain.

2. *State Legislative Response Before 1914*

Although many states regnlated narcotics indirectly through their general "poison laws" before 1870,[50] the first anti-narcotics legislation did not appear until the last quarter of the nineteenth century. Most of the early legislation focused primarily on crime prevention[51] and public education regarding the dangers of drug use.[52] The spread of opium-smoking, especially in the western states with high oriental populations,[53] provoked legislation in eighteen states between 1877 and 1911 designed

[47] *See* H. KANE, OPIUM-SMOKING IN AMERICA AND CHINA (1882), in which the author supports the contention that by approximately 1890 narcotic addiction had become widespread among the respectable and professional classes. He states:

> The practice [opium smoking] spread rapidly and quietly among this class of gamblers and prostitutes until the latter part of 1875, at which time the authorities became cognizant of the fact, and finding, upon investigation, that many women and young girls, as also young men of respectable family, were being induced to visit the dens ....

Quoted in TERRY & PELLENS 73.

[48] Ch. 3915, 34 Stat. 768 (1906).

[49] "The peak of the patent medicine industry was reached just prior to the passage of the federal Pure Food and Drug Act in 1906." TERRY & PELLENS 75.

[50] U.S. TREASURY DEP'T, STATE LAWS RELATING TO THE CONTROL OF NARCOTIC DRUGS AND THE TREATMENT OF DRUG ADDICTION 1 (1931) [hereinafter cited as STATE LAWS].

[51] The first drug legislation enacted in eight states outlawed the administering of a narcotic drug to any person with the intent to facilitate the commission of a felony. These states were California (1872), Idaho (1887), New York (1897), North Dakota (1883), Pennsylvania (1901), South Dakota (1883), Utah (1876) and Wisconsin (1901). *Id.* at 1-2.

[52] Twenty-two states made such legislation their first laws concerning the drug problem. *Id.* at 2.

[53] *Id.* at 3-4.

to eradicate the practice either by preventing the operation of opium dens or by punishing the smoking of opium altogether.[54] As the addictive qualities of opium, cocaine, morphine and later heroin became known, primarily through observation of "street" use, concerned physicians finally began to agitate for stricter regulation than that provided by the "poison laws," even though such laws included opium and cocaine. Nevada enacted the first law prohibiting the retail sale of opiates for nonmedical purposes in 1877.[55] In 1887, Oregon prohibited sale of cocaine without a prescription,[56] and seven states followed suit by the turn of the century,[57] as did thirty-nine more by 1914.[58] However, only twenty-nine states had included opiates in their prohibitionary legislation by 1914.[59]

With the exception of the Oregon scheme,[60] nineteenth century narcotic laws did not attempt to restrict or prohibit possession of narcotics, and were directed solely at distribution and sale. By 1913, only six states had prohibited the mere possession of restricted drugs by unauthorized persons.[61] Three additional states prohibited possession with intent illegally to dispense such drugs.[62]

3. Watershed: The Passage of the Harrison Act

The first national legislation designed to regulate narcotics distribution, the 1909 "Act to Prohibit Importation and Use of Opium," [63] barred the importation of opium at other than specified ports and for other than medicinal use. The law further required the keeping of import

---

[54] States with such legislation were Arizona (1883), California (1881), Georgia (1895), Idaho (1887), Maryland (1886), Missouri (1911), Montana (1881), Nevada (1877), New Mexico (1887), North Dakota (1879), Ohio (1885), Pennsylvania (1883), South Dakota (1879), Utah (1880), Wisconsin (1891) and Wyoming (1882). *See id.*, pt. III.

[55] *Id.* at 5.

[56] *Id.* at 5, 251.

[57] Arizona (1899), Arkansas (1899), Colorado (1897), Illinois (1897), Mississippi (1900), Montana (1889) and New York (1893). *Id.*, pt. III.

[58] *See id.*

[59] *Id.*

[60] *Id.* at 251.

[61] California (1909), Maine (1887), South Carolina (1911), Tennessee (1913), West Virginia (1911) and Wyoming (1903). *Id.*, pt. III.

[62] Maryland (1912), Ohio (1913) and Virginia (1908). *Id.*

[63] Act of Feb. 9, 1909, ch. 100, 35 Stat. 614, *as amended*, 21 U.S.C. § 173 (1964). This act was revised by Act of Jan. 17, 1914, ch. 9, 38 Stat. 275, in the same wave of reform that produced the Harrison Act.

records. The main force behind the passage of this statute was a desire to bring the United States into line with other nations that had signed international conventions against the use of the drug.[64] However, as state anti-narcotics legislation began to take on crusade proportions, pressure was generated for federal regulation of the importation of opium for medicinal purposes and of the interstate trade in cocaine, morphine and heroin. Consequently, the Harrison Act, until this year the foundation of federal law controlling narcotic drugs, was passed in 1914.[65]

The Harrison Act, a taxing measure, required registration and payment of an occupational tax by all persons who imported, produced, dealt in, sold or gave away opium, cocaine or their derivatives. The Act required all legitimate handlers of these narcotics to file returns setting forth in detail their use of the drugs. Each legitimate handler was required to use a special order form in making any transfer of narcotics. Since the Act also provided that only legitimate users could register and no one but a registered user could obtain the specified form, any transfer by an illegitimate user was a violation of the Act. For those failing to comply with its registration requirements, the original Harrison Act provided penalties of not more than $2,000 in fines or more than five years imprisonment, or both.

The passage of the Harrison Act was the culmination of increasing concern in the medical profession[66] about the freedom with which physicians prescribed and druggists dispensed addictive drugs, primarily morphine and heroin. During the period of little or no regulation, the innocent addicts were regarded as victims of an unfortunate sickness in need of treatment; usually they could find a friendly physician or druggist willing to sustain their habits. The passage of the Harrison Act, however, by imposing a stamp of illegitimacy on most narcotics use, fostered an image previously associated primarily with opium—that of the degenerate dope fiend with immoral proclivities. As the regulation of physicians and druggists became more stringent, especially after the Supreme Court held that prevention of withdrawal was not a legitimate medical use that justified a prescription to an unregistered

---

[64] *Hearings on the Importation and Use of Opium Before the House Comm. on Ways and Means*, 61st Cong., 2d Sess. *passim* (1910).

[65] 38 Stat. 785 (1914), *as amended*, 26 U.S.C. §§ 4701-36 (1964).

[66] *See, e.g.*, Stanley, *supra* note 39, at 587; *Fixes Blame for Dope Fiend Evil*, Boston Herald, Jan. 5, 1917.

person,[67] this image fulfilled itself. All addicts, whether accidental or pleasure-seeking, were shut off from their supply and had to turn underground to purchase the drugs. Inflated underground prices often provoked criminal activity and this activity in turn evoked in the public a moral response, cementing the link between iniquity and drug addiction.[68]

The early clinical experiments dealing with narcotics addiction were inevitable victims of enforcement of the Act.[69] The concept that underlay the clinical effort—that addiction was a medical problem to be dealt with by sustaining the addict cheaply while trying to induce gentle withdrawal—was antithetical to the attitude provoking the criminal classification of unlawful possessors of narcotic drugs.[70] Clinics were run in such cities as New York, Shreveport and Jacksonville,[71] but by 1923 all were closed, thus removing still another legitimate source of supply for the addict. Again, the crimes committed to enable these people to tap the illicit sources increased public hysteria and misunderstanding about the link between the opiates and crime.[72]

---

[67] Webb v. United States, 249 U.S. 96 (1919).

[68] *See* Weber, *Drugs and Crime*, 44 A.B.A. REP. 527 (1919). Kolb, *Factors That Have Influenced the Management and Treatment of Drug Addicts*, in NARCOTIC DRUG ADDICTION PROBLEMS 23, 26 (R. Livingston ed. 1958) states:

> Another result of the physicians' resignation to pressure was that addicts to the opiates began to commit petty crimes in order to secure the drugs which could prevent their suffering. These inevitable law-induced crimes greatly accentuated the general public belief that opiates had some inherent sinister property which could change normal people into moral perverts and criminals.

See generally T. DUSTER, THE LEGISLATION OF MORALITY 3-28 (1970).

[69] *See generally* A. LINDESMITH, *supra* note 31, at 135-61; King, *Narcotic Drug Laws and Enforcement Policies*, 22 LAW & CONTEMP. PROB. 113, 124-26 (1957); King, *The Narcotics Bureau and the Harrison Act*, 62 YALE L.J. 736 (1953); Note, *Narcotics Regulation*, 62 YALE L.J. 751, 784-87 (1953).

[70] For a savage attack on the clinic system by a well-known supporter of the law enforcement model of the Harrison Act, see Stanley, *Narcotic Drugs and Crime*, 12 J. CRIM. L. & CRIMINOLOGY 110 (1921).

[71] Lindesmith reports that for a brief period of time from 1919 to 1923 some forty clinics of this type existed in the United States. A. LINDESMITH, *supra* note 31, at 136.

[72] The closing of the New York Clinic in 1919 was an especially potent factor in promoting hysteria about heroin. More than 7,400 addicts, about 90 percent of whom were users of heroin, were thrown on the streets of the city. Driven to commit crimes, including those of narcotic violations, many of these addicts were arrested. The increased number of arrests was widely interpreted as an indication of moral deterioration due to narcotics instead of evidence of maladministration of what could have been a useful law. There were, of course, physicians who dissented both as to the wisdom of closing the clinics and as to the harmful effect of the drugs. Many of those who persisted in helping their patients were arrested. Kolb, *supra* note 68, at 27.

In addition to redefining the public conception of narcotic addiction in a way that would not be seriously challenged for half a century, the Harrison Act also provided a strange model for the administration of narcotics laws which would significantly affect future developments. Drafted as a tax law rather than an outright criminal statute, the Act was intended to do indirectly what Congress believed it could not do directly—regulate possession and sale of the opiates. Indeed, congressional caution was justified. A five-to-four decision by the Supreme Court in the 1903 *Lottery Case*[73] suggested what later became fact—the Court, as self-appointed arbiter of the federal system, would plant the tenth amendment in the path of congressional regnlation of "local" affairs. That direct regulation of medical practice was indeed considered beyond congressional power under the commerce clause is clearly indicated in contemporary opinions. First, in its 1918 decision in *Hammer v. Dagenhart*,[74] the Court held the Child Labor Act unconstitutional. Second, the Court ultimately upheld the Harrison Act as a valid exercise *of the taxing power*[75] only by a five-to-four margin. Finally, there is some fairly explicit language about congressional regulation of medical practice in subsequent Harrison Act opinions.[76]

This indirect regulation of narcotics traffic under the pretext of raising revenue had a number of significant consequences. First, since the Act could not penalize users or addiction directly, there was an immediate need for complementary residual state legislation in order to deal effectively with the drug problem. Second, the enforcement of the

---

[73] 188 U.S. 321 (1903).

[74] 247 U.S. 251 (1918).

[75] United States v. Doremus, 249 U.S. 86 (1919). The four dissenters asserted that "the statute was a mere attempt by Congress to exert a power not delegated, that is, the reserved police power of the States." *Id.* at 95. It is interesting to note, however, that a subsequent congressional attempt to regulate child labor through the taxing power was also invalidated. Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922).

[76] Justice McReynolds stated for the Court in Linder v. United States, 268 U.S. 5, 18 (1925):

> Obviously, direct control of medical practice in the States is beyond the power of the Federal Government. Incidental regulation of such practice by Congress through a taxing act cannot extend to matters plainly inappropriate and unnecessary to reasonable enforcement of a revenue measure.

The Court also held that the Harrison Act did not apply to mere possession of opium. In reaching this conclusion the Court pointed out that any congressional attempt to punish as a crime possession of any article produced in a state would raise the gravest questions of power. United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916).

Act was necessarily assigned to the Internal Revenue Service in the Treasury Department.

The first enforcement agency for the Harrison Act was the Narcotics Division of the Prohibition Unit of the Internal Revenue Service created in 1920.[77] This division was incorporated in the Prohibition Bureau which was created in 1927.[78] In 1930, the enforcement of the narcotics laws was severed from the Bureau of Prohibition and established as the separate Bureau of Narcotics in the Treasury Department.[79] The existence of this separate agency anxious to fulfill its role as crusader against the evils of narcotics has done as much as any single factor to influence the course of drug regnlation from 1930 to 1970.[80] Although the impact of the Bureau on the passage of the Uniform Narcotic Drug Act and the Marihuana Tax Act will be explained in detail in subsequent sections, it is important here to note that the existence of a separate bureau having responsibility only for narcotics enforcement and for educating the public on drug problems inevitably led to a particularly prosecutorial view of the narcotics addict. Moreover, this creation of the Bureau separate from the newly created FBI in the Justice Department unnecessarily bifurcated federal law enforcement operations in this area.

C. The Judicial Role and the Constitutional Framework: The Police Power and Intoxicant Prohibition to 1920

It is not novel to suggest that the fate of contemporary constitutional challenges to marijuana prohibition depends in part on a judicial reading of public opinion as well as on the availability of a constitutional peg on which to hang an "activist" judicial inquiry. Since contextual pressure and analytical conflict were also central elements of the judicial response to alcohol and narcotics prohibition between 1850 and 1920, it is worthwhile to trace that response.

As in today's court battles over marijuana laws, the clash then was between two polar constitutional concepts—the police powers of the state and allegedly "fundamental" personal constitutional rights. The

---

[77] Schmeckebier, *The Bureau of Prohibition*, in BROOKINGS INST. FOR GOV'T RESEARCH, SERVICE MONOGRAPH No. 57, at 143 (1929).

[78] An Act to Create a Bureau of Customs and a Bureau of Prohibition in the Department of the Treasury, ch. 348, 44 Stat. 1381 (1927).

[79] Act of June 14, 1930, ch. 488, 46 Stat. 585.

[80] *See generally* King, *The Narcotics Bureau and the Harrison Act*, 62 YALE L.J. 736 (1953).

conflict opened on state constitutional grounds and was continued in the realm of the fourteenth amendment. On the issues of alcohol and "hard" narcotics, the police power was triumphant. In the light of the comparisons drawn in current constitutional arguments among marijuana, alcohol and narcotics, an inquiry into the long struggle is informative.

1. Phase One: Prohibition of Sale and Manufacture of Alcohol

During the first wave of prohibitionist legislation in the 1850's, thirteen states outlawed manufacture[81] and sale of intoxicating beverages.[82] The constitutionality of such laws under the commerce clause of the Federal Constitution had been presaged in the *License Cases*[83] in 1847, where in six separate opinions the Supreme Court upheld Massachusetts, New Hampshire and Rhode Island laws regulating wholesale and retail sales of liquor. Chief Justice Taney's famous dictum stated:

> And if any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper.[84]

Armed with this pronouncement, the courts of eight states rebuffed challenges under their own constitutions.[85] Some of these decisions gave scant attention to the constitutional argument but simply defined the police power in broad terms[86] and perhaps cited the Taney dictum.[87]

[81] The primary objective of prohibitionary legislation was to suppress all traffic in intoxicating beverages. Accordingly, most states prohibited both manufacture and sale. However, New Hampshire's law, in effect from 1855 through 1903, forbade only sale.

[82] Sixteen states passed prohibitionary legislation for the whole territory of the state. However, twelve of them had repealed this legislation by 1903, and a thirteenth, Maine, had repealed its statute before 1884 when prohibition was embodied in a constitutional amendment. E. FREUND, POLICE POWER 202, 203 (1904).

[83] 46 U.S. (5 How.) 504 (1847).

[84] *Id.* at 577.

[85] State v. Paul, 5 R.I. 185 (1858); State v. Wheeler, 25 Conn. 290 (1856); State v. Allmond, 7 Del. 612 (1856); People v. Gallagher, 4 Mich. 244 (1856); Santo v. State, 2 Iowa 165 (1855); Lincoln v. Smith, 27 Vt. 328 (1855); People v. Hawley, 3 Mich. 330 (1854); Commonwealth v. Kendall, 66 Mass. (12 Cush.) 414 (1853); Jones v. People, 14 Ill. 196 (1852).

[86] State v. Paul, 5 R.I. 185 (1858); Commonwealth v. Kendall, 66 Mass. (12 Cush.) 414 (1853); Jones v. People, 14 Ill. 196 (1852).

[87] State v. Wheeler, 25 Conn. 290 (1856); State v. Allmond, 7 Del. 612 (1856); Santo v. State, 2 Iowa 165 (1855); Lincoln v. Smith, 27 Vt. 328 (1855).

However, the rationale and rhetoric of those decisions squarely rejecting the constitutional objections merit a detailed comparison with that of two decisions, in New York[88] and Indiana,[89] declaring the statutes void.

Even the opponents of the laws acknowledged the potential public evils of intemperance[90]—crime, pauperism and vice—the eradication of which was the objective of prohibitionary legislation. Yet they argued that the means employed to accomplish this end—prevention of sale—was beyond the police power. Alcohol had admittedly beneficial uses[91] and was harmful only when abused.[92] In order to eliminate it from channels of commerce, thereby depriving its owners of a fundamental incident of ownership—the right to sell[93]—a more pernicious character had to be shown.[94] Accordingly, the public benefit did not justify the

---

88 Wynehamer v. People, 13 N.Y. 378 (1856).

89 Beebe v. State, 6 Ind. 501 (1855).

90 Dissenting in People v. Gallagher, 4 Mich. 244 (1856), Justice Pratt noted: "That intemperance is a great evil, no sane man can doubt." *Id.* at 284. The Iowa court asserted:

> There is no statistical or economical proposition better established, nor one to which a more general assent is given by reading and intelligent minds, than this, that the use of intoxicating liquors as a drink, is the cause of more want, pauperism, suffering, crime and public expense, than any other cause—and perhaps it should be said, than *all* other causes combined.

Santo v. State, 2 Iowa 165, 190 (1855).

91 Dissenting in People v. Gallagher, 4 Mich. 244 (1856), Justice Pratt stated: "Spiritous liquors are necessary in the prosecution of many of the most valuable arts, as well as for mechanical, manufacturing and medicinal purposes." *Id.* at 260.

92 The Indiana Court noted "as a matter of general knowledge . . . tbat the use of beer &c. as a beverage, is not necessarily hurtful, any more than the use of lemonade or ice cream. . . . It is the abuse, and not the use, of all these beverages that is hurtful." Beebe v. State, 6 Ind. 501, 519-20 (1855).

93 Justice Pratt reasoned:

> Liquors, then, whether produced by fermentation or distillation, do legally constitute property of use and value; and the owner of this species of personal property, when lawfully acquired, is, upon every principle, . . . entitled to the possession and use of it. This legally includes the right of keeping, selling or giving it away, as the owner may deem proper. This is a natural primary right incident to ownership . . . .

People v. Gallagher, 4 Mich. 244, 263 (1856); *accord,* Wynehamer v. People, 13 N.Y. 378, 396-98 (1856) (Comstock, J.).

94 Said the Indiana Court:

> [T]he legislature enacted the law in question upon the assumption that the manufacture aud sale of beer . . . were necessarily destructive to the community, and in acting upon that assumption, in our judgment, has unwarrantably invaded the right to private property, and its use as a beverage and article of traffic.
>
> . . . We repeat, the manufacture and sale and use of liquors are not necessarily hurtful, and *this the Court has a right to judicially inquire into* and act upon in deciding upon the validity of the law in question—in deciding . . . whether it is

restriction of private rights. The criminalization of sale of alcohol beverages constituted a deprivation of "property" without due process;[95] or, failing that, it constituted an infringement of the inalienable right of life, liberty and the pursuit of happiness rooted in the precepts of natural justice that the people reserved to themselves when they entered into the social compact.[96] New York, in *Wynehamer v. People*,[97] accepted the due process argument, at least with respect to alcohol lawfully acquired, and Indiana endorsed the inalienable rights argument in *Beebe v. State*.[98]

The virtues of judicial restraint were vehemently defended in the decisions rejecting these arguments: The courts uniformly refused to interfere with the discretionary exercise of the police power in the absence of a specific constitutional prohibition. The Vermont Supreme Court view was typical:

> The legislature in passing the law in question doubtless supposed that the traffic and drinking of intoxicating liquors went hand in hand . . . and that by cutting off the one, the other would also fall with it. Whether the drinking of intoxicating liquors tends to produce intemperance and whether the intemperance is a gangrene, tending to corrupt

---

an indirect invasion of a right secured to the citizen by the Constitution. Beebe v. State, 6 Ind. 501, 520-21 (1855) (emphasis added).

[95] In an opinion often cited as the first to invoke the substantive construction of "due process of law," Judge Comstock in Wynehamer v. People, 13 N.Y. 378, 392-93, 398 (1856), stated:

> To say . . . that "the law of the land" or "due process of law", may mean the very act of legislation which deprives the citizen of his rights, privileges or property, leads to a simple absurdity. The Constitution would then mean, that no person shall be deprived of his property or rights unless the legislature shall pass a law to effectuate the wrong, and this would be throwing the restraint entirely away. The true interpretation of these constitutional phrases is, that where rights are acquired by the citizen under existing law, there is no power in any branch of the government to take them away.
>
> . . . .
>
> When a law annihilates the value of property, and strips it of its attributes, by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation, and certainly within the spirit of a constitutional provision intended expressly to shield private rights from the exercise of arbitrary power.

[96] The Indiana court held the prohibitionary legislation in contravention of a provision in the state constitution declaring that "all men are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness." Beebe v. State, 6 Ind. 501, 510 (1855). Dissenting in People v. Gallagher, 4 Mich. 244, 258 (1856), Justice Pratt conducted an identical natural rights inquiry without the benefit of Thomas Jefferson's penmanship.

[97] 13 N.Y. 378 (1856).

[98] 6 Ind. 501 (1855).

> the moral health of the body politic, and to produce misery and lamentation; and whether the law in question is well calculated to cut off or mitigate the evils supposed to flow directly from intemperance and indirectly from the traffic in intoxicating liquors, were questions to be settled by the lawmaking power; and their decision in this respect is final and not to be reviewed by us.[99]

Under this view, societal self-protection, the essence of the police power, is broadly defined.[100] So long as the *legislature determines* that the use of alcoholic beverages exerts an adverse effect on public health, safety or morals, the courts may question neither the factual determination nor the means employed to restrict that use. In answer to the argument that the courts have a special obligation to review the relation between means and ends where personal liberties are curtailed, these courts disavowed any power "to annul a legislative Act upon higher grounds than those of express constitutional restriction," [101] or, after assuming for sake of argument the existence of such power, they declined to exercise it.[102] In response to the argument accepted by Judge Comstock in *Wynehamer v. New York*—that prohibition of sale of legally acquired alcohol was a deprivation of property without due process of law—most courts distinguished *Wynehamer* on its facts,[103] held that no essential "property" right had been violated,[104] or construed "due process" to refer only to due procedure and not to the "power . . . to create and define an offense." [105]

Two polar conceptions of the scope of judicial review clashed over a subject of intense public interest. The immediate question was settled in favor of the constitutionality of prohibiting manufacture and sale of alcoholic beverages; in fact, the Indiana court itself disavowed its contrary decision in *Beebe* three years after rendering it.[106] However, the jurisprudential dialogue[107] had merely begun. Today, *Wynehamer* is

---

99 Lincoln v. Smith, 27 Vt. 328, 337-38 (1855).

100 *See* State v. Guerney, 37 Me. 156, 161 (1853).

101 State v. Allmond, 7 Del. 612, 639 (1856); *see* Lincoln v. Smith, 27 Vt. 328, 338-39 (1855).

102 People v. Gallagher, 4 Mich. 244, 255 (1856); State v. Wheeler, 25 Conn. 290, 297-98 (1856).

103 State v. Wheeler, 25 Conn. 290, 297 (1856); State v. Allmond, 7 Del. 612, 642 (1856).

104 State v. Allmond, 7 Del. 612, 692 (1856).

105 State v. Paul, 5 R.I. 185, 197 (1858); Lincoln v. Smith, 27 Vt. 328, 360 (1855).

106 Meshmeier v. State, 11 Ind. 482 (1858).

107 In People v. Gallagher, 4 Mich. 244 (1856), the majority stated:

> The legislature has said that . . . no man shall sell liquors to be used as a

regarded as the initial step on the road to the vested rights conception of due process. Similarly, *Beebe* is the philosophical ancestor of all challenges to prohibition of intoxicants—alcohol,[108] narcotics and marijuana.

With the passage of the fourteenth amendment, the Supreme Court was called upon to determine whether prohibitionary exercises of the state police powers were now limited by federal law. The battle fought in the 1850's on state constitutional grounds was refought in the 1870's and 80's on federal territory—with the same outcome. In a series of cases culminating in *Mugler v. Kansas*,[109] it slowly became settled that the manufacturer or seller of intoxicating liquors had no constitutional rights under either the privileges and immunities or due process clauses that could prevent the operation of the police power of the state, regardless whether the liquor was bought or manufactured before passage of the law or even whether it was manufactured solely for personal use.[110]

> beverage, because by so doing, he inflicts injury on the public; but, says the defendant, irrespective of the evil, this right to sell liquors is a *natural right*, and you have no power to pass a law infringing that right. How does he prove it? Not by any adjudged cases; there are none, nor by anything in the constitution preserving to him this right; but it is to be determined by the nature and character of the right. . . . [The manner in which the determination is to be made is] a question very suitable and proper for the discussion and deliberation of a legislative body, but one which cannot be entertained by this court.

Id. at 257. Judge Pratt replied:

> If the doctrine is true that the legislature can, by the exercise of an implied discretionary power, pass any law not expressly inhibited by the constitution, then it is certain that a hundred laws may be enacted by that body, invading directly legitimate business pursuits, impairing and rendering worthless trades and occupations, and destroying the substantial value of private property to the amount of millions of dollars. . . . But who, I ask, believes that the legislature possesses the power, or that the people, in their sovereignty, ever intended to confer on that body such unlimited omnipotence? As appears to me, no man of reason and reflection can believe it.

Id. at 277-79 (dissenting opinion).

[108] Mere possession or consumption of alcohol was not prohibited during this phase of temperance legislation. Many of the courts were careful to allude to this feature and to note that forfeiture could result only from illegal possession—possession with intent to sell in violation of the law. *See, e.g.*, Santo v. State, 2 Iowa 165 (1855); Commonwealth v. Kendall, 66 Mass. (12 Cush.) 414 (1853).

[109] 123 U.S. 623 (1887).

[110] In Bartemeyer v. Iowa, 85 U.S. (18 Wall.) 129 (1873), the Supreme Court held that the prohibition of traffic in intoxicating drinks violates no privilege and immunity of United States citizenship; the Court avoided the question whether a law prohibiting sale of liquor owned before the law was passed was a deprivation of property without due process. Four years later, in Beer Co. v. Massachusetts, 97 U.S. 25 (1877), the Court sustained a prohibition law against a challenge under the obligation of contracts clauses but still deferred consideration of the *Wynehamer* question. In upholding

Thus, as a matter of both state and federal constitutional law, the courts required no more, and probably less, than that legislation be designed to retard a public evil—here pauperism and crime—and be rationally related to that end.[111] Absent a specific constitutional limitation, it did not concern the courts that such regulations affronted personal liberty and property rights. The theoretical justification of incidental curtailment of private liberties in the public interest was that the legislature must conduct the balancing; if the balance is unsound, the law will be repealed. Indeed, the courts were probably willing to indulge that presumption as a practical matter since the passage of the prohibition laws was preceded by vigorous public debate. In fact, the public opinion process did work in reaction to these curtailments of private liberty, and most such laws were subsequently repealed[112] in the ensuing decade.

2. *Phase Two: Prohibition of Sale of Opium*

As noted above, the first prohibitionary narcotics legislation was enacted on the west coast in the 1880's in order to prohibit sale and distribution of opium for nonmedical purposes. The racial overtones

---

the seizure and forfeiture of liquors belonging to the petitioner, Justice Bradley stated:

> If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the State.

97 U.S. at 32.

Finally, in Mugler v. Kansas, 123 U.S. 623 (1887), *Wynehamer* was slain. The Court sustained a conviction for selling beer manufactured before the passage of the law. The Court even held that, in order to make effective its regulations against sale, the State might forbid manufacture for personal use. *Id.* at 662. The only constitutional inhibitions remaining after *Mugler* emanated from the commerce power. For a discussion of the gradual elimination of these restrictions by congressional action, see Safely, *Growth of State Power Under Federal Constitution to Regulate Traffic in Intoxicating Liquors*, 3 IOWA L. BULL. 221, 229-34 (1917).

[111] In *Mugler*, Justice Harlan stated:

> There is no justification for holding that the State, under the guise merely of police regulations, is here aiming to deprive the citizen of his constitutional rights. . . . If, therefore, a state deems the absolute prohibition of the manufacture and sale, within her limits, of intoxicating liquors for other than medical, scientific, and manufacturing purposes, to be necessary to the peace and security of society, the courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives. They have nothing to do with the mere policy of legislation.

123 U.S. at 662.

[112] See note 82 *supra*.

of this legislation were self-consciously acknowledged by the initial Oregon and Nevada decisions. Sustaining the conviction of an alien for selling opium in *Ex parte Yung Jon*,[113] the Oregon district court noted:

> Smoking opium is not our vice, and therefore it may be that this legislation proceeds more from a desire to vex and annoy the "Heathen Chinee" in this respect, than to protect the people from the evil habit. But the motives of legislators cannot be the subject of judicial investigation for the purpose of affecting the validity of their acts.[114]

The opium laws were attacked on precisely the same grounds as had been the alcohol prohibition legislation. The Nevada court had no trouble in *State v. Ah Chew*;[115] it simply cited the *License Cases*, the Delaware decision sustaining prohibition of alcohol sale, and distinguished *Wynehamer* as holding only that the sale of lawfully acquired property could not be prohibited. Within this framework, the result was obvious:

> It is not denied that the indiscriminate use of opium . . . tends in a much greater degree to demoralize the persons using it, to dull the moral senses, to foster vice and produce crime, than the sale of intoxicating drinks. If such is its tendency, it should not have unrestrained license to produce such disastrous results. . . . Under the police power . . . in the interest of good morals, the good order and peace of society, for the prevention of crime, misery and want, the legislature has authority to place such restrictions upon sale or disposal of opium as will mitigate, if not suppress, its evils to society.[116]

The Oregon court, in the *Yung Jon* decision five years later, did not take the easy way out. The court was apparently not disposed to imply that sale of previously owned alcohol and cigarettes could be prohibited, and thus reject outright the *Wynehamer* conception of due process;[117] instead it chose to hold that sale of opium for nonmedical purposes was

---

[113] 28 F. 308 (D. Ore. 1886). The prisoner had been convicted in an Oregon court and was being heard on petition for habeas corpus.

[114] *Id.* at 312.

[115] 16 Nev. 50 (1881).

[116] *Id.* at 55-56.

[117] The Supreme Court rejected it one year later in Mugler v. Kansas, 123 U.S. 623 (1887).

not an incident of ownership and, since the law did not prohibit sale for medical purposes, no property right was deprived. Not as cautious as his brethren, Judge Deady inquired more actively into the nature of opium before upholding the legislation. Whether a legislative act is "prohibitory" (and by implication whether it violates the due process clause) "must depend on circumstances, and particularly the character of the article, and the uses and purposes to which it has generally been applied in the community." [118] He then noted that opium was primarily a medicinal drug; that although used in the East for centuries as an intoxicant, that use was new in the United States and confined primarily to the Chinese; that it was classed as a poison and was less easily detected than alcoholic intoxication, "which it is said to replace where law and custom have made the latter disreputable;" and that its "evil effects" were manifest upon the nervous and digestive systems, resembling delirium tremens. Thus, there was no longstanding regard of opium as a legitimate article of property except for medical use. Accordingly,

> the act does not in effect prohibit the disposition of the drug, but allows it under such circumstances, and on such conditions, as will, according to the general practice and opinions of the country, prevent its improper and harmful use.[119]

Thus, whatever the judicial propensity to limit the police power in the interest of property rights, prohibition of traffic in opium—worse than alcohol and confined to aliens—violated no implied or express constitutional limitations.

3. Phase Three: Prohibition of Possession of Alcohol to 1915

At this stage of constitutional jurisprudence, criminalization of pos-

---

[118] *Ex parte* Yung Jon, 28 F. 308, 311 (D. Ore. 1886).

[119] *Id.* In defining property essentially in terms of habits of the community, Judge Deady was leaving room for the "natural" rights argument with regard to alcohol and tobacco:

> True, we permit the indiscriminate use of alcohol and tobacco, both of which are classed by science as poisons, and doubtless destroy many lives annually. But the people of this country have been accustomed to the manufacture and use of these for many generations, *and they are produced and possessed under the common and long-standing impression that they are legitimate articles of property,* which the owner is entitled to dispose of without any unusual restraint. . . . On the other hand, the use of opium, otherwise than as this act allows, as a medicine, has but little, if any, place in the experience or habits of the people of this country, save among a few aliens.

Id. at 311-12 (emphasis added).

session or consumption of alcohol or narcotics was arguably a deprivation of property without due process of law. The first wave of prohibition cases had held only that the right to sell even previously acquired liquor was not an essential element of ownership. They had not held that the state could forbid the essential attribute of ownership—the right to use. In fact, many courts had expressly noted that alcohol was still a legitimate article of property.[120]

Until 1915 the weight of authority was that it was beyond the police power to prohibit mere possession of alcoholic beverages unless the quantity justified an inference that they were held for sale. A few cases so held;[121] many courts so stated in dictum, while holding the laws either in conflict with particular constitutional provisions regarding the "sale" of liquor[122] or in excess of the power of municipal corporations;[123] and many contemporary commentators so stated.[124]

Although the due process rationale was sometimes employed,[125] the preferred approach was "inherent" limitation. In his 1904 treatise, *Police Power*, Ernst Freund premised the "inherent" limitation of noninterference with purely private conduct not on any inalienable natural right but on the requirement that interference be justified on grounds of the public welfare.[126] This and the "practical difficulties of enforce-

120 State v. Wheeler, 25 Conn. 290 (1856); Lincoln v. Smith, 27 Vt. 328 (1855); Commonwealth v. Kendall, 66 Mass. (12 Cush.) 414 (1853); *cf.* State v. Clark, 28 N.H. 176, 181 (1854) (ordinance that prohibited using or keeping intoxicating liquors in any refreshment saloon or restaurant, "not unreasonable," since it did not "profess to prohibit either the use or sale of liquor altogether").

121 *Ex parte* Wilson, 6 Okla. Crim. 451, 119 P. 596 (1911); Titsworth v. State, 2 Okla. Crim. 268, 101 P. 288 (1909); State v. Williams, 146 N.C. 618, 61 S.E. 61 (1908); *Ex parte* Brown, 38 Tex. Crim. 295, 42 S.W. 554 (1897) (alternative holding). *Contra,* Cohen v. State, 7 Ga. App. 5, 65 S.E. 1096 (1909); Easley Town Council v. Pegg, 63 S.C. 98, 41 S.E. 18 (1902).

122 Commonwealth v. Campbell, 133 Ky. 50, 117 S.W. 383 (1909); *Ex parte* Brown, 38 Tex. Crim. 295, 42 S.W. 554 (1897); State v. Gilman, 33 W. Va. 146, 10 S.E. 283 (1889).

123 Eidge v. City of Bessemer, 164 Ala. 599, 51 So. 246 (1909); Sullivan v. City of Oneida, 61 Ill. 242 (1871). *But see* Town of Selma v. Brewer, 9 Cal. App. 70, 98 P. 61 (Dist. Ct. App. 1908).

124 H. Black, Intoxicating Liquors 50 (1892); E. Freund, Police Power 484 (1904); H. Joyce, The Law Relating to Intoxicating Liquors § 85 (1910); Rogers, *"Life, Liberty and Liquor": A Note on the Police Power,* 6 Va. L. Rev. 156, 174 (1919).

125 *E.g.,* State v. Williams, 146 N.C. 618, 61 S.E. 61 (1908).

126 E. Freund, Police Power 486 (1904):

> Under these circumstances it seems impossible to speak of a constitutional right of private consumption. There seems to be no direct judicial authority for declaring private acts exempt from the police power, and the universal tolerance with regard to them should be ascribed to policy. Like any other exercise of the

ment, coupled with the constitutional prohibition of unreasonable searches," [127] would sufficiently deter legislative abuse.

Absent the addition of a natural rights notion, however, this decisional frame becomes ambivalent on the dispositive question in an adjudication questioning such legislative "abuse": Can the mere "policy" of nonintervention with private conduct justify a more rigorous judicial inquiry into the relation between the prohibited private acts and the alleged *public* evil? If it cannot, the constitutional attack on prohibition of possession is no stronger than that on prohibition of sale. If it can, is not the judicial role subject to the same charge of usurpation as it would be if the courts employed a pure natural rights approach?

In any event, when the courts first confronted possession prohibition, the rhetoric was varied—due process,[128] natural rights[129] and private liberty[130]—but the approach was the same—a refusal to accept the legislative findings as to the relation between private act and public harm and a refusal to defer to the legislative balance of private liberty and public need. For example, in one of the leading cases, *Commonwealth v. Campbell*,[131] the Court of Appeals of Kentucky cited Cooley, Mill and Blackstone for the proposition that

> [i]t is not within the competency of government to invade the privacy of the citizen's life and to regulate his conduct in matters in which he alone is concerned, or to prohibit him any liberty the exercise of which will not *directly* injure society.[132]

Noting next that defendant was "not charged with having the liquor in his possession for the purpose of selling it, or even giving it to another" and that "ownership and possession cannot be denied when that ownership and possession is not in itself injurious to the public," [133] the court concluded that

> [t]he right to use liquor for one's own comfort, if the use is without

police power, control of private conduct would have to justify itself on grounds of the public welfare.

127 *Id.*

128 *E.g.*, State v. Williams, 146 N.C. 618, 61 S.E. 61 (1908).

129 *E.g.*, State v. Gilman, 33 W. Va. 146, 10 S.E. 283 (1889).

130 *E.g.*, Eidge v. City of Bessemer, 164 Ala. 599, 51 So. 246 (1909); Commonwealth v. Campbell, 133 Ky. 50, 117 S.W. 383 (1909).

131 133 Ky. 50, 117 S.W. 383 (1909).

132 *Id.* at 58, 117 S.W. at 385 (emphasis added).

133 *Id.* at 63, 117 S.W. at 387.

> direct injury to the public, is one of the citizen's natural and inalienable rights .... We hold that the police power—vague and wide and undefined as it is—has limits . . . .[134]

The key to this reasoning, of course, is the court's insistence that the injury be *direct* as measured according to a judicial yardstick. Although the court devoted little attention to the question, it implicitly rejected arguments that the only way to exorcize the public evils attending excessive use and adequately to enforce prohibitions against sale was to prevent any private use at all. The court impliedly held that the posited connection, albeit rational, was "remote" or "indirect" or "unreasonable" and therefore entitled to no deference.[135]

4. *Phase Four: Prohibition of Possession of Narcotics*

This active judicial role in alcohol cases should be compared with the courts' simultaneous refusals to second-guess legislative "findings"

---

[134] *Id.* 63-64, 117 S.W. at 387.

[135] Similarly, in State v. Gilman, 33 W. Va. 146, 10 S.E. 283 (1889), the court stated:

> It can hardly be questioned that the right to possess property is [an inalienable] right, and that that right embraces the privilege of a citizen to keep in his possession property for another. It is not denied that the keeping of property which is injurious to the lives, health, or comfort of all persons may be prohibited under the police power. . . . [I]t must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others. *But it does not follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exercise of the police power of the State* . . . .
>
> The keeping of liquors in his possession by a person, whether for himself or for another, unless he does so for the illegal sale of it, or for some other improper purpose, can by no possibility injure or affect the health, morals, or safety of the public; and, therefore, the statute prohibiting such keeping in possession is not a legitimate exertion of the police power.

Id. at 148-49, 10 S.E. at 284 (emphasis added); *accord, Ex parte* Brown, 38 Tex. Crim. 295, 42 S.W. 554 (1897).

In *Ex parte* Wilson, 6 Okla. Crim. 451, 119 P. 596 (1911), the court, after quoting extensively from *Commonwealth v. Campbell*, noted, "The only conclusion that we can legitimately arrive at is that the act in question is not within a *reasonable* exercise of the police powers of the state—is unconstitutional and void." 6 Okla. Crim. at 475, 119 P. at 606 (emphasis added). Finally, the Alabama Supreme Court stated, in striking down a local ordinance prohibiting possession by beverage dealers of alcoholic beverages:

> [The ordinance] can be justified only, if at all, on the ground that it sustains some reasonable relation to the prohibition law in the way of preventing evasions of that law by trick, artifice, or subterfuge under guise of which that law is violated. But it has no such relation. It undertakes to prohibit the keeping in any quantity and for any purpose, however innocent, of intoxicating liquors and beverages in places which are innocent in themselves.

Eidge v. City of Bessemer, 164 Ala. 599, 606, 51 So. 246, 249 (1909).

with regard to the criminalization of possession of opium. In a series of cases decided in Washington, Oregon and California[136] in 1890, 1896 and 1911 respectively, courts held that the relation between narcotics use and public harm was to be drawn by the legislature.

In answer to the argument, accepted in the alcohol cases, that despite the absence of explicit constitutional limitations the police power of prohibition was inherently limited to acts which "involve direct and immediate injury to another," [137] the courts replied in predictable fashion: The state may prevent a weak man from doing injury to himself if it determines that such injury may cause the individual to become a "burden on society;" [138] the state could find that excessive use of opium, an active poison, would debase the moral and economic welfare of the society by causing ill health, pauperism and insanity;[139] the state could find that the potential for and evils attending excessive use demand a prohibition also of nondeleterious moderate use.[140] Accordingly, in the words of the Supreme Court of Washington,

> [i]t is for the legislature to place on foot the inquiry as to just in what degree the use is injurious; to collate all the information and to make all the needful and necessary calculations. These are questions of fact with which the court cannot deal. The constitutionality of laws is not thus to be determined.[141]

---

[136] *Ex parte* Yun Quong, 159 Cal. 508, 114 P. 835 (1911); Luck v. Sears, 29 Ore. 421, 44 P. 693 (1896); Ah Lim v. Territory, 1 Wash. 156, 24 P. 588 (1890).

[137] Ah Lim v. Territory, 1 Wash. 156, 163, 24 P. 588, 589 (1890).

[138] If the state concludes that a given habit is detrimental to either the moral, mental or physical well being of one of its citizens to such an extent that it is liable to become a burthen upon society, it has an undoubted right to restrain the citizen from the commission of that act; and fair and equitable consideration of the rights of other citizens make it not only its right, but its duty, to restrain him.

Id. at 164, 24 P. at 590; *accord, Ex parte* Yun Quong, 159 Cal. 508, 515, 114 P. 835, 837 (1911); Luck v. Sears, 29 Ore. 421, 426, 44 P. 693, 694 (1896).

[139] *Ex parte* Yun Quong, 159 Cal. 508, 515, 114 P. 835, 837 (1911); Luck v. Sears, 29 Ore. 421, 425, 44 P. 693, 694 (1896).

[140] But it is urged . . . that a moderate use of opium . . . is not deleterious and consequently cannot be prohibited. We answer that this is a question of fact which can only be inquired into by the legislature.

Ah Lim v. Territory, 1 Wash. 156, 164, 24 P. 588, 590 (1890). The dissent argued that moderate use by some could not be punished to prevent excessive use by others. *Id.* at 172-74, 24 P. at 592-93.

[141] *Id.* at 165, 24 P. at 590.

> [W]hether [opium's] nature and character is such that for the protection of the public its possession by unauthorized persons should be prohibited is a ques-

The California court had more difficulty with the argument that punishment of possession of alcohol had been held beyond the police power. Despite its rhetoric regarding the wide bounds of legislative fact-finding, the court actually made its own determination that public injury from private abuse was more likely with narcotics than alcohol. The lower court had said so overtly:

> But liquor is used daily in this and other countries as a beverage, moderately and without harm, by countless thousands . . .; whereas it appears there is no such thing as moderation in the use of opium. Once the habit is formed the desire for it is insatiable, and its use is invariably disastrous.[142]

The California Supreme Court shied away:

> We do not understand this to have been intended to declare an established or conceded fact. So interpreted, the expression would be, perhaps unduly sweeping. But the validity of legislation which would be necessary or proper under a given state of facts does not depend upon the actual existence of the supposed facts. It is enough if the law-making body may rationally believe such facts to be established. If the belief that the use of opium, once begun, almost inevitably leads to excess may be entertained by reasonable men—and we do not doubt that it may—such belief affords a sufficient justification for applying to opium restrictions which might be unduly burdensome in the case of other substances, as, for example, intoxicating liquors, *the use of which may fairly be regarded as less dangerous to their users or to the public.*[143]

What the court said is unobjectionable. What it did not say, however, is significant. This reasoning implies that if the legislature should determine that the potential for excessive use of alcohol—and consequently for the public evils of pauperism, crime and insanity—is great enough to prohibit all use, that judgment would have to stand. Probably not intending so to suggest, the court really held that *it* thought that opium use was more likely adversely to affect the public welfare

---

tion of fact and of public policy, which belongs to the legislative department to determine.

Luck v. Sears, 29 Ore. 421, 426, 44 P. 693, 694 (1896).

142 *Ex parte* Yun Quong, 159 Cal. 508, 514, 114 P. 835, 838 (1911) (quoting lower court opinion) (citations omitted).

143 *Id.* at 515, 114 P. at 838 (emphasis added).

than alcohol use; accordingly, paternal criminal legislation was "reasonable" in the former case and not in the latter, even though they were identically "indirect." It helped, perhaps, that the legislature was not telling the judge and his white, middle-class colleagues that *they* shouldn't smoke opium, and that the objective was merely to prevent a few "Heathen Chinee" from hurting themselves through their stupidity and from spreading their nasty habit to the whites.[144]

The only astounding thing about the opium possession cases is that there was at least one dissenting opinion. In the Washington case, *Ah Lim v. Territory*,[145] Judge Scott, for himself and another judge, insisted on either a more conclusive demonstration that the private act of smoking opium "directly and clearly affected the public in some manner" or a more narrowly drawn statute. He catalogued the alleged public justifications:

> That smoking or inhaling opium injures the health of the individual, and in this way weakens the state; that it tends to the increase of pauperism. That it destroys the moral sentiment and leads to the commission of crime. In other words, that it has an injurious effect upon the individual, and, consequently, results indirectly in an injury to the community.[146]

After noting the insufficiency of all of the justifications including the argument that the moderate desires of some must be sacrificed to prevent abuse by others,[147] the judge concluded:

> [The Act] is altogether too sweeping in its terms. I make no question but that the habit of smoking opium may be repulsive and degrading. That its effect would be to shatter the nerves and destroy the intellect; and that it may tend to the increase of pauperism and crime. But there is a vast difference between the commission of a single act, and a confirmed habit. There is a distinction to be recognized between the use and abuse of any article or substance. . . . If this

144 "It must be conceded that its indiscriminate use would have a very deleterious and debasing effect upon our race . . . ." *Id.* at 514, 114 P. at 838.

145 1 Wash. 156, 24 P. 588 (1890).

146 *Id.* at 168, 24 P. at 591.

147 Individual desires are too sacred to be ruthlessly violated where only acts are involved . . . which do not clearly result in an injury to society, unless, possibly, thus rendered necessary in order to prevent others from like actions which to them are injurious.

Id. at 173, 24 P. at 592. He concluded, however, that the statute was too broad and that this question need not be reached.

> act must be held valid it is hard to conceive of any legislative action affecting the personal conduct, or privileges of the individual citizen. that must not be upheld. . . . The prohibited act cannot affect the public in any way except through the primary personal injury to the individual, if it occasions him any injury. It looks like a new and extreme step under our government in the field of legislation, if it really was passed for any of the purposes upon which that character of legislation can be sustained, if at all.[148]

The sanctity of "the personal conduct or privileges of the individual citizen" had suffered its first blow. The knockout was only a few rounds away.

5. Phase Five: Prohibition of Possession of Alcohol After 1915

The year 1915 was the watershed year for prohibitionists in the courts. By 1913, the tide had finally turned in the state legislatures, many of which prohibited possession of more than a certain quantity of alcoholic beverages. The first of these statutes to reach the courts was that of Alabama in *Southern Express Co. v. Whittle*.[149]

Overruling its earlier decision in *Eidge v. City of Bessemer*,[150] one of the leading cases during the earlier phase, the Alabama court swept away all restraints on the police power. So long as the legislation was directed at some legitimate purpose and was not arbitrary, the court should not interfere.[151] Whether or not the Supreme Court had so intended, the Alabama court, like other state courts, relied heavily on Justice Harlan's opinion in *Mugler v. Kansas*,[152] and gave its legislature a blank check when exercising police powers:

> If the right of common law to manufacture an intoxicating liquor for one's own personal use, out of one's own materials by the application of one's own personal effort, may be forbidden by appropriate legislation under the police power, as was expressly ruled in *Mugler v. Kan-*

---

148 *Id.* at 174-75, 24 P. at 593.

149 194 Ala. 406, 69 So. 652 (1915).

150 164 Ala. 599, 51 So. 246 (1909).

151 It is the peculiar function of the lawmakers to ascertain and to determine when the welfare of the people requires the exercise of the state's police powers, and what are appropriate measures to that end, subject only to the power and authority of the courts to see, when assured to the requisite certainty, that the measures of police so adopted do not arbitrarily violate rights protected by the organic laws.
194 Ala. at 421, 69 So. at 656.

152 123 U.S. 623 (1887), *quoted in* 194 Ala. at 428-33, 69 So. at 659-60.

> *sas* . . . , it cannot be logically or soundly asserted that the receipt or possession of more than a specified quantity at one time may not be forbidden by a statute . . . .[153]

The alleged sanctity of private conduct gave the court little pause; this was just one of a number of instances

> where ancillary prohibitions of acts and conduct, innocent in themselves, have been sustained and confirmed as an exercise of the police power of the state; and so upon the theory that some valid legislative purpose might be more certainly made effective, or that evasions of the laws might be prevented or hindered of accomplishment.[154]

Though the Alabama court did not do so, it could have cited the opium possession cases as authority. Most courts did.

The Alabama decision was quickly followed in Idaho[155] and in nine other states.[156] When the Idaho case, *Crane v. Campbell*,[157] came before the Supreme Court, Justice McReynolds dealt the knockout blow:

> As the state has the power . . . to prohibit [sale and manufacture], it may adopt such measures as are reasonably appropriate or needful to render exercise of that power effective. And, considering the notorious difficulties always attendant upon efforts to suppress traffic in liquors, we are unable to say that the challenged inhibition of their possession was arbitrary and unreasonable or without proper relation to the legitimate legislative purpose.[158]

The principle noted by Freund,[159] that the police power did not easily extend to matters of private conduct, was ignored:

---

153 194 Ala. at 433, 69 So. at 660.

154 *Id.* at 434, 69 So. at 660.

155 *Ex parte* Crane, 27 Idaho 671, 151 P. 1006 (1915), *aff'd sub nom.* Crane v. Campbell, 245 U.S. 304 (1917).

156 *Ex parte* Zwissig, 42 Nev. 360, 178 P. 20 (1919); Fitch v. State, 102 Neb. 361, 167 N.W. 417 (1918); State v. Brown, 40 S.D. 372, 167 N.W. 400 (1918); Liquor Transportation Cases, 140 Tenn. 582, 205 S.W. 423 (1918); State v. Certain Intoxicating Liquors, 51 Utah 569, 172 P. 1050 (1918); Delaney v. Plunkett, 146 Ga. 547, 91 S.E. 561 (1917); State v. Carpenter, 173 N.C. 767, 92 S.E. 373 (1917); City of Seattle v. Brookins, 98 Wash. 290, 167 P. 940 (1917); Brennan v. Southern Express Co., 106 S.C. 102, 90 S.E. 402 (1916) (dictum).

157 245 U.S. 304 (1917).

158 *Id.* at 307-08 (citations omitted).

159 See text at note 126 *supra*.

> [I]t clearly follows from our numerous decisions upholding prohibition legislation that the right to hold intoxicating liquors for personal use is not one of those fundamental privileges of a citizen of the United States which no State may abridge. A contrary view would be incompatible with the undoubted power to prevent manufacture, gift, sale, purchase or transportation of such articles—the only feasible ways of getting them. An assured right of possession would necessarily imply some adequate method to obtain not subject to destruction at the will of the State.[160]

Given the restrictive interpretation of the privileges and immunities clause[161] and the refusal to extend substantive due process outside the economic area,[162] there was no existing federal constitutional pigeonhole for "private conduct" as a principle of constitutional limitation. And on the state level the courts ignored the "intrinsic limitation" argument and discarded the direct-indirect yardstick in the wake of the temperance movement.

The commentators were outraged. Again and again the courts were indicted for interpreting constitutional precepts to correspond with public opinion.[163] The judicial retreat on the temperance question coincided perfectly with the final success of the Prohibition movement. And the commentators were quite justified in so noting.

It was merely icing on the cake when the Supreme Court upheld the provision of the Volstead Act[164] outlawing possession of intoxicating liquor. The Court predictably rebuffed[165] an argument that it was beyond congressional power under section 2 of the eighteenth amendment to prohibit possession for personal consumption of liquor owned before the passage of the Act.[166]

---

160 245 U.S. at 308.

161 *E.g.*, Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1873).

162 Substantive due process was slowly being watered down even in the economic area during this time. *See, e.g.*, Muller v. Oregon, 208 U.S. 412 (1908).

163 *E.g.*, Bronaugh, *Limiting or Prohibiting the Possession of Intoxicating Liquors for Personal Use*, 23 LAW NOTES 67 (1919); Rogers, *"Life, Liberty & Liquor": A Note on the Police Power*, 6 VA. L. REV. 156 (1919); Safely, *Growth of State Power Under Federal Constitution to Regulate Traffic in Intoxicating Liquors*, 3 IOWA L. BULL. 221 (1917); Vance, *The Road to Confiscation*, 25 YALE L.J. 285 (1916).

164 Ch. 85, 41 Stat. 305 (1919).

165 Corneli v. Moore, 257 U.S. 491 (1922).

166 This argument was accepted in United States v. Dowling, 278 F. 630 (S.D. Fla. 1922).

6. A Postscript on the Police Power: The Cigarette Cases

Interestingly, the legislative solicitude for the health of the citizenry during the period under discussion also extended to the prohibition of cigarette smoking in several jurisdictions. In 1897, the General Assembly of Tennessee made it a misdemeanor to sell, give away or otherwise dispose of cigarettes or cigarette paper.[167] The Supreme Court of Tennessee upheld the statute under the police power on the grounds that cigarettes were not legitimate articles of commerce, being "inherently bad and bad only." [168] The United States Supreme Court affirmed in *Austin v. Tennessee*,[169] primarily on the authority of the alcohol and opium cases, noting that there need be only a rational basis for the legislative determination that the commodity is harmful to justify its prohibition.[170] The Court did not even mention any objection based on deprivation of property rights or personal liberty.

The issue was posed more directly in Kentucky and Illinois cases[171] regarding the validity of local ordinances prohibiting smoking of cigarettes "within the corporate limits" in one case and "in any street, alley, avenue . . . park . . . or [other] public place" in the other. Both courts held the ordinances unreasonable interferences with personal

---

167 Law of Feb. 11, 1897, ch. 30, [1897] Tenn. Acts 156.

168 Austin v. State, 101 Tenn. 563, 48 S.W. 305 (1898), *aff'd*, 179 U.S. 343 (1900).

169 179 U.S. 343 (1900).

170 The primary issue before the Court was whether the statute infringed the exclusive power of Congress to regulate interstate commerce. *Id.* at 344. However, before turning to the "original package" questions, the Court first had to conclude that the statute was a legitimate exercise of the police power, for only then could an indirect interference with interstate commerce be sustained. *Id.* at 349. The Court noted on this point:

> Cigarettes do not seem until recently to have attracted the attention of the public as more injurious than other forms of tobacco; nor are we now prepared to take judicial notice of any special injury resulting from their use or to indorse the opinion of the Supreme Court of Tennessee that "they are inherently bad and bad only." At the same time we should be shutting our eyes to what is constantly passing before them were we to affect an ignorance of the fact that a belief in their deleterious effects, particularly upon young people, has become very general and that communications are constantly finding their way into the public press denouncing their use as fraught with great danger to the youth of both sexes. Without undertaking to affirm or deny their evil effects, we think it within the province of the legislature to say how far they may be sold, or to prohibit their sale entirely . . . provided . . . there be no reason to doubt that the act in question is designed for the protection of the public health.

Id. at 348-49; *cf.* Gundling v. City of Chicago, 177 U.S. 183 (1900) (affirming validity of licensing sale of cigarettes).

171 City of Zion v. Behrens, 262 Ill. 510, 104 N.E. 836 (1914); Hershberg v. City of Barbourville, 142 Ky. 60, 133 S.W. 985 (1911).

liberty.[172] The argument that the ordinances were calculated to insure the public safety by preventing fire hazards was held to be too remote and the argument accepted in *Austin* regarding potential injury to the smoker's health apparently was not made or at least went unacknowledged by both courts.

These decisions, rendered in 1911 and 1914, were probably consistent, under a direct-indirect injury to society theory, with *Austin* and with the alcohol and narcotics cases up to that time. The post-1915 alcohol possession cases, however, undermined any such distinction, insofar as it authorized a more active judicial inquiry into the relationship between the private conduct and the public need. At least at this stage of its development it may be fruitless to seek out a "neutral principle" beyond common sense regarding the undefined constitutional limitations on the police power. Professor Brooks Adams noted in 1913 that the scope of the police power

> could not be determined in advance by abstract reasoning. Hence, as each litigation arose, the judges could follow no rule but the rule of common sense, and the Police Power, translated into plain English, presently came to signify whatever, at the moment, the judges happened to think reasonable. Consequently, they began guessing at the drift of public opinion, as it percolated to them through the medium of their education and prejudices. Sometimes they guessed right and sometimes wrong, and when they guessed wrong they were cast aside, as appeared dramatically enough in the temperance agitation.[173]

And Justice Holmes noted:

> It may be said in a general way that the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned

---

[172] In the broad language in which the ordinance is enacted it is apparently an attempt on the part of the municipality to regulate and control the habits and practices of the citizen without any reasonable basis for so doing. The ordinance is an unreasonable interference with the private rights of the citizen . . . .

262 Ill. at 513, 104 N.E. at 837-38.

> The ordinance is so broad as to prohibit one from smoking a cigarette in his own home or on any private premises in the city. To prohibit the smoking of cigarettes in [such circumstances] is an invasion of his right to control his own personal indulgences.

142 Ky. at 61, 133 S.W. at 986 (1911). By holding that the ordinance applied in the home, the Kentucky court avoided the question raised in the Illinois case. The reasoning would appear to compel the same result, however.

[173] B. Adams, The Theory of Social Revolutions 94 (1913).

> by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.[174]

Whether the development of the judicial response to exercises of the police power at the time was the result of the changing public opinion or a changing analytical framework, trends in that response were evident. It remains to be seen whether any trends are evident today to indicate how marijuana users will fare in the future.

III. The Genesis of Marijuana Prohibition

Until the inclusion of marijuana in the Uniform Narcotic Drug Act in 1932 and the passage of the Marihuana Tax Act in 1937, there was no "national" public policy regarding the drug. However, as early as 1914 the New York City Sanitary Laws included cannabis in a prohibited drug list and in 1915 Utah passed the first state statute prohibiting sale or possession of the drug. By 1931 twenty-two states had enacted such legislation. In the succeeding section, we shall delve into the circumstances surrounding the passage of several of these early laws and the ensuing judicial acquiescence in the legislative value judgments concerning marijuana. We conclude that the legislative action and judicial approval were essentially kneejerk responses uninformed by scientific study or public debate and colored instead by racial bias and sensationalistic myths.

A. Initial State Legislation: 1914-1931

As indicated above, the Harrison Act, a regulatory measure in the garb of a taxing statute, left many gaps unfilled in the effort to prohibit illegal or nonmedical use of opiates and cocaine. Although Commissioner Anslinger of the Federal Bureau of Narcotics stated in 1932 that few states had responded to the Harrison Act,[1] most states had in fact enacted or reenacted narcotics laws in the period from 1914 to 1931.[2] In so doing, twenty-one states had also restricted the sale of marijuana as part of their general narcotics articles, one state had prohibited its use for any purpose, and four states had outlawed its

[174] Noble State Bank v. Haskell, 219 U.S. 104, 111 (1911).

[1] Anslinger, *The Reason for Uniform State Narcotic Legislation*, 21 Geo. L.J. 52, 53 (1932).

[2] State Laws 35-327.

cultivation.[3] Our objective in this section is to determine why these states chose to include cannabis in their lists of prohibited drugs.

The first consideration was the increasing public awareness of the narcotics problem. As noted above, the Harrison Act engendered a shift in public perception of the narcotics addict. With ever-increasing frequency and venom, he was portrayed in the public media as the criminal "dope fiend." This hysteria, coupled with the actual increases in drug-related criminal conduct due to the closing of the clinics,[4] was the basis for a good many of the post-Harrison Act narcotic statutes.[5] Other forces such as lurid accounts in the media,[6] publications of private narcotics associations,[7] and the effective separation of the addict and his problems from the medical profession[8] all pressed legislatures into action to deal more effectively with what was perceived as a growing narcotics problem.

Despite the increasing public interest in the narcotics problem during this period, we can find no evidence of public concern for, or understanding of, marijuana, even in those states that banned it along with the opiates and cocaine. Observers in the middle and late 1930's agreed that marijuana was at that time a very new phenomenon on the national scene.[9] The perplexing question remains—why did some states include marijuana in their prohibitive legislation a decade before it achieved any notice whatsoever from the general public and the overwhelming majority of legislators?

From a survey of contemporary newspaper and periodical commentary we have concluded that there were three major influences. The most prominent was racial prejudice. During this period, marijuana legislation was generally a regional phenomenon present in the southern and western states. Use of the drug was primarily limited to Mexican-Americans who were immigrating in increased numbers to those states. These movements were well noted in the press accounts

---

[3] *Id.* at 14.

[4] For a discussion of the change in the public image of addicts and the closing of clinical experiments, see p. 988 *supra.*

[5] *See* TERRY & PELLENS 877-919.

[6] *See, e.g.,* text at notes 24-25 *infra.* For somewhat more clinical discussions, see TERRY & PELLENS 877-919.

[7] *See* Weber, *Drugs and Crime,* 10 J. CRIM. L. & CRIMINOLOGY 370 (1919).

[8] A. LINDESMITH, THE ADDICT AND THE LAW 3-35 (1965); King, *Narcotic Drug Laws and Enforcement Policies,* 22 LAW & CONTEMP. PROB. 113, 120-26 (1957).

[9] *Hearing on H.R. 6385 Before the House Comm. on Ways and Means,* 75th Cong., 1st Sess. 20 (1937) [hereinafter cited as *Tax Act Hearings*].

of passage of marijuana legislation. A second factor was the assumption that marijuana, which was presumed to be an addictive drug, would be utilized as a substitute for narcotics and alcohol then prohibited by national policy. This factor was particularly significant in the New York law, the forerunner of nationwide anti-marijuana legislation. Finally, there is some evidence that coverage of the drug by the Geneva Conventions in 1925 was publicized in this country and may have had some influence.

1. Rationale in the West: Class Legislation

Geometric increases in Mexican immigration after the turn of the century naturally resulted in the formation of sizeable Mexican-American minorities in each western state.[10] It was thought then[11] and is generally assumed now[12] that use of marijuana west of the Mississippi was limited primarily to the Mexican segment of the population. We do not find it surprising, therefore, that sixteen of these states prohibited sale or possession of marijuana before 1930.[13] Whether motivated by outright prejudice or simple discriminatory disinterest, the result was the same in each legislature—little if any public attention, no debate, pointed references to the drug's Mexican origins, and sometimes vociferous allusion to the criminal conduct inevitably generated when Mexicans ate "the killer weed."

In Utah, for example, the nation's first statewide prohibition of marijuana[14]—in 1915—was attended by little publicity. The combina-

[10] The Bureau of Immigration recorded the entry of 590,765 Mexicans into the United States between 1915 and 1930. Of these, upwards of 90% in each year were to be resident in the 22 states west of the Mississippi, and more than two-thirds were to reside in Texas alone. Information compiled from Tables, Immigrant Aliens, By States of Intended Future Residence and Race or Peoples, published yearly for each fiscal year from 1915 to 1930 in COMM'R GEN. OF IMMIGRATION ANN. REP.

[11] *Tax Act Hearings* 20, 33.

[12] THE MARIHUANA PAPERS at xiv (D. Solomon ed. 1966).

[13] *Id.* at xv.

[14] At its 1915 session, the Utah legislature passed an omnibus narcotics and pharmacy bill which included under it the cannabis drugs. Ch. 66, §§ 7, 8, [1915] Utah Laws 77. The law forbade sale and possession of the named drugs, and provided for medical use under a system of prescriptions and order blanks. Interestingly, clinical treatment of addicts was allowed. *Id.* at 77-80. The law also prohibited possession of opium and marijuana pipes. *Id.* at 80. Violations were misdemeanors punishable by fines and/or imprisonment for terms up to six months, but third offenders faced prison terms from one to five years. The statute made no distinction between sale and possession, nor among the various drugs. The law was revised in 1927. Ch. 65, [1927] Utah Laws 107.

tion of increasing Mexican immigration[15] and the traditional aversion of the Mormons to euphoriants of any kind[16] led inevitably to the inclusion of marijuana in the state's omnibus narcotics and pharmacy bill. Similarly, when the New Mexico and Texas legislatures passed marijuana legislation in 1923, the former by separate statute[17] and the latter by inclusion,[18] newspaper reference was minimal despite coverage in both states of legislative action.[19] The longest of the *Santa Fe New Mexican* references noted:

> The Santa Fe representative, however, had better luck with his bill to prevent sale of marihuana, cannabis indica, Indian hemp or hashish as it is variously known. This bill was passed without any opposition. Marihuana was brought into local prominence at the penitentiary board's investigation last summer when a convict testified he could get marihuana cigarets anytime he had a dollar. The drug produces intoxication when chewed or smoked. Marihuana is the name commonly used in the Southwest and Mexico.[20]

---

[15] See note 10 *supra.*

[16] *See* THE DOCTRINE AND COVENANTS OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, CONTAINING THE REVELATIONS GIVEN TO JOSEPH SMITH, THE PROPHET § 89, at 154 (1921) (¶¶ 5, 7, wine or strong drink) (¶ 8, tobacco) (¶ 9, hot drinks) (revelations given through Joseph Smith the Prophet, at Kirtland, Ohio, February 27, 1833, known as the Word of Wisdom).

[17] The statute made importation of cannabis illegal and established a presumption of importation whenever a person was found to possess the drug. Ch. 42, §§ 1-2, [1923] N.M. Laws 58-59. Violations were pnnishable by fine and/or imprisonment from one to three years. Cultivation, sale or giving away cannabis except for use by physicians and pharmacists was also prohibited, and violations were punishable on first offense by one to three years in prison and on subseqnent offenses by three to five years imprisonment. *Id.* §§ 3, 4.

[18] The Texas general narcotics statute, ch. 150, [1919] Tex. Gen. Laws 277-79, *as amended,* ch. 61, [1919] Tex. Special Sess. Laws 156-57, similar in format to the Utah statute and the Harrison Act, included "any drug or preparation known or sold under the Spanish name of 'Marihuana' . . . ." *Id.* at 278. Unlike the Utah and New Mexico statutes, Texas prohibited only selling, furnishing or giving away marijuana. Except for the exempted medical purposes, such divestment of any of the listed narcotics could have resulted in a fine and/or imprisonment from one month to one year. *Id.* at 279.

[19] The *Santa Fe New Mexican,* bometown paper of the bill's sponsor, made only one mention of marijuana at the time of passage, and that was to note that the drug was being smuggled into the state prisons. Santa Fe New Mexican, Feb. 1, 1923.

The *Austin Texas Statesman* gave heavy coverage to legislative news at this time because the legislature was in special session called by the Goveruor to deal with a budgetary problem.

[20] Santa Fe New Mexican, Jan. 31, 1923. The statute was passed on February 27, 1923; during the period from January 20 to February 28, there were only three other

In its only direct reference to marijuana, the *Austin Texas Statesman* stated:

> The McMillan Senate Bill amended the anti-narcotic law so as to make unlawful the possession for the purpose of sale of any marihuana or other drugs. Marihuana is a Mexican herb and is said to be sold on the Texas-Mexican border.[21]

The discriminatory aspects of this early marijuana legislation, suggested only obliquely by origin and apparent disinterest in Utah, New Mexico and Texas, are directly confirmed in Montana and Colorado. Montana newspapers gave relatively "full" coverage to a proposal to exclude marijuana from the general narcotics law and to create a separate marijuana statute.[22] On seven different days from January 24 to February 10, 1929 (the date of the bill's passage), the *Montana Standard* succinctly noted the progress of the bill through the legislature. The giveaway appeared on January 27 when the paper recorded the following:

> There was fun in the House Health Committee during the week when the Marihuana bill came up for consideration. Marihuana is Mexican opium, a plant used by Mexicans and cultivated for sale by Indians. "When some beet field peon takes a few rares of this stuff," explained Dr. Fred Fulsher of Mineral County, "He thinks he has just been elected president of Mexico so he starts out to execute all his political enemies. I understand that over in Butte where the Mexicans often go for the winter they stage imaginary bullfights in the 'Bower of Roses' or put on tournaments for the favor of 'Spanish Rose' after a couple of whiffs of Marijuana. The Silver Bow and

references to marijuana. The newspaper first noted the bill in a one sentence report that a ban on sale of marijuana was to be discussed. *Id.*, Jan. 20, 1923. Finally, in articles entitled "A Day In The Legislature," the progress of the bill (H.B. 56) was noted on February 21 and 27 in simple lists of bills enacted. *Id.*, Feb. 21, 27, 1923. So inconsequential was the bill that it was not even mentioned in two stories describing the activities of the legislature for that session. *Id.*, Feb. 27, 1923, at 1, col. 1.

[21] Austin Texas Statesman, June 19, 1923. Despite heavy coverage of legislative news and of narcotics generally, the *El Paso Times* made no reference to marijuana between June 10 and June 25. The *Texas Statesman* mentioned the "McMillan Bill" only two other times, each time without direct reference to marijuana.

[22] Unlike most states that passed laws early in the 1920's against marijuana use, Montana in 1927 passed a statute which merely amended the first section of its general narcotic law, Rev. Code of Mont. ch. 227, § 3186 (1921), to include marijuana. Ch. 91, § 1, [1927] Mont. Laws 324. The new law, ch. 6, [1929] Mont. Laws 5, made use, sale or possession without a prescription a misdemeanor.

> Yellowstone delegations both deplore these international complications." Everybody laughed and the bill was recommended for passage.[23]

The same year, a change in Colorado's marijuana law was precipitated by less comic apprehensions of the drug's evil effects. On April 7, 1929, a girl was murdered by her Mexican step-father. The story was lead news in the *Denver Post* every day until April 16, probably because the girl's mother was white. On the 16th it was first mentioned that this man might have been a marijuana user. Headlined "Fiend Slayer Caught in Nebraska[;] Mexican Confesses Torture of American Baby," and subheaded "Prisoner Admits to Officer He is Marihuana Addict," the story relates in full the underlying events:

> "You smoke marihuana?"
> "Yes"
> The Mexican said he had been without the weed for two days before the killing of his step-daughter.[24]

On April 17, the story on the Mexican included the following:

> He repeated the story he had told the Sidney Chief of Police regarding his addiction to marihuana saying that his supply of the weed had become exhausted several days before the killing and his nerves were unstrung.[25]

With regard to the legislative news there is no mention at any time of a bill to regulate marijuana; however, on April 21, the *Denver Post* noted the Governor had signed a bill increasing penalties for sale, possession or production of marijuana.[26]

The reader should note that public perception of marijuana's ethnic origins and crime-producing tendencies often went hand in hand, especially in the more volatile areas of the western states. Stories such as the one appearing in the *Denver Post*, where defendants charged with

---

[23] The Montana Standard, Jan. 27, 1929, at 3, col. 2.

[24] Denver Post, April 16, 1929, at 2, col. 1.

[25] *Id.*, April 17, 1929, at 2, col. 1.

[26] *Id.*, April 21, 1929. Ch. 95, [1927] Colo. Laws 309, penalized possession, sale, gift, or cultivation of any of the cannabis drugs as a misdemeanor. Offenses carried a fine and/or imprisonment in the county jail for not less than one or more than six months. The new law, ch. 93, [1929] Colo. Laws 331, increased the penalties for second offenders to one to five year terms in the penitentiary.

violent crimes attempted to blame their actions on the effects of marijuana, were primarily responsible for the drug's characterization as a "killer weed." In any event, from this brief survey of marijuana prohibition in the western states, we have concluded that its Mexican use pattern was ordinarily enough to warrant its prohibition, and that whatever attention such legislative action received was attended by sensationalist descriptions of crimes allegedly committed by Mexican marijuana users.

2. Rationale in the East: Substitution

The first significant[27] instance of marijuana regulation appeared in the 1914 amendments to the New York City Sanitary Laws. The inclusion by the New York legislature of marijuana in its general narcotics statute in 1927 was the precursor of nationwide legislation.[28] For these reasons, we have chosen New York as the most likely source of information regarding the rationale for marijuana prohibition in Maine, Massachusetts, Michigan, Ohio, Rhode Island and Vermont, all of which had acted before 1931.[29]

In January 1914 the New York legislature passed its first comprehensive statute—The Boylan Bill—regulating the sale and use of habit-forming drugs[30] and did not include marijuana among its list of pro-

[27] Although Commissioner Anslinger stated in the 1937 Tax Act Hearings that the District of Columbia had no law regulating marijuana, Dr. Woodward of the AMA refuted the Commissioner's statement by citing a 1906 provision which limited the sale of cannabis to pharmacists and regulated sale of the drug by such pharmacists to the public. *Tax Act Hearings* 92-93. The D.C. provision, Act of May 7, 1906, ch. 2084, § 13, 34 Stat. 175, is typical of early attempts to deal with the drug under the general poison laws, but it is noteworthy in its treatment of marijuana separately from opiates.

[28] See pp. 1030-33 *infra.*

[29] In 1913, Maine prohibited the sale of *cannabis indica* without a prescription. STATE LAWS 137. Massachusetts passed a similar law in 1917, *id.* at 150, and Michigan forbade possession in 1929, *id.* at 161. A 1923 Ohio law prohibited sale or possession with intent to sell, *id.* at 242; Rhode Island prohibited sale in 1918, *id.* at 263; and Vermont barred sale without a prescription in 1915, *id.* at 296.

[30] Ch. 363, [1914] N.Y. Laws 1120. The first narcotics legislation in New York was enacted in 1893. Ch. 661, art. XII, § 208, [1893] N.Y. Laws 1561. The 1893 law provided that no prescription containing opium, morphine, cocaine or chloral could be filled more than once. Two years later, the legislature enacted a provision requiring that the effect of narcotics on the human system be taught in the public schools. Ch. 1041, § 1, [1895] N.Y. Laws 972. In 1897, a law was passed making it a felony to possess any narcotic "with intent to administer the same or cause the same to be administered to another" without his consent. Ch. 42, § 1, [1897] N.Y. Laws 21. The first provision aimed at the sale of narcotics was passed in 1907 and

hibited narcotics. It appears that the Board of Health of New York City then amended its Sanitary Code adding "Cannabis indica, which is the Indian hemp from which the East Indian drug called hashish is manufactured," [31] to the City's list of prohibited drugs. Violation of this provision of the City Sanitary Code was a misdemeanor punishable by a small fine and/or a jail term of up to six months. On July 29, 1914, an article reporting the amendment appeared in the *New York Times* wherein the drug was described:

> This narcotic has practically the same effect as morphine and cocaine, but it was not used in this country to any extent while it was easy to get the more refined narcotics.[32]

The next day the editors of the *Times* commented:

> [T]he inclusion of cannabis indica among the drugs to be sold only on prescription is only common sense. Devotees of hashish are now hardly numerous enough here to count, but they are likely to increase as other narcotics become harder to obtain.[33]

From these observations, it would appear (1) that there were few marijuana users at the time; and (2) that use of the drug was expected to increase as a direct result of the restriction of opiates and cocaine.

Despite New York City's early classification of cannabis with known narcotics, New York State did not prohibit sale and possession of the drug for other than medicinal purposes until 1927.[34] And this was true despite a great deal of activity on the narcotics front from 1914 to 1927, when the legislature acted four different times.[35] Throughout

provided that the sale or distribution of cocaine without a prescription was unlawful. Ch. 424, § 1, [1907] N.Y. Laws 879. This provision was subsequently amended to provide for the keeping of records of sales and of transactions between dealers. Ch. 470, § 2, [1913] N.Y. Laws 984; ch. 131, § 1, [1910] N.Y. Laws 231; ch. 277, § 1, [1908] N.Y. Laws 764.

[31] N.Y. Times, July 29, 1914, at 6, col. 2.

[32] *Id.*

[33] *Id.*, July 30, 1914, at 8, col. 4.

[34] Ch. 672, [1927] N.Y. Laws 1695-1703.

[35] The 1914 act was amended by the Whitney Act in 1918 which also provided for the repeal of the 1914 act. Ch. 639, [1918] N.Y. Laws 2026. In 1921 an act was passed that in effect repealed all the legislation relating to the narcotics problem. Ch. 708, [1921] N.Y. Laws 2496. The measure made no provision for other laws on the subject. This surprising move was made in the interests of economy, N.Y. Times, Jan. 6, 1921, at 1, col. 8, and with the belief that the drug problem could be better handled by local authorities working in concert with federal agencies. *See id.*, Jan. 9,

all this tumult and in the variety of narcotics proposals suggested or enacted,[36] marijuana or cannabis was not classified among the restricted drugs until the drafting of the 1927 Act. This act[37] defined cannabis as a "habit-forming drug," [38] and accordingly punished as misdemeanors[39] the control, sale, distribution, administration and dispensing[40] of cannabis except for medical purposes. The penalty provision of the statute did not discriminate among types of offenses, first or subsequent violations, or the prohibited narcotic drugs.[41]

There is no apparent indication in the contemporary commentary of the reasons for inclusion of marijuana in the New York laws. When the 1927 law was passed, public concern was focused on the general need to reduce narcotic addiction; none of the commentators were concerned about marijuana.[42] While there were numerous articles in the media dealing with the problems of the opiates, morphine, cocaine and heroin, only four articles about marijuana appeared in the major New York newspaper during the entire period from 1914 until 1927. In 1923 the *New York Times* noted that the "latest habit forming drug . . . marihuana, which is smoked in a cigarette" was exhibited at a women's club meeting.[43] In 1925 the same paper reported that the drug had been banned in Mexico.[44] One year later, the paper reported the results

1921, § 2, at 1, col. 7; *id.*, May 22, 1921, § 2, at 11, col. 3. An act making illegal the sale of cocaine without a prescription was enacted in 1923. Ch. 130, [1923] N.Y. Laws 160. The possession of opium or cocaine without a prescription was outlawed in 1926. Ch. 650, § 2, [1926] N.Y. Laws 1198.

[36] As late as 1918, a legislative committee that had exhaustively studied the narcotics problem in New York did not mention the use of marijuana and concluded: "The drugs which are the sources of the difficulty are cocaine and eucaine with their salts and derivatives and opium and its derivatives, codeine, morphine and heroin." JOINT LEGISLATIVE COMM. TO INVESTIGATE THE LAWS IN RELATION TO THE DISTRIBUTION AND SALE OF NARCOTIC DRUGS, FINAL REPORT, NEW YORK SENATE DOC. NO. 35 (1918), *quoted in* TERRY & PELLENS 833.

[37] The Act of April 5, 1927, repealed both the 1923 and 1926 laws and replaced them with a comprehensive narcotic control scheme. Ch. 672, [1927] N.Y. Laws 1695. This act contained provisions relating to the control and use of narcotic drugs and treatment of addicts; it also exempted certain preparations from its coverage. The act furnished the model for the Uniform Narcotic Drug Act. *See* pp. 1030-31 *infra*.

Subsequently, in 1929, unlawful sale of narcotics was made a felony and all other violations of the 1927 act were made misdemeanors. Ch. 377, [1929] N.Y. Laws 881.

[38] Ch. 672, § 421(14), [1927] N.Y. Laws 1697.

[39] *Id.* § 443, at 1702.

[40] *Id.* § 423, at 1697.

[41] *See id.* § 443, at 1702.

[42] *See* N.Y. Times, Mar. 25, 1927, at 4, col. 6.

[43] *Id.*, Jan. 11, 1923, at 24, col. 1.

[44] *Id.*, Dec. 29, 1925, at 10, col. 7.

of testing in Panama on the effects of marijuana. The article noted that as a result of these tests the study group concluded marijuana smoking was relatively safe; thus, it was "recommended that no steps be taken by the authorities of the Canal Zone to prevent the sale or use of marijuana and that no special legislation on that subject was needed." [45] Finally, in July 1927, the *Times* reported that a Mexican family was said to have gone insane from eating marijuana.[46] Perhaps the clearest indication of the absence of notice given the marijuana section of the 1927 Act is that none of the articles discussing the Act after its passage refer to marijuana.[47]

It is likely, then, that the inclusion of cannabis in the state law was motivated primarily by the same fear that had provoked the Sanitary Law Amendment in 1914. Use, though still slight, was expected to increase. Throughout the entire New York experience the main argument was preventive: Marijuana use must be prohibited to keep addicts from switching to it as a substitute for the drugs which had become much more difficult to obtain after the enactment of the Harrison Act, and for alcohol after Prohibition.[48] Accordingly, the passage of the Harrison and Volstead Acts were direct causes of the preventive inclusion of marijuana among prohibited drugs. In fact, it has been observed that marijuana use *did* increase during this period.[49]

Another factor that may have influenced the passage of the 1927 Act was the Second Opium Conference at Geneva in 1925,[50] which included Indian hemp within the Convention against Opium and other Dangerous Drugs, even though the United States had withdrawn in

---

[45] *Id.*, Nov. 21, 1926, § 2, at 3, col. 1.

[46] *Id.*, July 6, 1927, at 10, col. 6.

[47] *See id.*, Mar. 25, 1927, at 4, col. 6; *id.*, April 6, 1927, at 13, col. 2.

[48] *See* Simon, *From Opium to Hash Eesh,* SCI. AM., Nov. 1921, at 14-15. *See also* N.Y. Times, Jan. 11, 1923, at 24, col. 1. A similar argument was made with respect to cocaine:

> Cocaine in particular is greatly in demand. When prohibition is in force, persons, especially drinkers from compulsion of habit who have been robbed of their daily drink, will naturally resort to cocaine . . . .

Weber, *supra* note 7, at 372.

[49] B. RENBORG, INTERNATIONAL DRUG CONTROL 216 (1947):

> As the campaign against the illicit traffic in opium, morphine, and cocaine drugs made progress and gradually resulted in diminution of the supplies on the illicit market, a marked increase in the illicit traffic and the use of Indian hemp drugs was noticed, more particularly on the North American Continent (the problem of marihuana) and in Egypt (the hashish problem).

[50] See Second Geneva Opium Conference, Convention, Protocol and Final Act, *quoted in* W. WILLOUGHBY, OPIUM AS AN INTERNATIONAL PROBLEM 534-70 (1925).

1925 from the League of Nations deliberations on controlling and regulating the international traffic in dangerous drugs.[51]

3. The International Scene

The first mention of marijuana on the international front came with the preliminary negotiations for the Hague Conference of 1912. In preparing for this Conference, which represented an attempt to deal with the international opium traffic, the government of Italy proposed that the production and traffic in Indian hemp drugs be included as part of the agenda of the Conference.[52] During the Conference itself, there was no mention of the drng, and the Convention did not include cannabis in its provisions. In addition to the Convention, however, the delegates signed a closing protocol:

> 2. The Conference considers it desirable to study the question of Indian hemp from the statistical and scientific point of view, with the object of regulating its abuses, should the necessity thereof be felt, by internal legislation or by an international agreement.[53]

It was not until just before the Geneva Conference of 1925 that the proposal was mentioned again. In 1923 the following resolution was passed by the Advisory Committee on Traffic in Opium and Other Dangerous Drugs of the League of Nations:

> IV. With reference to the proposal of the Government of the Union of South Africa that Indian hemp should be treated as one of the habit-forming drugs, the Advisory Committee recommends the Council that, in the first instance, the Governments should be invited to furnish to the League information as to the production and use of, and traffic in, this substance in their territories, together with their observations on the proposal of the Government of the Union of South Africa.[54]

At the 1925 meeting in Geneva, the Egyptians led the way in proposing that hashish be included within the Convention.[55] An Egyptian dele-

[51] *Id.* at 344-46.

[52] Wright, *The International Opium Conference*, 6 AM. J. INT'L L. 865, 871 (1912).

[53] Addendum and Final Protocol of The International Opium Conf., The Hague, 1912, *quoted in* W. WILLOUGHBY, *supra* note 50, at 492.

[54] ADVISORY COMM. ON TRAFFIC IN OPIUM AND OTHER DANGEROUS DRUGS, REPORT TO COUNCIL ON THE WORK OF THE SIXTH SESSION (1924), *quoted in* W. WILLOUGHBY, *supra* note 50, at 374.

[55] *See* W. WILLOUGHBY, *supra* note 50, at 251.

gate presented a paper on the effects and use of hashish in Egypt. Mr. El Guindy's study is so typical of the so-called scientific or empirical evidence that has been presented to justify the drug's prohibition that the following excerpt must be included. In stating that the real danger of hashish is that it will produce insanity, the Egyptian delegate presented the following:

> The illicit use of hashish is the principal cause of most of the cases of insanity occurring in Egypt. In support of this contention, it may be observed that there are three times as many cases of mental alienation among men as among women, and it is an established fact that men are much more addicted to hashish than women.[56]

The Egyptian proposal was referred to a subcommittee for study and later in the Conference this group reported that the use of Indian hemp drugs should be limited to medical and scientific purposes. The proceedings contain no record of what medical or scientific evidence might have been brought forward to support the inclusion of the Indian hemp drugs in the Convention.[57] Nevertheless, they were the subject of Chapters IV and V of the Convention.[58]

4. Conclusion

The early laws against the cannabis drugs were passed with little public attention. Concern about marijuana was related primarily to the fear that marijuana use would spread, even among whites, as a substitute for the opiates and alcohol made more difficult to obtain by federal legislation. Especially in the western states, this concern was identifiable with the growth of the Mexican-American minority. It is clear that no state undertook any empirical or scientific study of the effects of the drug. Instead they relied on lurid and often unfounded

---

[56] *Quoted in id.* at 378. Mr. El Guindy concludes by saying: "Generally speaking, the proportion of cases of insanity caused by the use of hashish varies from 3 to 60 percent of the total number of cases occurring in Egypt." *Id.* at 379.

[57] There are no records of these subcommittee hearings, so we can only surmise that the quality of the evidence might have been about as bad as that presented in the floor report of the Egyptian delegation.

[58] Geneva Convention of 1925, *quoted in* W. WILLOUGHBY, *supra* note 50, at 539. Moreover, the Convention defines Indian hemp as follows:

> "Indian hemp" means the dried flowering or fruiting tops of the pistillate plant *Cannabis sativa L.* from which the resin has not been extracted, under whatever name they may be designated in commerce.

Id. at 535

accounts of marijuana's dangers as presented in what little newspaper coverage the drug received. It was simply assumed that cannabis was addictive and would have engendered the same evil effects as opium and cocaine. Apparently, legislators in these states found it easy and uncontroversial to prohibit use of a drug they had never seen or used and which was associated with ethnic minorities and the lower class.

B. Judicial Corroboration

Two significant conclusions appear from a study of the few cases[59] involving convictions for marijuana offenses under the initial wave of state laws. First, the argument regarding a private conduct limitation on the police power had been so discredited it was not even made. Second, the courts, like the legislatures, relied on nonscientific materials to support the proposition that marijuana was an addictive, mind-destroying drug productive of crime and insanity.

In only one case was there a serious constitutional challenge to the validity of the legislation. Appealing a Louisiana conviction for possession of five hundred plants of marijuana, the defendant in *State v. Bonoa*[60] argued not that the state could not punish mere possession but rather that the statute was overbroad, since aside from its use as an intoxicant the marijuana plant was employed in the manufacture of hemp line, in the preparation of useful drugs and for the production of bird seed for canaries. Defendant's contention was that only possession, sale or use for deleterious purposes could be prohibited.

The court's reply was that the drug's deleterious properties outweighed its uses, especially since "[t]he Marijuana plant is not one of the crops of this state." [61] Defendant also offered the *reductio ad absurdum* argument that if possession of the marijuana plant may be prohibited simply because intoxicating resin may be extracted from the flowering tops, then the possession of corn or grapes may be prohibited

[59] In an extensive survey of cases appearing in the Fourth Decennial Digest for the years 1926 to 1936, we could find only eight cases dealing with marijuana under laws enacted prior to the Uniform Narcotic Drug Act. In chronological order: Gonzales v. State, 108 Tex. Crim. 253, 299 S.W. 901 (1927); State v. Franco, 76 Utah 202, 289 P. 100 (1930); State v. Bonoa, 172 La. 955, 136 So. 15 (1931); Santos v. State, 122 Tex. Crim. 69, 53 S.W.2d 609 (1932); Baker v. State, 123 Tex. Crim. 209, 58 S.W.2d 534 (1933); Horton v. State, 123 Tex. Crim. 237, 58 S.W.2d 833 (1933); State v. Navaro, 83 Utah 6, 26 P.2d 955 (1933); People v. Torres, 5 Cal. App. 2d 580, 43 P.2d 374 (Dist. Ct. App. 1935).

[60] 172 La. 955, 136 So. 15 (1931).

[61] *Id.* at 964, 136 So. at 18.

because whiskey and wine may be made from them, or possession of poppies because opium may be extracted from them. To this the court replied that alcohol was less injurious than marijuana and that both alcohol and opium were difficult to prepare from these sources while the marijuana plant was easily converted into tobacco and cigarettes.

The court's reasoning is admirable if we accept the basic premise that the marijuana drug is deleterious. To support this conclusion the court quoted from Solis Cohen Githens' *Pharmacotheraupeutics:*

> The first symptom is usually an exaltation of the mind . . . . The ideas are joyous . . . . Sleep follows . . . . When aroused from sleep . . . the mind . . . passes into the same somnolent condition, which lasts for several hours and is followed by a sense of weakness and extreme mental depression. In certain eastern people . . . perhaps because of continued use, the somnolent action is replaced by complete loss of judgment and restraint such as is seen more often from alcohol. An Arab leader, fighting against the crusaders, had a bodyguard who partook of haschisch, and used to rush madly on their enemies, slaying everyone they met. The name of "haschischin" applied to them has survived as "assassin."
>
> The habitual use of cannabis does not lead to much tolerance, nor do abstinence symptoms follow its withdrawal. It causes, however, a loss of mentality, resembling dementia, which can be recognized even in dogs.[62]

The court also quotes Rusby, Bliss & Ballard, *The Properties and Uses of Drugs:*

> The particular narcosis of cannabis consists in the liberation of the imagination from all restraint . . . . Not rarely, in [the depression] state, an irresistible impulse to the commission of criminal acts will be experienced. Occasionally an entire group of men under the influence of this drug will rush out to engage in violent or bloody deeds.[63]

On these two sources, the entire opinion stands. The allegedly deleterious consequences—criminal activity and insanity—are supported only by the mythical etymology of the word "assassin." The marijuana user's purported propensity toward crime, based on similar and often

[62] *Id.* at 961-62, 136 So. at 17-18.

[63] *Id.* at 962-63, 136 So. at 18.

weaker authority, was the primary rationale underlying passage of the Marihuana Tax Act.[64] So preposterous is this assertion that even the proponents of criminalization—including the Commissioner of the Bureau of Narcotics—later implicitly rejected it.[65]

In any event, the courts were as willing to accept such evidence as the legislatures. In a Utah case, *State v. Navaro*,[66] where the court cited the acknowledged evils of marijuana to repel a vagueness attack,[67] it relied on another set of dubious authorities. First, the court referred to the case of *State v. Diaz*[68] wherein a defendant in a first degree murder prosecution tried to disprove the requisite mens rea by showing that he was under the influence of marijuana at the time of the offense. Diaz had claimed that "his mind was an entire blank as to all that happened to him and stated that after smoking the marijuana he became 'very crazy.' "[69] To corroborate his assertion, defendant summoned a physician whose testimony was summarized in *Diaz* in a passage quoted in full in *Navaro:*

> He stated that [marijuana] is a narcotic and acts upon the central nervous system affecting the brain, producing exhilarating effects and causing one to do things which he otherwise would not do and especially induces acts of violence; that violence is one of the symptoms of an excessive use of marijuana. . . . That the marijuana produces an "I don't care" effect. A man having used liquor and marijuana might deliberately plan a robbery and killing and carry it out and escape, and then later fail to remember anything that had occurred . . . .[70]

Thus an attempt in an adversary setting by an accused to escape criminal responsibility by blaming his offense on marijuana intoxication

---

64 See pp. 1055-57 *infra.*

65 See pp. 1072-73 *infra.*

66 83 Utah 6, 26 P.2d 955 (1933).

67 Appellant, convicted on an information charging "possession of marijuana," contended that the statute prohibited only possession of the flowering tops and leaves of the marijuana plant. The court held that marijuana was the popular name for the drug, not just the plant, and that the information accordingly charged an offense. For this proposition, it cited dictionaries, other state statutes, articles, cases and texts. It is the court's familiarity with the articles describing the allegedly evil effects of the drug with which we are concerned.

68 76 Utah 463, 290 P. 727 (1930).

69 *Id.* at 469, 290 P. at 729.

70 83 Utah at 12, 26 P.2d at 957, *quoting* 76 Utah at 469-70, 290 P. at 729.

became medical authority for the scientific hypothesis that marijuana use causes crime.

The second source of support in *Navaro* for the allegedly deleterious effects of marijuana was a 1932 article by Hayes and Bowery (the latter a member of the Wichita, Kansas, Police Department) entitled *Marihuana*.[71] Calling for stricter penalties for marijuana use, the authors stated that during the exhilaration phase, the user is likely to have increased sexual desires[72] and to commit "actions of uncontrollable violence, or even murder." [73] For these propositions, they cited newspaper accounts of crimes the causes of which the reporter attributed to marijuana[74] and police testimony to the same effect.[75] For example, the Chief Detective of the Los Angeles Police Department was quoted as saying:

> In the past we have had officers of this department shot and killed by Marihuana addicts and *have traced the act of murder directly to the influence of Marihuana, with no other motive.* Numerous assaults have been made upon officers and citizens with intent to kill by Marihuana addicts which were directly traceable to the influence of Marihuana.[76]

It should be noted that Hayes and Bowery attributed the violent impulse to the absence of restraint engendered during the so-called exhilaration phase, while each of the authorities cited by the Louisiana court in *Bonoa* attributed the same impulse to the sufferings experienced during the "depression" phase.[77]

The authors also asserted that habitual use leads to a "loss of mental activity, accompanied by a general dullness and indolence, like that of chronic alcoholics or opium eaters," to "destruction of brain tissues" and inevitably to insanity. For this proposition, the authors merely said that "seventeen to twenty per cent of all males admitted to mental hospitals and asylums in India have become insane through the use of this drug." [78]

---

[71] Hayes & Bowery, *Marihuana*, 23 J. CRIM. L. & CRIMINOLOGY 1086 (1932).
[72] *Id.* at 1087, 1089.
[73] *Id.* at 1088.
[74] *Id.* at 1093.
[75] *Id.* at 1088, 1090-91.
[76] *Id.* at 1088 (emphasis added).
[77] Compare text at note 72 *supra* with text at notes 62-63 *supra*.
[78] Hayes & Bowery, *supra* note 71, at 1090.

Finally the court cited an article by Eugene Stanley, the District Attorney of New Orleans, entitled *Marihuana as a Developer of Criminals.*[79] The title conveys the message. We will return to Mr. Stanley in the succeeding section.[80]

The nonchalance with which Utah and Louisiana courts cited sensationalistic, nonscientific sources to support the proposition that marijuana produced crime and insanity suggests how widely accepted this hypothesis was among decision-makers, both judicial and legislative, prior to 1931. Given the prevalence of this attitude, the noninvolvement of the middle class, and the precedent established in the earlier alcohol and narcotics cases, it is not surprising that constitutional challenges were either not made or easily rebuffed. Nor is it surprising that challenges regarding the ambiguity of the word "marijuana" were unsuccessful.[81] The courts, like the legislatures, assumed marijuana caused crime and insanity, and assumed that had public opinion crystallized on the question, it would have favored the suppression of a drug with such evil effects.

IV. Passage of the Uniform Narcotic Drug Act: 1927-1937

Our conclusions to this point bear summarization. During the first two decades of the twentieth century, state as well as national policy was steadfastly opposed to manufacture, sale and consumption of narcotics and alcohol except for medical purposes. Constitutional objections were uniformly ignored, in the narcotics cases primarily because the nexus between the private conduct and public harm was *in fact* a close one, and in the alcohol cases primarily because the legislation was in response to full operation of the public opinion process, to which the courts were willing to defer.

We have also found that public opinion had not crystallized against

---

[79] Stanley, *Marihuana as a Developer of Criminals*, 2 Am. J. Police Sci. 252 (1931), *cited in* State v. Navaro, 83 Utah 6, 14-15, 26 P.2d 955, 958 (1933).

[80] See p. 1044 *infra.*

[81] *E.g.*, State v. Navaro, 83 Utah 6, 15, 26 P.2d 955, 959 (1933); State v. Bonoa, 172 La. 955, 959, 136 So. 15, 17 (1931). The Texas court was somewhat stricter in a series of cases charging simply sale or possession of "narcotic drugs" without specifying marijuana. On the same day, the court reversed convictions in Baker v. State, 123 Tex. Crim. 209, 58 S.W.2d 534 (1933) (possession); Baker v. State, 123 Tex. Crim. 212, 58 S.W.2d 535 (1933) (sale or possession); and Horton v. State, 123 Tex. Crim. 237, 58 S.W.2d 833 (1933) (possession). On the other hand the court held that an indictment charging "possession of marijuana" is sufficient even though it does not allege that marijuana is a narcotic drug. Santos v. State, 122 Tex. Crim. 69, 53 S.W.2d 609 (1932).

intoxicants generally, although public policy was moving rapidly in that direction. Ultimately, the mere existence of that public policy—even in the form of criminal law—was not sufficient to convert a public antipathy toward the evils of commercial alcohol traffic into opposition to moderate use of alcohol. On the question of private use, the public policy was unenforceable and eventually abandoned. However, with respect to narcotics, the public policy, also expressed through the criminal law, effectively converted narcotics use, in the public view, from a medical problem to a legal-moral problem. Sympathy for unfortunate victims turned into moral indictment. Because other laws and medical advances had reduced the number of accidental addicts, the number of addicts decreased; in this sense the public policy was successful. However, to the extent that this policy effectively ostracized a group of users from the rest of society, drove them to criminal activity to sustain their habit, and engendered a moralistic public image, the stage was set for many ensuing problems the consequences of which have only recently become matters of public debate.

Ancillary to these developments during this period was the classification of marijuana in some half the states as an addictive drug that produced the same evils as the opiates and cocaine—crime, pauperism and insanity. The users, few in number, were primarily Mexicans. But as Mexican immigration increased and the legitimate supply of narcotics and alcohol disappeared, a fear developed, particularly in the western states, that marijuana use would increase, particularly among the white youth. As a result, some twenty-two states restricted marijuana use to medical channels. The private conduct objection having evaporated, the courts uncritically affirmed the legislative classification, accepting on faith nonscientific opinion that marijuana was a "killer weed."

Even though the public opinion process did not operate on the issue during this period, the decision-makers in all probability thought that their actions comported with latent public attitudes. If indeed marijuana caused crime and insanity, of course the public would oppose its use, as it presumably did use of opium and cocaine. Because the users were few in number and confined primarily to a suppressed social and economic minority, there was no voice *which could be heard* to challenge these assumptions. To put it another way, the middle class had successfully frustrated alcohol prohibition because the public opinion process came to reflect its view that the law should not condemn intoxication. Yet because marijuana use was primarily a lower class phenomenon, the middle class was generally unaware of the proposed leg-

islation. The public opinion process did not operate, and decision-makers remained uninformed about the drug. Quickly aud with neither consideration nor dissent, the laws were enacted, thus establishing a deliberative format followed often in the succeeding decades.

Although the groundwork had been laid, denigration of the "loco-weed" was primarily a regional phenomenon until 1932. Nationalization ensued in two fell swoops in the 1930's. First, cannabis was included in an optional provision of the Uniform Narcotic Drug Act proposed in 1932. Second, Congress enacted the Marihuaua Tax Act in 1937. In the following sections we shall scrutinize these two watershed developments.

A. Origins of the Uniform Law

As we have suggested, the Harrison Act's masquerade as a revenue measure required residual state legislation in order to effectuate full prohibition of the narcotics trade in America.[1] After its passage most states obediently marched to the tune played in Washington. By 1931 every state had restricted the sale of cocaine and, with the exception of two, the opiates.[2] Thirty-six states had enacted legislation prohibiting unauthorized possession of cocaine[3] and thirty-five prohibited unauthorized possession of the opiates and other restricted drugs.[4] Eight states also prohibited possession of hypodermic syringes.[5] Perhaps the most significant feature of the state response to the Harrison Act was the sharp increase in penalties between 1914 and 1931.[6] Even these penalties, however, seem light in comparison with current penalties.[7]

On the other hand, some influential legislators thought that the Federal Act was sufficient to deal with the problem.[8] And there was a con-

---

[1] See p. 989 *supra*.

[2] STATE LAWS 13.

[3] *Id.* at 8.

[4] *Id.*

[5] *Id.* at 21.

[6] For example, *compare* ch. 337, [1929] N.Y. Laws 881 *with* ch. 363, [1914] N.Y. Laws 1120.

[7] See Appendix A, Tables II, III.

[8] For example, in 1921 New York had repealed its general narcotics provision, ch. 708, [1921] N.Y. Laws 2496. See note 35 at pp. 1017-18 *supra*. Governor Miller of New York at that time stated:

> *Being unable to resolve that conflict of opinion,* I have deemed it the *safest course* to leave the subject to be governed by the Federal statute *until such time at least as it shall more clearly appear in what way that statute may be wisely supplemented by the State.*

48 REPORT OF THE NEW YORK STATE BAR ASS'N 133 (1925) (emphasis original). Com-

siderable lack of uniformity regarding the offenses prohibited and the penalties imposed by the several states. Finally, there was little attention devoted to development of enforcement patterns within and among the states.[9]

With such a variety of state legislation, it is not surprising that little data is available on the enforcement of these laws. Since the *Uniform Crime Statistics*, currently the most reliable source for enforcement data, were first compiled in 1932, there are no figures on the number of drug arrests by state authorities in the 1920's. One commentator asserts:

> As of June 30, 1928, of the 7738 prisoners in federal penitentiaries, 2529 were sentenced for narcotics offenses, 1156 for prohibition law violations, and 1148 for stolen-vehicle transactions. Data are not available for approximately the same number in state institutions at this time.[10]

Despite the significant degree of federal enforcement activity evidenced by the above data, state law enforcement agencies seldom involved themselves with narcotics.[11] Perhaps the best evidence of the lax enforcement of state narcotic laws from 1914 to 1927 is the 1921 call for more effective enforcement of the 1917 Massachusetts anti-narcotic law by the Medical Director of the Boston Municipal Court:

---

missioner Anslinger felt that the states had failed to do their part during this period:

> Notwithstanding the limited power of the Federal Government, state officers immediately became imbued with the erroneous impression that the problem of preventing abuse of narcotic drugs was one now [after the Harrison Act] exclusively cognizable by the National Government, and that the Federal Law alone, enforced, of course, by Federal agencies only, should represent all the control necessary over the illicit narcotic drug traffic.

Anslinger, *The Reason for Uniform State Narcotic Legislation*, 21 GEO. L.J. 52, 53 (1932).

[9] TERRY & PELLENS 969-91. *See also* 1928 HANDBOOK OF THE NAT'L CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS 77-78 [handbooks hereinafter cited as 19— HANDBOOK].

[10] King, *The Narcotics Bureau and the Harrison Act*, 62 YALE L.J. 736, 738 n.12 (1953). *See also* Schmeckbier, *The Bureau of Prohibition* in BROOKINGS INST. FOR GOV'T RESEARCH, SERVICE MONOGRAPH No. 57, at 143 (1929).

[11] *See* JOINT LEGISLATIVE COMM. TO INVESTIGATE THE LAWS IN RELATION TO THE DISTRIBUTION AND SALE OF NARCOTIC DRUGS, FINAL REPORT, NEW YORK SENATE DOC. No. 35 (1918):

> No fixed policy exists for the enforcement of the State statutes except in the larger cities of the State but their enforcement has been left to the desultory or spasmodic efforts of local police officials . . . .

Quoted in TERRY & PELLENS 834. *See also* H. BECKER, OUTSIDERS 137-38 (1963).

> Our laws aiming at the suppression of morphinism could perhaps be better, but, no matter whether they be improved or not, they will not have their maximal efficiency without *adequate appropriations* for their enforcement. Even with the insufficient funds now available, more could be reached. I understand, for instance, that there is *no special police force* (white squads) entrusted with the detection and arrest of cases of V.D.L. [Violation of the Drug Law] and that officers are very much hampered by not being allowed to follow suspected persons outside their particular districts.[12]

The general lack of uniformity in anti-narcotic legislation,[13] the weakness of state enforcement procedures,[14] and the growing hysteria about dope fiends and criminality[15] converged in several requests beginning as early as 1927 for a uniform state narcotic law.[16]

The drafting process of the Uniform Narcotic Drug Act must also be viewed against the backdrop of two larger movements: (1) the trend toward the creation and dissemination of uniform state laws by the National Commissioners on Uniform State Laws, a group to which each state sent two representatives appointed by the governor; and (2) the general concern in the late 20's and early 30's about controlling interstate crime, manifested, for example, in the creation of the nearly autonomous Federal Bureau of Investigation in 1930.

Because the concepts of states rights and narrowly construed federal power held such sway in this period, appeal to the National Commissioners was the inevitable recourse for those pressing for uniform anti-narcotic regulations.

B. Drafting the Law

A committee of Commissioners in conjunction with Dr. William C. Woodward, Executive Secretary of the Bureau of Legal Medicine and Legislation of the American Medical Association, prepared and submitted at the 1925 meeting of the Commissioners the First Tentative Draft.[17] The Committee report stated: "It occurs to your committee

---

[12] Sandoz, *Report on Morphinism to the Municipal Court of Boston*, 13 J. CRIM. L. & CRIMINOLOGY 10, 54 (1922) (emphasis original).

[13] *See* STATE LAWS 31-34.

[14] *Id.* at 28.

[15] *See* SPECIAL COMMITTEE TO INVESTIGATE THE TRAFFIC IN NARCOTIC DRUGS, U.S. TREASURY DEP'T, REPORT (1919).

[16] H. ANSLINGER & W. TOMPKINS, THE TRAFFIC IN NARCOTICS 159 (1953).

[17] 1925 HANDBOOK 977-85.

that the New York Act should be taken as a basis for framing a Uniform Act, and the draft submitted herewith is largely a copy of the New York Act." [18] It appears that the First Draft was drawn up by the Chairman of the Committee alone.[19] It was never presented on the floor of the full meeting but was recommitted for further study.[20] The First Draft included the following definitions:

> (12) "Cannabis indica" or "cannabis sativa" shall include any compound, manufacture, salt, derivative or preparation thereof and any synthetic substitute for any of them identical in chemical composition.
>
> (13) "Habit forming drugs" shall mean coca leaves, opium, cannabis indica or cannabis sativa.[21]

Nowhere in the Committee report or in the Proceedings does there appear an explanation of the inclusion of cannabis under the prohibited or regulated drugs.

The Second Tentative Draft was presented in 1928,[22] and again the draft was not discussed at the Conference but recommitted for further study.[23] The Second Draft was an exact copy of the 1927 New York statute.[24] It retained cannabis in the class of "habit forming drugs." [25] The lack of concern on the part of the Commissioners themselves for the whole narcotics matter is reflected in the remarks of the President of the Conference in introducing a brief statement to the Conference by Dr. Woodward:

> *President Miller:* In view of the importance of the act I think it would not be amiss to listen to the Doctor for a few minutes, that he may point out to us why it is important. In some of the states we do not recognize the importance because it has not been called to our attention.[26]

Moreover, the statements of Dr. Woodward point out that one of the major forces supporting the drafting of the Uniform Act was the

---

[18] *Id.* at 975.
[19] *Id.* at 305.
[20] *Id.*
[21] *Id.* at 978.
[22] 1928 HANDBOOK 323-33.
[23] *Id.* at 75-78.
[24] Ch. 672, [1927] N.Y. Laws 1695-1703.
[25] 1928 HANDBOOK 325.
[26] *Id.* at 76-77.

AMA. The doctors not only wanted to protect the public from drug addiction but also sought uniformity among state laws "in order that the profession may have a better understanding of its obligations and duties and of its rights in the use of narcotic drugs." [27]

Two Third Drafts were submitted. The initial one closely resembled the first two Tentative Drafts and was presented in 1929.[28] Again, it was recommitted for further study.[29] The second Third Tentative Draft[30] was the first to remove cannabis from the definition of "habit forming drugs" and to include only a supplemental provision for dealing with the drug.[31] The explanation for this change from the first two drafts is contained in this note following the supplemental section:

> *Note:* Because of the many objections raised to the inclusion of cannabis indica, cannabis americana and cannabis sativa in the general list of habit-forming drugs, no mention is made of them in other sections of this act. The foregoing section is presented in order to meet an apparent demand for some method of preventing the use of such drugs for the production and maintenance of undesirable drug addiction. It may be adopted or rejected, as each state sees fit, without affecting the rest of the act.[32]

Judge Deering, the Chairman of the Committee on the Uniform Narcotic Drug Act, recommended recommission for further study because the committee had not yet had a chance to consult with the newly created Bureau of Narcotics. At the time of this conference (August 14, 1930) no one had yet been appointed to fill the office of Commissioner of the Bureau.[33]

After receiving suggestions from the newly appointed Commissioner

---

[27] *Id.* at 77.

[28] 1929 HANDBOOK 332-40.

[29] *Id.* at 83.

[30] 1930 HANDBOOK 485-97.

[31] The provision, which made an exemption for medicinal or scientific use, read in part as follows:

> Section 12. (*Cannabis Indica, Cannabis Americana and Cannabis Sativa.*) No person shall plant, cultivate, produce, manufacture, possess, have under his control, sell, prescribe, administer, dispense or compound cannabis indica, cannabis americana, or cannabis sativa, or any preparation or derivative thereof, or offer the same for sale, administering dispensing or compounding . . . .

Id. at 493.

[32] *Id.* There is no evidence of what objections had been raised. The authors feel certain that the dissenters were birdseed and hemp growers who also objected to the passage of the Marihuana Tax Act. See pp. 1054, 1059 *infra*.

[33] 1930 HANDBOOK 126-27.

Anslinger, the Committee presented a Fourth Tentative Draft to the national conference in September 1931.[34] The section dealing with marijuana was identical to that included in the 1930 revised version of the Third Tentative Draft.[35] The national conference directed the Committee to return the next year with a Fifth Tentative or Final Draft.[36]

The Fifth—and final—Tentative Draft was adopted by the National Conference of Commissioners on October 8, 1932.[37] There were some major changes in the Uniform Act between the Fourth and the Fifth Tentative Drafts with regard to the regulation of marijuana. Although the marijuana provisions remained supplemental to the main body of the Act, any state wishing to regulate sale and possession of marijuana was instructed to simply add cannabis to the definition of "narcotic drugs," in which case all the other provisions of the Act would apply to marijuana as well as the opiates and cocaine.[38] It appears that the change from a supplemental section to a series of amendments to the relevant sections of the Act was preferred by the Narcotics Bureau.[39] The only opposition to adoption of the Final Draft came from some Commissioners who objected to tying the uniform state law to the terms of the Federal Harrison Act.[40] This last obstacle to adoption of the Act was overcome by the argument that a number of states had already passed such legislation so that the federalism problem should not stand in the way; the Act was adopted 26-3. [41] These floor arguments at the national conference are a most important indication that no one challenged or even brought up the issue of the designations of the drugs to be prohibited. Moreover, this brief debate confirms the notion that the Act received very little attention of any of the Commissioners other than those sitting on the committee that drafted it.[42]

---

[34] 1931 HANDBOOK 390-402.

[35] *Id.* at 398-99.

[36] *Id.* at 127-28.

[37] 1932 HANDBOOK 95-107.

[38] *Id.* at 326.

[39] *See* Tennyson, *Uniform State Narcotic Law*, 1 FED. B. ASS'N J., Oct. 1932, at 55; *Illicit Drug Traffic*, 2 FED. B. ASS'N J. 208-09 (1935) (indicating that the simple amendments for marijuana were designed by the Bureau so that other drugs could be added in the same way).

[40] 1932 HANDBOOK 95-107.

[41] *Id.* at 107.

[42] From our own computations, the total time spent by all the Commissioners discussing this Act from 1927 to 1932 could not have exceeded one hour. Moreover, the small number of states present at the time of the roll call, as compared with the

Examination of the annual proceedings of the Commissioners immediately suggests several conclusions about the drafting and proposal of the Uniform Narcotic Drug Act. (1) It was drafted in conjunction with the American Medical Association and, after 1930, Commissioner Anslinger of the Federal Bureau of Narcotics. (2) It was not one of the more controversial uniform laws and it was given little consideration during the full meetings of the Commissioners. (3) Impetus for the legislation, especially the optional marijuana provisions, came from the Bureau of Narcotics itself. (4) No scientific study of any kind was undertaken before the optional marijuana section was proposed. (5) The first three tentative drafts included marijuana within the general part of the Act while the last two (including the one finally adopted by the Commissioners) made marijuana the subject of a separate, optional provision. (6) The model for all the drafts of the Uniform Act was the 1927 New York State statute.

C. Passage of the State Laws

By 1937 every state had enacted some form of legislation relating to marijuana, and thirty-five had enacted the Uniform Act.[43] The process by which a previously regional phenomenon became nationwide closely parallels that which characterized the earlier state-by-state developments. The major difference is that the Bureau of Narcotics sought to insure passage of the Act in each state through lobbying and testifying before the legislatures and by propagandizing in channels of public opinion. The Bureau's role has been overstated, however. The same factors that combined to produce the earlier legislation were exacerbated during the nationalization period, 1932-1937, and the legislation probably would have passed just as easily without the efforts of the Bureau.

Use of the drug was still slight and confined to underprivileged or fringe groups who had no access either to public opinion or to the legislators. The middle class had little knowledge and even less interest in the drug and the legislation. Passage of the Act in each state was attended by little publicity, no scientific study and even more blatant ethnic aspersions than the earlier laws. In short, the laws went unnoticed by legal commentators, the press and the public at large, despite the propagandizing efforts of the Bureau of Narcotics.

---

48 that voted on the Uniform Machine Gun Act the day before, indicates that concern for this Act was less than overwhelming.

[43] *Tax Act Hearings* 25-26.

1. Use Patterns and Public Knowledge: 1931-1937

As we noted earlier, marijuana use began in this country in states near the Mexican border,[44] "marijuana" in fact being a Mexican label for the cannabis drug. Throughout the 1920's marijuana use was confined primarily to the Mexican-American community; however, by the late 20's use of this drug had spread to many of the larger cities and had become quite popular among some elements in the Black ghettoes.[45] Jazz musicians, dancers and others found the drug a cheap and readily available euphoriant.[46]

Nevertheless, use still remained slight even in 1934. Commissioner Anslinger himself asserted in 1937: "Ten years ago we only heard about it [marijuana] throughout the Southwest . . . . [I]t has only become a national menace in the last 3 years." [47] Still another commentator has written:

> Only in the 1920's was there any significant usage even by the Mexican-American communities in border cities, and only in the mid and late 1920's did Negro, jazz musicians and "degenerate" bohemian sub-cultures start smoking marijuana. Even the most lurid journalists did not claim marijuana "seeped" into society at large until the 1930's and usually the mid-30's.[48]

As late as 1928, the arrest of one Harlem youth for possession of a small amount of marijuana was news.[49] Thus, we conclude that the number of users was still small, although it may have begun to grow around 1935, and that these users were still concentrated regionally in the West and Southwest and socio-economically within the lower-class Mexican-American and Black communities.

---

[44] *See* H. BECKER, OUTSIDERS 135 (1963).

[45] NEW YORK CITY MAYOR'S COMMITTEE ON MARIHUANA, REPORT, *reprinted in* THE MARIHUANA PAPERS 277-307 (D. Soloman ed. 1966) [hereinafter cited as LAGUARDIA REPORT].

[46] *Id.* at 292-94. The following exchange from the Hearings on the Marihuana Tax Act indicates the low cost of the drug in 1937:

> Mr. Thompson: What is the price of marijuana?
>
> Mr. Anslinger: The addict pays anywhere from 10 to 25 cents per cigarette. In illicit traffic the bulk price would be around $20 per pound. Legitimately, the bulk is around $2 per pound.

Tax Act Hearings 27.

[47] *Tax Act Hearings* 20.

[48] Mandel, *Hashish, Assassins and the Love of God,* 2 ISSUES IN CRIMINOLOGY 149 (1966).

[49] N.Y. Times, Oct. 7, 1928, § 2, at 4, col. 6.

At the same time, the overwhelming majority of middle-class Americans in the 1930's knew nothing of marijuana use—they had never seen marijuana and knew no one who used the drug. Prior to 1935 there was little, if any, attention given marijuana in major national magazines[50] and the leading national newspapers.[51] That few middle-class Americans in this period knew anything of marijuana or its effects is best illustrated by the fact that the Bureau of Narcotics conducted a campaign to alert people to the dangers of marijuana. The Bureau as early as 1932 began arousing public opinion against marijuana by "an educational campaign describing the drug, its identification and its evil effects." [52] In July 1936, the New York City police were shown marijuana so that they would recognize it growing or in dried, smokeable form.[53] Thus, even policemen had to be shown the plant as late as 1936 to permit effective enforcement of the New York state law. We may accordingly infer that the level of public familiarity with the drug was quite low indeed.[54]

What little information filtered to the middle class was generated by sporadic campaigns by local newspapers detailing the potential evils of marijuana; the accounts, as before, were sensationalistic and tended to exacerbate latent ethnic prejudices. For example, a 1934 newspaper account linked crime in the Southwest with marijuana smoking Mexican-Americans in the region.[55] In a 1935 letter to the editor of the *New York Times*, a Sacramento, California, reader asserted:

> Marijuana, perhaps now the most insidious of our narcotics, is a direct by-product of unrestricted Mexican immigration . . . . Mexican peddlers have been caught distributing sample marijuana cigarettes to school children.[56]

---

[50] There is only one article even vaguely related to marijuana listed prior to 1935—*Our Home Hasheesh Crop*, LITERARY DIGEST, Apr. 3, 1926, at 64. *See* H. BECKER, OUTSIDERS 141 (1963).

[51] From 1923 to 1935 there were only thirteen short articles related in any way to marijuana in the New York Times, even though New York City had banned marijuana as early as 1914 and the state legislature had acted in 1927.

[52] BUREAU OF NARCOTICS, U.S. TREASURY DEP'T, TRAFFIC IN OPIUM AND OTHER DANGEROUS DRUGS 59 (1937). *See also* H. BECKER, OUTSIDERS 140 (1963).

[53] N.Y. Times, July 24, 1936, at 6, col. 3.

[54] In 1923 the *New York Times*, in a short article, reported: "The latest habit forming drug . . . marijuana, which is smoked in a cigarette—was exhibited" at a women's club meeting. N.Y. Times, Jan. 11, 1923, at 24, col. 1.

[55] N.Y. Times, Sept. 16, 1934, § 4, at 6, col. 3.

[56] *Id.*, Sept. 15, 1935, § 4, at 9, col. 4.

The writer went on to demand a quota on Mexicans permitted to enter the country. In testifying in favor of the Marihuana Tax Act, Commissioner Anslinger submitted a letter he had received from the editor of a Colorado newspaper asking the Bureau to help stamp out the marijuana menace. After describing an attack by a Mexican-American, allegedly under the influence of marijuana, on a girl of his region the writer stated:

> I wish I could show you what a small marijuana cigaret can do to one of our degenerate Spanish-speaking residents. That's why our problem is so great; the greatest percentage of our population is composed of Spanish-speaking persons, most of whom are low mentally, because of social and racial conditions.[57]

Again, in the testimony at the hearings on the Marihuana Tax Act the following is excerpted from an article included in the record:

> We find then that Colorado reports that the Mexican population there cultivates on an average of 2 to 3 tons of the weed annually. This the Mexicans make into cigarettes, which they sell at two for 25 cents, mostly to white school students.[58]

Thus, not only did few middle-class Americans know about marijuana and its use, but also what little "information" *was* available provoked an automatic adverse association of the drug with Mexican immigration, crime and the deviant life style in the Black ghettos. Naturally, the impending drug legislation, as had the earlier state legislation, became entangled with society's views of these minority groups.

2. *Role of the Federal Bureau of Narcotics*

It has become quite fashionable among critics of existing marijuana legislation to assert that the sole cause of the illegal status of marijuana has been the crusading zeal of the Federal Bureau of Narcotics and especially of its long-time head, Harry J. Anslinger. Some observers have suggested that the Bureau's activity was produced by bureaucratic exigencies and the need to expand;[59] others have said the Bureau was

[57] *Tax Act Hearings* 32.

[58] Gomila, *Marijuana—A More Alarming Menace to Society Than All Other Habit Forming Drugs, quoted in Tax Act Hearings* 32-33. *See also* Gusfield, *On Legislating Morals: The Symbolic Process of Designating Deviance*, 56 CALIF. L. REV. 54, 69 (1968).

[59] Dickson, *Bureaucracy and Morality: An Organizational Perspective on a Moral Crusade*, 16 SOCIAL PROB. 143 (1968).

on a moral crusade;[60] still others have asserted that the Bureau believed its own propaganda about the link between criminality and dope fiends.[61] While much of this may be true, it is clear that the Bureau did not single-handedly conjure up the idea of banning marijuana use. Since many states had already undertaken the regulation of marijuana before the creation of the Bureau in 1930, we cannot credit the Bureau alone with the pressure to outlaw the drug.

At the same time, it is certain that the Federal Bureau of Narcotics' actions quickened the pace of the passage by state legislators of the Uniform Narcotic Drug Act. The Bureau saw the passage of state narcotics laws as one of its primary objectives. To this end we have detailed how directly the Bureau was involved in the creation of the Final Draft of the Uniform Act. After approval of the Final Draft, the Bureau began a significant campaign in the newspapers and legal journals to boost public support for the Uniform Act.[62] By detailing the inability of federal enforcement agencies to deal with the burgeoning narcotics traffic, the Bureau continued to press for passage of the Uniform Act by creating a felt need in the public for such legislation.[63] Despite the efforts of the Bureau, the Uniform Act went virtually unnoticed by legal commentators and periodicals, and by the public media.

3. Legislative Scrutiny and Media Coverage

The Uniform Act was passed by the legislatures of most states without scientific study or debate and without attracting public attention. In examining in detail the passage of the Uniform Act in Virginia and some other selected states, it will be clear that public concern over marijuana succeeded the outlawing of the drug and did not precede it. Our methodology to determine the extent of public attention in a given state at the time of the passage of the act was to review the newspapers of larger cities for the two weeks before and after passage.[64]

---

60 H. BECKER, OUTSIDERS 137-45 (1963); *see* T. DUSTER, THE LEGISLATION OF MORALITY 17-19 (1970).

61 King, *The Narcotics Bureau and the Harrison Act*, 62 YALE L.J. 736, 737-39 (1953).

62 *E.g.*, Anslinger, *The Reason for Uniform State Narcotic Legislation*, 21 GEO. L.J. 52 (1932); Tennyson, *Uniform State Narcotic Law*, 1 FED. B. ASS'N J., Oct. 1932, at 55 (Mr. Tennyson was Legal Advisor, Bureau of Narcotics).

63 *See, e.g.*, N.Y. Times, Sept. 16, 1931, at 37, col. 2.

64 It seems that if there were any public concern at all about the Uniform Act and its adoption, it should appear at those times in mention of the bill, marijuana or narcotic drugs in general. We used the papers of the larger cities under the assumption

In Virginia the Uniform Narcotic Drug Act passed the House 88-0 on February 16, 1934,[65] and was approved 34-0 by the Senate on February 22.[66] Although the Act as passed in Virginia contained no marijuana provisions, the same legislature the next month passed a bill (H.B. 236), prohibiting "use of opium, marijuana [and] loco weed . . . in the manufacture of cigarettes, cigars" and other tobacco products.[67] This law, which amended a 1910 Virginia statute prohibiting the use of opium in the manufacture of cigarettes,[68] was the first mention of marijuana or any of its derivatives in the Virginia Code.

An examination of the *Richmond Times-Dispatch*, the newspaper of the state capital and perhaps the most influential newspaper in the state at that time, for the period surrounding the enactment of these two provisions (February 1 to March 15, 1934) shows clearly that little, if any, public attention attended their passage. There is no mention at any time of H.B. 236.[69] As for H.B. 94 (the Uniform Act), the *Times-Dispatch* reported on February 7 that the bill had been introduced. This announcement was buried among the list of all bills introduced and referred on February 6.[70] In a February 12 article dealing with "controversial" bills before the House and Senate that week no mention was made of H.B. 94. On March 6, the newspaper recorded: "Among the important bills passed were: . . . [far down the list] the Scott bill, mak-

that they would usually contain the fullest and most accurate account of the business of state legislatures.

[65] VA. HOUSE JOUR. 324 (1934).

[66] VA. SENATE JOUR. 300-01 (1934).

[67] Any manufacturer or manufacturers of cigarettes who shall employ opium, marihuana, loco weed, or any other sedative, narcotic or hypnotic drug, like chemical or substance, either in the tobacco used or paper wrappers of cigarettes, cigars, tobacco or any otherwise undiluted foodstuff or beverage, other than that advertised, sold and used as a drug or medicine, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than one hundred dollars nor more than one thousand dollars, or confined in jail not less than six months nor more than twelve months, or both, for each offense.
Ch. 268, [1934] Va. Acts of Assembly 411 (H.B. 236).

[68] Ch. 246, [1910] Va. Acts of Assembly 358 (codified as amended in VA. CODE ANN. §§ 18.1-345, -346 (Supp. 1970)).

[69] On March 11, 1934, the day after the prohibition of use of opium in cigarettes was amended to include marijuana, the *Richmond Times-Dispatch* did not mention the action, and an article entitled "Bills Passed by Assembly" did not mention any marijuana or narcotic laws. Richmond Times-Dispatch, Mar. 11, 1934, at 4, col. 2. A March 12, six-column article, entitled "Vital Measures Passed in Busy 1934 Assembly" also did not mention either the narcotics legislation or the marijuana amendment. *Id.*, Mar. 12, 1934, at 1, col. 2.

[70] *Id.*, Feb. 7, 1934, at 4, col. 1.

ing the State narcotic law conform to the Federal statute." [71] That is the sum of the publicity received by the Uniform Act and the statute that first regulated marijuana in any way in Virginia.

In 1936, the legislature passed a separate statute prohibiting the sale and use of marijuana. This bill—S.B. 289—passed the House and Senate unanimously.[72] The Act prohibited, except for a narrow medical exception, sale, possession, use and cultivation of marijuana.[73] The penalties for violation, interestingly, were more severe than those for violation of the 1934 Uniform Act. Looking again at the *Times-Dispatch* for the period from February 15 to March 19, 1936, we find only one brief article on the new marijuana legislation. After the Senate passed the measure on February 29, the following appeared:

> Among the bills passed by the Senate was the Apperson measure prohibiting the cultivation, sale or distribution of derivatives of the plant cannabis sativa, introduced as an outgrowth of alleged traffic in marihuana cigarettes in Roanoke. It fixes punishment for violation of its provisions at from one to 10 years in the penitentiary, or by confinement in jail for 12 months and a fine of not more than $1,000 or both.
>
> Charges that school children were being induced to become addicts of marihuana cigarettes and that the weed was being cultivated in and near the city on a wide scale were laid before the Roanoke City Council last year. A youth who said he was a former addict of the drug testified before the Council that inhalation of one of the cigarettes would produce a 'cheap drunk' of several days' duration.[74]

No further mention of this statute was made after the House passed it or after the Governor sigued it into law.

In order to determine whether the lack of public attention in Virginia was common to other states when the first prohibition of marijuana took place, we have surveyed the leading newspapers of several other states at the times encompassing passage of the law. We tried to select states that had not previously regulated use of the drug under the assumption that more publicity would attend initial legislation than an amendment of existing law.

In New Jersey, Rhode Island, Oregon and West Virginia, for ex-

---

[71] *Id.*, Mar. 6, 1934, at 2, col. 5.

[72] VA. HOUSE JOUR. 827 (1936); VA. SENATE JOUR. 498 (1936).

[73] Ch. 212, [1936] Va. Acts of Assembly 361.

[74] Richmond Times-Dispatch, Mar. 1, 1936, at 12, col. 3.

ample, the major newspapers of Newark,[75] Providence,[76] Salem[77] and Charleston,[78] respectively, referred to the Uniform Act only once and to marijuana not at all. In Kentucky, the *Louisville Herald Post* printed only two short references to the Uniform Act,[79] one of which referred to marijuana:

> [Congressman] Kramer added that boys and girls of school age are being led into the use of habit forming drugs by underworld leaders. . . . "[M]uggles" or cigarettes made from marijuana, commonly called loco weed or hemp, are also tabooed under the new state law, it was learned.[80]

Typical of both legislative and newspaper concern about the new law is the following *Charleston Daily Mail* comment:

> A Narcotic Bill
>
> Inconspicuously upon the special calendar of the house of delegates—rather far down upon it—is Engrossed S.B. No. 230, lodging specific powers in the hands of state authorities for the control of the traffic in narcotics. It has passed the Senate unanimously. It should pass the

---

[75] The *Newark Star Ledger* was surveyed from May 20 to June 10, 1933, a period surrounding the passage of the statute, ch. 186, [1933] N.J. Acts 397, on June 5, 1933. On the day of the signing of the bill, there appeared a short article noting that the Uniform Narcotic Drug Act had become law. Newark Star Ledger, June 5, 1933, at 2.

[76] The statute, ch. 2096, [1934] R.I. Acts 101, was approved April 26, 1934. The *Providence Journal* was surveyed from April 10 to April 28, 1934, and on April 12 there appeared five sentences on the Uniform Act. Providence Journal, Apr. 12, 1934, at 8. On April 21, the law was described in a short article summarizing the business of the legislative session. *Id.*, Apr. 21, 1934, at 7. Neither article mentioned marijuana.

[77] The *Salem Oregon Statesman* in the period from February 8 to February 28, 1935, had only one article dealing with drugs. Salem Oregon Statesman, Feb. 21, 1935, at 2, col. 2.

[78] The Uniform Act was passed in West Virginia on March 8, 1935. Ch. 46, [1935] W. Va. Acts 179. The *Charleston Daily Mail*, which carried detailed legislative news, was surveyed from March 1 to March 20, 1935. On March 1, the legislature reconvened under a special calendar including the Uniform Act. During this period, the Act attracted little attention except for an editorial on March 7. Charleston Daily Mail, Mar. 7, 1935, at 10, col. 1. The bill was mentioned in passing in two other stories on upcoming legislation, and in a report that a federal judge criticized West Virginia's failure to enact the Act. *Id.*, Mar. 6, 1935, at 6, col. 4.

[79] The *Louisville Herald Post* was surveyed from April 15 to June 15, 1934. The marijuana section of the Uniform Act became effective on June 14, 1934. Ch. 142, [1934] Ky. Acts 562. The only reference to the Act was Louisville Herald Post, June 6, 1934, at 10.

[80] *Id.*

> House, and its only danger of defeat there is the very real one that it will become lost in the shuffle of adjournment now but a few hours away.
>
> The bill goes under the name of the uniform narcotic drug act and it is just that. Identical measures for the control by the states of illicit traffic on drugs have been passed by other states, notably the Southern group. Its passage here would result in a broad territory in which there are corresponding laws . . . .[81]

The editorial nowhere mentions marijuana. The bill itself passed in the waning hours of the special session with no subsequent attention given it.[82]

From our survey of these and other states, we have concluded that with but one exception[83] the Virginia experience was the norm. (1) The laws prohibiting use, sale, possession, and distribution of marijuana passed unnoticed by the media. There was no public outcry for such legislation. (2) Quite often the bill was buried beneath more controversial bills in a busy legislative session. (3) In many states the Act was passed late in the session along with myriad other "uncontroversial" laws. (4) Finally, no state undertook independent study to determine the medical facts about marijuana—they relied on information supplied by the Federal Bureau of Narcotics[84] or a few lurid newspaper stories.[85]

4. Available Medical Opinion

In conjunction with the fourth conclusion from our state case histories of the passage of this Act, we should examine the extent of medical knowledge that might have been available to legislators had they wanted to conduct an independent evaluation of the dangers of the hemp drugs.

---

[81] Charleston Daily Mail, Mar. 7, 1935, at 10, col. 1.

[82] *Id.*, Mar. 11, 1935, at 1, col. 1, reports: "In the confusion of the closing hours Saturday night the legislature passed many bills, many of them unread and unprinted and not understood."

[83] In Missouri, the passage of the Uniform Act was attended by pressure on the legislature stemming from a hysteria campaign in the *St. Louis Star Times* which contained 5 major articles urging the outlawing of marijuana and presenting lurid case studies of the evils of the drug. These articles were quoted in the *Tax Act Hearings*. *See* St. Louis Star Times, Jan. 17-Feb. 19, 1935.

[84] *See, e.g.*, N.Y. Times, Sept. 16, 1931, at 37, col. 2 (recording Commissioner Anslinger's statements on the need for uniform state laws to regulate marijuana).

[85] In the Missouri case, the legislature, in response to the scare stories in the *St. Louis Star Times*, took only 10 days to present the law, hold quick hearings, and unanimously pass the anti-marijuana legislation.

There were five influential sources for information about the effects of marijuana and hemp on humans. None of these were conducted with the scientific precision characterizing modern studies of drug effects. However, they each deserve mention here either because they deserved attention then or because they heavily influenced later commentators.

The first exhaustive study of the effects of cannabis and the other hemp drugs was done by the British in India. Their Indian Hemp Drugs Commission studied cannabis use among the native population in India in 1893 and 1894,[86] and submitted its conclusions in a 500-page report. The Commission received evidence from 1,193 witnesses, including 335 doctors, and studied the relevant drug-related judicial proceedings and the intake records of every mental hospital in British India. As a result they concluded:

> In regard to the moral effects of the drugs, the Commission are of opinion that their moderate use produces no moral injury whatever. There is no adequate ground for believing that it injuriously affects the character of the consumer. Excessive consumption, on the other hand, both indicates and intensifies moral weakness or depravity. Manifest excess leads directly to loss of self-respect, and thus to moral degradation. In respect to his relations with society, however, even the excessive consumer of hemp drugs is ordinarily inoffensive. His excesses may indeed bring him to degraded poverty which may lead him to dishonest practices; and occasionally, but apparently very rarely indeed, excessive indulgence in hemp drugs may lead to violent crime. But for all practical purposes it may be laid down that there is little or no connection between the use of hemp drugs and crime.[87]

It is quite clear, however, that the Indian Hemp Drug Commission Report was not disseminated in the United States until 1969.[88]

On the other hand, periodic reports of the Panama Canal Zone Governor's Committee to study the physical and moral effects of the use of marijuana *were* available to legislators before the passage of the Uniform Act. After an investigation extending from April to December 1925, the Committee reached the following conclusions:

> There is no evidence that marijuana as grown here is a "habit-forming" drug in the sense in which the term is applied to alcohol,

[86] INDIAN HEMP DRUGS COMMISSION 1893-94, REPORT: MARIJUANA (J. Kaplan ed. 1969).
[87] *Id.* at 264.
[88] *Id.* at vi.

> opium, cocaine etc. or that it has any appreciable deleterious influence on the individual using it.[89]

In 1933, a similar Panama Canal Zone committee reported:

> Delinquencies due to mariajuana smoking which result in trial by military court are negligible in number when compared with delinquencies resulting from the use of alcoholic drinks which also may be classed as stimulants and intoxicants.[90]

About the time that the final Governor's Committee Report from the Canal Zone was completed, a New Orleans physician, Dr. Fossier, completed a study from which he concluded that marijuana was a highly dangerous drug with habit-forming properties.[91] This piece would have remained relatively unnoticed due to the obscurity of the journal in which it was published had it not been picked up by the New Orleans District Attorney, Eugene Stanley, and made the basis for his own article—*Marihuana as a Developer of Criminals*[92]—which appeared in a law enforcement journal. Mr. Stanley stated:

> It is an ideal drug to cut off inhibitions quickly. . . .
> At the present time the underworld has been quick to realize the value of this drug in subjugating the will of human derelicts to that of a master mind. Its use sweeps away all restraint, and to its influence may be attributed many of our present day crimes. It has been the experience of the Police and Prosecuting Officials in the South that immediately before the commission of many crimes the use of marihuana cigarettes has been indulged in by criminals so as to relieve themselves from the natural restraint which might deter them from the commission of criminal acts, and to give them the false courage necessary to commit the contemplated crime.[93]

Mr. Stanley's article, based on no empirical data whatsoever, was widely used by courts to corroborate early legislation and by lobbyists to justify the later prohibitive legislation against the hemp drugs.[94]

In 1933 the following colloquy appeared in the Journal of the American Medical Association:

---

89 *Quoted in Mariajuana Smoking in Panama*, 73 THE MILITARY SURGEON 274 (1933).
90 *Id.* at 279.
91 Fossier, *The Marijuana Menace*, 84 NEW ORLEANS MEDICAL & SURGICAL J. 247 (1931).
92 Stanley, *Marihuana as a Developer of Criminals*, 2 AM. J. POLICE SCI. 252 (1931).
93 *Id.* at 256.
94 *See Tax Act Hearings* 23-24, 37.

Effects of Cannabis

To the Editor:—I have been hearing about the smoking of cigarets dipped into or medicated with fluidextract of Cannabis americana. I can find nothing about the use of the drug by addicts. What is its immediate effect? What are its late effects? What is the minimum lethal dose? In what way does it differ from or resemble "muggles" in its action? While in Louisiana I was told that the use of marihuana causes dementia. Is this true? Please omit name.

M.D., Illinois.

ANSWER.—The effect of Cannabis americana is the same as that of Cannabis indica; and, of the effect of the latter, the books are so full that it is hardly necessary to detail them here. It must suffice here to say that cannabis, at the height of its action, usually produces hallucinations, with or without euphoria, and that these are followed by a deep sleep. Its most marked after-effect is the liability to the establishment of a craving for the drug, the habitual use of which undermines the intellectual qualities and the social value of the victim and leads to general physical deterioration. It is stated that smokers nearly always become imbecile in time. The minimum lethal dose is unknown, no fatalities having been reported in man. In view of the fact that one dose may kill one dog that has no marked effect on another, one must admit the possibility of a lethal effect on man. In view of what has been said, it must be admitted that "marihuana," which is merely another name for Cannabis indica, may cause dementia.[95]

The reply contains no indication how or where the persons who answered the question got their data. It seems clear from the nature of the response that the medical community was quite uncertain as to the effects of the drug in 1933.

In 1934, Dr. Walter Bromberg, senior psychiatrist at Bellevue Hospital, reported that marijuana was not a habit-forming drug and was far less responsible for crime than other drugs such as alcohol. In this study, Bromberg drew his data from examination of 2,216 inmates convicted of felonies.[96] Dr. Bromberg pointed out that marijuana users tend to be passive in comparison to users of alcohol and that the hemp drugs

[95] 100 J.A.M.A. 601 (1933).

[96] Bromberg, *Marijuana Intoxication: A Clinical Study of Cannabis Sativa Intoxication*, 91 AM. J. PSYCHIATRY 303 (1934).

should lead to crime only in cases of use by already psychopathic types.[97]

This then was the extent of medical evidence available to laymen and legislators alike at the time the Uniform Narcotic Drug Act and the first prohibitions of marijuana were enacted in most states. We can conclude the following from our brief review of the medical literature: (1)

---

[97] *Id.* at 309; *see Facts and Fancies About Marijuana,* LITERARY DIGEST, Oct. 24, 1936, at 7-8. This presentation begins by digesting Dr. Bromberg's article for laymen:

> It is clear from this study [of 2,216 criminals convicted of felonies] that in this region the drug is a breeder of crime only when used by psychopathic types in whom the drug allows the emergence of aggressive, sexual or antisocial tendencies. . . . It is quite probable that alcohol is more responsible as an agent for crime than is marihuana.

The article continues:

> The following facts stand out in social and medical reports:
>
> 1. Marihuana is not a habit-forming drug, as is heroin or opium.
>
> 2. It prolongs sensations; it is in high favor as an aphrodisiac.
>
> 3. It is the most inexpensive of drugs; marihuana cigarettes usually selling at from three to twenty-five cents each.

The article then describes the effects of marijuana:

> After smoking from one to three "reefers," if one has not been told what to expect, the first effects of the drug pass almost unnoticed—nothing, perhaps, but a slight twitching of muscles of the neck, back or legs. The mind remains calm and clear. Suddenly, without apparent cause, a chance remark . . . sends the subject into a spasm of violent laughter.
>
> Becoming calm again, while the drug continues to exert its weird effects, the smoker finds ideas crowding through his brain with bewildering rapidity; those around him become slow—dull. Nor is the language of his own tongue swift enough to keep pace with his lightning thoughts.
>
> Soon the self-esteem of the smoker begins to grow in like proportion. . . .
>
> Paradoxically, trifling discomforts become unbearable evils; the flare of a match near-by brings a resentment that is immediately transformed into an overwhelming desire for revenge. But before the "reefer man" could possibly climb to his feet, or even reach a hand for a gun or knife, new thoughts have come crowding in. . . .
>
> Above all other distinguishing effects of marihuana intoxication is the fact that all normal conceptions of time and space are lost.
>
> As in the split-second dream that seems to last the night through, time seems of interminable length; the clock stands still for days.
>
> Vision, too, takes on new concepts. Inconsiderable distances become tremendous. . . .
>
> . . . .
>
> Yet, throughout the intoxication, there is constant awareness that the strange fancies rushing through the mind are not natural, but purely the effects of the drug; unlike the opium-eater, he is acutely conscious of those about him. He has many of the sensations of the gay "drunk" at the ball.

Describing a pot-party:

> There is little noise; windows are shut, keeping the smell of smoking weeds away from what might be curious nostrils.
>
> Nor is there any of the yelling, dashing about, playing of crude jokes or physical violence that often accompany alcoholic parties; under the effects of marihuana, one has a dread of all these things.

Little was really known about the effects of marijuana use—there were few studies and what studies there were had serious methodological flaws. (2) Even if the studies we record had been adequate methodologically, they appeared generally in obscure medical journals not widely read by laymen. (3) Of these studies, most found marijuana relatively harmless especially in contrast to use of alcohol. (4) None of these studies were considered in either the formulation or the passage of the Uniform Act in the states examined. And what is more astounding is that instead of consulting medical opinion, legislators relied on lurid newspaper accounts of marijuana, often provided by defendants in criminal prosecutions whose motivation was to use marijuana to escape criminal responsibility.

5. Provisions of the Uniform Narcotic Drug Act and Supplemental Virginia Marijuana Statute

Having studied the circumstances surrounding passage of the Uniform Act and similar legislation in several states between 1932 and 1937, we shall briefly summarize the provisions of those laws.

(*a*) *Classification and Offenses.*—The Virginia legislature made no changes in the Uniform Act as drafted by the Commissioners and did not include the supplementary marijuana provisions in passing that Act.[98] In 1936, Virginia passed special marijuana legislation[99] which defined cannabis exactly as did the definitional provision of the Uniform Act. Both the special marijuana statute in Virginia and the Uniform Act prohibited possession, transfer and cultivation of the drug[100] but did not refer to the more specific acts that later came to be separated and punished more heavily, such as sale to a minor and possession of more than a certain amount.

(*b*) *Penalties.*—The Uniform Act contained no specific penalties for its violations; the matter of supplying the appropriate penalties was left to each state. Virginia punished first violations of its Uniform Act by a fine not exceeding $100 and/or imprisonment in jail not exceeding one year, and second and subsequent offenses by a fine not exceeding $1,000 and/or imprisonment for not more than five years in the penitentiary.[101] The penalties for violation of Virginia's 1936 marijuana

[98] Ch. 86, [1934] Va. Acts of Assembly 81.
[99] Ch. 212, [1936] Va. Acts of Assembly 361.
[100] *Id.*
[101] Ch. 86, § 20, [1934] Va. Acts of Assembly 90.

statute were *stiffer* than for violation of its Uniform Act. Each offense was punishable by imprisonment in the penitentiary for from one to ten years or by confinement in jail for not more than twelve months and/or by a fine up to $1,000, in the discretion of the court or jury.[102]

An analysis of penalties for violation of the marijuana statutes enacted in other states at about the same time indicates Virginia's penalties were atypically harsh. In New Jersey, for instance, the penalty for unlawful possession and sale of marijuana was that attaching to a high misdemeanor.[103] In Rhode Island the penalty for unlawful possession was a fine of not more than $1,000 or imprisonment for not more than three years or both.[104] For unlawful selling, Rhode Island provided a fine of not more than $2,000 or imprisonment for not more than five years or both.[105] In Kentucky the penalty for a first offense violation was a fine of not less than $100 and not more than $500 or jail for not less than thirty days nor more than one year or both. For second and subsequent offenses the statute required imprisonment in the penitentiary for not less than one nor more than five years.[106] Finally, West Virginia penalized a first offender by a fine not exceeding $100 or jail for not exceeding one year or both, and subsequent offenders by fine not exceeding $1,000 or imprisonment in the penitentiary not exceeding five years or both.[107]

This comparison indicates that Virginia penalties could be more severe than the average. Moreover, Virginia did not distinguish in penalty between possession and sale of the drug, and violation of Virginia's separate marijuana law could be more heavily penalized than violation of the Uniform Act.

V. Passage of the Marihuana Tax Act of 1937

The first assertion of federal authority over marijuana use was the Marihuana Tax Act, passed in 1937. The obvious question, from a historical point of view, is why such legislation was thought to be nec-

102 Ch. 212, § 1(c), [1936] Va. Acts of Assembly 362. The penalty for violation of ch. 268, [1934] Va. Acts of Assembly 411, which prohibited the use of marijuana in the manufacture of cigars and cigarettes, was confinement in jail for from 6 to 12 months and/or a fine of from $100 to $1000.

103 Ch. 186, § 12, [1933] N.J. Laws 411.

104 Ch. 2096, § 14, [1934] R.I. Acts 111.

105 *Id.* § 15.

106 Ch. 142, [1934] Ky. Acts 562.

107 Ch. 46, § 23, [1935] W. Va. Acts 192.

essary, especially after the brushfire passage of the Uniform Act and related legislation in every state in the previous few years. Enforcement difficulty and public hysteria are two reasons which have been propounded for the federal action. We subscribe to a third, one which we rejected with respect to the uniform acts—Congress was hoodwinked by the Federal Bureau of Narcotics.

A. State Enforcement of the Uniform Law

One of the primary arguments in support of the Marihuana Tax Act was that the legislation was required to permit and facilitate adequate enforcement of the Uniform Narcotic Drug Act.[1] Initial examination of enforcement statistics after passage of the Uniform Act suggests that marijuana seizures and arrests in most states rose dramatically.

[1] The best example of this argument is contained in Commissioner Anslinger's statement to the congressional committee hearings on the Marihuana Tax Act:

> STATE LAWS
>
> All of the States now have some type of legislation directed against the traffic in marijuana for improper purposes. There is no legislation in effect with respect to the District of Columbia dealing with marijuana traffic. There is unfortunately a loophole in much of this State legislation because of a too narrow definition of this term. Few of the States have a special narcotic law enforcement agency and, speaking generally, considerable training of the regular peace officers will be required together with increased enforcement facilities before a reasonable measure of effectiveness under the State laws can be achieved.
>
> NEED FOR FEDERAL LEGISLATION
>
> Even in States which have legislation controlling in some degree the marijuana traffic, public officials, private citizens, and the press have urged or suggested the need for national legislation dealing with this important problem. A partial list of States wherein officials or the press have urged the need for Federal legislation on the subject are Colorado, Kansas, New Mexico, Louisiana, and Oklahoma.
>
> The uniform State narcotic law has now been adopted by some 35 States, many of these including cannabis or marijuana within the scope of control by that law. However, it has recently been learned that the legislative definition of cannabis in most of these laws is too narrow, and it will be necessary to have the definition amplified in amendatory legislation in most of the States, to accord with the definition in the pending Federal bill. As is the case at present with respect to opium, coca leaves, and their respective alkaloids, the uniform State law does not completely solve the enforcement problem with respect to marijuana but it will provide the necessary supplement to the Federal act and permit cooperation of State and Federal forces, each acting within its respective sphere, toward suppression of traffic for abusive use, no matter in what form the traffic is conducted. The Bureau of Narcotics, under the Marijuana Taxing Act, would continue to act as an informal coordinating agency in the enforcement of the Uniform State law, exchanging information as between the respective State authorities in the methods of procedure and attempting to secure true uniformity in the enforcement of the act in the various States which have adopted it.

Tax Act Hearings 31.

However, we should be careful to note at the outset the inadequacies of most drug statistics, which, especially during this period, do not permit conclusive analysis regarding the extent of enforcement.

Reporting officials frequently do not differentiate among the drugs. Different jurisdictions employ different measures of enforcement—number of arrests, convictions, kilograms of the drug seized, or number of seizures; even where the same measures are used, statistics are often compiled for different time frames. In addition, changes in the definitions in the laws—such as a change from considering cannabis as only the flowering top of the plant to considering it the whole plant—can wildly distort the statistics from year to year. To add to the confusion, enforcement agencies can manipulate the data for their own uses; if they must appear to be attacking the drug problem or to need more resources, they can change radically the statistical appearance of the enforcement problem by using, for example, arrests as their enforcement measure. Finally, the mere passage of prohibitive legislation will in itself be reflected in the enforcement data. This is especially important for our study of enforcement patterns in the states before passage of the Marihuana Tax Act. As one commentator has explained:

> A point that should be obvious but that is sometimes overlooked is that there are no official statistics relating to violations of a drug law until the drug law is enacted. To compare official preenactment and postenactment data is to compare nothing to something, and naturally drug use will appear to rise.[2]

For all these reasons, the drug statistics from the period of the 1930's must be used somewhat hesitantly to support any contention about the extent of state enforcement before the enactment of Marihuana Tax Act. With this caveat in mind, we shall proceed, nevertheless, to do so.

Although Commissioner Anslinger testified at the hearings on the Tax Act that state officials frequently asked for federal assistance,[3] it appears from the Federal Bureau's own statistics that state and municipal agencies were proceeding with vigor to stamp out marijuana use.[4] We

[2] Mandel, *Problems with Official Drug Statistics*, 21 STAN. L. REV. 991, 1002 (1969). This article is the most complete discussion of the present inadequacies of all official drug statistics.

[3] *Tax Act Hearings* 26-27.

[4] The FBN statistics for 1935 through 1937 on quantities (in pounds) of harvested marijuana seized by state and municipal authorities in the major states are as follows:

do not have fully accurate data, but there are indications that both New York and Louisiana were moving against marijuana use. In 1934, the New York police discovered a large field of marijuana growing near the Brooklyn Bridge. In making a related raid, the police also seized 1,000 marijuana cigarettes.[5] In 1935, the police burned a marijuana crop found growing on the grounds of the Welfare Island penitentiary.[6] Throughout 1936, the narcotics division of the New York police found and destroyed several marijuana crops growing in and around the city.[7] Fragmentary figures are available on law enforcement in Louisiana which indicate there were 219 arrests on marijuana charges in New Orleans alone from 1930 until April of 1936.[8] In Louisiana as a whole for 1936 over 1,195 pounds of bulk marijuana were seized.[9]

This evidence suggests that state authorities in areas where marijuana use had become common at all were dealing fairly effectively with the trade in the drug. Although some states may have hoped that passage of a federal law dealing with marijuana would reduce the enforcement burden on state and local police and bring additional federal services and money,[10] the law cannot really be justified as filling an enforcement void. Nevertheless, this was one of the most effective arguments advanced by Commissioner Anslinger in the halls of Congress.

	1935	1936	1937
Louisiana	20	1,196	30
Mississippi	5	1,309	*
New York	372,000	1	*
Ohio	17,314	431	86
Texas	216	463	20
All other states	2,232	1,972	120
TOTALS	391,787	5,372	256

BUREAU OF NARCOTICS, U.S. TREASURY DEP'T, TRAFFIC IN OPIUM AND OTHER DANGEROUS DRUGS 63 (1935) [hereinafter cited as TRAFFIC IN OPIUM]; *id.* at 90 (1936); *id.* at 81 (1937); Part of the erratic quality of these figures may stem from failure to weigh only the dried flowering tops of the plants seized. For example, 256 pounds seized in 1937 may represent a larger quantity of total plants than 391,787 pounds seized in 1935. *See* Mandel, *supra* note 2, at 999.

[5] N.Y. Times, Oct. 18, 1934, at 4, col. 4. The article goes on to refer to "mariajuana [*sic*], or loco weed, which produces a pleasant, relaxed sensation when smoked, and eventually drives the habitual user insane . . . ."

[6] *Id.*, July 17, 1935, at 8, col. 8.

[7] *See id.*, Aug. 19, 1936, at 16, col. 3; *id.*, July 28, 1936, at 11, col. 6.

[8] *See Tax Act Hearings* 35.

[9] TRAFFIC IN OPIUM 90 (1936).

[10] *See Tax Act Hearings* 26.

B. Public Hysteria or Continued Public Ignorance?

Some observers have attributed passage of the Tax Act to public hysteria.[11] In support of this contention, they show that there was a marked increase in the number of titles dealing with marijuana in the *Readers' Guide to Periodical Literature* from 1936 until 1939, compared with the total absence of articles on this subject in preceding years.[12] It should be noted, however, that only seven articles treating marijuana or hashish appeared from 1920 to August 1937, when the Tax Act was passed.[13] With respect to medical opinion, the *AMA Journal* presented an article opposing the enactment of the Tax Act and arguing, as did their representative at the Tax Act hearings,[14] that existing state laws were sufficient if properly enforced.[15]

It seems the national media and medical opinion were far from hysterical at the time the Tax Act passed. There were a few local newspaper campaigns against the drug, but they tended to peak about two years before the passage of the Act and were isolated instances of public support for the Uniform Narcotic Drug Act.[16] Moreover, these atypical state scares did not draw national attention.

In fact, whatever publicity the "marijuana problem" received during this period was attributable to Commissioner Anslinger and his office, who conducted an active educational campaign for federal legislation. They prepared press stories on the dangers of the drug and travelled around the country disseminating propaganda.[17] Despite these efforts,

---

11 *See, e.g.*, THE MARIHUANA PAPERS at xv (D. Solomon ed. 1966). *See also* H. BECKER, OUTSIDERS 140-42 (1963).

12 Becker's survey of marijuana-related articles in the *Readers' Guide to Periodical Literature* between January 1925 and March 1951 indicates no articles written before July 1935, four articles written between July 1935 and June 1937, and seventeen written between July 1937 and June 1939. H. BECKER, OUTSIDERS 141 (1963).

13 The *Readers' Guide* citations are: Anslinger & Cooper, *Marihuana: Assassin of Youth*, AM. MAGAZINE, July 1937, at 18; Parry, *Menace: Marihuana*, 36 AM. MERCURY 487 (1935); Simon, *From Opium to Hash Eesh*, SCI. AM., Nov. 1921, at 14; Wolf, *Uncle Sam Fights a New Drug Menace*, POPULAR SCI., May 1936, at 14; *Facts and Fancies About Marihuana*, LITERARY DIGEST, Oct. 24, 1936, at 7; *Marihuana Menaces Youth*, SCI. AM., Mar. 1936, at 150; *Our Home Hasheesh Crop*, LITERARY DIGEST, Apr. 3, 1926, at 64.

14 See text at notes 47-50 *infra*.

15 108 J.A.M.A. 1543-44 (1937).

16 *See* St. Louis Star-Times, Jan. 17-Feb. 19, 1935.

17 *See, e.g.*, N.Y. Times, Jan. 3, 1937, § 6, at 6, col. 4. The article reported a meeting between Anslinger and the chairwoman of the New York Federation of Women's Clubs. After the meeting, the chairwoman started an all out campaign against marijuana, focusing on lobbying for the nationwide passage of state legislation, and on an

however, public knowledge of the marijuana proposals was minimal at best. The *New York Times* contained nine references to marijuana from January 1936 until it reported on August 3, 1937,[18] "President Roosevelt signed today a bill to curb traffic in the narcotic, marihuana, through heavy taxes on transactions." [19]

As in prior years, marijuana was still not a matter of public attention, and the so-called "problem" and the federal proposal to cure it went virtually unnoticed by most of the American public. At the same time, however, the "educational" campaign conducted by the Bureau to inform *the Congress* of the dimensions of the "problem" was highly successful. In this sense, the Bureau itself created the "felt need" for federal legislation; the Bureau—and not public hysteria which it was unable to arouse—was the major force behind the Tax Act. We assign to the Bureau the instrumental role with respect to passage of the Tax Act even though we did not do so with respect to the Uniform Act. So successful were the Commissioner's efforts in the Congress that the hearings before the House Ways and Means Committee and the floor debate on the bill are near comic examples of dereliction of legislative responsibility.

C. The Tax Act Hearings

Although the Marihuana Tax Act was modelled after the Harrison Act, marijuana was not simply included in the earlier act primarily for three reasons. First, the importation focus of the Harrison Act was inappropriate for marijuana because there were domestic producers.[20]

educational program aimed at educating high school students on the dangers of the drug. Another *New York Times* article described the appearance of a representative of the Federal Bureau of Narcotics at a meeting of the national Parents and Teachers Association held in Richmond, Virginia, urging the members of the association to help fight the menace of marijuana which produced in its users "a temporary sense of complete irresponsibility which led to sex crimes and other 'horrible' acts of violence." N.Y. Times, May 4, 1937, at 26, col. 1.

[18] *Id.*, July 24, 1936, at 6, col. 3; *id.*, July 28, 1936, at 11, col. 6; *id.*, Aug. 14, 1936, at 12, col. 3; *id.*, Aug. 19, 1936, at 16, col. 3; *id.*, Oct. 4, 1936, § 1, at 3, col. 3; *id.*, Oct. 28, 1936, at 27, col. 6; *id.*, Jan. 3, 1937, § 6, at 6, col. 4; *id.*, Mar. 22, 1937, at 24, col. 1; *id.*, May 4, 1937, at 26, col. 1.

[19] *Id.*, Aug. 3, 1937, at 4, col. 5.

[20] *Compare Tax Act Hearings* 13-14 (testimony of Clinton Hester, Office of the General Counsel of the Treasury Department) *with* State v. Bonoa, 172 La. 955, 136 So. 15 (1931). It should be asked whether the information at congressional disposal changed so drastically between 1937 and 1956 as to justify the statutory presumption enacted at that time, 21 U.S.C. § 176a (1964), providing that possession of marijuana was presumptive evidence of knowing concealment of illegally imported marijuana.

Second, since cannabis had been removed from the *United States Pharmacopoeia* and had no recognized medicinal uses, the variety of medical exceptions in the Harrison Act were inapplicable.[21] Third, even though the Supreme Court had upheld the Harrison Act's prohibition against *purchase* by unregistered persons of the designated drugs, there was some uncertainty whether the earlier 5-4 decision[22] would be followed. Accordingly, the Marihuana Tax Act imposed a prohibitive tax of $100 an ounce on the designated transactions, rather than prohibit the purchases directly.[23]

The brief three days of hearings on the Act[24] present a case study in legislative carelessness. At no time was any primary empirical evidence presented about the effects of the drug, and the participating congressmen seem never to have questioned the assumed evils. Furthermore, the only real concerns seem to have been that farmers would be inconvenienced by having to kill a plant which grew wild in many parts of the country, and that the birdseed, paint and varnish, and domestic hemp industries would be damaged by passage of the law.[25] Finally, the one witness appearing in opposition to the bill, Dr. William C. Woodward, legislative counsel of the American Medical Association and an early and respected participant in the drafting of the Uniform Narcotic Drug Act,[26] was roundly insulted for his audacity in daring to question the wisdom of the Act.

We reproduce in the following few pages some of the dialogne from the hearings, to give the reader the flavor of these ramshackle proceedings, and to allow him to understand more fully the pyramiding of absurdity represented by the amendments of the 1950's. From the hearings we extract contemporary perception of use patterns and harmful effects of marijuana, the quality of medical and other evidence presented, and a short glimpse at how the witnesses were treated by the committee.

1. Who Were Users?

The record of the hearings indicates quite clearly that the Federal

[21] *Tax Act Hearings* 13-14. Earlier state statutes, particularly Virginia's, had taken great pains to outline medical exemptions from the marijuana prohibition. See p. 1040 *supra*.

[22] United States v. Doremus, 249 U.S. 86 (1919).

[23] *Tax Act Hearings* 13-14.

[24] The hearings, including all material not actively discussed but merely read into the record, cover only 124 pages.

[25] *Tax Act Hearings* 77-86; *see* State v. Bonoa, 172 La. 955, 136 So. 15 (1931).

[26] See pp. 1030-32 *supra*.

Narcotics Bureau was anxious for the committeemen to believe marijuana use was a relatively new phenomenon that was on the increase in America.[27] Once again, marijuana use and the Mexican minority were closely linked: "The Mexican laborers have brought seeds of this plant into Montana and it is fast becoming a terrible menace, particularly in the counties where sugarbeets are grown."[28] Again, also, marijuana was presented as the agent by which the underworld class hoped to enslave American youth.[29] The youth of the marijuana users was contrasted with the increasing age of the usual opiate addict. Perhaps most interestingly for later developments, Commissioner Anslinger succinctly noted that heroin addicts and marijuana users came from totally different classes and that the use of one drug was unrelated to use of the other:

> Mr. Anslinger. This drug is not being used by those who have been using heroin and morphine. It is being used by a different class, by a much younger group of people. The age of the morphine and heroin addict is increasing all the time, whereas the marihuana smoker is quite young.
>
> Mr. Dingell. I am just wondering whether the marihuana addict graduates into a heroin, an opium or cocaine user.
>
> Mr. Anslinger. No sir; I have not heard of a case of that kind. I think it is an entirely different class. The marihuana addict does not go in that direction.[30]

The hearings shed no more light on who was using the drug and in what numbers.

2. *What's Wrong with Marijuana?*

If the proceedings did not shed light on the patterns of usage, this in no way was an obstacle to unanimity on the evils of the drug—insanity, criminality and death. Three major sources were relied on to support

---

[27] *See Tax Act Hearings* 30-31.

[28] *Id.* at 45.

[29] Quoting Dr. Walter Bromberg, Mr. Anslinger stated:

> Young men between the ages of 16 and 25 are frequent smokers of marihuana; even boys of 10 to 14 are initiated (frequently in school groups); to them as to others, marihuana holds out the thrill. Since the economic depression the number of marihuana smokers was increased by vagrant youths coming into intimate contact with older psychopaths.

Tax Act Hearings 24. *See also id.* at 32-35, 39, 45.

[30] *Id.* at 24.

this consensus: (1) a variety of horror stories from newspapers cited by Mr. Anslinger and others about atrocious criminal acts committed by individuals under the influence of the drug;[31] (2) studies by Eugene Stanley, the District Attorney of New Orleans, linking the drug and the population of the Louisiana jails;[32] and (3) some inconclusive experimentation on dogs.[33] As we noted earlier, the newspaper stories about crimes committed under the influence of marijuana have two things in common: The reports are unsubstantiated, and many of the accused invoked their use of marijuana as a defense to the charge.[34]

The New Orleans report concluded: "After an exhaustive research on marijuana from its earliest history to the present time, this drug is in our judgment the one that must be eliminated entirely." [35] What was this exhaustive research? It appears to have been nothing but quotations from the most hysterical series of newspaper articles to appear at that time[36] and reports of the number of marijuana addicts to be found in the prison population.[37] The relation of these figures to the conclusion that the drug must be regulated was never established.

The Stanley study[38] was even less well documented and even more outrageous in its description of the effects of marijuana use. "It is an ideal drug to quickly cut off inhibitions." [39] For this proposition Stanley relied on the story of the Persian "Assassins" who allegedly committed

---

[31] *Id.* at 22-23.

[32] *Id.* at 32-37.

[33] *Id.* at 50-52.

[34] *See id.* at 22-23. It is entirely likely that some of these particularly lurid stores were the product of desperate defendants, who, upon being caught red-handed in the commission of crime, sought mitigation of their penalties by claiming to be under the influence of the drug. *See* Bromberg, *Marijuana: A Psychiatric Study*, 113 J.A.M.A. 4 (1939). Bromberg cautions, "The extravagant claims of defense attorneys and the press that crime is caused by addiction to marihuana demands [*sic*] careful scrutiny, at least in this jurisdiction [New York County]." *Id.* at 10.

[35] *Tax Act Hearings* 35.

[36] A good example is the series run by the *St. Louis Star-Times* in early 1935 which featured such articles as the one entitled "Young Slaves to Dope Cigaret Pay Tragic Price for Their Folly" on Jan. 18, 1935.

[37] *See* Gomila & Gomila, *Marihuana—A More Alarming Menace to Society Than All Other Habit-Forming Drugs, quoted in Tax Act Hearings* 32, 34. Mr. F. R. Gomila was public safety director of New Orleans.

[38] Stanley, *Marihuana as a Developer of Criminals*, 2 Am. J. Police Sci. 252 (1931), *quoted in Tax Act Hearings* 37-42, is based on, and indeed is nearly a word-for-word paraphrase of, Fossier's article in the *New Orleans Medical Journal*, *supra* note 91 at p. 1044. As we have seen, Fossier, in reaching his conclusions, overlooked the Panama Canal Zone study.

[39] *Tax Act Hearings* 39.

acts of terror while under the influence of hashish. Although Stanley included in his list of references the Indian Hemp Drugs Commission Report, it is clear he made little effort to catalogue the then available data but contented himself with a number of bold and undocumented assertions. In reading the hearings, one continues to expect some report of a medical or scientific survey, and instead one finds these two reports by New Orleans law enforcers. The contrary conclusions of the Canal Zone studies were not even mentioned.

Finally, a scientific study of the effects of marijuana was presented, but, in keeping with the overall tone of the hearings, this was the most preposterous evidence of all. The Treasury Department presented a pharmacologist who had tested the effects of the cannabis drugs on dogs.[40] He concluded that "[c]ontinuous use will tend to cause the degeneration of one part of the brain."[41] One paragraph later, however, this scientist stated: "Only about 1 dog in 300 is very sensitive to the test."[42] Later in the doctor's testimony, after he had stated over and over the potential evils found from the testing on dogs, he was unable to make the crucial link between a dog's response to the drug and the human response. More incredibly, as the following exchange points out, the doctor really had no knowledge of what effect the drug had on the dogs, since he was not familiar with the psychology of dogs:

> Mr. McCormack. Have you experimented upon any animals whose reaction to this drug would be similar to that of human beings.
>
> Dr. Munch. The reason we use dogs is because the reaction of dogs to this drug closely resembles the reaction of human beings.
>
> Mr. McCormack. And the continued use of it, as you have observed the reaction on dogs, has resulted in the disintegration of the personality?
>
> Dr. Munch. Yes. So far as I can tell, not being a dog psychologist . . . .[43]

Dr. Woodward, the sole witness representing the American Medical Association, noted the inadequacy of these medical statistics. We include his statement on that point in full:

---

[40] One assumes the drug was thought to be too dangerous to risk experimentation on people.

[41] *Tax Act Hearings* 48.

[42] *Id.*

[43] *Id.* at 51.

> That there is a certain amount of narcotic addiction of an objectionable character no one will deny. The newspapers have called attention to it so prominently that there must be some grounds for their statements. It has surprised me, however, that the facts on which these statements have been based have not been brought before this committee by competent primary evidence. We are referred to newspaper publications concerning the prevalence of marihuana addiction. We are told that the use of marihuana causes crime.
>
> But yet no one has been produced from the Bureau of Prisons to show the number of prisoners who have been found addicted to the marihuana habit. An informal inquiry shows that the Bureau of Prisons has no evidence on that point.
>
> You have been told that school children are great users of marihuana cigarettes. No one has been summoned from the Children's Bureau to show the nature and extent of the habit, among children.
>
> Inquiry of the Children's Bureau shows that they have had no occasion to investigate it and know nothing particularly of it.
>
> Inquiry of the Office of Education—and they certainly should know something of the prevalence of the habit among the school children of the country, if there is a prevalent habit—indicates that they have had no occasion to investigate and know nothing of it.
>
> Moreover, there is in the Treasury Department itself, the Public Health Service, with its Division of Mental Hygiene. The Division of Mental Hygiene was, in the first place, the Division of Narcotics. It was converted into the Division of Mental Hygiene, I think, about 1930. That particular Bureau has control at the present time of the narcotics farms that were created about 1929 or 1930 and came into operation a few years later. No one has been summoned from that Bureau to give evidence on that point.
>
> Informal inquiry by me indicates that they have had no record of any marihuana or Cannabis addicts who have even been committed to those farms.
>
> The Bureau of the Public Health Service has also a division of pharmacology. If you desire evidence as to the pharmacology of Cannabis, that obviously is the place where you can get direct and primary evidence, rather than the indirect hearsay evidence.[44]

Dr. Woodward's testimony clearly manifests the deficiencies of the hearings, for at no time did the congressional committee hear primary sources of competent medical evidence before labeling cannabis the producer of crime and insanity.

---

[44] *Id.* at 92.

3. How Dare You Dissent!

Following the testimony of the Treasury Department and its witnesses, the only witnesses who came forward were representatives of legitimate industries that feared the Tax Act would damage their businesses, because manufacture of their products required some part or parts of the cannabis plant.[45] These witnesses were assured that the Tax Act would have little if any impact on their operations.[46]

The one witness who opposed the adoption of the Act was roundly accused of obstructionism and bad faith. Dr. Woodward, one of the chief drafters of the Uniform Narcotic Drug Act, appeared on behalf of the AMA to suggest that, if there was to be any regulation of the cannabis drugs at all, it should be added to the Harrison Act and not be the subject of this separate, and he felt inadequately considered, legislative proposal.[47] We have already examined Dr. Woodward's skepticism on the dangers of the drug. He added to this a thinly veiled attack on the lack of cooperation the AMA had received from the Federal Bureau of Narcotics.[48] Finally, he advocated either assisting state enforcement of their existing laws dealing with the drug or at most including marijuana as a regulated and taxed drug under the Harrison Act.

Either because of antipathy to the AMA or because of the audacity of these suggestions, the Committee members savagely attacked both Dr. Woodward and the AMA. Witness the following exchange, starting with the doctor's answer to questions why he had not proposed marijuana legislation:

> Dr. Woodward. In the first place, it is not a medical addiction that is involved and the data do not come before the medical society. You may absolutely forbid the use of Cannabis by any physician, or the disposition of Cannabis by any pharmacist in the country, and you would not have touched your Cannabis addiction as it stands today,

---

[45] Thus, the following witnesses appeared: Hon. Ralph E. Lozier, General Counsel of the National Institute of Oilseed Products; Raymond G. Scarlett of the birdseed industry; and Joseph B. Hertzfeld, Manager, Feed Department, The Philadelphia Seed Co.

[46] *See id.* at 74.

[47] *Id.* at 87-121.

[48] *Id.* at 87-88 ("During the past 2 years I have visited the Bureau of Narcotics probably 10 or more times. Unfortunately, I had no knowledge that such a bill as this was proposed until after it had been introduced").

> because there is no relation between it and the practice of medicine or pharmacy. It is entirely outside of the those two branches.
>
> The Chairman. If the statement that you have just made has any relation to the question that I asked, I just do not have the mind to understand it; I am sorry.
>
> Dr. Woodward. I say that we do not ordinarily come directly to Congress if a department can take care of the matter. I have talked with the Commissioner, with Commissioner Anslinger.
>
> The Chairman. If you want to advise us on legislation, you ought to come here with some constructive proposals, rather than criticism, rather than trying to throw obstacles in the way of something that the Federal Government is trying to do. It has not only an unselfish motive in this, but they have a serious responsibility.
>
> Dr. Woodward. We cannot understand yet, Mr. Chairman, why this bill should have been prepared in secret for 2 years without any intimation, even, to the profession, that it was being prepared.[49]

After accusing Dr. Woodward of obstruction, evasion and bad faith, the Committee did not even thank him for his testimony.[50]

D. Congressional "Deliberation" and Action

We noted earlier that the marijuana "problem" and the proposed federal cure were virtually unnoticed by the general public. Unable to arouse public opinion through its educational campaign, the Bureau of Narcotics nevertheless pushed the proposed legislation through congressional committees. The Committee members were convinced by meaningless evidence that federal action was urgently needed to suppress a problem that was no greater and probably less severe than it had been in the preceding six years when every state had passed legislation to suppress it. The Committee was also convinced, incorrectly, that the public was aware of the evil and demanded federal action.

The debate on the floor of Congress shows both the low public visibility of the legislation and the nonchalance of the legislators. The bill passed the House of Representatives in the very late afternoon of a long

---

[49] *Id.* at 116.

[50] *See id.* at 121. There is some indication in Fred Vinson's questioning of Dr. Woodward that one cause of the hostility directed at the witness was the growing disfavor with which the New Deal Congress viewed the fairly conservative AMA. Vinson was particularly pointed when he said that the AMA was trying to obstruct here as it had with the Health Care provisions of the Social Security Act. *Id.* at 102-04.

session; many of the members were acquainted neither with marijuana nor with the purpose of the Act. When the bill first came to the House floor late on June 10, 1937, one congressman objected to considering the bill at such a late hour, whereupon the following colloquy occurred:

> Mr. DOUGHTON. I ask unanimous consent for the present consideration of the bill (H.R. 6906) to impose an occupational excise tax upon certain dealers in marihuana, to impose a transfer tax upon certain dealings in marihuana, and to safeguard the revenue therefrom by registry and recording.
>
> The Clerk read the title of the bill.
>
> Mr. SNELL. Mr. Speaker, reserving the right to object, and notwithstanding the fact that my friend, Reed, is in favor of it, is this a matter we should bring up at this late hour of the afternoon? I do not know anything about the bill. It may be all right and it may be that everyone is for it, but as a general principle, I am against bringing up any important legislation, and I suppose this is important, since it comes from the Ways and Means Committee, at this late hour of the day.
>
> . . . .
>
> Mr. RAYBURN. Mr. Speaker, if the gentleman will yield, I may say that the gentleman from North Carolina has stated to me that this bill has a unanimous report from the committee and that there is no controversy about it.
>
> Mr. SNELL. What is the bill?
>
> Mr. RAYBURN. It has something to do with something that is called marihuana. I believe it is a narcotic of some kind.
>
> Mr. FRED M. VINSON. Marihuana is the same as hashish.
>
> Mr. SNELL. Mr. Speaker, I am not going to object but I think it is wrong to consider legislation of this character at this time of night.[51]

On June 14 when the bill finally emerged on the House floor, four representatives in one way or another asked that the proponents explain the provisions of the Act. Instead of a detailed analysis, they received a statement of one of the members of the Ways and Means Committee repeating uncritically the lurid criminal acts Anslinger had attributed to marijuana users at the hearings. After less than two pages of debate, the Act passed without a roll call.[52] When the bill returned as amended from the Senate, the House considered it once again, and adopted as

[51] 81 CONG. REC. 5575 (1937).

[52] *Id.* at 5689-92.

quickly as possible the Senate suggestions, which were all minor.[53] The only question was whether the AMA agreed with the bill. Mr. Fred Vinson not only said they did not object when in fact their committee witness had dissented strenuously, but he also claimed that the bill had AMA *support.* After turning Dr. Woodward's testimony on its head, he also called him by another name, Wharton.[54]

In summary, the Act passed the Congress with little debate and even less public attention. Provoked almost entirely by the Federal Bureau of Narcotics and by a few hysterical state law enforcement agents hoping to get federal support for their activities, the law was tied neither to scientific study nor to enforcement need. The Marihuana Tax Act was hastily drawn, heard, debated and passed; it was the paradigm of the uncontroversial law.

E. Provisions of the Act

Except for the three differences noted above, the Marihauna Tax Act is modelled directly after the earlier federal tax act regulating the opiates —the Harrison Act. As with that Act, the enforcement of the new marijuana tax was left to the Bureau of Narcotics in the Treasury Department. Thus, as a result of the 1937 statute, the jurisdiction of the Bureau was increased substantially.[55]

The Marihuana Tax Act deals specifically with the seeds, resin and most other parts and derivatives of the plant *Cannabis Sativa L.* The Act requires persons importing, producing,[56] selling or in any other way dealing with the drug to pay an occupational tax and to register with the Internal Revenue Service. In addition, all transferees of marijuana are required to file a written order form and to pay a transfer tax, $1 per ounce if registered and a prohibitive $100 per ounce if not registered.[57] Possession of the drug without a written order form constitutes presumptive evidence of noncompliance with the Act. It is also unlawful for a transferor to transfer the drug to a person who has not secured the

---

[53] *Id.* at 7624-25.

[54] *Id.* at 7625.

[55] *See* Dickson, *Bureaucracy and Morality: An Organizational Perspective on a Moral Crusade,* 16 SOCIAL PROB. 143 (1968) (relating this expansion of the Bureau's area of enforcement to their solid support for the need of such federal legislation).

[56] Section 4(b) of the Act (now INT. REV. CODE of 1954, § 4755(a)(2)) gives rise to a presumption that one is a producer of marijuana within the terms of the Act if marijuana is found growing on his property.

[57] The Act does not prohibit possession or purchase of marijuana per se.

order form and paid the tax. As originally enacted, section 12 of the Act assessed a fine of not more than $2,000 and/or imprisonment for not more than five years for violation of each provision of the Act.

VI. The 1950's: Harsher Penalties and a New Rationale—The "Stepping Stone" Theory

The 1950's witnessed the advent of an extremist legislative policy with respect to drugs generally and marijuana in particular. For the first time in our national history, there was public interest in narcotic drugs. Apparently there had been an increase in narcotic drug abuse in the late 40's, and the public mind was ripe for the FBN propaganda. In the paranoid atmosphere of the times, the call for harsher penalties was soothing. Unfortunately, marijuana was caught in the turbulence of this era. Although the pharmacological facts about the drug were beginning to emerge, congressional furor was aroused by the novel assertion, rejected by Commissioner Anslinger in 1937, that use of marijuana led to use of harder drugs. This new plateau of misinformation was to provide the base for continual escalation of penalties and proliferation of offenses throughout the decade.

A. The Boggs Act and Its Progeny: The First Escalation

In 1951 Congress passed the next major piece of federal narcotics legislation[1]—the Boggs Act.[2] The importance of this legislation is that it provided much harsher penalties for all drug violators. Also, for the first time on the federal level, marijuana and other narcotics were lumped together as a result of the Act's provision for uniform penalties for violators of either the Narcotic Drugs Import and Export Act[3] or the Marihuana Tax Act.[4] This indiscriminate treatment of marijuana as just another narcotic drug flew in the face of contemporary testimony challenging the assumption that the hemp drugs were addictive, crime-producing, and likely to lead to insanity and death. New testimony that marijuana was unlikely to be addictive was buried under the new rationale for harsh penalties against offenders of the marijuana laws—that the drug

[1] Between 1937 and 1951, the Uniform Narcotic Drug Act was amended to change the definition of cannabis from the flowering or fruiting tops of just the female plant to include the corresponding parts of the male plant. *See* 1942 Handbook 172-73.

[2] Act of Nov. 2, 1951, ch. 666, 65 Stat. 767.

[3] 21 U.S.C. § 174 (1964).

[4] 26 U.S.C. §§ 4741-76 (1964).

inevitably is the stepping stone to heroin addiction. Eventually, the states followed the federal lead in striking out against drug violators with the same mindless fervor that characterized their anti-communist campaigns.

1. The Problem: Increased Narcotics Use

The hearings before the Subcommittee of the House Ways and Means Committee and the floor debate show that the primary reason for passage of the Boggs Act was the increase in narcotic use in the period 1948-1951. Testimony and evidence from a wide variety of sources indicated an abrupt and substantial increase in addiction, especially among teenagers, between 1947 and 1951.[5] Young people under 21 who had rarely been addicts suddenly became a predominant group involved in addiction and narcotics crimes.[6] Representative Boggs, speaking during the congressional debates on his bill, enunciated a concern which was reflected in many other quarters. After noting that there had been a 24 percent increase in arrests for narcotics violations between 1949 and 1950 and a 77 percent increase between 1948 and 1950, Representative Boggs stated:

> The most shocking part about these figures is the fact that there has been an alarming increase in drug addiction among younger persons. In the first 6 months of 1946, the average age of addicted persons committed . . . at Lexington, Ky. was 37½ years. Only 3 patients were under the age of 21. During the first 6 months of 1950, only 4 years later, the average had dropped to 26.7 years, and 766 patients were under the age of 21. . . .

---

[5] *Hearings Before the Special Senate Comm. to Investigate Organized Crime in Interstate Commerce*, 82d Cong., 1st Sess., pt. 14, exhibit 1, at 131, 240-41, 266 (1951) [hereinafter cited as *Kefauver Committee Hearings*]. Senator Kefauver stated at the June 26, 1951, session of the hearings:

> Illegal drug use has reached epidemic proportions, according to information secured by this committee from different parts of the country. One of the most alarming aspects is the reported increase in addiction among the younger generation, some of school age.

Id., pt. 14, at 235. *See also* N.Y. Times, June 19, 1951, at 25, col. 1 ("the present wave of juvenile addiction struck us with hurricane force in 1948 and 1949, and in a short time had the two Federal hospitals bursting at the seams") (statement of Commissioner Anslinger).

[6] A 57 year-old addict witness, who had started smoking opium around 1912, stated that he had never seen significant use of drugs by young people until recently and theorized that marijuana was the cause. *Kefauver Committee Hearings*, pt. 14, at 382.

> . . . [I]n New York City alone it has been estimated that 1 out of every 200 teen-agers is now addicted to some type of narcotics.[7]

Later he said, "We need only to recall what we have read in the papers in the past week to realize that more and more younger people are falling into the clutches of unscrupulous dope peddlers . . . ." [8]

Representative Boggs then proceeded to insert in the record eleven newspaper and magazine articles dated between May 2 and July 16, 1951.[9] The *Washington Evening Star* of July 16 (the day of the debate) carried a story on the results of a mayor's committee report on drug addiction in New York City. According to the newspaper, "between 45,000 and 90,000 persons in New York City are using illicit dope. . . . Based on the city's population of 7,835,099, that would be 1 out of every 87 or 1 out of 174 persons." The paper indicated that the report showed an increase in addiction among teenagers, and it called for "more severe penalties for dope sellers, and for wholesale revisions of Federal and State penal statutes relating to sale."

An article in *Time* magazine of June 25, 1951, inserted by Mr. Boggs, related New York City School Superintendent William Jansen's statement that one out of every 200 high school students in the city was a user of habit forming drugs. The article went on to describe the "alarming increases in dope consumption" in other major cities and the ease with which school children obtained narcotics. Another article, in the *Washington Evening Star* of June 12, 1951, contained statements by a member of the staff of the Attorney General of New York to the effect that between 5,000 and 15,000 of New York City's 300,000 high school students were drug addicts. To supplement the stock figures, these articles included the testimony of witnesses who described their own acts of prostitution aud thievery, the loss of educational opportunities, the death of addicts from "hot shots," the horrors of withdrawal, and a wide variety of other aspects of drug abuse.

This evidence of increasing use of narcotics, especially among the young, and the fear that narcotics use would continue to spread, presented a problem that Congress felt needed a quick and effective solution.

---

[7] 97 CONG. REC. 8197 (1951).

[8] *Id.* at 8198.

[9] *Id.* at 8198-8204.

2. The Solution: Harsher Penalties

In the same way that the congressional hearings, investigations and debates reflect the impetus for enactment of the Boggs Act, they also reveal the official and public consensus as to the solution—harsher penalties. Perhaps Commissioner Anslinger best described the prevailing climate when he stated:

> Short sentences do not deter. In districts where we get good sentences the traffic does not flourish. . . .
>
> . . . .
>
> There should be a minimum sentence for the second offense. The commercialized transaction, the peddler, the smuggler, those who traffic in narcotics, on the second offense if there were a minimum sentence of 5 years without probation or parole, I think it would just about dry up the traffic.[10]

This statement before the Committee was quoted by Representative Boggs during the congressional debate on his bill, along with the Kefauver Committee's recommendation that "mandatory penalties of imprisonment of at least 5 years should be provided for second offenders." [11] Representative Boggs indicated that his bill was intended to incorporate the Kefauver Committee recommendations of mandatory minimum sentences for drug peddlers and had as its

> principal purpose . . . to remove the power of suspension of sentence and probation in the cases of second and subsequent offenders against the narcotics and marijuana laws, and to provide minimum sentences . . . .[12]

Moreover, Representative Boggs and others supported the mandatory minimum sentences because they felt some federal judges had been lax in enforcing the narcotic laws[13] and because they believed harsher penalties had reduced crimes, particularly kidnapping and the white slave trade, in other areas.[14] Representative Edwin Arthur Hall of New

[10] *Id.* at 8198 (as quoted by Representative Boggs). *See also Kefauver Committee Hearings*, pt. 14, at 430-31 (testimony of Commissioner Anslinger).

[11] 97 CONG. REC. 8198 (1951).

[12] *Id.* at 8196.

[13] *See id.* at 8197, 8207. One of the most critical statements on this point came from Representative Harrison of Virginia who, after noting that narcotics laws violations had been increasing "only" in those jurisdictions where federal judges had failed to impose adequate sentences on recidivists, stated: "Where the judiciary is abusing its discretion, it is the duty of the law-making body to limit the discretion in order that the public may be protected." *Id.* at 8211.

[14] *Id.* at 8207.

York urged substitution of his bill, which provided for minimum sentences of 100 years for dope peddlers.[15] Although there was some opposition to the Boggs Act, notably by Representative Celler, who thought that the mandatory minimum sentence provision would be unjust for addicts,[16] the majority opinion was clearly that mandatory minimum sentences were necessary to insure punishment of peddlers.[17] In response to Mr. Celler's contention that young addicts could be subjected to long prison terms because of the loss of judicial discretion in sentencing, Representative Jenkins stated:

> The enforcing officers will always have sympathy for the unfortunate consumer, especially if he is harmless. These enforcing officers are going to protect the little boys and little girls. They are not going to drag the high school boys and girls before the criminal courts until they know that they are collaborating with the peddlers.[18]

Mr. Boggs presented a more reasonable justification for mandatory minimums:

> [I]t is not the intention of this legislation to affect a teen-ager or any such person who has possession of narcotics. But the gentleman also knows that if we try to make a distinction between possession and peddling that we immediately open the law to all types of abuses.[19]

The Act as passed provided uniform penalties for violations of the Narcotic Drugs Import and Export Act and the Marihuana Tax Act. The penalties prescribed were:

First offense	2 - 5 years
Second offense	5 - 10 years
Third and subsequent offenses	10 - 20 years
Fine for all offenses	$2,000.00

The relatively low fines reflected a congressional belief that monetary penalties were an insignificant deterrent.[20] An essential provision of the

---

[15] *Id.* at 8209.

[16] *Id.* at 8210.

[17] Representative Celler suggested that harsh mandatory sentences would have "two results: grand juries will refuse to indict and petit juries will refuse to convict." *Id.* at 8206.

[18] *Id.* at 8207.

[19] *Id.* at 8206.

[20] *Id.* at 8197.

Act removed judicial discretion in sentencing by providing that upon conviction for a second or subsequent offense the imposition or execution of the sentence could not be suspended nor probation granted. As in the nontax predecessors of the Boggs Act since 1909 and the Marihuana Tax Act, possession of a narcotic drug was sufficient for conviction unless the defendant could explain the possession to the satisfaction of the jury.[21]

3. Marijuana and the Boggs Act

Congressional and public attention was clearly focused on hard narcotics use, primarily the opiates. Judging from the recorded proceedings, especially the floor debate in the House, marijuana seems to have been along for the ride, much as it had been during enactment of the Uniform Narcotic Drug Act. However, here there was a conscious decision to include marijuana violations in the new penalty provisions. Underlying this decision were determinations that marijuana use had also increased during the later 1940's, that it too was spreading to white teenagers, and that the drug's dangers warranted the harsh treatment contemplated by the Act.

(*a*) *Increased Use.*—To test the allegation of an increase in marijuana use during this period, we have used the seizure and enforcement figures used by the proponents of the legislation. These figures tend to sustain the hypothesis that marijuana traffic increased from 1948 to 1951, following a decline throughout the early 40's. However, the figures are also consistent with other hypotheses, for example that improved enforcement techniques and increased state-federal cooperation had increased arrests.

Federal agents of the Narcotics Bureau began vigorously enforcing the Marihuana Tax Act almost as soon as President Roosevelt signed it into law. From October 1 to December 31, 1937, alone, the FBN made 369 seizures totaling 229 kilograms of the drug.[22] Moreover, state

[21] Representative Keating questioned the constitutionality of the provision. *Id.* at 8206. Apparently Keating accepted Representative Harrison's statement that the language had been in the statutory predecessors for years and had been passed on by the Supreme Court. *Id.* at 8211.

[22] TRAFFIC IN OPIUM 80 (1937). For a full and effective discussion of the flaws in these drug statistics from 1937 until the mid 1940's due to a confusion over what parts of the marijuana plant were to be weighed in determining how much of the drug had been seized, see Mandel, *Problems with Official Drug Statistics*, 21 STAN. L. REV. 991, 998-99 (1969).

officials made extensive seizures either in conjunction with FBN agents or in pursuance of their newly-passed state controls over marijuana.[23]

Marijuana seizures by federal authorities hit their low point in 1945 when only 257 kilograms were taken, 128 of which were seized by the FBN and the rest by United States Customs agents.[24] At this time the FBN had approximately 180 agents.[25] This low seizure figure suggests a decrease in marijuana use throughout the early 1940's.[26]

Beginning in about 1948, however, the arrest and seizure[27] figures rose

---

[23] The following figures are available from 1936 to 1941. After 1941 the FBN ceased publication of the number of seizures by state and municipal authorities:

Year	*Number of seizures*	*Amount seized*
1935	unreported	195 + tons
1936	377	386 tons
1937	335	116 Kg.
1939	289	22,807 Kg.
1940	433	71,129 Kg.
1941	193	19 Kg.

TRAFFIC IN OPIUM 63 (1935); *id.* at 57 (1936); *id.* at 81 (1937); *id.* at 80 (1939); *id.* at 73 (1940); *id.* at 38 (1941). The great discrepancy in these numbers may be one reason the FBN ceased their publication in 1941.

[24] *Id.* at 80 (1945).

[25] *Hearings on Dep'ts of Treasury and Post Office Appropriations for 1951 Before a Subcomm. of the House Comm. on Appropriations*, 81st Cong., 2d Sess., pt. 1, at 128 (1950).

[26] The figures on the amount seized by federal agents from 1939-1945 are as follows:

Year	*No. of Kgs. Seized*	
	FBN	*Customs*
1939	419	63
1940	495	100
1941	396	212
1942	289	44
1943	150	168
1944	247	78
1945	128	129

TRAFFIC IN OPIUM 78 (1939); *id.* at 72 (1940); *id.* at 37 (1941); *id.* at 49 (1942); *id.* at 42 (1943); *id.* at 34 (1944); *id.* at 23 (1945).

[27] The figures for the period 1946-1951 are as follows:

Year	*No. of Kgs. Seized*		*No. of Arrests for Violations of Marijuana Laws*
	FBN	*Customs*	
1946	293	331	953
1947	307	466	911
1948	422	1023	1278
1949	384	1165	1643
1950	323	933	1490
1951	447	558	1177

TRAFFIC IN OPIUM 23, 27 (1946); *id.* at 23, 29 (1947); *id.* at 23, 28 (1948); *id.* at 22, 26 (1949); *id.* at 29, 33 (1950); *id.* at 25, 29 (1951).

dramatically, the arrest figures rising 33 percent from 1947 to 1948. These figures tend to corroborate the Commissioner's assertion that there was a drastic increase in narcotics use between 1948 and 1951[28] and to justify the simultaneous calls for amendment of the narcotics and marijuana laws.[29] On the other hand, these figures could reflect increased or improved enforcement. For example, in 1949 the FBN had begun to encourage the largest cities to form special narcotics squads to deal especially with the drug problem.[30] By 1951, however, only New York and Los Angeles had formed the separate police detail the FBN had requested.[31] Thus even if one were tempted to try to correct for improvements in the law enforcement machinery, the seizure figures for the late 40's and 50's do sustain the notion that the traffic in marijuana increased from 1948 to 1951.

(*b*) *Youthful Users.*—As with the hard narcotics, Congress was especially alarmed by the alleged spread of marijuana to white teenagers and school children. Militating against this proposition is evidence that marijuana use was not widespread among the young as late as 1944. In that year, the famous La Guardia Report reached the following conclusions among others: Marijuana use was widespread in the Borough of Manhattan but tended to be limited to certain areas, notably Harlem; the majority of marijuana smokers were Negroes and Latin-Americans; and marijuana smoking was *not* widespread among school children.[32]

---

28 *See Teen-Age Dope Addicts New Problem?*, U.S. NEWS & WORLD REPORT, June 29, 1951, at 18 (interview with Commissioner Anslinger).

29 See text at note 10 *supra.*

30 *See Teen-Age Dope Addicts New Problem?*, *supra* note 28, at 19.

31 Anslinger, *The Facts About Our Teen-Age Addicts*, READERS DIGEST, Oct. 1951, at 139.

32 The conclusions of the La Guardia Report are discussed in THE MARIHUANA PAPERS 277-410 (D. Solomon ed. 1966). The thirteen conclusions on the sociology of marijuana use are so significant we include them in full:

> From the foregoing study the following conclusions are drawn:
> 1. Marihuana is used extensively in the Borough of Manhattan but the problem is not as acute as it is reported to be in other sections of the United States.
> 2. The introduction of marihuana into this area is recent as compared to other localities.
> 3. The cost of marihuana is low and therefore within the purchasing power of most persons.
> 4. The distribution and use of marihuana is centered in Harlem.
> 5. The majority of marihuana smokers are Negroes and Latin-Americans.
> 6. The consensus among marihuana smokers is that the use of the drug creates a definite feeling of adequacy.
> 7. The practice of smoking marihuana does not lead to addiction in the medical sense of the word.
> 8. The sale and distribution of marihuana is not under the control of any single

The La Guardia study portrays marijuana use in this period as a rather casual adjunct to ghetto life. Since it was not costly, this euphoriant was well within the reach of ghetto residents. It appears that throughout the early 40's marijuana use in the West as well as in the East continued to be associated with the ethnic minorities, especially in the inner city.[33]

The fear that marijuana use would spread to white teenagers is one that has recurred since the earliest legislative cognizance. In fact, it was probably a factor in the early opium laws.[34] We have been unable to confirm whether the fear was justified at this time, but in light of the documentation of increased narcotics use among the young, we shall presume the same use patterns to be true of marijuana.

(*c*) *The Danger: A New Rationale.*—The FBN had begun its educational campaign for harsher marijuana penalties immediately after passage of the Tax Act.[35] In the early years, the campaign was particularly effective with judges. For example, in one of the first cases under the Tax Act, a Colorado judge stated:

> I consider marihuana the worst of all narcotics—far worse than the use of morphine or cocaine. Under its influence men become beasts, just as was the case with [the defendant]. Marihuana destroys life itself. I have no sympathy with those who sell this weed.
>
> In the future I will impose the heaviest penalties. The Government is going to enforce this new law to the letter.[36]

---

organized group.

9. The use of marihuana does not lead to morphine or heroin or cocaine addiction and no effort is made to create a market for these narcotics by stimulating the practice of marihuana smoking.

10. Marihuana is not the determining factor in the commission of major crimes.

11. Marihuana smoking is not widespread among school children.

12. Juvenile delinquency is not associated with the practice of smoking marihuana.

13. The publicity concerning the catastrophic effects of marihuana smoking in New York City is unfounded.

Id. at 307.

[33] The New York trend was also typical of Los Angeles. California Division of Narcotic Enforcement, Marijuana—Our Newest Narcotic Menace, April 1, 1940, at 12. *See also* Note, *Youth and Narcotics*, 1 U.C.L.A.L. Rev. 445, 453 (1954) (reporting a breakdown by race of narcotics arrests by the Oakland police department).

[34] For example, in 1895 New York had passed a statute, ch. 1041, § 1, [1895] N.Y. Laws 972, requiring instruction in public schools on the effect of narcotics.

[35] For full accounts of the FBN "educational campaigns" up through the present day, see Traffic in Opium from 1937 to the present. For the full exposition of the FBN's position on the drug user as a criminal before he becomes an addict, see *Recidivism on Narcotic Law Violators*, in Traffic in Opium for each year.

[36] Judge J. Foster Symes of Denver, Colorado, *quoted in* Traffic in Opium 57 (1937).

The crime, pauperism and insanity rationale was accepted unquestioningly as late as 1951.[37] Under this rationale, harsher penalties were certainly as imperative for marijuana offenders as they were for opiate offenders. However, in a paper filed as an exhibit to the hearings[38] on the Boggs Act, Dr. Harris Isbell, Director of Research at the Public Health Service hospital in Lexington, Kentucky, exploded the traditional rationale. He stated that marijuana was not physically addictive.[39] Although he postulated a definition of addiction which amounts to nothing more than chronic intoxication[40] and noted the possibility of "temporary psychoses" in "predisposed individuals," Isbell's description of marijuana was extraordinarily favorable. Before the Kefauver Committee he testified:

> [M]arijuana smokers generally are mildly intoxicated, giggle, laugh, bother no one, and have a good time. They do not stagger or fall, and ordinarily will not attempt to harm anyone.
>
> It has not been proved that smoking marijuana leads to crimes of violence or to crimes of a sexual nature. Smoking marijuana has no unpleasant after-effects, no dependence is developed on the drug, and the practice can easily be stopped at any time. In fact, it is probably easier to stop smoking marijuana cigarettes than tobacco cigarettes.
>
> In predisposed individuals, marijuana may precipitate temporary psychoses and is, therefore, not an innocuous practice with them.[41]

Dr. Isbell's statements that marijuana does not cause a physical dependence were supported by other doctors,[42] prison officials,[43] and per-

---

[37] *See, e.g.*, G. CREIGHTON, NARCOTICS: THEIR LEGITIMATE AND ILLICIT USE (1951).

[38] *Hearings on H.R. 3490 before the Subcomm. on Narcotics of the House Comm. on Ways and Means*. 82d Cong., 1st Sess. 147 (1951) [hereinafter cited as *Boggs Act Hearings*].

[39] Dr. Isbell's paper stated:

> Any definition [of addiction] which makes dependence an essential feature will also not include intoxications with such substances as cocaine, marijuana, and amphetamine, because dependence on these substances is no more marked than is dependence on tobacco and coffee and yet, in some ways, intoxication with cocaine or marijuana is more harmful than is addiction to morphine. Furthermore, definitions which exclude cocaine and marijuana from the list of addicting drugs would cause endless confusion because, in common parlance and legally, both drugs are regarded as addicting.

Id. at 147-48.

[40] *Id.* at 148.

[41] *Kefauver Committee Hearings*, pt. 14, at 119.

[42] *Id.* at 136. *See also Boggs Act Hearings* 101.

[43] *Boggs Act Hearings* 96.

haps most significantly by the statement of a number of narcotics addicts.[44]

Despite this testimony the legislators approved greatly increased penalties for marijuana users. The crucial reason for this severe treatment can be seen in the following colloquy during the House subcommittee hearings:

> Mr. Boggs. From just what little I saw in that demonstration, I have forgotten the figure Dr. Isbell gave, but my recollection is that only a small percentage of those marijuana cases was anything more than a temporary degree of exhiliration . . . .
>
> Mr. Anslinger. The danger is this: Over 50 percent of those young addicts started on marijuana smoking. They started there and graduated to heroin; they took the needle when the thrill of marijuana was gone.[45]

Many others—doctors,[46] crime prevention experts,[47] police and narcotics bureau officials[48]—testified to the link between marijuana use and ultimate heroin addiction. Representative Boggs himself summed up this novel danger of marijuana in one of the few statements even to mention marijuana in House floor debate:

> Our younger people usually start on the road which leads to drug addiction by smoking marijuana. They then graduate into narcotic drugs—cocaine, morphine, and heroin. When these younger persons become addicted to the drugs, heroin, for example, which costs from $8 to $15 per day, they very often must embark on careers of crime . . . and prostitution . . . in order to buy the supply which they need.[49]

---

[44] *Kefauver Committee Hearings*, pt. 14, at 73, 101, 109 (statements of three addicts). *See also id.* at 190, 204 for statements by addicts to the effect that upon moving from marijuana to hard drugs they did not know that the latter were addictive. The implication is clear that marijuana is not addictive. *See id.* at 91.

[45] *Boggs Act Hearings* 206.

[46] *Kefauver Committee Hearings*, pt. 14, at 133.

[47] *Boggs Act Hearings* 105.

[48] *Kefauver Committee Hearings*, pt. 14, at 449; *Boggs Act Hearings* 62.

[49] 97 CONG. REC. 8197-98 (1951). The linkage of marijuana use to heroin was also supplied by some of the testimony by addicts themselves. Of 27 addicts interviewed in part 14 of the *Kefauver Committee Hearings*, 15 testified that they had started their drug use with marijuana. This figure is misleading because a substantial majority of the 12 who had not used marijuana were addicts because of illness or were older addicts who had begun using drugs before marijuana was readily available. *See Kefauver*

The passage of this new Federal Act marked a significant shift in rationale for the illegal status of marijuana; that status became more entrenched by the indiscriminate lumping of marijuana with the other narcotic drugs.

4. The State Response: Mindless Escalation

While the Boggs Act was still pending in Congress, the Bureau of Narcotics encouraged the states to modify their existing narcotic and marijuana legislation to enact "penalties similar to those provided for in the Boggs bill [which] would be of material assistance in the fight against the narcotic traffic." [50] Seventeen states (including Virginia) and the Territory of Alaska responded by passing "little Boggs Acts" by 1953, and eleven other states increased their penalties by 1956.

In 1951, seven states and the Territory of Alaska passed penalty provisions similar to those contained in the Boggs Act.[51] In addition, nine other states amended their drug laws to provide for more severe penalties, but the provisions were neither uniform nor identical to those provided for under the federal measure.[52] In 1952, four more states, including Virginia, amended the penalty provisions of their drug laws

---

Committee Hearings, pt. 14, at 11, 29, 54, 62, 71, 84, 93, 99, 104, 108, 153, 157, 160, 162, 167, 171, 182, 189, 194, 203, 211, 216, 220, 367, 380, 432, 436. Approximately 5 of the addict witnesses indicated that marijuana did in fact lead to the use of the harder drugs but only one gave definite reasons why he thought this transition inevitably took place. One male addict, after stating that the average age of marijuana smokers was 13 or 14, stated:

> You would very seldom find a person smoking marijuana who does just that, he keeps on, and he gets to the point where he does not have the same drive or feeling that he first had, and it is like a stepping stone, he graduates to heroin.

Kefauver Committee Hearings, pt. 14, at 199-200.

Note that among many of these addicts curiosity and peer group pressure was the primary factor in starting them into the use of hard drugs. *Id.* at 12, 32, 94, 109, 254. Moreover, Representative Boggs introduced some mystery into his statements during the House debates by stating:

> A study in February of 1950 of 602 case reports indicates that 53 percent . . . started their addiction to drugs by reason of association with other addicts, and 7 percent of them started on marijuana.

97 CONG. REC. 8197 (1951). This study is cited on the same page with Representative Boggs' statement that our young people usually start on the road to drug addiction by smoking marijuana.

[50] TRAFFIC IN OPIUM 6 (1950).

[51] Alabama, Indiana, Maryland, New Jersey, Oklahoma, Tennessee and West Virginia. *Id.* at 8 (1951).

[52] Connecticut, Illinois, Louisiana, Michigan, New York, Pennsylvania, Utah, Washington and Wisconsin. *Id.* at 8-9.

to bring them in line with the Boggs Act.[53] Six more states followed suit in 1953.[54] Finally, in 1955 and 1956 two states, Ohio and Louisiana respectively, enacted penalty provisions which were substantially more severe than those passed previously in any jurisdiction.[55]

The Virginia "little Boggs Act" was signed into law on April 1, 1952,[56] after having passed both houses unanimously.[57] The measure was regarded as routine, and as one of the "less controversial" proposals to come before the legislature during the 1952 session.[58] It cleared the House on a day when bills were being passed "at the rate of about one a minute during some periods" [59] and won Senate approval during the final rush to complete business in the waning hours of the 1952 General Assembly.

The Act produced three basic changes in Virginia's scheme of narcotics control. It added marijuana to those drugs whose sale was forbidden under the state's version of the Uniform Narcotic Drug Act; it created the new substantive crime of sale to a minor; and it provided for harsher penalties for violations of the drug laws.

Prior to 1952, the Virginia anti-marijuana provision[60] was separate from those provisions governing the sale of "hard" drugs. But the 1952 Act repealed this provision and included marijuana under the state's general narcotic control law. As a result, a person illegally selling marijuana became subject to the same penalties imposed upon a person illegally vending such drugs as heroin, morphine and cocaine.[61]

The heart of the 1952 Act was the provision for stiffer penalties for the violation of Virginia's general narcotic laws prohibiting the sale of drugs without a prescription. For the first offense, the penalty was im-

---

[53] Colorado, Georgia, Kentucky and Virginia. *Id.* at 6 (1952).

[54] Delaware, Iowa, Minnesota, Nebraska, Pennsylvania and Wyoming. *Id.* at 9 (1953).

[55] The Ohio law, approved June 16, 1955, provided for imprisonment of any one found guilty of illegally selling narcotic drugs for a period of not less than twenty nor more than forty years. *Id.* at 7 (1955). The Louisiana measure, adopted the following year, provided severe prison sentences without parole, probation or suspension for the illegal sale, possession or administration of a narcotic drug. Sentences ranged from a five year minimum to a ninety-nine year maximum. *Id.* at 28 (1956).

[56] Ch. 451, [1952] Va. Acts of Assembly 736.

[57] The bill, H.B. 132, passed the House 65-0 on February 23, 1952, and the Senate 34-0 on March 7, 1952.

[58] Richmond Times-Dispatch, Mar. 2, 1952, § 2, at 1, col. 6.

[59] *Id.*, Feb. 24, 1952, § 2, at 5, col. 3. The House passed fifty bills and advanced thirty-five more during its session of February 23, 1952. *Id.*

[60] Ch. 212, [1936] Va. Acts of Assembly 361.

[61] Ch. 451, [1952] Va. Acts of Assembly 736.

prisonment in the penitentiary for not less than three nor more than five years plus a fine of not more than $1,000. For the second offense, the penalty was imprisonment for not less than five nor more than ten years and a fine of not more than $2,000. For the third and succeeding offenses, the penalties were fines of not more than $3,000 and imprisonment for not less than ten nor more than twenty years.

The 1952 Act also made it a felony to sell, barter, peddle, exchange or otherwise dispense marijuana or any other narcotic drug to a minor. Any person found guilty of such offense was subject to imprisonment for a term of not less than ten years nor more than thirty years, no part of which could be suspended, and a fine of not more than $1,000 for the first offense, $2,000 for the second offense and $3,000 for the third and subsequent offenses. Such a provision exemplifies the increased sophistication of anti-narcotic legislation during the 1950's. Thus, the continued escalation of penalties for drug law violators was followed in Virginia. Moreover, despite the public concern and attention in the national media, in Virginia it is plain that the 1952 amendments to the narcotic laws passed virtually unnoticed in the press.[62]

B. The Late 1950's: Another Escalation of the Penalties

Whether because use had decreased or because the propagandists had accomplished their main mission, the narcotics problem dropped almost entirely from public view after the Boggs Act was passed. Nevertheless, state and federal police authorities, armed with data suggesting that the strengthening of the drug laws had at least halted the increase in drug use, pressed for further increases in penalties in order entirely to root out the drug menace.[63] Without significant debate or public

[62] *See also* Proffit, *An Analysis of the Missouri Narcotic Drug Laws*, 17 Mo. L. Rev. 252 (1952), in which the author shows that narcotic hysteria was closely linked to the general hysteria and "Red Scare" of the early fifties: "The opinion has been advanced that the recent upsurge in consumption [of drugs] is fostered by Communists in an effort to undermine the morals of our youth." *Id.* at 252-53. He cites a Missouri official who so testified before a state legislative committee. For more of the same, see W. Oursler & L. Smith, Narcotics: America's Peril 266 (1952). The Missouri case parallels the Virginia data in that great public concern is expressed about the possible spread of narcotics addiction but little if any separate notice was given marijuana. Everywhere the narcotics evil was linked by veiled references to international communism, especially that of China, the traditional home of the opium habit.

[63] *Hearings on Illicit Narcotics Traffic Before the Subcomm. on Improvements in the Federal Criminal Code of the Senate Comm. on the Judiciary*, 84th Cong., 1st Sess. 57 (1955) [hereinafter cited as *Daniel Committee Hearings*]; *see* H. Anslinger & W. Oursler, The Murderers (1962).

interest, Congress responded by passing the Narcotic Control Act of 1956.[64]

Although the legislators paid even less attention to marijuana than they had in 1951, the precedent there established of classifying marijuana with hard narcotics resulted in a proliferation of marijuana offenses and a further increase in penalties. In some ways, this legislation represents the high-water mark of uninformed public policy regarding marijuana. In almost every respect, the provisions of the Act and the legislative motivation bear absolutely no rational relation to marijuana's pharmacology and to the drug's actual use and traffic patterns.

1. Provisions of the Narcotic Control Act of 1956

Public Law 728, an act intended to make more effective control of the narcotic drugs and marijuana, was approved on July 18, 1956. It amended the Internal Revenue Code of 1954 and the Narcotic Drugs Import and Export Act[65] primarily in the direction of increasing still further the penalties for violation of those acts and proliferating the scope of federal control over the use, possession and sale of narcotic drugs and marijuana.

The new law raised the potential fine for all narcotics and marijuana offenses to $20,000[66] and increased the mandatory minimum sentences for offenses in the prescription, registration and possession categories to two, five and ten years for successive offenses.[67] No distinction was made between addicts and traffickers with regard to these types of violations. Violations of the sale, transfer and smuggling provisions of the Act carry a minimum sentence of five years for first offenses and ten years for all subsequent offenses.[68] In this connection the Act created a new offense by prohibiting illegal importation of marijuana and forbidding knowing receipt, concealment, purchase, sale, and facilitation of transportation or concealment of such illegally imported marijuana.[69] Simple possession was by statute sufficient evidence of guilt to convict.[70] This provision, now 21 U.S.C. § 176a, paralleled a similar importation provision for narcotics originally passed in 1909.

---

[64] Ch. 629, 70 Stat. 567.

[65] Ch. 202, 42 Stat. 596 (1922).

[66] Ch. 629, §§ 103, 105-06, 108, 70 Stat. 568, 570, 571 (codified at 26 U.S.C. § 7237 (1964); 21 U.S.C. §§ 174, 176a, 184a (1964)).

[67] *Id.* § 103, 70 Stat. 568 (codified at 26 U.S.C. § 7237 (1964)).

[68] *Id.*

[69] *Id.* § 106, 70 Stat. 570 (codified at 21 U.S.C. § 176a (1964)).

[70] *Id.* (declared unconstitutional in Leary v. United States, 395 U.S. 6 (1969)).

In addition, any sale or transfer of any drug by an adult to a juvenile was made punishable by a minimum ten-year sentence.[71] Finally, the Act made suspension, probation and parole unavailable to all offenders except those convicted of a first offense for possession, prescription or registration.[72]

In addition to the increases in offenses and penalties, the law contained a wide variety of provisions relating to enforcement. Customs and Narcotics Bureau agents were authorized to carry weapons and to make arrests without a warrant on belief that a drug violation had been committed.[73] The Government was allowed to appeal unfavorable decisions suppressing evidence[74] and to compel testimony from witnesses by a grant of immunity.[75] In a concession to those legislators who favored a wiretapping provision, the new law created a category of offense based on the use of communications instrumentalities in violation of the drug laws.[76] This provision carried penalties of a minimum two-year sentence and up to a $5,000 fine. The Act required that citizens who are drug users and drug law violators must register with the immigration authorities upon entering or leaving the United States.[77] The Act also amended the Immigration and Nationality Act to provide for deportion of alien drug users and drug law violators.[78]

2. *Marijuana—Along for the Ride*

The Narcotic Control Act of 1956 was premised on the same beliefs as was the Boggs Act. Few if any of the legislators recognized that marijuana was in any way different from the physically addictive narcotics.[79] The stepping stone concept was now so widely accepted that only once

---

[71] *Id.* § 103, 70 Stat. 568 (codified at 26 U.S.C. § 7237(b)(1) (1964)). The statute also provided that a seller peddling heroin to a minor may be subject to a sentence of life imprisonment imposed by a court, or to a death sentence imposed by a jury. *Id.* § 107, 70 Stat. 571 (codified at 21 U.S.C. § 176b (1964)).

[72] *Id.* § 103, 70 Stat. 569 (codified at 26 U.S.C. §7237(d) (Supp. III, 1966)).

[73] *Id.* § 104, 70 Stat. 570 (codified at 26 U.S.C. § 7607 (1964)).

[74] *Id.* § 201, 70 Stat. 573 (codified at 18 U.S.C. § 1404 (1964)).

[75] *Id.*, 70 Stat. 574 (codified at 18 U.S.C. § 1406 (1964)).

[76] *Id.*, 70 Stat. 573 (codified at 18 U.S.C. § 1403 (1964)).

[77] *Id.*, 70 Stat. 574 (codified at 18 U.S.C. § 1407 (1964)).

[78] *Id.* § 301; 70 Stat. 575 (codified at 8 U.S.C. §§ 1182(a)(5), (23) (1964)).

[79] The House Subcommittee on Narcotics, which produced what became the essentials of the Narcotic Control Act of 1956, revealed its knowledge of the distinction between marijuana and narcotics solely by a footnote to the major heading "Narcotics" which stated in fine print that the term narcotics included marijuana. *See* U.S. CODE CONG. & AD. NEWS 3294 (1956).

during the extensive congressional debates on the House and Senate versions of the bill was the subject of marijuana as a separate substance even raised. In a statement reflecting both ignorance of the basic characteristics of marijuana and naive acceptance of the stepping stone concept, Senator Daniel, Chairman of the Senate subcommittee that investigated the drug problem, described marijuana:

> That is a drug which starts most addicts in the use of drugs. Marihuana, in itself a dangerous drug, can lead to some of the worst crimes committed by those who are addicted to the habit. Evidently, its use leads to the heroin habit and then to the final destruction of the persons addicted.[80]

Because Congress bought the FBN's propaganda lock, stock and barrel, it is not surprising that there was no dissent from the proposition that harsher penalties were the means to eliminate illicit use and sale of all drugs.[81]

3. Trafficking Patterns

The 1956 Act reflected an unsupported conception of the nature of the marijuana traffic. Under the assumption that "peddlers" of all drugs, marijuana included, are controlled by organized crime, the Act assessed

---

[80] 102 CONG. REC. 9015 (1956).

[81] Representative Boggs, father of the Boggs Act and Chairman of the Subcommittee on Narcotics of the House Ways and Means Committee, stated that "[e]ffective steps to eliminate the unlawful drug traffic requires . . . the imposition of severe punishment by the courts." *Id.* at 10689. The subcommittee, which had set out to determine the effect of the Boggs Act on narcotics traffic, U.S. CODE CONG. & AD. NEWS 3291 (1956), began its recommendations with calls for further increases in the penalties for narcotics law violations. *Id.* at 3309. In fact, the subcommittee felt that this was the only way to eliminate the drug menace, and recommended that educational programs on the evils of narcotics *not* be instituted in the schools for fear of exciting the curiosity of young people. *Id.* at 3305. Both the House Ways and Means Committee report and the subcommittee report are filled with statements to the effect that harsher penalties are the most effective weapons in the war against illicit narcotics. *Id.* at 3281-3303 *passim.* The Ways and Means Committee conclusion was succinct: "Experience with the Boggs law . . . has clearly demonstrated the efficacy of severe punishment in reducing the illicit commerce in drugs." *Id.* at 3286.

Finally, Senator Daniel, speaking for the Senate subcommittee investigating the drug situation in the United States, found "it absolutely necessary for the Congress of the United States to strengthen the hands of our law enforcement officers and provide higher penalties if we are to stop the narcotics traffic in this country." 102 CONG. REC. 9014 (1956). His subcommittee also recommended the kind of across-the-board increases in penalties that the Act eventually contained.

extremely heavy penalties for sale, especially to minors. For example, the House Ways and Means Committee report noted that "narcotic traffickers . . . are in most cases well organized professional racketeers." [82] Similarly, in recommending prohibition of probation or suspension of sentence for first-offender peddlers, the House subcommittee had asserted that if the first offender peddler problem was not solved, there would eventually be "large scale recruiting of our youth by the upper echelon of traffickers." [83]

While the reference to organized crime was undoubtedly valid with respect to hard drugs, the assumption that marijuana traffic was controlled by large-scale racketeers was completely unsupported. The marijuana distribution pattern today is far different than the distribution pattern for "hard" drugs. On college campuses today, the marijuana seller is likely to be a smoker who has a small amount he wants to sell. Unless one is to believe that organized crime has abdicated a distribution role to "amateurs," it is difficult to imagine that it controlled the distribution of marijuana in 1956. Accordingly, the 1956 Act's widely divergent treatment of sale and use of marijuana may not have been justified at the time of enactment, and it certainly makes little sense today.

4. Origin and Use

A related misconception about the marijuana trade concerns the new importation offenses. Underlying the presumption of knowing concealment of smuggled marijuana arising from possession are two findings—that the mainstay of marijuana traffic is imported from Mexico and that possessors are likely to be aware of that fact. Even in 1956, such findings were dubious.[84] As to the presumption of importation, Commissioner Anslinger's estimate that 90 percent of all marijuana seized by federal authorities had been smuggled from Mexico[85] was grossly misleading. The Federal Bureau of Narcotics had practically abandoned the responsibility for marijuana control to increasingly effective state

[82] U.S. CODE CONG. & AD. NEWS 3283 (1956); *see id.* at 3302.

[83] *Id.* at 3304.

[84] In holding unconstitutional the presumption of knowledge that marijuana was smuggled, the Supreme Court in Leary v. United States, 395 U.S. 6 (1969), relied on the change in use patterns from 1959 to 1967. We think the presumption was unconstitutional when passed in 1956, both as to importation and knowledge.

[85] *Daniel Committee Hearings* 18.

narcotics squads and to the Customs agents.[86] Of course, federal figures taken alone would suggest a high percentage of importation. Furthermore, the Commissioner's conclusion was inconsistent with an essential premise of the Tax Act[87] and with other materials before the Congress,[88] all of which emphasized the large degree of domestic cultivation.

As to the possessor's knowledge, the underlying assumption again was that there was an organized trade pattern so that each user knew where his drug came from. As we know, marijuana was then a casual adjunct to ghetto life. It was a social, rather than an economic, phenomenon limited almost exclusively to unemployed or menially employed members of racial minorities in the center cities.[89] As applied to such a class of people, the presumption is farcical.[90]

5. Enforcement Patterns

Although the proliferation of federal offenses suggests on its face that state enforcement was inadequate to cope with marijuana trade or that increased use of the drug presaged increased narcotics addiction, nothing could be farther from the truth. Considering marijuana alone, the 1956 legislation was passed in response to no need at all. The enforcement statistics confirm our hypothesis that marijuana was simply "along for the ride."

---

[86] The decline in the number of FBN arrests and seizures is directly related to the increase in local and state enforcement personnel. This thesis is supported by data from California where statewide arrests soared while federal arrests remained stable. Bureau of Criminal Statistics, California Dep't of Justice, Crime in California (1956). *See also* A. LINDESMITH, THE ADDICT AND THE LAW 238 (1963). One commentator has suggested that except for the years immediately after the passage of the Marihuana Tax Act, when the Bureau wanted to concentrate on its newly acquired enforcement field, the FBN arrest data show clearly its emphasis on the hard narcotics. Mandel, *Problems with Official Drug Statistics*, 21 STAN. L. REV. 991, 1019-20 (1969).

[87] See note 20 at p. 1053 *supra*.

[88] Written materials inserted into the record of the Senate hearings included the testimony of an experienced federal Customs official that high quality marijuana was being grown near the Texas cities of Laredo and Brownsville. *Daniel Committee Hearings* 3488-89. In addition, the Attorney General of Ohio noted that marijuana "may grow unnoticed along roadsides and vacant lots in many parts of the country." *Id.* at 4814. Also, a bulletin issued by the Philadelphia Police Academy recited that "[p]lenty of marijuana is found growing in this city." *Id.* at 599.

[89] Blum, *Mind-Altering Drugs and Dangerous Behavior: Dangerous Drugs*, in THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: NARCOTICS AND DRUG ABUSE 21, 24 (1967); Bouquet, *Cannabis*, 3 U.N. BULL. ON NARCOTICS, Jan. 1951, at 22, 32-33.

[90] This is especially true with respect to the young and black minorities. The

First, as we noted above, federal arrests declined continually after 1952.[91] Although attributable in part to increased state enforcement[92] and to a conscious FBN decision to concentrate on narcotics, the figures do suggest a decline in or at least a stabilization of marijuana use by the middle fifties, even in areas in which narcotics use continued unabated. Second, the class of users does not seem to have changed at all during this period. Arrest statistics still indicate that use was centered in the ghetto areas of major cities[93] in California, Texas, Louisiana, Michigan, New York and Illinois.[94] However, because statistics were not refined according to race, age, sex and often even the drug used,[95] we cannot state categorically that there was no change in use patterns.[96]

6. *The Epitome of Irrationality: Virginia's 1958 Amendment*

In 1958, Virginia's Uniform Drug Act was further amended to make the "possession of illegally acquired narcotic drugs [which included marijuana] in any quantity greater than twenty-five grains, if in solid form, or eight ounces, if in liquid form," a crime punishable by a fine of not more than $5,000 and imprisonment for not less than twenty nor more than forty years.[97] The effect of this enactment was to provide a penalty for illegal possession that was more than twice as severe as the penalty for unlawful sale and one and one-half times more stringent than that for sale to a minor. It is incredible that despite the extreme

---

presumption has validity only as applied to recently immigrated Mexicans. *Cf.* Chein, *The Status of Sociological and Social Psychological Knowledge Concerning Narcotics*, in NARCOTIC DRUG ADDICTION PROBLEMS 146, 155 (R. Livingston ed. 1963). Mr. Chein reports a shift in drug use from 1930-1960 from old to young and a continued increase in the percentage of drug users who are Black or Spanish-speaking.

[91] The number of federal arrests for marijuana violations fell from 1288 in 1952 to 169 in 1960. TRAFFIC IN OPIUM 26 (1952); *id.* at 69 (1960).

[92] By 1954, many major states and cities had special narcotics squads. *See Daniel Committee Hearings* 13-14, 110.

[93] *Cf.* TRAFFIC IN OPIUM 66 (1956); *id.* at 41 (1959). The FBN charts show clearly the extraordinary incidence of drug abuse among Blacks, Mexican-Americans and other minority communities.

[94] *Daniel Committee Hearings*, exhibit 7, at 267-71. Local arrests in those six states accounted for 2,822 of the 3,205 marijuana arrests made by local law enforcers in 1954.

[95] For example, the statistics in TRAFFIC IN OPIUM seldom even distinguish among the drugs involved, and the FBI Uniform Crime Statistics frequently report all drug related arrests together, with no delineation of the type of drug used or the nature of the offender.

[96] Chein, *supra* note 90, at 152, suggests that whatever patterns of drug use existed in the fifties were merely continuations of patterns observed in the thirties.

[97] Ch. 535, [1958] Va. Acts of Assembly 675.

harshness of this penalty, the measure passed both houses of the General Assembly with but one dissenting vote, and no mention was made of it in the *Richmond Times-Dispatch* during the period of February 14 to April 7, 1958.

In conclusion, the Federal Narcotic Control Act of 1956 and subsequent state legislation reflect the same basic congressional and public misconceptions about the nature and dangers of marijuana that characterized the early fifties. Even more unchanged, and in fact strengthened by results under the Boggs Act, was the assumption that the key to the solution of the narcotic drug problem was the imposition of harsher penalties on both users and traffickers in illicit drugs. Classification of marijuana with narcotic drugs was now a foregone conclusion. In fact, legislators seemed less aware that marijuana was a distinct substance than they had been in 1951.

VII. Marijuana Users in the Courts: 1930-1965

Having studied the evolution of legislative hostility to marijuana from a regional phenomenon with racial overtones to a nationwide paranoia, it is worthwhile to consider the fate of marijuana users in the courts during this evolutionary period. After the courts had summarily rejected the substantive constitutional arguments, appeals in marijuana cases tended to focus on three contentions particularly germane to drug violations: procedural objections arising from interrelated statutory schemes on the state and federal levels punishing essentially the same conduct; objections to police conduct intrinsic to victimless crimes; and objections to sufficiency of evidence at trial. Like their legislative colleagues, state and federal judges translated what they knew of the drug's mythical effects into overt hostility. Coupled with the traditionally conservative treatment afforded the rights of criminal defendants, especially in state prosecutions, this judicial hostility produced ever-lengthening sentences and few reversals.

A. Statutory Fantasies: The Complications of Federal Legislation

1. Quadruple "Jeopardy" and the "Killer Weed"

When Congress passed the Marihuana Tax Act in 1937, marijuana had already been included in the Uniform Narcotic Drug Act and every state had enacted some form of marijuana prohibition.[1] In addition to

[1] See p. 1034 *supra*.

its ostensible revenue-raising function, the Act was obviously designed both to deter further use of the drug[2] and to facilitate enforcement of the state laws.[3] The statute assured the availability to state prosecutors of the order forms filed with the IRS at the time of payment of the tax.[4] Congress had thought that the order forms and registration requirements would develop an "adequate means of publicizing dealings in marihuana in order to tax and control the traffic effectively." [5]

Thus, after 1937, possession of marijuana without filing the transfer form and paying the federal tax constituted a violation of both state and federal law;[6] yet filing the form and paying the tax would probably not have eliminated the buyer's exposure to prosecution under state law. Indeed, compliance would probably have readily identified the buyer to state officials. To this unfairness the courts paid no heed, noting that exposure to state and federal prosecution for the same act did not constitute double jeopardy[7] and that the fifth amendment did not protect defendants from prosecution for violation of state law.[8]

---

[2] *See, e.g., Hearings on H.R. 6906 Before a Subcomm. of the Senate Comm. on Finance*, 75th Cong., 1st Sess. 5-7 (1937); H.R. REP. No. 792, 75th Cong., 1st Sess. 1-3 (1937).

[3] *See* Leary v. United States, 395 U.S. 6, 26-27 (1969).

[4] 26 U.S.C. § 4773 (1964).

[5] H.R. REP. No. 792, 75th Cong., 1st Sess. 2 (1937); S. REP. No. 900, 75th Cong., 1st Sess. 3 (1937).

[6] With minor exceptions, the Marihuana Tax Act requires all transactions in marijuana to be carried out by written order form. 26 U.S.C. §§ 4741-44 (1964). It is unlawful for a transferor to transfer except by such form obtained by the transferee, 26 U.S.C. § 4742 (1964), and for the transferee to acquire, transport or conceal marijuana without filing the transfer form, registering with the IRS and paying the applicable transfer tax. 26 U.S.C. § 4744(a) (1964). For heretofore unregistered persons, that tax is $100 an ounce. 26 U.S.C. § 4741 (1964). Since marijuana was excised from the United States Pharmacopoeia, there have been few legitimate transactions by registered persons. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY 214 (1967). Since the tax is otherwise prohibitive, the Act is in effect almost entirely a criminal law; the crime is having anything to do with marijuana—possession, sale, acquisition or importation—since proof of possession coupled with failure, after reasonable notice and demand by the Secretary of the Treasury or his delegate, to produce the transfer form is "presumptive evidence" of guilt. 26 U.S.C. § 4744(a) (1964).

[7] *Cf.* Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959); United States v. Lanza, 260 U.S. 377 (1922). One state court held, as an interpretation of state legislative policy rather than under constitutional compulsion, that acquittal of a federal marijuana possession charge would constitute a defense to the same state charge. State v. Wortham, 63 Ariz. 148, 160 P.2d 352 (1945).

[8] *See* Leary v. United States, 383 F.2d 851, 870 (5th Cir. 1967), *rev'd*, 395 U.S. 6 (1969); Haynes v. United States, 339 F.2d 30, 31-32 (5th Cir.), *cert. denied*, 380 U.S. 924 (1965).

After passage of the 1956 federal narcotic drug legislation,[9] possession of marijuana constituted at least one, and often two, additional crimes. First, the Narcotic Drugs Import and Export Act was amended[10] in 1956 to punish directly illegal importation[11] of marijuana or other dealings in the drug with knowledge that it had been illegally imported. Since mere possession was sufficient evidence to convict under the Act,[12] possession without registration and order form now constituted three crimes, and compliance with the filing and tax provisions would have exposed the defendant to liability under state law and under the importation provision if the original importation was illegal. Again the courts saw no fifth amendment violation.[13] Second, another provision of the 1956 package required every person addicted to or using narcotics or convicted of a violation of the narcotics or marijuana laws punishable by over one year's imprisonment to register upon leaving the country.[14] Designed to aid the Government in identifying potential smugglers, the statute was upheld, as a strict liability offense,[15] against a multitude of constitutional challenges.[16] Since penalties for marijuana possession almost uniformly exceeded one year's imprisonment during this period, a first offense possession conviction by either sovereign triggered the registration provision.

2. *Statutory Presumptions*

Because the federal statutes punished sale and possession of marijuana only indirectly, each had to bridge the gap between those acts and the

---

[9] See pp. 1077-78 *supra*.

[10] 21 U.S.C. § 176a (1964).

[11] Importation "contrary to law" was that in violation of the Marihuana Tax Act, 26 U.S.C. § 4755 (1964), or the Customs Act, 19 U.S.C. §§ 1496-97 (1964).

[12] See note 19 *infra* and accompanying text.

[13] *See, e.g.*, Rule v. United States, 362 F.2d 215 (5th Cir. 1966), *cert. denied*, 385 U.S. 1018 (1967).

[14] 18 U.S.C. § 1407 (1964).

[15] Application of the statute was particularly harsh. Even though defendant, found guilty of a drug offense and sent to the California Youth Authority for several months, had been told upon release that his record was clean, the court held that he had violated the statute by failing to register. Adams v. United States, 299 F.2d 327 (9th Cir. 1962).

[16] *See* Palma v. United States, 261 F.2d 93 (5th Cir. 1958); Reyes v. United States, 258 F.2d 774 (9th Cir. 1958); United States v. Eramdjian, 155 F. Supp. 914 (S.D. Cal. 1957). The courts struggled mightily with arbitrariness, vagueness, right to travel, self-incrimination, and equal protection arguments, but upheld the statute. *But cf.* Russell v. United States, 306 F.2d 402 (9th Cir. 1962) (gun registration requirement unconstitutional since it required admission of presumptively unlawful possession).

technical crimes—tax violations and importation-related acts. As a bootstrap from the federal taxing power to a federal police power, Congress chose presumptions. Thus, under the Marihuana Tax Act, possession plus failure to produce the required forms was presumptive evidence of the criminal act—failure to pay the tax[17]—and the courts had no trouble upholding this provision.[18] In addition, under the Import and Export Act possession of marijuana constituted presumptive evidence of illegal importation and of defendant's knowledge of such importation.[19]

Against a rash of attacks on the rationality of this presumption, the lower federal courts[20] noted that the Supreme Court had upheld the same statutory language in the original Federal Import and Export Act with respect to opium,[21] and that there was sufficient general knowledge that most marijuana was imported from Mexico to make the presumption rational. Although the Ninth Circuit at one time indicated that a defendant could rebut the presumption by showing that the marijuana in his possession was manicured and therefore more likely to have been domestically grown,[22] that court later held that such proof was insufficient and that the defendant must also show actual domestic production.[23]

---

[17] 26 U.S.C. § 4744(a) (1964).

[18] *E.g.*, Manning v. United States, 274 F.2d 926 (5th Cir.), *rev'd on other grounds on rehearing*, 280 F.2d 422 (5th Cir. 1960).

This provision was early interpreted *not* to require government agents to request the transfer form at the time of arrest, the courts holding that possession of the form was an affirmative defense. *E.g.*, Hill v. United States, 261 F.2d 483 (9th Cir. 1958); Hensley v. United States, 160 F.2d 257 (D.C. Cir.), *cert. denied*, 331 U.S. 817 (1947).

[19] 21 U.S.C. § 176a (1964).

[20] Leary v. United States, 383 F.2d 851, 869 (5th Cir. 1967), *rev'd*, 395 U.S. 6 (1969); Borne v. United States, 332 F.2d 565 (5th Cir. 1964); United States v. Gibson, 310 F.2d 79 (2d Cir. 1962); Claypole v. United States, 280 F.2d 768 (9th Cir. 1960); Butler v. United States, 273 F.2d 436 (9th Cir. 1959); Caudillo v. United States, 253 F.2d 513 (9th Cir.), *cert. denied*, 357 U.S. 931 (1958).

[21] Yee Hem v. United States, 268 U.S. 178 (1925).

[22] Caudillo v. United States, 253 F.2d 513 (9th Cir.), *cert. denied*, 357 U.S. 931 (1958). Implying that the presumption of importation was a rule of evidence, not of substantive law, the court noted that imported marijuana was ordinarily composed of mixed twigs and stems since the growers waited until maturity before harvesting. In the United States, on the other hand, growers avoided police detection by picking individual leaves before the plant matured. Since appellant possessed mixed twigs and stems, the court upheld application of the presumption; the clear suggestion, however, was that the presumption would not be applied to manicured marijuana.

[23] Costello v. United States, 324 F.2d 260 (9th Cir. 1963), *cert. denied*, 376 U.S. 930 (1964).

B. Attacks on State Legislation

Most attacks on the state statutes focused on the vagueness of statutory terms—marijuana, however spelled, or cannabis or Indian Hemp[24] —both as a scientific matter and in terms of common experience.[25] Predictably, however, few state courts were of a mind to inhibit legislative proscription of the "killer weed." Due in part to greatly exaggerated conceptions about the effects of the drug[26] and in part to the ease with which the mature plant is processed for the outlawed purposes,[27] the courts construed these statutory definitions as broadly as possible,[28] despite the traditional rule of strict construction of criminal statutes.

With the progressive increase in the severity of penalties which accompanied adoption of the Uniform Act in the 1930's and 1940's and the surge of amendments in the 1950's in the wake of the Boggs Act,[29]

---

[24] Use of the Latin word "cannabis" was challenged as an unconstitutionally vague definition of the prohibited substance in People v. Oliver, 66 Cal. App. 2d 431, 152 P.2d 329 (Dist. Ct. App. 1944), on the basis of an early holding that the use of Latin to define a sex crime was unconstitutionally vague, *Ex parte* Lockett, 179 Cal. 581, 178 P. 134 (1919) (fellatio and cunnilingus). In rejecting the vagueness argument, the court held that "cannabis" was later explained in the statute by the use of the word "marijuana" and that the two words were synonymous. *See* People v. Martinez, 117 Cal. App. 2d 701, 256 P.2d 1028 (Dist. Ct. App. 1953) ("Indian Hemp" not unconstitutionally vague); *cf.* People v. Johnson, 147 Cal. App. 2d 417, 305 P.2d 82 (Dist. Ct. App. 1957) ("lophophora" not unconstitutionally vague reference to peyote).

[25] A related issue was whether the charge of possession of "marijuana" was specific enough where there were statutory exceptions to protect the bird seed and hemp industries. The general rule was that the state need not allege that the parts possessed were not within the statutory exceptions. *E.g.*, Simpson v. State, 129 Fla. 127, 176 So. 515 (1937). *Contra,* People v. Sowrd, 370 Ill. 140, 18 N.E.2d 176 (1938).

[26] *See, e.g.*, Simpson v. State, 129 Fla. 127, 131, 176 So. 515, 517 (1937) (marijuana canses erotic hallucinations, loss of sense, false conviction, loss of values, a general weakening of powers, making it dangerous to mind and body). In Commonwealth v. LaRosa, 42 Pa. D. & C. 34, 36-37 (Fayette County Dist. Ct. 1941), the court stated:

> The deleterious, even vicious, qualities of the plant which render it highly dangerous to the mind and body, upon which it operates to destroy the will, to produce imaginary delectable situations, and gradually to weaken the physical powers, reside in a sticky resin of great narcotic power that pervades the entire plant . . . .

[27] State v. Bonoa, 172 La. 955, 136 So. 15 (1931).

[28] *See* State v. Hall, 41 Wash. 2d 446, 249 P.2d 769 (1952); Commonwealth v. LaRosa, 42 Pa. D. & C. 34 (Fayette County Dist. Ct. 1941). *LaRosa* held that the statute, passed two years earlier, created a duty to cut down marijuana plants before they could seed and that defendant had no right to plant marijuana even if he meant to cut the plants before maturity. Defendant's conviction for possession of two thousand mature plants and one hundred fifty thousand immature plants was accordingly affirmed.

[29] See pp. 1074-75 *supra.*

some problems of application arose. Interestingly enough, some courts applied the lesser penalty where one of two penalties could be imposed.[30] Similarly many courts tended to impose minimum sentences until the late 1950's when they, too, lost all sense of proportion.[31]

C. Procedural Defenses and Entrapment

Statutory attacks during this period tended to reflect the complicated interrelation of state and federal law and the scientific imprecision of legislative drafting. These attacks were usually rebuffed, and defendants, caught in a squeeze of judicial and legislative hostility, had few, if any, viable defenses based on whether or not they had violated the regulatory scheme. Both state and federal statutes merely required the prosecution to prove that the particular defendant was found in possession of a substance which when chemically tested was found to be marijuana. There were few tricky problems of proof, and the prose-

[30] *E.g.*, State v. Economy, 61 Nev. 394, 130 P.2d 264 (1942).

[31] This was particularly true in the Southwest, where use cases were more numerous and appeals more frequent. Indicative of this trend are the following Texas cases in chronological order: Gonzales v. State, 108 Tex. Crim. 253, 299 S.W. 901 (1928) ($25 fine); Baker v. State, 123 Tex. Crim. 209, 58 S.W.2d 534 (1933) (5-year sentence reversed); Horton v. State, 123 Tex. Crim. 237, 58 S.W.2d 833 (1933) (2-year sentence reversed); Spangler v. State, 135 Tex. Crim. 36, 117 S.W.2d 63 (1938) (1-year sentence affirmed); Ramirez v. State, 135 Tex. Crim. 442, 125 S.W.2d 597 (1938) (3-year sentence affirmed) (possession of a crop of 300 plants); Fawcett v. State, 137 Tex. Crim. 14, 127 S.W.2d 905 (1939) (2-year sentence reversed); Anderson v. State, 137 Tex. Crim. 461, 131 S.W.2d 961 (1939) (5-year sentence affirmed) (defendant tried to dispose of marijuana in station house); Martinez v. State, 138 Tex. Crim. 51, 134 S.W.2d 276 (1939) (6-year sentence reversed); Carrizal v. State, 138 Tex. Crim. 103, 134 S.W.2d 287 (1939) (2-year sentence affirmed); Lufkin v. State, 144 Tex. Crim. 501, 164 S.W.2d 709 (1942) (2-year affirmed); Cornelius v. State, 158 Tex. Crim. 356, 256 S.W.2d 102 (1953) (2-year sentence affirmed); Sparks v. State, 159 Tex. Crim. 111, 261 S.W.2d 571 (1953) (2-year sentence reversed); Rao v. State, 160 Tex. Crim. 416, 271 S.W.2d 426 (1954) (2-10 year sentence); Brewer v. State, 161 Tex. Crim. 28, 274 S.W.2d 411 (1954) (8-year sentence affirmed); Torres v. State, 161 Tex. Crim. 480, 278 S.W.2d 853 (1955) (3-year sentence affirmed); Gomez v. State, 162 Tex. Crim. 30, 280 S.W.2d 278 (1955) (5-25 year sentence affirmed); McWhorter v. State, 163 Tex. Crim. 318, 291 S.W.2d 329 (1956) (2-3 year sentence affirmed); Orosco v. State, 164 Tex. Crim. 257, 298 S.W.2d 134 (1957) (2-year sentence affirmed); Garcia v. State, 166 Tex. Crim. 482, 316 S.W.2d 734 (1958) (life sentence affirmed); Sherrad v. State, 167 Tex. Crim. 119, 318 S.W.2d 900 (1958) (13-year sentence reversed); Leal v. State, 169 Tex. Crim. 222, 332 S.W.2d 729 (1959) (75-year sentence affirmed) (one prior conviction); King v. State, 169 Tex. Crim. 34, 335 S.W.2d 378 (1959) (7-year sentence affirmed); Locke v. State, 169 Tex. Crim. 361, 334 S.W.2d 292 (1960) (15-year sentence affirmed); Massiate v. State, 365 S.W.2d 802 (Tex. Crim. App. 1963) (life sentence affirmed) (two prior burglary convictions).

cution usually had a clear case. If these offenders were caught dead to rights on the merits, the energetic attorney had to look elsewhere for his defense.

Fortunately, the exigencies of police practice in the field of narcotics law enforcement provided a defendant's attorney with a new area of attack—procedural irregularities in the arrest and apprehension of his client. The possession and sale of marijuana epitomize the crime without a victim; neither seller nor buyer is apt to complain of the transaction. In order to promote vigorous law enforcement in this area, the police have had to use a series of undercover agents, surprise raids and often questionable search and arrest techniques. Because of the nature of the conduct they are trying to stifle, the police must intrude into a private social relationship where none of the parties wants it; thus, the police have found it essential to employ highly secretive and often patently deceitful practices. It is no coincidence that the vast developments in the law of criminal procedure—especially in the fourth amendment area—have been outgrowths primarily of narcotics and marijuana cases.

1. Search and Seizure

Today the major remedy for an illegal search is exclusion of the seized items as evidence. Some states and the federal courts have used this exclusionary rule since early in the twentieth century. However, before the 1961 decision in *Mapp v. Ohio*[32] required all states to adopt this remedy, many state courts did not exclude illegally seized evidence. In jurisdictions without the rule, it scarcely helped the victim of an illegal search to raise the point. So, for example, in a 1945 Louisiana case, the court permitted introduction of marijuana seized without a warrant from defendant's room while he was out of town.[33]

Because of the scope permitted the searching officer, things were not much better in jurisdictions adhering to the exclusionary rule. In states using the rule before *Mapp*, the crucial issue when the lawfulness of a search was questioned was whether or not the search was reasonable under the circumstances.[34] One might expect, in view of the

[32] 367 U.S. 643 (1961).

[33] State v. Shotts, 207 La. 898, 22 So. 2d 209, *cert. denied*, 326 U.S. 730 (1945).

[34] *See, e.g.*, United States v. Rabinowitz, 339 U.S. 56 (1950). The Court here upheld the search of a one-room office on the grounds that the search was incident to a lawful arrest, and said that the scope of such searches must turn on the reasonableness of the search considering all the underlying circumstances.

judicial hostility toward marijuana defendants, that the reasonableness standard provided sufficient leeway for circumvention of the exclusionary rule in more than a few cases.[35] Other end runs around the rule were developed in the federal system and in the states purporting to apply the rule to evidence seized in an illegal search. First, courts upheld searches if there was arguably an untainted source for seizure of the evidence. For example, a court might admit marijuana seized in a concededly illegal search where a police officer saw the marijuana before beginning the illegal search.[36] Second, in order to have standing to assert the inadmissibility of seized items, one had to admit the narcotics in question belonged to him.[37] Third, courts often permitted searches pursuant to a warrant to extend far beyond the items named in the warrant[38] under what came to be known as the contraband theory. This theory reasoned that certain items could never lawfully be pos-

---

[35] *Cf.* Anderson v. State, 137 Tex. Crim. 461, 131 S.W.2d 961 (1939). *See also* Leal v. State, 169 Tex. Crim. 222, 332 S.W.2d 729 (1959), holding it reasonable for a policeman to search defendant's shorts where he suspected from an informer's tip that the "out of the ordinary bulge" in defendant's pants concealed marijuana.

[36] Ramirez v. State, 135 Tex. Crim. 442, 125 S.W.2d 597 (1938). Eventually, courts began to allow the admission of illegally seized evidence if there was any untainted source whatsover. Thus, where defendant testified that the police had found marijuana in a dresser drawer in his house, the court permitted the state to introduce the marijuana based on the untainted source of defendant's own statements in court. Rao v. State, 160 Tex. Crim. 416, 271 S.W.2d 426 (1954).

[37] *See* Conuolly v. Medalie, 58 F.2d 629 (2d Cir. 1932). In that case Judge Learned Hand wrote:

> Men may wince at admitting that they were the owners, or in possession, of contraband property; may wish at once to secure the remedies of a possessor, and avoid the perils of the part; but equivocation will not serve. If they come as victims, they must take on that role, with enough detail to cast them without question. The petitioners at bar shrank from that predicament; but they were obliged to choose one horn of the dilemma.

Id. at 630.

[38] *See* King v. State, 169 Tex. Crim. 34, 335 S.W.2d 378 (1959). Here the Texas court held, with one dissent, that a search warrant for the premises of the husband authorized a search of the wife's bag in the house; her conviction for the materials found in the bag was affirmed.

In the field of search incident to an arrest, courts went even farther. Thus, a Texas court affirmed a conviction based upon the arrest and search of a defendant, even though the police officer admitted he had arrested the defendant solely for the purpose of searching him. The officer ostensibly arrested the defendant for a knife fight, but later admitted that he had arrested him because he suspected him of possession of marijuana. The court noted that the defendant was unable to give any authority for his contention that the state should be bound by the officer's statement as to the purpose of the arrest. Gonzales v. State, 160 Tex. Crim. 548, 272 S.W.2d 524 (1954).

sessed and belonged only to the government; thus any seizure of these items was permissible.[39]

2. Entrapment

In order for federal and state agents to detect narcotics traffic and use, it is essential that they infiltrate the drug culture. Obtaining this inside information may often involve police use of special employees—informers—or may require that the police become directly involved in the commission of the criminal act.[40] Many defendants in narcotics cases have claimed that they were forced into sales or purchases of narcotics by the police or their agents. These charges led to the affirmative defense of entrapment, first recognized in federal courts by the Supreme Court in *Sorrels v. United States*.[41] Since that time, the principles of the defense, as stated in that decision, were reaffirmed by the Supreme Court in *Sherman v. United States*.[42] In *Sherman*, a government informer induced the defendant, who was trying to quit his use of narcotics and was undergoing treatment at a narcotics rehabilitation center, to resume his use and supply the informer. The Court held that the conduct of the police informer constituted entrapment.

The entrapment defense would seem the ideal defense tactic in marijuana cases, because so often the defendant has been apprehended due to some police informer or police trick.[43] However, the theoretical and practical outlines of the defense narrowly restrict its scope and make it rarely successful. Moreover, because it may entail an admission that defendant committed the act charged,[44] it is usually the last resort.

From the beginning there have been two conflicting views of the entrapment defense. The majority view has considered entrapment an exception to the given criminal statute on the ground that the legislature could not have intended entrapment to fall within the statutory defi-

[39] It had been held that contraband may be seized in a search incident to arrest although the items taken had no relationship to the crime for which the arrest was made. Harris v. United States, 331 U.S. 145 (1947), *overruled*, Chimel v. California, 395 U.S. 752 (1969).

[40] THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: NARCOTICS AND DRUG ABUSE 8. *See also* MASS PRODUCTION JUSTICE AND THE CONSTITUTIONAL IDEAL 52-53 (C. Whitebread ed. 1970).

[41] 287 U.S. 435 (1932).

[42] 356 U.S. 369 (1958).

[43] *See* A. LITTLE, DRUG ABUSE AND LAW ENFORCEMENT (1967).

[44] *See* Henderson v. United States, 237 F.2d 169, 172 (1956); State v. Taylor, 375 S.W.2d 58, 62 (Mo. 1964). *But see* People v. Perez, 62 Cal. 2d 769, 401 P.2d 934, 44 Cal. Rptr. 326 (1965) (Traynor, C.J.).

nition of the crime. With this as the theoretical justification of the defense, the inquiry focuses on the innocence of the defendant but for the police conduct. The practical question is whether the police merely supplied an opportunity for a person with a pre-existing predilection to the criminal act. In the majority view this question of fact is to be resolved by the jury.[45]

Throughout the years a substantial minority position has contended that the entrapment defense should be considered a police control mechanism. Under this view, the focus is on the police and their conduct rather than on the character of the defendant. This rationale is premised on the court's supervisory powers over the administration of justice, and the question of entrapment is one of law to be decided by the judge, not by the jury.[46]

The focus of the defense on the character of the defendant and the use of usually unsympathetic juries to decide the issue have greatly hindered the successfulness of the entrapment defense. Since the defense must be raised affirmatively, the defendant bears a heavy burden in proving that he would not have committed the crime but for the police inducement. Thus, in *Gilmore v. United States*[47] the defendant was unable to carry the burden of proving that he would not have otherwise committed the marijuana offense. A government agent approached the defendant and requested marijuana, but the jury found no entrapment and the court could not declare that there was entrapment as a matter of law.

With the entrapment defense, as with illegal searches, the court has a known lawbreaker before it and for this reason is reluctant to free him unless there is an overwhelming reason to dismiss the charges. As a California court stated, "It is not the entrapment of a criminal upon which the law frowns . . . ." [48] The focus upon the defendant and his

[45] Sherman v. United States, 356 U.S. 369, 377 & n.8 (1958) (Warren, C.J.).

[46] *Id.* at 378 (Frankfurter, J., concurring); Sorrells v. United States, 287 U.S. 435, 453-59 (1932) (Roberts, J., dissenting).

[47] 228 F.2d 121 (5th Cir. 1955). *See also* United States v. Davis, 272 F.2d 149 (7th Cir. 1959). *Davis* was not strictly an entrapment case; the government agents had arranged for the transportation of a bag of marijuana from Texas to Chicago. The defendant argued that the agents' activities were illegal, and for that reason, the government was estopped from prosecuting him and that the evidence was inadmissible. The trial court found that the defendant had arranged for the deal and instructed the jury to acquit if the agents had illegally caused the importation. As in *Gilmore*, the jury was not willing to condemn the police.

[48] People v. Branch, 119 Cal. App. 2d 490, 494, 260 P.2d 27, 30 (Dist. Ct. App. 1953), where the police had their witness call the defendant and ask to buy some

mental state, rather than a focus on the government enforcement practices and their possible effect of creating a particular crime, places an incredible burden on the defendant to try to convince the jury that he is otherwise blameless. The use of informers and special agents who become friendly with those suspected of dealing in marijuana, and the use of this friendship to try to purchase marijuana, often by supplying the cash,[49] are bound to have a detrimental effect on the lay enforcement officers as well as to assure a slight increase in the supply of marijuana which would otherwise not have entered the trade. Nevertheless, the defense as presently structured remains virtually impossible for the defendant to raise with any real hope of success.

D. The Pro Forma Trial

When the marijuana defendant had exhausted his motions for dismissal or suppression of the evidence and was brought to trial, he was usually in deep trouble, faced with judicial hostility, lax methods of identification, and loose standards of proof. Convictions were rarely reversed for any reason and especially not for insufficient evidence. And penalties, no matter how harsh, were never set aside.

The first line of defense in the marijuana trial often involved the defendant's claim that the substance seized from him was not really marijuana. In general, the state had no difficulty proving the substance to be marijuana. In the important case, expert evidence of chemical tests may have been introduced,[50] but more commonly courts permitted the testimony of police officers,[51] undercover agents and other lay witnesses[52] to be sufficient to create a question of fact for the jury to decide.[53] Thus, when chemical evidence was not introduced, juries

marijuana and then accompanied the witness to the defendant's home.

[49] *See* People v. Williams, 146 Cal. App. 2d 656, 304 P.2d 100 (1956); Commonwealth v. Jones, 46 Dauph. 300 (Dauphin County, Pa., Dist. Ct. 1938).

[50] *See, e.g.*, People v. Agajanian, 97 Cal. App. 2d 399, 218 P.2d 114 (Dist. Ct. App. 1950); People v. Oliver, 66 Cal. App. 2d 431, 152 P.2d 329 (Dist. Ct. App. 1944); Valdez v. State, 135 Tex. Crim. 201, 117 S.W.2d 459 (1938).

[51] McWhorter v. State, 163 Tex. Crim. 318, 291 S.W.2d 329 (1956).

[52] People v. Sanchez, 197 Cal. App. 2d 617, 17 Cal. Rptr. 230 (Dist. Ct. App. 1961); People v. Haggard, 181 Cal. App. 2d 38, 4 Cal. Rptr. 898 (Dist. Ct. App. 1960); People v. Janisse, 162 Cal. App. 2d 117, 328 P.2d 11 (Dist. Ct. App. 1958). Even minors who receive the marijuana from the defendant are competent to identify the substance. People v. Sanchez, *supra*.

[53] *See* Hernandez v. State, 137 Tex. Crim. 343, 129 S.W.2d 301 (1938).

were strongly inclined to believe the policeman or a disinterested prosecution witness as against the defendant.[54]

This ease of identification combined with the uncritical acceptance of uncorroborated testimony[55] produced what amounted in fact to a very low standard of proof. Thus, in a California case, *People v. Janisse*,[56] the conviction was upheld on the testimony of teenage boys, though the defendant's co-workers testified for an alibi. The evidence of rookie police officers who later failed their civil service exams[57] has been accepted over the word of the defendant. Finally, even the testimony of witnesses who stand to benefit only from the conviction of the defendant has been accepted without corroboration, whether the benefit was indirect[58] or direct.[59] The wisdom of allowing such testimony by itself to be legally sufficient for a conviction is doubtful.

Although in theory the state must prove the defendant's possession was knowing,[60] through the use of circumstantial evidence the state usually encountered few problems in meeting its burden of proof. The state was permitted to use circumstantial evidence to link the defendant to a quantity of marijuana, but where only circumstantial evidence existed there must have been an instruction to the jury that all other

---

[54] *See, e.g.*, cases cited at note 52 *supra*.

[55] *See, e.g.*, People v. Ballejos, 216 Cal. App. 2d 286, 30 Cal. Rptr. 725 (Dist. Ct. App. 1963); People v. Johnson, 99 Cal. App. 2d 559, 222 P.2d 58 (Dist. Ct. App. 1950), *overruled*, People v. Perez, 62 Cal. 2d 769, 401 P.2d 934, 44 Cal. Rptr. 326 (1965) (Traynor, C.J.). *See also* People v. Sanchez, 197 Cal. App. 2d 617, 17 Cal. Rptr. 230 (Dist. Ct. App. 1961); People v. Mimms, 110 Cal. App. 2d 310, 242 P.2d 331 (Dist. Ct. App.), *cert. denied*, 344 U.S. 846 (1952).

[56] 162 Cal. App. 2d 117, 328 P.2d 11 (Dist. Ct. App. 1958) (it was not too improbable that defendant would have given marijuana away to a near stranger). *But see* People v. MacCagnan, 129 Cal. App. 2d 100, 276 P.2d 679 (Dist. Ct. App. 1954) (evidence of sale price admitted to show the unlikelihood that defendant was given the marijuana).

[57] People v. Gebron, 124 Cal. App. 2d 675, 268 P.2d 1068 (Dist. Ct. App. 1954).

[58] People v. Mimms, 110 Cal. App. 2d 310, 242 P.2d 331 (Dist. Ct. App.), *cert. denied*, 344 U.S. 846 (1952).

[59] People v. Winston, 46 Cal. 2d 151, 293 P.2d 40 (1956) (witnesses against defendant for sale to minor were due to go on trial themselves); People v. Ballejos, 216 Cal. App. 2d 286, 30 Cal. Rptr. 725 (Dist. Ct. App. 1963) (agent alleged to be paid by government if successful was only witness against defendant).

[60] *See* People v. Carrasco, 159 Cal. App. 2d 63, 323 P.2d 129 (Dist. Ct. App. 1958); People v. Antista, 129 Cal. App. 2d 47, 276 P.2d 177 (Dist. Ct. App. 1954) (defendant never reported having previously used marijuana and apartment used by many other persons); People v. Candiotto, 128 Cal. App. 2d 347, 275 P.2d 500 (Dist. Ct. App. 1954); People v. Savage, 128 Cal. App. 2d 123, 274 P.2d 905 (Dist. Ct. App. 1954) (maid found marijuana wrapped in napkins two days after a party held to be insufficient evidence) (trial judge held to be prejudiced); Fawcett v. State, 137 Tex. Crim. 14, 127 S.W.2d 905 (1939) (reversed for failure to give instruction on ignorance as a defense).

reasonable inferences of innocence had been overcome.[61] For example, behavior such as running away from police, if marijuana was found along the path run, was sufficient to link the defendant to possession,[62] though mere proximity without other guilty behavior was not enough to prove possession.[63]

Finally, judicial hostility to the "morally depraved" marijuana user was so strong that often judges condoned inflammatory statements by the prosecution to the jury about the nature of the drug and its users. Indeed, some judges themselves often participated in these highly emotional statements. For example, one judge in *instructing a jury* announced:

> Marijuana is a vicious, demoralizing substance that robs a person of morality, honor, integrity, decency, and all the virtues that are the foundation of good character and good citizenship. The Government is constantly engaged in an effort to stamp out traffic in this and in narcotic drugs. Officers of the Government are employed in this effort usually and are entitled to credit for their loyalty and integrity.[64]

In the same way, direct aspersions toward a defendant's character were tolerated.[65] For instance, courts overlooked prosecution comments

---

[61] Gonzales v. People, 128 Colo. 522, 264 P.2d 508 (1953); State v. Walker, 54 N.M. 302, 223 P.2d 943 (1950).

[62] Perez v. State, 34 Ala. App. 406, 40 So. 2d 344 (Ct. App. 1949) (paper in apartment matched paper on marijuana). *See also* People v. Rodriguez, 151 Cal. App. 2d 598, 312 P.2d 272 (Dist. Ct. App. 1957) (defendant knowingly helping owner move marijuana is sufficient for possession).

[63] People v. Miller, 162 Cal. App. 2d 96, 328 P.2d 506 (Dist. Ct. App. 1958) (reversible error to introduce marijuana found down the street from the defendant's apartment without further proof of defendant's ownership). In Sherrad v. State, 167 Tex. Crim. 119, 318 S.W.2d 900 (1958), defendant's conviction was reversed for the failure of the prosecutor to connect the payment to the defendant with the later payment to another defendant who made delivery of the marijuana to the agent. The court noted that defendant had been charged as the principal, and that no proof of any conspiracy had been made. *See also* People v. Vasquez, 135 Cal. App. 2d 446, 287 P.2d 385 (Dist. Ct. App. 1955) (defendant chargeable with transporting, not possession, where he told co-defendant to throw marijuana away and co-defendant did not do so).

[64] Lake v. United States, 302 F.2d 452 (8th Cir. 1962).

[65] *See, e.g.*, People v. Sykes, 44 Cal. 2d 166, 280 P.2d 769, *cert. denied*, 349 U.S. 934 (1955) (evidence of defendant's activities as a pimp admissible in a trial on charge of marijuana sale to minor in order to prove that there was a plot to subjugate both the body and mind of the minor) (Traynor, C.J., dissented, stating that the evidence was prejudicial and of no probative value); Escamilla v. State, 162 Tex. Crim. 346, 285 S.W.2d 216 (1955) (permissible for prosecutor to call defendant a peddler and then to withdraw statement); People v. Salo, 73 Cal. App. 2d 685, 167 P.2d 269 (Dist. Ct. App. 1946);

that the defendant sold his drugs near a junior high school[66] or that drug use among teenagers must be stopped.[67]

In sum, then, defendants in marijuana cases had great difficulties at trial during this period. Easy identification methods, jury acceptance of uncorroborated testimony, use of circumstantial evidence to prove defendant's possession was knowing, and the judicial participation in inflammatory statements to the jury made defense success at trial a virtual impossibility.

VIII. The Public Discovers the Truth About Marijuana

We need not belabor the point, but sometime after 1965 the wisdom of the marijuana laws suddenly became dinner-table conversation in most American middle-class homes along with the Indochina war and campus dissent. Many sons and daughters, and even mothers and fathers, of the middle class had tried the drug, and those who had not were certainly familiar with "pot" and the law. The medical profession finally commenced a research effort to determine who was right—the user who said the drug was a harmless pleasant euphoriant or the lawmakers, who by their actions had condemned it as a noxious cause of crime, addiction and insanity.

A. Marijuana and the Masses

Although marijuana arrests and seizures hit their all-time low point in 1960,[1] the middle and late sixties witnessed a revolution in marijuana use. Vast numbers of people have recently adopted the drug as their principal euphoriant; however, by all estimates, the new users are the sons and daughters of the middle class, not the ethnic minorities and ghetto residents formerly associated with marijuana.[2] Student marijuana

Medina v. State, 149 Tex. Crim. 249, 193 S.W.2d 196 (1946) (no error to call defendant a dealer in marijuana in possession trial).

[66] Torres v. State, 161 Tex. Crim. 480, 278 S.W.2d 853 (1955).

[67] People v. Head, 108 Cal. App. 2d 734, 239 P.2d 506 (Dist. Ct. App. 1952).

[1] Traffic in Opium 69 (1960).

[2] In reporting the marijuana arrests of Robert Kennedy, Jr., and R. Sargent Shriver, Jr., Walter Cronkite noted that "[t]his case is not unusual; more and more parents across the nation find themselves going to court with their children on drug charges. It's becoming an incident of modern living." CBS Evening News, Aug. 6, 1970. *See also* J. Rosevear, Pot: A Handbook of Marihuana 117-31 (1967); Traffic in Opium 2, 40 (1966).

use is now so common that it has been associated in the public eye with the overall campus life style.[3] Accompanying the growth of widespread marijuana use on campus has been an increasing experimentation with the drug by intellectuals, professors, young professionals and members of several other social groups who would never have considered using the drug ten years ago.[4]

Dr. Stanley F. Yolles, former Director of the National Institute of Mental Health, testifying before a Senate subcommittee, said, "A conservative estimate of persons in the United States, both juvenile and adult, who have used marihuana, at least once, is about 8 million and may be as high as 12 million people." [5] Other estimates have run as high as twenty to twenty-five million users.[6] This vast increase in the number of people using marijuana seems to have begun in the early and middle sixties. It is likely that this new use pattern was initially precipitated by the publicity surrounding the LSD experimentation of Doctors Alpert and Leary at Harvard in 1963.[7] As a growing segment of the academic fringe began to preach consciousness-expansion, students began to find marijuana available on campus. From that point the phenomenon snowballed. As more novice marijuana users reported no ill effects from its use, more students tried it, and in turn those who used and enjoyed the drug began to "turn on" those who had not. By 1970, some campuses reported that over seventy percent of the student body were users.[8] More recently, marijuana use spread beyond the student subculture; reportedly its use has become common even among young professionals on Wall Street.[9] Moreover, since it is readily available and widely used in Vietnam, marijuana has become popular with many soldiers.[10]

---

[3] *See, e.g.*, R. DEBOLD & R. LEAF, LSD, MAN AND SOCIETY (1967); R. GOLDSTEIN, ONE IN SEVEN: DRUGS ON CAMPUS (1966); K. KENNISTON, THE UNCOMMITTED: ALIENATED YOUTH IN AMERICAN SOCIETY (1967); D. LOURIA, THE DRUG SCENE (1968); L. SIMMONS & B. WINEGRAD, IT'S HAPPENING (1967).

[4] *See* Malabre, *Drugs on the Job*, Wall St. J., May 4, 1970, at 1, col. 6. This article deals not only with drug use by professionals but also details the increasing trend of drug use on the job.

[5] *Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 267 (1969) [hereinafter cited as *Narcotics Legislation Hearings*].

[6] *Id.* at 268.

[7] *See* R. DEBOLD & R. LEAF, LSD, MAN AND SOCIETY 130-31 (1967).

[8] TIME, Sept. 26, 1969, at 69; Yale Daily News, Jan. 14, 1970.

[9] Malabre, *supra* note 4.

[10] D. LOURIA, THE DRUG SCENE 10 (1968).

The general public is clearly aware that there has been both a vast increase in the number of users and a shift from lower- to middle-class use of the drug. These great changes in the nature of marijuana use have had important social consquences. First, with the sharp rise in the number of users and the tendency of marijuana users to share common life styles and often political opinions, the drug has become associated in the past few years with a major counter-culture. Many proponents of that counter-culture have contended that the illegal status of marijuana —which puts large numbers of people on the wrong side of the criminal law—is the most significant unifying and recruiting agent for the New Left and the other political and social causes of the late sixties.[11] Some New Left leaders have gone so far as to oppose reduction in the penalties for marijuana possession because they feel severe penalties aid their recruiting ends by making marijuana users outraged against a society that overacts so strongly to a nonexistent danger.[12] We feel the general disrespect for marijuana laws may be causing a dangerous disrespect for all laws in a sizeable segment of the population. The credibility of government suffers on all issues when its handling of the use of this drug seems to so many so far removed from reality. This opinion is supported by the increasing medical evidence that the dangers of the drug are *de minimus*.

Secondly, the new middle-class use of marijuana has induced the first significant medical inquiry into the nature of the drug, has spawned increasing numbers of challenges to the constitutionality of marijuana laws and penalties, and has spurred the passage of more lenient legislation. One commentator has stated:

> Nobody cared when it was a ghetto problem. Marijuana—well, it was used by jazz musicians or the lower class, so you didn't care if they got 2-to-20 years. But when a nice, middle-class girl or boy in college gets busted for the same thing, then the whole community sits up and takes notice. And that's the name of the game today. The problem has begun to come home to roost—in all strata of society, in suburbia, in middle-class homes, in the colleges. Suddenly, the punitive, vindictive approach was touching all classes of society. And now the

11 Perhaps the best statement the authors have yet encountered to this effect was made by Jerry Rubin, one of the Chicago Seven, in Charlottesville, Virginia, on May 6, 1970, when he said: "Smoking pot makes you a criminal and a revolutionary—as soon as you take your first puff, you are an enemy of society." *See also* J. RUBIN, DO IT! (1970).

12 Wash. Post, Feb. 24, 1970, at B1, col. 3.

> most exciting thing that's really happening is the change in attitude by the people. Now we have a willingness to examine the problem, as to whether it's an experimentation, or an illness rather than "an evil." With this change I think we can come to a more rational approach to methods of drug control.[13]

Without doubt, the new class of users has successfully demanded more favorable attention from the legislatures and the courts than the lower class could have attracted. In fact, even the slightest circumscription of the reach of a state marijuana law is now national news.[14]

A third result of the widespread use of marijuana has been a substantial challenge to the traditional picture of the national marijuana trade. Over the past three decades, law enforcement officials continued to convince legislators that the traffic in marijuana was controlled by professional criminals.[15] Confronted with this portrait of the marijuana trade, legislators naturally stereotyped the "seller" as the vicious criminal pushing his wares for high profit and felt that extraordinarily harsh penalties were justified for sellers.[16] From several recent studies it appears that the structure of marijuana traffic bears little or no relation to the traditional stereotype. In a recent survey of 204 users it was found that 44 percent had sold to friends at least once. Many casual users sell to leave themselves enough profit to cover the amount of their own use.[17] The study further finds that even at the very top, profits are too small and the product too bulky to interest the criminal class that probably underwrites sales of heroin and other "hard drugs."[18] Thus even at the top, amateurs—composed generally of the students, young professionals and soldiers who constitute the users—are the main source of the drug.[19] It is also important to note that marijuana is typi-

---

[13] N.Y. Times, Feb. 15, 1970, § 6 (Magazine), at 14 (statement of Dr. Stanley Yolles).

[14] *See, e.g.*, Wash. Post, May 16, 1970, at A3, col. 8 (reporting a Minnesota Supreme Court decision holding that possession of small amount of marijuana does not necessarily justify conviction). This case is discussed at p. 1122 *infra*.

[15] N.Y. Times, Oct. 19, 1969, § 4, at 8, col. 2.

[16] *Narcotics Legislation Hearings* 4 (statement of Senator Dodd).

[17] Goode, *The Marijuana Market*, 12 COLUM. F., Winter 1969, at 7.

[18] *Id.* at 8.

[19] *Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. 4510 (1968) [hereinafter cited as *Juvenile Delinquency Hearings*]. At these hearings, former Commissioner of the Bureau of Narcotics, Henry Giordano, stated: "We have not seen any evidence of criminal syndicates such as the Mafia being involved [in the marijuana trade]." *Id.*

cally sold by the ounce[20] rather than by the cigarette as was traditionally assumed. Thus, even the relatively casual experimenter is likely to have at least an ounce of the drug in his possession.

B. Enforcement of the Marijuana Laws: 1960-1970

As a result of the rapid spread of marijuana use, full enforcement of the marijuana laws has become impossible.[21] By 1967 the Federal Bureau of Narcotics had 299 agents, roughly 50 more than in 1956;[22] in the same period the use of marijuana probably increased 1,000 fold. It seems obvious from both FBN statistics and the best available state and local statistics that two enforcement patterns emerged in the sixties: concentration on "sellers" and selective enforcement.

Since 1960 the FBN and major state and municipal narcotic squads have concentrated on the larger sellers. In the early sixties this trend was less pronounced,[23] but by 1968 the Commissioner of the FBN said that 75 percent of federal marijuana arrests were of dealers and that even the remaining 25 percent were sellers but were charged with possession as a result of plea bargains.[24] Statistics from California show the same concentration on sellers;[25] nevertheless the California bureau found that most of these sellers were young and first offenders.[26] Thus, at least by 1968 it became clear that sellers were quite often neophytes.

At the same time that the police have abandoned full enforcement for concentration on dealers, enforcement of the laws has remained necessarily haphazard and somewhat selective. Since marijuana use has become so common, there are certain student and hippie communities

---

20 Goode, *supra* note 17, at 4, 5. *See also* Leary, *The Politics, Ethics and Meaning of Marijuana*, in THE MARIHUANA PAPERS 121 (D. Solomon ed. 1966).

21 *See* Los Angeles Times, Dec. 4, 1967, § 2, at 6, col. 1 (statement by Los Angeles police chief).

22 *See* Mandel, *Problems with Official Drug Statistics*, 21 STAN. L. REV. 991, 1021 n.114 (1969).

23 *See* TRAFFIC IN OPIUM 72 (1960); *id.* at 65 (1961); *id.* at 78 (1963).

24 *Hearings on Dept's of Treasury and Post Office and the Executive Office Appropriations for 1969 Before a Subcomm. of the House Comm. on Appropriations*, 90th Cong., 2d Sess., pt. 1, at 624 (1968).

25 The state of California has kept excellent statistics since 1959. In 1968, as a typical year of the late sixties, the police seized over 30,000,000 grams of marijuana of all kinds in only 10,000 arrests. The high amount seized relative to the number of arrests seems to indicate the concentration on dealers. BUREAU OF CRIMINAL STATISTICS, DEP'T OF JUSTICE, STATE OF CALIFORNIA, DRUG ARRESTS AND DISPOSITIONS IN CALIFORNIA 41, 43 (1968).

26 *Id.* at 37-39.

in which the police could arrest nearly everyone. Here the problem of selective enforcement necessarily arises—the police arrest those they dislike for other reasons, either political disagreement or suspicion of use of other drugs. This inevitable practice, although perhaps not consciously planned, has brought outcry from some victimized communities.[27] This policy—if not a policy by the police at least a perception by the hippies—of selective enforcement has provided them increased impetus toward the anti-establishment life style they have adopted. Their attitude is aggravated when the police engage in particularly aggressive tactics, such as use of informers, to trap the offenders.[28]

By 1970, the unenforceability of the marijuana laws was most clearly evidenced by the failure of President Nixon's Operation Intercept which was designed to seal off the Mexican border and the supply of marijuana coming into the United States from Mexico.[29] Both national and international tensions led to the failure of the "Noble Experiment." By now, the marijuana trade is so scattered and at the same time so fragmented (with no real hierarchy in the trade) that the unenforceability of these laws has reached Prohibition proportions.

C. Emergence of Medical Opinion

One of the most significant causes of widespread middle-class use of marijuana was the lack of any medical proof of the allegedly evil effects of its use.[30] In fact, what authoritative studies had been conducted up to this time were inconsistent with the assumptions underlying anti-marijuana legislation. In this situation, users viewed themselves as experimenters with a mild euphoriant, not criminals endangering themselves or society at large. The inevitable consequence was increased medical inquiry into the effects of the drug, beginning in about 1967.[31]

---

27 *See* Fort, *Social Problems of Drug Use and Drug Policies*, 56 Calif. L. Rev. 17, 23 (1968). *See also* H. Becker, Outsiders 159 (1963); T. Duster, The Legislation of Morality: Law, Drugs and Moral Judgment (1970).

28 *See* Little, Drug Abuse and Law Enforcement 1313-15 (1967); Project, *Marijuana Laws: An Empirical Study of Enforcement and Administration in Los Angeles County*. 15 U.C.L.A.L. Rev. 1507, 1522-31 (1968).

29 Time, Sept. 26, 1969, at 70.

30 One commentator has charged that those most knowledgeable about marijuana have "dodged" the topic. Kaplan, *The Special Case of Marihuana (Or, It's the Doctor's Fault)*. 9 J. Clinical Pharmacology 349, 351 (1969).

31 At the end of 1968 there existed only four known studies on human subjects conducted by Americans. *See* Weil, Zinberg & Nelson, *Clinical and Psychological Effects of Marihuana in Man*, 162 Science 1234, 1235 (1968) [hereinafter cited as Weil

Concurrently, the National Institute of Mental Health significantly increased its funding for grants and contracts for marijuana research.[32]

Despite this intensified inquiry, uncertainty about the effects of the drug persists. There are several major research obstacles responsible for continued absence of reliable research. After outlining the impediments to conclusive findings, we shall extract from the existing studies the present state of medical knowledge.

1. Research Obstacles

The major obstacle is the nature of the marijuana plant itself. Marijuana is a derivative of the plant *Cannabis Sativa*, commonly denoted the hemp plant. It is classified as a dioecious plant, that is, the male reproductive parts are on one individual plant and the female parts are on another. The differentiation of the male and female plants is exceedingly significant because the chemical compounds responsible for the euphoric effect of marijuana are found primarily in the sticky resin that covers the unfertilized female flowers and adjacent leaves. The male plant may contain a small amount of this active resin, but it is grown mainly for hemp fiber.[33]

The hemp plant yields three rough grades of intoxicating substances, the least potent of which is "marijuana."[34] Yet, because the classifica-

Study]. The previous lack of concern with marijuana can also be observed by an examination of the number of articles appearing in medical periodicals. During the decade between 1942 and 1951, only six articles dealing with the subject are listed in the index for medical journals. Eleven reports were noted as being published in the next ten years. From 1962 to 1966, an average of three materials per year were available. It was not until 1967 that the subject became of sufficient interest to occupy the time of a reasonable number of medical authors. In that year, eleven articles appeared in medical periodicals. By 1968, this number had increased to 30, and in 1969 more than 60 articles dealing with the topic of human marijuana consumption have appeared. In other words, more than three times the number of articles appeared in the last three years than in the 25 preceding years.

[32] "In Fiscal year 1967, NIMH obligated $786,000 for marihuana research grants and contracts. Comparable figures for 1968 and 1969 respectively were $1,239,000 and $1,330,000. In Fiscal year 1970, if funds are available, the Institute proposes to obligate $2,550,000 to support grant and contract studies of marihuana, which means that there will have been a more than three-fold increase for support of these studies in the last four years." Statement by Dr. Roger O. Egeberg, Assistant Secretary for Health and Scientific Affairs, M.S. Dep't of HEW, before the Select Committee on Crime, U.S. House of Representatives (mimeographed press release).

[33] Weil Study 1234.

[34] The three substances are charas—pure unadulterated resin that has been scraped from the leaves and flowering tops of the female plant; hashish or ganja—an agglomeration of female flowering tops and stems with whatever resin is attached to their surfaces,

tions are imprecise, confusion is engendered by attributing to "marijuana" the effects produced by the excessive use of the more potent forms of cannabis.[35] In addition, the psychic potency of the plant differs depending upon where the marijuana is grown,[36] and upon cultivation variables such as occurrence of fertilization and time of harvesting:

> If the male plants are not removed and fertilization occurs, the female plants which carry the main intoxicating properties are considerably weakened in that respect. In addition, unless harvesting is carried out immediately before the blossoming of the flowers there is further weakening and variation in the potency of the produce.[37]

It is interesting to note in this connection that the marijuana used in the United States is among the weakest in the world.[38] These factors frus-

---

thought to contain about 40% resin; and marijuana—a low potency preparation consisting of dried mature leaves and flowering tops of both male and female plants, thought to contain between 5 and 8% resin. Schwarz, *Toward a Medical Understanding of Marihuana*, 14 CAN. PSYCHIATRIC ASS'N J. 591, 592 (1969).

35 As long as the term *marihuana* is used indiscriminately to refer to cannabis of all kinds and potencies, confusion will continue. . . . In this country some of the vigorous opponents of marihuana seem to foster this confusion by attributing to any use of marihuana the effects produced primarily by the excessive use of the more potent forms of cannabis in an attempt to preserve a strongly negative public image of marihuana.

H. NOWLIS, DRUGS ON THE COLLEGE CAMPUS 93 (1969).

36 "The major botanical feature of the plant is the extreme variability in its appearance, characteristics and properties when grown in different geographical and climatic condition." Schwarz, *supra* note 34, at 591. In the United States and Mexico, for example, the production of the more potent forms is relatively uncommon, and there appears to be no demand for them. J. ROSEVEAR, POT: A HANDBOOK OF MARIHUANA 31-33 (1967).

37 Schwarz, *supra* note 34, at 592.

38 Zunin, *Marijuana: The Drug and the Problem*, 134 MILITARY MED. 104, 106-07 (1969). According to the author, several factors contribute to this phenomenon:

(1) The amount of resin found in the flowering tops markedly decreases as the plants are grown in more temparate areas. It is estimated that the resin content of Indian cannabis is 20%; Mexican 15% or less; that grown in Kentucky 8%; and that found in Wisconsin 6% or less.

(2) The activity of the resin in the female is greatly reduced if fertilized by the male. In this country, because of an inability to distinguish between the two plants, inattention to cultivation and lack of knowledge, the female plants are fertilized.

(3) The resinous content is highest prior to "going to seed" of the female plant. The marijuana in this country has gone to seed prior to harvesting.

(4) The male plant contains little or no resin content. In this country, the male plant is indiscriminately mixed with the female plant in the final preparation.

(5) The most active portion of the plant is the flowering top. In this country,

trate the creation of a standardized dosage in any given experiment and preclude the comparison of the results of independent studies.[39]

In addition to the problems engendered by the great variance in potency and dosage, meaningful marijuana research is also inhibited by differences in means of consumption. Since standardized doses are generally considered impossible if the drug is smoked,[40] most studies, including the La Guardia Report, are based upon oral administration of marijuana to the subjects. Yet smoking is the method of consumption among nearly all American users. Furthermore, standardized dosage is not even assured by the oral method since "little is known about the gastrointestinal absorption of the highly water-soluble cannabinals in man." [41] Finally, "[t]here is considerable indirect evidence from users that the quality of the intoxication is different when marijuana or its preparations are ingested rather than smoked. In particular, ingestion seems to cause more powerful effects . . . ." [42]

2. *Current Medical Knowledge*

It is perhaps best to begin with the medical data concerning the traditional allegations about marijuana.

(*a*) *The Myths.*—First, it is universally accepted among medical

---

preparations of marijuana are composed primarily of leaves, twigs and seeds which are crushed.

(6) The potency of marijuana decreases with time. It is reduced at the end of one year, markedly reduced at the end of two years, and nonexistent at the end of three years. In addition, it keeps better in cold, dry climates. Most of the marijuana in the United States is several months to several years old by the time it has been harvested and has passed through the smuggling operation.

39 Given the above variations in the plant and in its products and extracts, together with the continuing ignorance of its chemistry, it is not surprising that it is virtually impossible to make direct comparisons between the various studies on the effects of *cannabis* on human beings who are even more individually variable.

Schwarz, *supra* note 34, at 593.

Recently, what is believed to be the active ingredient in marijuana has been isolated and synthesized. However, this substance, denominated tetrahydrocannabinal (THC), is only available for research in very limited quantities. Weil Study 1235. Furthermore, it has not been proven that THC is the sole ingredient contributing to the effects caused by marijuana.

40 "[M]any pharmacologists dismiss the possibility of giving marihuana by smoking because, they say, the dose cannot be standardized." Weil Study 1235.

41 *Id.*

42 *Id.*

authorities that marijuana is not physically habit-forming.[43] Although some researchers have asserted that a psychological dependence may result from continued use of the drug, this hypothesis has not been established and its relevance has been questioned. One authority has noted that "habituation to marihuana is not as strong as to tobacco or to alcohol." [44] Another has commented that "[a] psychological dependence and desire for the drug may occur, but this is inconsistent and is not uncontrolable. . . . Perhaps the dependence is even less than the dependence on cigarettes." [45]

Second, there is no evidence whatsoever that the use of marijuana has a direct relationship to the commission of crime. One commentator has noted that "[d]uring the high the marihuana user may say things he would not ordinarily say, but he generally will not do things that are foreign to his nature. If he is not normally a criminal, he will not commit a crime under the influence of the drug." [46] In fact, it is entirely likely that the characteristic passive reaction to the use of marijuana tends to inhibit criminality. A recent study has shown that juvenile "potheads" tend to be nonaggressive and to stay away from trouble.[47] Similarly, there is no scientific evidence for the proposition that marijuana is an aphrodisiac. It has been suggested to the contrary that the most potent form of cannabis, pure ganja, has the reverse effect, being taken by Indian priests to quell the libido.[48]

Finally, the evidence is at best inconclusive regarding the contention that use of marijuana leads to the use of "hard" narcotics. Some of the early studies claiming to have established a valid connection were scientifically unreliable. One authority has observed in this regard:

---

[43] "There is now an abundance of evidence that marihuana is not an addictive drug. Cessation of its use produces no withdrawal symptoms, nor does a user feel any need to increase the dosage as he becomes accustomed to the drug." Grinspoon, *Marihuana*, 221 SCI. AM. 17, 21 (1969).

[44] *Id.*

[45] Zunin, *supra* note 38, at 108.

[46] Grinspoon, *supra* note 43, at 22.

[47] McGlothlin & West, *The Marihuana Problem: An Overview*, 125 AM. J. PSYCH. 370, 372-73 (1968). This supports the finding of the La Guardia Report that marijuana is not a direct causal factor in criminal misconduct, but that the "high" leads to sociable attitudes.

[48] THE MARIHUANA PAPERS 44 (D. Solomon ed. 1966). Since marijuana has a tendency to produce drowsiness, it is difficult to see how it could lead to an act of violent sex. J. ROSEVEAR, *supra* note 36, at 61. *See also* La Guardia Report, in THE MARIHUANA PAPERS 296-97 (D. Solomon ed. 1966).

> Supposedly scientific studies of this problem have been conducted in the past, such as the one done in a deprived area of a large city where the use of heroin was widespread, and indicating that many users of marijuana went on to the use of more hazardous drugs. I am sure that without previous marijuana, the use of such drugs in that environment would be just as high, and that if such a study were done on a college population, it would be found that the subsequent use of "hard" drugs would be negligible.[49]

Referring to a presidential task force investigation, another authority has commented:

> It is true that the Federal study showed that among heroin users about 50% had had experience with marijuana; the study also found, however, that most of the heroin addicts had been users of alcohol and tobacco. There is no evidence that marijuana is more likely than alcohol or tobacco to lead to the use of narcotics.[50]

On the basis of the available information, most authorities have concluded that there is no scientific basis for the theory that the use of marijuana is a causal factor in the use of "hard" narcotics.[51] In any event, as a matter of common sense, it would appear that the phenomenon in dispute is very complex, including both individual personality features and environmental factors. As one commentator put it, "Several of the studies indicate that the previous statistics have been misleading and exaggerated." Whether or not the proposition can be scientifically established, "there is probably a slightly greater chance that an individual who has used marijuana could go on to opiates, but statistically this is not . . . an important social consideration." [52]

Thus it appears that none of the traditional allegations about marijuana has been scientifically established, that its allegedly addictive qualities have been disproved, and that the overwhelming weight of authority disputes its allegedly crime-producing and stepping stone tendencies. We will now briefly survey the medically recognized effects of the drug, physical, psychomotor and psychological.

---

[49] Radoosky, *Marihuana Foolishness*, 280 NEW ENG. J. MED. 712 (1969).

[50] Grinspoon, *supra* note 43, at 21-23.

[51] THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: NARCOTICS AND DRUG ABUSE 13-14 (1967); Council on Mental Health and Committee on Alcoholism and Drug Dependence, *Dependence on Cannabis (Marijuana)*, 201 J.A.M.A. 368-71 (1967).

[52] Zunin, *supra* note 38, at 108.

(*b*) *Physical Effects.*—The acute physical effects of marijuana are the subject of much debate. Various studies have reached different conclusions. Nearly all authorities, however, are in agreement that the bodily symptoms accompanying the "high" are very slight. The most commonly noted effects are a slight rise in blood pressure, conjunctival vascular congestion, slight elevation in blood sugar, urinary frequency and an increase in pulse rate.[53] In general, these acute symptoms are relatively short-lived, and there are no known lasting physical effects.[54] On the other hand, there is evidence that prolonged smoking could lead to "marijuana bronchitis," and that communal smoking has the tendency to encourage the spread of communicable diseases.

(*c*) *Psychomotor Effects.*—Varying results have also been reported in studies of the acute effects of marijuana upon psychomotor functions. Although the researchers have sometimes found some slight impairment in performance tests,[55] there is apparently no general depressing or stimulating effect on the nervous system and no influence on speech and coordination.[56] In the most recent study, Doctors Weil, Zinburg and Nelson of the Boston University School of Medicine found that marijuana users are able to compensate nearly 100 percent for whatever adverse effects may result on ordinary psychomotor performance.[57]

---

[53] L. GOODMAN & A. GILMAN, THE PHARMACOLOGICAL BASIS OF THERAPEUTICS ch. 16 (3d ed. 1965). Nausea, vomiting and diarrhea have also been reported, but it is felt that these symptoms are mainly the result of oral administration. Grinspoon, *supra* note 43, at 20. Increased appetite and dryness of the mouth are also said to be common.

[54] Usually the reports of chronic ill effects are to be found in Eastern studies of individuals using the stronger *hashish* or pure resinous substances over prolonged periods of time and are complicated by the immeasurable effects of many other social, economic, personality and cultural factors.

Schwarz, *supra* note 34, at 595.

[55] Tests by Robert S. Morrow in the 1930's revealed that even large doses of marijuana did not affect performances on tests of the speed of tapping or the quickness of response to simple stimuli. Grinspoon, *supra* note 43, at 20. "The drug did affect steadiness of the hand and body and the reaction time for complex stimuli." *Id.* The most recent study in this area was done by Andrew Weil, Norman Zinburg and Judith Nelson of the Boston University School of Medicine. Their conclusions were that regular users of marijuana may show some slight degree of impairment in performance tests, but that the aptitude of the subjects may even improve slightly after smoking marijuana. Weil Study 1242. Marijuana-naive subjects tended to show some impairment in performance. *Id.*

[56] N.Y. Times, May 11, 1969, § 6 (Magazine), at 92, col. 2.

[57] We were struck by the difficulty of recognizing when a subject is high unless he tells you that he is . . . . It seems possible to ignore the effects of marihuana on consciousness, to adapt to them, and to control them to a significant degree. *Id.*

Such findings suggest that marijuana is not likely to be a causal factor in driving accidents, a hypothesis that is supported by a recent simulated driving test comparing the performance of subjects under the influence of marijuana and alcohol.[58] There seems to be no contention in the medical field that there are any lasting effects from marijuana in the psychomotor area. The Weil study reported that noticeable effects "were diminished between 30 minutes and 1 hour, and they were largely dissipated 3 hours after the end of smoking. No delayed or persistent effects beyond 3 hours were observed or reported." [59]

(*d*) *Psychological Effects.*—The acute psychological effects of the use of marijuana are more complex. At the outset, it can be stated with certainty that "marijuana is definitely distinguishable from other hallucinogenic drugs such as LSD, DMT, mescaline, peyote, and psilocybin. Although it produces some of the same effects, it is far less potent than these other drugs. It does not alter consciousness to nearly so great an extent as they do nor does it lead to increasing tolerance to the drug dosage." [60] Furthermore, the subjective effects of cannabis are dependent upon the personality of the user, his expectations, and the circumstances under which the drug is taken, as well as learning to smoke marijuana properly.[61]

There is general agreement about the pleasurable psychological effects. Users uniformly experience greatly enhanced perception—whether real or delusory—of visual, auditory, taste and touch effects, increased sense of humor or hilarity, feelings of well-being or wonderment, and distorted time and space perceptions.[62] In this connection, it is interesting to note that even the pleasurable phenomena are dependent on individual circumstances, particularly when the drug is taken for the first time. Many, if not most, people do not become "high" on their first exposure to marijuana even if it is smoked correctly.[63] The probable explanation for

---

[58] *Comparison of the Effects of Marijuana and Alcohol on Simulated Driving Performance,* 164 SCIENCE 851 (1969) (concluding that subjects under a "social marijuana high" showed no significant differences from control subjects in accelerator, brake, signal, steering, and total errors). In addition, "unlike alcohol drinkers, most pot smokers studiously avoid driving while high." J. ROSEVEAR, *supra* note 36, at 135.

[59] Weil Study 1238.

[60] Grinspoon, *supra* note 43, at 19.

[61] H. NOWLIS, DRUGS ON THE COLLEGE CAMPUS 96-101 (1969).

[62] L. GOODMAN & A. GILMAN, *supra* note 53, at ch. 16; *Dependence on Cannabis (Marijuana), supra* note 51, at 368-71.

[63] Weil Study 1241; Wash. Post, May 24, 1970, at A26, col. 1.

this curious phenomenon is that repeated exposure to marijuana reduces psychological inhibition, as part of, or as a result of, a learning process.[64]

Medical knowledge is most tentative with reference to adverse psychological effects. Recent studies, however, have vehemently disputed an earlier tendency to attribute psychoses and severe panic reactions to marijuana use.[65] As Dr. Weil has noted:

> Because reliable information about the acute effects of marijuana has been as scarce within the medical profession as without, many of these reactions have been misinterpreted and incorrectly treated. For example, simple panic states, which doubtless would be properly diagnosed in other circumstances, are often called "toxic psychoses" when doctors elicit immediate histories of marijuana use.[66]

Medical experts now generally agree that the possibility of depression, panic and psychoses depends entirely on the circumstances of use and the personality of the user.[67] In his most recent study, Dr. Weil concluded that "serious adverse reactions are uncommon in the 'normal' population," [68] but noted three exceptions. First, simple depressive reactions which rarely occur in regular users may occur in novices who approach their initial use ambivalently.[69] Second, the most frequent adverse reaction is apprehension, more often described as anxiety, and sometimes reaching a degree of panic. Again, such reactions are closely related to the attitude of the user and to the social setting.[70] The social setting also influences the frequency of panic reactions, suggesting again that this phenomenon correlates with the degree of reluctance with which people approach initial use of the drug:

---

64 "The subjective responses of our subjects indicate that they had imagined a marihuana effect to be much more profoundly disorganizing than what they experienced." Weil Study 1241. This subjective control over the effects extended as far as the reporting of no effects when in actuality the subject had received a large dose. *Id.*

65 Grinspoon, *supra* note 43, at 23-24.

66 Weil, *Adverse Reactions to Marijuana*, 282 NEW ENG. J. MED. 997 (1970).

67 *See, e.g.*, Schwarz, *supra* note 34, at 595; Weil, *supra* note 66.

68 Weil, *supra* note 66, at 997.

69 Marihuana depressions I have seen have occurred mainly in obsessive-compulsive persons who are ambivalent about trying the drug or who invested the decision to experience marihuaua with great emotional meaning. In interviewing these patients, I have thought that they used marihuana as an excuse for letting themselves be depressed, not that their depressions were psycho-pharmacological. *Id.* at 998.

70 Dr. Weil has stated that "panic reactions occurred most often among novice users of marijuana—frequently older persons who are ambivalent about trying the drug in the first place." N.Y. Times, May 1, 1970, at 18C, col. 2.

> In a community where marijuana has been accepted as a recreational intoxicant, they may be extremely rare (for example, one per cent of all responses to the drug). On the other hand, at a rural Southern college, where experimentation with the drug may represent a much greater degree of social deviance, 25 per cent of persons trying it for the first time may become panicked.[71]

The panicked person normally believes that he is either dying or losing his mind, and simple reassurance will end most such reactions.[72] The reaction normally is short-lived, but it may be prolonged by an attitude encouraging the underlying fears.[73] In short, "panic reactions . . . seem more nonpharmacologic than pharmacologic." [74]

Third, psychotic reactions occur rarely, if at all, in normal users,[75] and occur mainly in persons with a low psychosis threshold or a history of psychosis[76] or hallucinogenic drug experimentation.[77] Even in such cases, marijuana is a precipitant rather than a primary cause of this type of reaction[78] which lasts at most a day or two.[79]

IX. Marijuana Legislation Clashes with Judicial Skepticism and Emerging Values—Piecemeal Judicial Response: 1965-1970

The dramatic increase in marijuana use during the latter 1960's and the consequent increase in prosecution[1] were matters of high public visibility. Judicial response at both the trial and appellate levels was in-

[71] *Id.* These panic reactions may emulate acute psychoses in hospital emergency wards "where the patient may feel overwhelmed, helpless and unable to communicate his distress." Weil, *supra* note 66, at 998.

[72] *Id.*

[73] N.Y. Times, May 1, 1970, at 18C, col. 3.

[74] Weil, *supra* note 66, at 1000.

[75] Dr. Weil is of the opinion that "all adverse reactions to marihuana should be considered panic reactions until proven otherwise," *id.* at 998, and that he has never seen a toxic psychosis following the smoking of marijuana by a normal user. *Id.* at 999.

[76] *Id.* at 1000.

[77] *Id.* at 999-1000.

[78] H. Nowlis, Drugs on the College Campus 96-101 (1969); Schwarz, *supra* note 34, at 595.

[79] McGlothlin & West, *The Marijuana Problem: An Overview*, 125 Am. J. Psych. 370, 372 (1968).

[1] See pp. 1096-1101 *supra*. *See also* People v. Patton, 264 Cal. App. 2d 637, 70 Cal. Rpt. 484 (Dist. Ct. App. 1968), where the arresting officer testified that he had made about 1,000 marijuana arrests.

fluenced by a combination of powerful forces, none of which had been present in the preceding years. The 1960's saw a revolution in the law of criminal procedure, and in few areas were police practices more suspect than in the enforcement of the drug laws. The latter part of the decade witnessed widespread dissent against the political and legal systems; this protest milieu gave an added dimension to marijuana use as more and more people smoked, oftentimes overtly, in order to defy a seemingly ignorant law. Faced with this unusual conjunction of widespread political and social eccentricity, the courts—institutional protectors of political deviants—were inevitably pressed into institutional sympathy for social deviants. A third force was the revitalized judicial interest in the value of privacy in a highly automated, technological society; more and more people went to the courts to question long-standing governmental prohibitions against essentially private decisions and acts—homosexuality, abortion, contraception and drugs. Together with the well-publicized medical skepticism about the soundness of the nation's drug laws, particularly those regulating marijuana, these forces moved the courts to scrutinize enforcement practices and consider a new wave of constitutional objections to state and federal marijuana legislation.

A. Multiple Offenses: Untying the Statutory Knots

1. Federal Developments

In the major decision during this period, the United States Supreme Court voided the federal provisions most often employed to prosecute the possessor (buyer) of marijuana. In the first arm of *Leary v. United States*,[2] the Court held that the fifth amendment relieves unregistered buyers of any duty to pay the transfer tax and to file the written order form as required by the Marihuana Tax Act.[3] The Court reasoned that, since filing such a form would expose a buyer to liability under state law, under the occupational tax provisions of the Tax Act, and perhaps under the marijuana provision of the Import and Export Act,[4] the filing

[2] 395 U.S. 6 (1969).

[3] Although *Leary* involved only the concealment and transportation provision, 26 U.S.C. § 4744(a)(2) (1964), the Eighth Circuit has held, correctly, that *Leary* also covers the acquiring provision, § 4744(a)(1), "since a person obviously would have to acquire the marijuana to knowingly transport or conceal it." United States v. Young, 422 F.2d 302, 304 (8th Cir.), *cert. denied*, 398 U.S. 914 (1970).

[4] Because the "danger of incrimination under state law" was "so plain," the Court did not pursue the additional question of a buyer's exposure to liability under the Import and Export Act. 395 U.S. at 16 n.14.

provisions violated the fifth amendment guarantees against self-incrimination. On the other hand, the Court held in a later case that the fifth amendment does not relieve the marijuana seller of the duty to confine his sales to transferees who are willing to comply with the order form requirements.[5] Similarly, the Eighth Circuit recently held[6] that *Leary* does not compel invalidation of Tax Act section 4755(b), which prohibits the interstate transportation of marijuana, because a conviction under that section is not really a conviction for failing to register and pay the occupational tax and, even if it were, registration under section 4753 is not necessarily incriminating as was the written order form requirement struck down in *Leary*.[7]

The second arm of *Leary* reversed the long line of decisions[8] upholding the presumption of knowing concealment of illegal importation arising from possession under section 176a of the Import and Export Act.[9] The Court held that, in light of the ease with which marijuana was domestically cultivated and the number of users, the presumption of knowledge could not rationally be drawn from possession;[10] it could not be said "with substantial assurance that the presumed fact [knowing concealment of illegally imported marijuana] is more likely than not to flow from the proved fact [possession] on which it is made to depend."[11] Although there is authority to the contrary,[12] the Ninth Circuit has held this part of *Leary* retroactive, thereby invalidating all prior section 176a convictions in which the defendant did not admit

---

[5] Minor v. United States, 396 U.S. 87 (1969).

[6] United States v. Young, 422 F.2d 302 (8th Cir.), *cert. denied*, 398 U.S. 914 (1970).

[7] "Although we need not reach the question, we feel that the Fifth Amendment is not violated by the insubstantial hazards of incrimination posed by § 4753." *Id.* at 306.

[8] See p. 1086 *supra*.

[9] Anticipating the *Leary* decision on the § 176a presumption was United States v. Adams, 293 F. Supp. 776 (S.D.N.Y. 1968).

[10] 395 U.S. at 52-53. Having found the "knowledge" presumption unconstitutional, the Court avoided consideration of the "illegal importation" presumption. *Id.* at 38. The knowledge presumption has also been held invalid as applied to hashish, United States v. Maestri, 424 F.2d 1066 (9th Cir. 1970); *cf.* United States v. Cepelis, 426 F.2d 134 (9th Cir. 1970) (remanded for factual determination on whether *Leary* applies to hashish).

In Turner v. United States, 396 U.S. 398 (1970), the Court upheld the presumption in 21 U.S.C. § 174 (1964) (direct ancestor of § 176a as applied to heroin but declared it irrational as applied to cocaine. It has been held that *Turner* is retroactive. United States v. Vallejo, 312 F. Supp. 244 (S.D.N.Y. 1970).

[11] 395 U.S. at 36.

[12] Rivera-Vargas v. United States, 307 F. Supp. 1075 (D.P.R. 1969).

knowledge and the jury was instructed as to the applicability of the statutory presumption.[13]

A serious dispute remains as to what the Government will have to prove in subsequent prosecutions under section 176a. Assuming that the entire provision does not violate the privilege against self-incrimination,[14] it is likely that the prosecution will have to prove actual knowledge of illegal importation in the future.[15] Since it is highly improbable that such proof will be forthcoming, section 176a has probably been rendered useless as applied to possessors. It should be clear that the entire series of decisions under the Tax Act and section 176a has an air of unreality about them because Congress probably has Article I power directly to prohibit possession and sale of marijuana and has now exercised that power in the Comprehensive Drug Abuse Prevention and Control Act of 1970.[16] This new legislation, although stopping short in some respects, discards many of the fictions perpetuated by earlier legislation. The *Leary* decision was at least partially responsible for forcing Congress to rationalize the federal role in the drug field, particularly with respect to marijuana.

Another manifestation of judicial dissatisfaction with the extreme nature of existing drug legislation is the apparent reversal of the trend of decisions upholding the strict liability of one-time drug offenders, users

---

[13] United States v. Scott, 425 F.2d 55 (9th Cir. 1970). We think the Ninth Circuit is right, at least with respect to convictions secured after marijuana achieved high public visibility in the 1960's. Since the number of people still incarcerated for earlier convictions is minimal, complete retroactive effect is in order. Essential to the *Leary* decision was a determination that the presumption was factually unsupportable; it therefore constituted a material flaw in the fact-finding process and seriously impaired the right to jury trial.

[14] Absent the written order form requirement of the Marihuana Tax Act, we do not see how prosecution under § 176a involves the fifth amendment at all. Neither did the Ninth Circuit. *Id.* at 61.

[15] *See* United States v. Martinez, 425 F.2d 1300 (9th Cir. 1970); McClain v. United States, 417 F.2d 489 (9th Cir. 1969). A mere inference of importation is clearly not enough to sustain a conviction since it would nullify *Leary*. *Cf.* United States v. Ramos, 282 F. Supp. 354 (S.D.N.Y. 1968) (where Government failed to prove possession beyond reasonable doubt, court could not infer knowledge of importation). It is difficult to see how the Government could raise an inference of knowledge without proving actual knowledge. If, however, such can be done, it is clear that the defendant has a right to prove that the marijuana was not imported. United States v. Espinoza, 406 F.2d 733 (2d Cir.), *cert. denied*, 395 U.S. 908 (1969) (retrial ordered for failure of trial judge to allow defendant to prove that marijuana came from California).

[16] Pub. L. No. 91-513 (Oct. 27, 1970). *See also* Leary v. United States, 395 U.S. 6, 54 (1969) ("We are constrained to add that nothing in what we hold today implies any constitutional disability in Congress to deal with the marijuana traffic by other means").

and addicts for failure to register when leaving the country.[17] The Ninth Circuit held the phrase "uses narcotic drugs" unconstitutionally vague.[18] Taking a more direct approach, the Second Circuit found knowledge of the registration requirement to be an element of the crime.[19] Thus construed, the statute precludes any due process challenge to the sufficiency of the notice.[20] Although a self-incrimination issue remains,[21] the Second Circuit's decision removed the most serious defect in the statute, one that had become intolerable as the number of marijuana convictions escalated in the late 1960's.

2. *State Developments*

The erosion of the archaic federal criminal statutes for marijuana-related offenses has been accompanied by a similar, albeit limited, development on the state level. The major issue in state litigation concerns so-called "drug-proximity" offenses which are generally employed as plea-bargaining tools or to prevent the release of a suspect when evidence was illegally seized or when the evidence is insufficient to secure a conviction under the substantive drug offense. Typical ancillary offenses are loitering in the common areas of a building for the purpose of unlawfully using or possessing any narcotic drug;[22] loitering in public by a user, addict or convicted drug offender without lawful employment;[23] presence in an establishment where narcotic drugs are dispensed;[24] and presence of a user or drug offender in a private place where drugs are kept.[25]

The decisional trend seems to point to the unconstitutional vagueness of simple loitering and vagrancy statutes.[26] Because of the nexus between

---

[17] See p. 1085 *supra*.

[18] Weissman v. United States, 373 F.2d 799 (9th Cir. 1967). Struggling to confine its holding, the court distinguished an apparently contradictory case, United States v. Eramdjian, 155 F. Supp. 914 (S.D. Cal. 1957), on the ground that it involved "addiction" rather than use of narcotic drugs.

[19] United States v. Mancuso, 420 F.2d 556 (2d Cir. 1970).

[20] *See* Lambert v. California, 355 U.S. 225 (1957) (application of city ordinance requiring convicted felons to register within five days after arrival in city where there is no actual notice or knowledge of ordinance is unconstitutional).

[21] The *Mancuso* court did not discuss the issue.

[22] N.Y. PENAL LAW § 1533(5) (McKinney 1967).

[23] D.C. CODE ANN. § 22-3302 (1967).

[24] *Id.* § 22-1515(a).

[25] *Id.* § 33-416(a).

[26] *E.g.*, Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969), *appeal docketed*, 38 U.S.L.W. 3409 (U.S. Apr. 21, 1970) (No. 1273, 1969 Term; renumbered No. 102,

narcotics and crime, however, the courts are struggling to redefine narcotics-proximity statutes to avoid the vagueness objection.[27] It might appear that where "good account" provisions give the arresting police officer too much discretion the statute will fail.[28] On the other hand, courts generally avoid vagueness objections based on lack of notice by reading in knowledge elements wherever necessary.[29] Because of the tenuous relation between marijuana and crime, the courts should construe "narcotics" in such statutes not to include marijuana.

Similar restriction of marijuana-related offenses has been accomplished by holding that charges of possession and sale will not both lie where the only possession is incident to sale,[30] and by tightening the requirements of specificity in the indictment regarding the proscribed parts of the plant.[31]

1970 Term); Lazarus v. Faircloth, 301 F. Supp. 266 (S.D. Fla.) *appeal docketed*, 38 U.S.L.W. 3225 (U.S. Dec. 16, 1969) (No. 630, 1969 Term; renumbered No. 43, 1970 Term; Broughton v. Brewer, 298 F. Supp. 260 (S.D. Ala. 1969).

[27] In People v. Pagnotta, 25 N.Y.2d 333, 253 N.E.2d 202, 305 N.Y.S.2d 484 (1969), the New York Court of Appeals upheld a statute making it illegal to loiter about any "stairway, staircase, hall, roof, elevator, cellar, courtyard, or any passageway of a building for the purpose of unlawfully using or possessing any narcotic drug." The court distinguished the ordinary vagrancy and loitering cases on the ground that the conduct punished in the narcotics vagrancy statute is directly related to the commission of crime *against others:*

> [P]rotection of innocent citizens from drug users is a very crucial problem. As has recently been pointed out by several newspaper articles, in some of our poorer urban areas where drug use is high, innocent citizens are often beaten, robbed and even murdered by drug addicts . . . . It is completely reasonable and proper for the Legislature to protect these citizens from accidentally stumbling into the midst of such miscreants in the common areas of buildings.

Id. at 338, 253 N.E.2d at 206, 305 N.Y.S.2d at 489.

[28] Ricks v. District of Columbia, 414 F.2d 1097, 1104-05 (D.C. Cir. 1968). *But cf.* United States v. McClough, 263 A.2d 48 (D.C. Ct. App. 1970) (upholding statute prohibiting presence in an establishment where defendant knows narcotics are being dispensed).

[29] *E.g.*, United States v. McClough, 263 A.2d 48 (D.C. Ct. App. 1970) (reading scienter provision into statute prohibiting prior drug users or offenders from being "found in any place . . . building, structure . . . in which any illicit narcotic drugs are kept"); *cf.* People v. Brim, 257 Cal. App. 2d 839, 65 Cal. Rptr. 265 (Dist. Ct. App. 1968) (interpreting statute outlawing knowingly being in a place where narcotics are being used as charging defendant with intentional involvement with the unlawful use of marijuana).

[30] State v. Duplain, 102 Ariz. 100, 425 P.2d 570 (1967); People v. Theobald, 231 Cal. App. 2d 351, 41 Cal. Rptr. 758 (Dist. Ct. App. 1964).

[31] *See, e.g.*, State v. Haddock, 101 Ariz. 240, 418 P.2d 577 (1966) (seeds contain no cannabin, therefore no crime charged); State v. Curry, 97 Ariz. 191, 398 P.2d 899 (1965) (marijuana refers to the parts of the plant containing cannabin). *Contra*, State v. Ringo, 5 Conn. Cir. 134, 246 A.2d 208 (Cir. Ct. 1968) (possession of seed, residue in

B. Procedural Objections to Enforcement Practices

The law of criminal procedure underwent a major revolution in the 1960's. The Bill of Rights was applied piece by piece to the states through the fourteenth amendment. The Supreme Court focused its concern on protecting the rights of the criminal defendant. The earlier philosophy had been that, so long as the defendant's rights at trial were guaranteed, the Court should not, and did not need to, intrude into the pretrial stages of the criminal process. For a variety of reasons it became clear in the 1960's that in a system where between 75 and 90 percent of all defendants bargain and enter guilty pleas, rights must be assured well before trial if they are to have any real meaning to the average person caught in the net of the criminal process. Thus, step by step the Court began to regulate police practices—search, arrest and interrogation techniques—and the conduct of the early stages of the criminal process. This substantial change in attitude meant that more marijuana defendants could successfully raise procedural objections.

1. Search and Seizure

The most important development for the marijuana offender has been the close judicial scrutiny of police searches as a result of Supreme Court rulings under the fourth amendment. More stringent standards have been established for the police to obtain search warrants,[32] and the proper scope of searches incident to a lawful arrest has been narrowed substantially.[33]

Although courts have refused to exclude any evidence that was in plain sight when seized, such as a bag of marijuana in a school satchel voluntarily opened by a student,[34] or marijuana thrown out of a window by a defendant trying to dispose of it,[35] they have narrowed the per-

pipes and a small package of marijuana); Commonwealth v. Cunningham, 35 Pa. D. & C.2d 527 (O. & T. Allegheny 1964) (possession of marijuana seeds); *cf.* State v. Everidge, 77 N.M. 505, 424 P.2d 787 (1967) (defendant required to raise defense that marijuana possessed was within statutory exception); State v. Mudge, 69 Wash. 2d 861, 420 P.2d 863 (1966) (same).

[32] Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964).

[33] Chimel v. California, 395 U.S. 752 (1969) (search incident to a lawful arrest limited to an area within immediate control of the suspect). *See also* Terry v. Ohio, 392 U.S. 1 (1968).

[34] People v. Bloom, 270 Cal. App. 2d 731, 76 Cal. Rptr. 137 (Dist. Ct. App. 1969).

[35] State v. Garcia, 76 N.M. 171, 413 P.2d 210 (1966).

missible time and area in which a car may be searched.[36] Moreover, the difficult standing problem posed by the requirement that one had to admit possession or ownership of the seized property in order successfully to challenge the search was alleviated in cases involving group arrests by permitting all those on the premises to challenge a given search.[37]

The new requirements for procuring search warrants led to a number of technical defense victories. For example, searches of defendants' residences were successfully challenged in two Montana marijuana cases[38] because the warrants were issued by a justice of the peace, rather than by a district judge, as required by the state law. These holdings were premised on the sanctity of private residences, and they suggest a growing reluctance to countenance "reasonable" warrantless searches, especially of the home. Similarly, Maryland struck down the fruits of a search of defendant's guests and their automobiles on the ground that the permissible search was limited to the areas described in the warrant.[39] An Illinois court has held that property not included in the warrant must be returned to the defendant.[40] This return to a more stringent view of particularity requirements of warrants stands in stark contrast to the willingness of courts to overlook these requirements in the late fifties.[41]

Likewise, courts now scrutinize more closely police claims of probable cause for expanding the area of the search. A California court held that even though defendant was lawfully arrested, search of his luggage in a friend's apartment was justified neither by the friend's consent nor by the officer's having seen the defendant swallow something.[42] The search was especially unjustifiable since the defendant had been arrested in his automobile. In another California case, the presence of peculiar odors did not constitute probable cause for the search of a footlocker.[43]

---

[36] Preston v. United States, 376 U.S. 364 (1964). *See also* Cooper v. California, 386 U.S. 58 (1967). The holdings in both these cases are probably limited by *Chimel*.

[37] Jones v. United States, 362 U.S. 257 (1960).

[38] State v. Kurland, 151 Mont. 569, 445 P.2d 570 (1968); State v. Langan, 151 Mont. 558, 445 P.2d 565 (1968).

[39] Haley v. State, 7 Md. App. 18, 253 A.2d 424 (1969).

[40] People v. Hartfield, 94 Ill. App. 2d 421, 237 N.E.2d 193 (1968).

[41] See pp. 1089-91 *supra*.

[42] People v. Cruz, 61 Cal. 2d 861, 395 P.2d 889, 40 Cal. Rptr. 841 (1964); *accord*, People v. Patton, 264 Cal. App. 2d 637, 70 Cal. Rptr. 484 (Dist. Ct. App. 1968). In *Cruz* the court stated that it was reasonable for the officers to try to dislodge the suspected marijuana from the defendant's mouth.

[43] People v. McGrew, 103 Cal. 3d 404, 462 P.2d 1, 82 Cal. Rptr. 473 (1969), *relying on*

An airline had detained the footlocker since it corresponded to a police description. The officers had smelled the marijuana and then searched the footlocker before sending it on its way and tracing it. The California Supreme Court held that the smell alone was not sufficient cause to search without a warrant.

Despite judicial narrowing of the scope of searches with or without a warrant, the easing of the standing requirements, and the closer scrutiny on the probable cause issue, courts continue to permit police to enter dwellings without knocking or by force where circumstances indicate such action is reasonable and necessary. For example, a California court upheld a marijuana search, even though the police entered without knocking, because the police heard people running around inside yelling, "It's the police," and thought they heard a shot fired.[44] The court held that the statutory knocking requirement was subject to exception when there was danger of destruction of evidence and danger to the police. Closely related to no-knock entry is forcible entry, upheld in an Illinois case[45] where the police broke into the defendant's residence when he did not immediately respond to their knocks. The necessity for forced entry is essentially the same as for unannounced entry, but forced entry adds the danger of causing fright and damage.

Another search area that has not been substantially liberalized is that of the border search. Customs officials have a much more extensive right to search than their police colleagues. Mere suspicion is sufficient to justify a border search.[46] Even though the jurisdiction of customs agents ends once entry into the country is completed, the courts have allowed border guards great discretion in determining what constitutes completed entry. In *Thomas v. United States*,[47] the Fifth Circuit held admissible evidence seized an hour and a half after the appellant had reentered the United States because he was only six blocks from the border. Although there is an inevitable problem of how far the jurisdiction of the customs agent extends, *Thomas* suggests clearly that it is not limited to border crossings.

People v. Marshall, 69 Cal. 2d 51, 442 P.2d 665, 69 Cal. Rptr. 585 (1968) ("'In plain smell,' therefore, is plainly not the equivalent of 'in plain view'").

[44] People v. Clay, 273 Cal. App. 2d 279, 78 Cal. Rptr. 56 (Dist. Ct. App. 1969).

[45] People v. Hartfield, 94 Ill. App. 2d 421, 237 N.E.2d 193 (1968).

[46] United States v. Glaziou, 402 F.2d 8 (2d Cir. 1968), *cert. denied*, 393 U.S. 1121 (1969); Henderson v. United States, 390 F.2d 805 (9th Cir. 1967).

[47] 372 F.2d 252 (5th Cir. 1967). The customs agents had searched the defendants belongings at the time he had entered the country and had not discovered the marijuana and heroin he possessed. They came into town and searched the defendant when they were notified by an informer that he was carrying the contraband.

2. Entrapment

Although the majority opinions in *Sorrells v. United States*[48] and *Sherman v. United States*,[49] remain the leading statements on entrapment, some courts have recently permitted expansion of the defense. In California a defendant may plead not guilty and still raise the entrapment defense in some cases. The court in *People v. Perez* stated:

> To compel a defendant to admit his guilt as a condition of invoking the defense of entrapment would compel him to relieve the prosecution of its burden of proving his guilt beyond a reasonable doubt at the risk of not being able to meet his burden of proving entrapment.[50]

The defendant must, however, still raise the defense at trial to be determined as a matter of fact by the jury.[51] There is no right to raise the defense in a pretrial motion to suppress the evidence.[52] Most courts continue to focus on the moral culpability of the accused[53] in determining whether or not entrapment has been successfully shown. Recent Arkansas[54] and Nevada[55] cases, however, suggest that the courts are in-

[48] 287 U.S. 435 (1932).

[49] 356 U.S. 369 (1958).

[50] 62 Cal. 2d 769, 776, 401 P.2d 934, 938, 44 Cal. Rptr. 326, 330 (1965). The decision overturned a long series of precedents. That all justices concurred is indicative of the sentiment for change. The court required the prosecution to disclose the identity of the informant because he was essential to the defenses of entrapment and lack of knowledge. The decision was immediately implemented in People v. Marsden, 234 Cal. App. 2d 796, 44 Cal. Rptr. 728 (Dist. Ct. App. 1965). There, defendant was repeatedly requested to furnish marijuana to a government agent and finally purchased and gave the agent one marijuana cigarette. The court noted that the case was close to entrapment as a matter of law.

[51] People v. Oatis, 264 Cal. App. 2d 324, 70 Cal. Rptr. 524 (Dist. Ct. App. 1968), *cert. denied*, 393 U.S. 1108 (1969).

[52] State v. Folsom, 463 P.2d 381 (Ore. 1970).

[53] Commonwealth v. Harvard, 253 N.E.2d 346 (Mass. 1969); Glosen v. Sheriff, 451 P.2d 841 (Nev. 1969).

[54] Peters v. State, 450 S.W.2d 276 (Ark. 1970). Here the defendant gave some marijuana free of charge to the agent after repeated requests. The marijuana had been left in the defendant's shop by others. In remanding the case for consideration by the jury whether entrapment existed the court stated:

> Perhaps, neither the persistent solicitation, the use of an alias, the misrepresentation of the purposes for which [the agent] wanted to acquire the marijuana nor the use of friends of appellant for an entree, standing alone, would have been sufficient to raise a fact question as to entrapment, but when taken together along with the total lack of evidence that [the defendant] had possessed or sold marijuana before, there was such an issue.

Id. at 278.

[55] Froggatt v. State, 467 P.2d 1011 (Nev. 1970) (reversed for failure to give entrapment

creasingly concerned about the conduct of law enforcement agents, especially in marijuana cases.

3. Other Prosecution Practices

Several major abuses, although judicially recognized, remain largely uncorrected. Long delay between offense and arrest is common in narcotics offenses because the police desire to expose the full extent of distribution and to maintain a cover for the undercover agent as long as possible. Yet any substantial delay will prejudice the defendant since the prosecution continues to gather evidence while the defendant may forget exact circumstances and possibly exculpating facts. Judicial response has been inconsistent, focusing primarily on the purposefulness of the delay.[56] In light of the recent rejuvenation of the speedy trial requirement by the Supreme Court,[57] there is some hope that this abuse may be corrected.

A more serious abuse with which state and federal prosecutors have been charged is politically-motivated discretionary enforcement.[58] Although the courts can do little to remedy this state of affairs, it forms the basis for one of our basic contentions: The political-social overtones of the marijuana problem may inhibit a rational political and prosecutorial response and at the same time may provoke a protective judicial response. One judge, particularly expert with regard to contemporary drug problems, has acknowledged the partial truth of the charges of political prosecution against hippies, long-hairs and draft-card burning college students.[59] To the extent that other trial and appellate judges recognize

---

instruction where policeman placed marijuana in defendant's car and then defendant sold it to another officer).

[56] *Compare* Jordan v. United States, 416 F.2d 338 (9th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970) (since three-month delay was not purposeful, defendant must show actual prejudice), *with* Ross v. United States, 349 F.2d 210 (D.C. Cir. 1965) (charges dismissed since seven-month delay found purposeful).

[57] Smith v. Hooey, 393 U.S. 374 (1969).

[58] *E.g.*, J. KAPLAN, MARIJUANA—THE NEW PROHIBITION 40-42 (1970).

[59] Oliver, *Assessment of Current Legal Practices from the Viewpoint of the Courts*, in DRUGS AND YOUTH 229 (J. Wittenborn ed. 1969). Judge Oliver tried to minimize the seriousness of the problem, however:

> I think that as judge I must be interested in what might appear to be a pattern of discriminatory law enforcement, but I . . . consider much of this talk must be viewed with the same critical eye which most other talk about drug abuse must be viewed.

Id. at 233.

these prosecutorial tendencies, we can expect some judicial compensation either in fact-finding, in sentencing, or in response to substantive challenges to the law. It is our contention, of course, that such judicial reaction has already begun.

C. *Sufficiency of the Evidence*

The ease of identifying marijuana in conjunction with the use of uncorroborated testimony and circumstantial evidence continues to require of the prosecution only a very low burden of proof. Nevertheless, appellate decisions are gradually beginning to tighten these requirements, and active judicial hostility at trial has all but disappeared.

Although the use of uncorroborated testimony to convict continues to be upheld by the courts,[60] an Illinois appellate court has reversed a conviction because of the behavior of the testifying officer.[61] Noting that the officer had repeatedly pressured the defendant to become an informer, the court held that the uncorroborated testimony of this officer was not sufficient to support a conviction. The court did not make clear whether it exercised a weight of the evidence review of the trial judge's fact-finding, or whether it applied an exclusionary evidence rule pursuant to its inherent powers over the administration of criminal justice. Whatever the case, judicial perspective in the clash between marijuana defendant and police officer has clearly shifted.

The amount of marijuana required to uphold a conviction is undergoing substantial change. The California Supreme Court held in *People v. Leal*[62] that to be sufficient for conviction, the amount of narcotics must be enough for sale or consumption, the rule generally applied where the statute does not specify a minimum quantity.[63] In *Eckroth*

---

[60] *See, e.g.*, Winfield v. State, 248 Ind. 95, 223 N.E.2d 576 (1967).

[61] People v. Quintana, 91 Ill. App. 2d 95, 234 N.E.2d 406 (1968). The court was greatly displeased with the continuing misbehavior of the officer: "[The 5-8 previous arrests and shakedowns] were a high-handed display of police power which completely disregarded the defendant's constitutional rights." *Id.* at 98, 234 N.E.2d at 408.

[62] 64 Cal. 2d 504, 413 P.2d 665, 50 Cal. Rptr. 777 (1966) (heroin).

[63] People v. Villalobos, 245 Cal. App. 2d 561, 54 Cal. Rptr. 60 (Dist. Ct. App. 1966) (50 milligrams insufficient); *see* Tuttle v. State, 410 S.W.2d 780 (Tex. Crim. App. 1967) (63 milligrams sufficient, enough to make a very small cigarette); People v. Hokuf, 245 Cal. App. 2d 394, 53 Cal. Rptr. 828 (Dist. Ct. App. 1966) (reversible error for the court not to instruct the jury that fragments of marijuana cannot support conviction). *But see* Franklin v. State, 8 Md. App. 134, 258 A.2d 767 (1969) (heroin), in which the court upheld a conviction for possession where the defendant went to the hospital with an overdose. Although recognizing that once the drug is inside the body there is no possession because there is no control, the court felt that prior possession and

v. State[64] a Florida court ruled that the taking of a drug from a passing pipe is not sufficient to constitute possession where the defendant did not own the pipe, the drug or the premises. Similarly, in a case that received national publicity,[65] the Minnesota Supreme Court held that if the state defines marijuana as a narcotic, it cannot punish possession of what could be native cannabis in amounts too scanty to produce a "narcotic" effect. Accordingly, exiguous traces of the drug found in the crevices of defendant's brief case left in his mistress' car did not constitute an amount sufficient for conviction.[66]

Other problems remain unsolved. Circumstantial evidence continues to link defendants to seized marijuana. Constructive possession was found where the defendant's daughter was the actual possessor,[67] and the fact that marijuana was found where an informer said she had seen defendant smoking it the previous day was sufficient to support the defendant's conviction.[68] There is a split as to whether a conviction can be upheld where the defendant gratuitously brings the buyer and seller together. Massachusetts upheld the conviction for possession where the defendant's only contact with the marijuana was passing it to the state's agent,[69] ruling that the facilitation of the sale added enough to the act of passing to allow the court to find possession. In a similar case, however, a New York court held that there was not present the required involvement or concert of action to uphold a conviction for sale.[70]

Nevertheless, courts have refused conviction on numerous occasions in which the defendant was not linked exclusively with the marijuana that was found,[71] and have generally required an outside linking factor before upholding the possession.[72] However, the element that can tip the

self-administration could be inferred. The decision should do much to discourage addicts from receiving any medical treatment that might expose them to criminal penalties.

64 227 So. 2d 313 (Fla. Dist. Ct. App. 1969).

65 See p. 1099 & note 14 *supra.*

66 State v. Resnick, 177 N.W.2d 418 (Minn. 1970).

67 People v. Thomas, 76 Ill. App. 2d 42, 221 N.E.2d 800 (1966).

68 State v. Mantell, 71 Wash. 2d 768, 430 P.2d 980 (1967).

69 Commonwealth v. Harvard, 253 N.E.2d 346 (Mass. 1969).

70 People v. Hingerton, 27 App. Div. 2d 754, 277 N.Y.S.2d 754 (1967).

71 *See, e.g.,* State v. Oare, 249 Ore. 597, 439 P.2d 885 (1968) (one marijuana cigarette found in bathroom with two people, home owner convicted); People v. Van Syoc, 269 Cal. App. 2d 370, 75 Cal. Rptr. 490 (Dist. Ct. App. 1969) (marijuana found on right-hand side of the dashboard in defendant's car while parked in public lot); People v. Evans, 72 Ill. App. 2d 146, 218 N.E.2d 781 (1966) (marijuana found under bar where defendant had been sitting).

72 State v. Faircloth, 181 Neb. 333, 148 N.W.2d 187 (1967) (defendant had dufflebag

scales in favor of conviction is often unrelated to the possible possession of the marijuana. For example, a California court[73] upheld the finding of possession of marijuana discovered along with a purse the defendants had stolen. The defendants contended that the marijuana was not theirs and must have been in the purse when stolen. That the defendants were thieves probably played more heavily in the conviction than any evidence of their connection with marijuana.

Where marijuana is found on the premises of the individual, possession is presumed, although the courts have read in a defense of ignorance of the presence of the marijuana.[74] Nevertheless, in a New Hampshire case[75] the court upheld a possession conviction premised on the defendant's knowledge of presence of the drug on the premises even though the court apparently believed the defendant's story that it belonged to a third party. Ordinarily there is direct corroborating evidence to indicate the defendant's knowledge.[76]

Along with the gradual thaw on these points in state courts, the late sixties witnessed a total absence of the outrageous judicial participation in inflammatory statements about the dangers of the drug and its users which we saw was typical of the late fifties. To the contrary, the appellate opinions, at least, are replete with skeptical references to the inclusion of marijuana in the narcotics classification.[77]

D. Sanction

Nowhere has judicial disenchantment with the drug laws, especially marijuana, been greater than in the area of punishment. Preference for civil treatment of drug abuse,[78] disgust with severe mandatory sentencing that deprives the judiciary of its traditional function of weigh-

full of marijuana between his legs in automobile); People v. Blunt, 241 Cal. App. 2d 200, 50 Cal. Rptr. 440 (Dist. Ct. App. 1966) (defendant only one who had sat in back of police car where marijuana found).

[73] People v. Irvin, 264 Cal. App. 2d 747, 70 Cal. Rptr. 892 (Dist. Ct. App. 1968).

[74] *See* Commonwealth v. Buckley, 354 Mass. 508, 238 N.E.2d 335 (1968); People v. Mitchell, 51 Misc. 2d 82, 272 N.Y.S.2d 523 (Sup. Ct. 1967). *Contra,* State v. Givens, 74 Wash. 2d 48, 442 P.2d 628 (1968).

[75] State v. Colcord, 109 N.H. 231, 248 A.2d 80 (1968).

[76] The evidence of fragments of marijuana on the defendant often provides this evidence. *See, e.g.,* People v. Slade, 264 Cal. App. 2d 188, 70 Cal. Rptr. 321 (Dist. Ct. App. 1968); People v. Haynes, 253 Cal. App. 2d 1060, 61 Cal. Rptr. 859 (Dist. Ct. App. 1967), *cert. denied,* 392 U.S. 914 (1968); People v. Hurta, 238 Cal. App. 2d 162, 47 Cal. Rptr. 580 (Dist. Ct. App. 1965).

[77] See 1131-32 *infra.*

[78] *E.g.,* Oliver, *supra* note 59.

ing the culpability of the individual offender,[79] and skepticism about a statutory scheme which catches the user or small scale distributor and misses the major trafficker[80] have all found their way into judicial opinions.

This dissatisfaction with legislative inaction in the area of de-escalating punishment has already begun to provoke remedial[81] judicial action. In a landmark decision[82] receiving national attention,[83] the Supreme Court of New Jersey recently held that any prison sentence imposed for first-offense possession of marijuana for personal use "should be suspended." [84] While the court based its holding on the judiciary's statutory authority to suspend sentences in "the best interests of the public as well as of the defendant," [85] and on the appellate court's power to review for abuse of discretion trial court sentencing decisions, it appears that the true locus of the opinion is the eighth amendment. That is, the court really determined that any prison sentence for first-offense possession of marijuana for personal use is unreasonably excessive. Accordingly, the decision will be discussed in more detail in the following section.[86]

[79] *See, e.g.*, United States v. Kleinzahler, 306 F. Supp. 311 (E.D.N.Y. 1969) (Weinstein, J.); Oliver, *supra* note 59, at 230:

> In most other areas of the law, however, legislatures have freely granted judges the power and discretion within quite flexible limitations, to determine appropriate sentences for all particular defendants before them that may or may not, dependent upon the particular case, include committment to a penal institution. . . . In the field of drug abuse, quite contrary to that experience, mandatory prison sentences apparently reflect a legislative conviction that all drug offenders are so alike that sending all to prison is, in fact, a real solution to what must have been viewed as a relatively simple problem. They also seem to reflect a certainty and righteousness that can hardly be said to be justified by our present scientific knowledge.

[80] For example, in Aguilar v. United States, 363 F.2d 379 (9th Cir. 1966), the court, affirming the smuggling conviction of a Mexican mechanic driving a car containing marijuana back to the United States, noted:

> Here was a young man with a previous clean record, and there was no indication he was a user of narcotics or inside a narcotics ring. Apparently he was a victim of his personal economics. When the law gets no closer than this to the real rascal, one must wonder about the policy of it, although it be beyond our function.

Id. at 381. *See also* Oliver, *supra* note 59, at 233.

[81] What Justice Jackson said about adjudicative mood when the death penalty hangs in the balance is equally appropriate with regard to harsh marijuana penalties:

> When the penalty is death, we, like state judges, are tempted to strain the evidence and even, in close cases, the law in order to give a doubtfully condemned man another chance.

Stein v. New York, 346 U.S. 156, 196 (1953).

[82] State v. Ward, No. A-9 (N.J., Oct. 26, 1970).

[83] N.Y. Times, Oct. 27, 1970, at 1, col. 4.

[84] State v. Ward, No. A-9, at 9.

[85] N.J. STAT. ANN. § 2A:168-1 (1969).

[86] See pp. 1138-39 *infra*.

X. The Heart of the Matter—Substantive Constitutional Challenges to the Marijuana Laws: 1965-1970

Perhaps the most significant legal development engendered by the new class of marijuana users and shift in medical opinion is the vigorous wave of substantive constitutional attacks on the marijuana laws launched in 1965. Although the challengers have employed many labels, the essence of their attacks is an insistence on rationality in the legislative process. Contending that marijuana is a harmless euphoriant, the challengers have questioned governmental authority to prohibit its use at all. Arguing that it is no more, and perhaps less, harmful than alcohol and tobacco, the challengers have indicted as irrational the total prohibition of one coupled with permissive regulation of the others. Conversely, the challengers have vigorously attacked the arbitrary inclusion of marijuana in the legislative classification "narcotics" with admittedly harmful opiates and cocaine. Finally, the severity of the punishments imposed for marijuana violations has been attacked as violative of the eighth amendment cruel and unusual punishment clause. A potent weapon in advancing these attacks has been the fact that the state and federal legislatures never conducted meaningful investigation into the effects of the drug, but relied instead on hearsay and emotional pleas.

Although the judiciary has become increasingly sympathetic to these challenges, to date it has left the legislation intact. As we inquire into the reasons for this recalcitrance, the reader should recall the nature of the judicial debate about intoxicants a half century ago. As the scope of the due process and equal protection clauses was substantially broadened over the years, the free-form "pursuit of happiness" and "inherent limitations" approaches were laid on the ash heap of constitutional history. As a result of the incorporation of Bill of Rights guarantees into the fourteenth amendment, there now exist a plethora of more or less "explicit" constitutional limitations upon which the challengers have relied. Analytically, however, the marijuana challengers have asked the courts to fit square pegs into round constitutional holes. The dynamism of recent constitutional interpretation has not yet eroded the obstacles in the challengers' path. But this is not to say that this erosion should not, and will not, eventually occur. In the succeeding pages, we shall evaluate the merits of the various arguments and the adequacy of the judicial responses.

A. The Burden of Justification: The Importance of Having a Presumption on Your Side

The mortar in the wall separating judicial from legislative power is the presumption of constitutionality of legislative action. Although this presumption evaporates where "legislation appears on its face to be within a specific prohibition of the Constitution," [1] or where it affects adversely other fundamental rights,[2] the courts ordinarily will defer to the rationality of legislative proscriptions, classifications and sanctions. When legislation is attacked as irrational, arbitrary or factually groundless, the pertinent questions are whether the judiciary should conduct its own factual inquiry, and how groundless the legislation must be to earn the "arbitrary" or "irrational" designation (or its contextual equivalent).

Because of the placement of the burden of (dis)proof, legislation is not "arbitrary" simply because the legislature did not conduct a fact-finding investigation.[3] When the legislation is attacked, the courts will assume that it was based on the collective knowledge and experience of the legislators. In short, the legislature, as a matter of constitutional law, has no affirmative duty to utilize the trappings of rationality.

Furthermore, legislation is not irrational simply because a factual hypothesis upon which it is premised cannot be proven. The legislature is entitled to guess and act upon the contemporary state of knowledge or ignorance. The generally accepted "facts" about marijuana in the 1920's and 30's, when the drug's possession and use were criminalized, were that it was physically addictive, caused insanity, and gen-

[1] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

[2] Gomillion v. Lightfoot, 364 U.S. 339 (1960) (voting rights); United States v. O'Brien, 391 U.S. 367 (1968) (dictum) (free speech).

[3] Although a requirement of fact-finding investigations for all legislation is desirable, judicial enforcement would reward persuasive legislative history and shake the separation of powers doctrine to its very roots. The spectre of judicial surveillance of everyday legislating, albeit by method and not substance, is one not likely to enthuse either legislators or judges.

Counsel for defendants in Commonwealth v. Leis, 355 Mass. 189, 243 N.E.2d 898 (1969), contended that the notable lack of legislative investigation into medical and scientific evidence concerning marijuana "violates certain minimum standards of rationality which must be part of the legislative process." Oteri & Silverglate, *The Pursuit of Pleasure: Constitutional Dimensions of the Marihuana Problem*, 3 SUFF. L. REV. 55, 60 (1968). However, the trial court and the Supreme Judicial Court both responded correctly that the nature of the legislative records was not the issue before the court. The question was whether the facts today are inconsistent with assumptions necessary to the rationality of the legislation. Commonwealth v. Leis, Nos. 28841-2, 28844-5, 28864-5 (Suffolk Super. Ct. 1968), *excerpted in* 3 SUFF. L. REV. 23, 25 (1968) (Tauro, C.J.), *aff'd*, 355 Mass. 189, 243 N.E.2d 898 (1969).

erated crimes of violence. Later, in the 1950's, legislation was premised on the hypothesis that marijuana was the stepping stone to heroin and the other opiates. Since the assumptions could not be conclusively disproved, the legislation was rationally related to the legitimate objectives of preventing crime, pauperism and disease. As the California court in *Ex parte Yun Quong* had noted in 1911 in response to an attack on the early anti-opium laws:

> [B]ut the validity of legislation which would be necessary or proper under a given state of facts *does not depend upon the actual existence of the supposed facts.* It is enough if the law-making body may rationally believe such facts to be established.[4]

Between 1950 and 1965 attacks on the marijuana laws were repelled in this manner since medical inquiry had not yet produced affirmative evidence of irrationality. Challenges to the classification of marijuana as a narcotic were rebuffed either by citing *Navaro* and the other cases first upholding the marijuana laws,[5] or by quoting *Ex parte Yun Quong*.[6]

By 1965, however, the revolution in marijuana use was underway, and independent medical researchers had begun to challenge the venerable assumptions. Armed with an increasing volume of scientific literature in their favor,[7] challengers have assaulted the legislation in court in an effort to prove that "facts judicially known or proved *preclude*" the legislation's rationality.[8] Several trial judges have taken evidence on the physiological, psychological and sociological effects of marijuana,[9] and some appellate courts have suggested that such steps be taken in their respective inferior courts.[10] In Colorado, trial judges have twice declared

---

[4] 159 Cal. 508, 515, 114 P. 835, 838 (1911) (emphasis added).

[5] *E.g.*, Gonzalez v. State, 168 Tex. Crim. 49, 323 S.W.2d 55 (1959), *citing* Gonzalez v. State, 1963 Tex. Crim. 432, 293 S.W.2d 786 (1956); Miller v. State, 50 Del. 579, 137 A.2d 388 (1958), *citing* State v. Navaro, 83 Utah 6, 26 P.2d 955 (1933).

[6] People v. Glaser, 238 Cal. App. 2d 819, 48 Cal. Rptr. 427 (Dist. Ct. App. 1965), *cert. denied*, 385 U.S. 880 (1966); People v. Mistriel, 110 Cal. App. 2d 110, 241 P.2d 1050 (Dist. Ct. App. 1952).

[7] See pp. 1104-10 *supra.*

[8] South Carolina Hwy. Dep't v. Barnwell Bros., Inc., 303 U.S. 177, 191 (1938) (emphasis added).

[9] *See* United States v. Drotar, 416 F.2d 914 (5th Cir. 1969); Raines v. State, 225 So. 2d 330 (Fla. 1969); People v. Stark, 157 Colo. 59, 400 P.2d 923 (1965); Commonwealth v. Leis, Nos. 28841-2, 28844-5, 28864-5 (Suffolk Super. Ct. 1968), *aff'd*, 355 Mass. 189, 243 N.E.2d 898 (1969); *cf.* People v. McKenzie, 458 P.2d 232 (Colo. 1969).

[10] *E.g.*, Scott v. United States, 395 F.2d 619, 620 (D.C. Cir. 1968); People v. Walton, 116 Ill. App. 2d 293, 296, 253 N.E.2d 537, 539 (1969).

that state's marijuana laws unconstitutional on the basis of such evidence, only to be reversed both times.[11] Again and again, the verdict has been the same: Despite the substantial weight of authority regarding the mildness of the drug, enough doubt remains and enough rational men still consider the drug harmful that the courts cannot say the legislation is irrational.[12] Some judges have expressed their own doubts about the accuracy of the factual premises and the wisdom of the legislative judgments pertaining to marijuana,[13] but even they have been constrained to uphold the legislation. At the other extreme, some courts continue to rely on the old myths, considering the question well settled[14] and rebuffing the challengers' attacks with a swish of the robed forearm:

> Clearly, the use of marijuana and other drugs . . . presents a danger to the public safety and welfare of the community since they are clearly related to each other and to the commission of crime.[15]

Many legislators hesitate to revise the marijuana laws drastically, because they feel the data is not yet complete. For the same reason, the courts have been even more reluctant to find that present legislation has no rational basis in fact, a finding made only in the rarest circumstances. Assuming for present purposes that the legislation is entitled to the traditional presumption, we believe that attacks grounded in the due process and equal protection clauses should fail. On the other hand, we are not convinced that challenges grounded in a rationality arm of the eighth amendment prohibition against cruel and unusual punishment are without merit. This argument has the advantage of acknowledging the rationality of criminalization while indicting the severity of the sanction.

1. Due Process and Equal Protection: Rationality of the Classification

The concurrent classification of marijuana as a "narcotic" with the

[11] People v. McKenzie, 458 P.2d 232 (Colo. 1969); People v. Stark, 157 Colo. 59, 400 P.2d 923 (1965).

[12] See cases cited notes 28-31 *infra*.

[13] *E.g.*, United States v. Kleinzahler, 306 F. Supp. 311, 317 (E.D.N.Y. 1969) (Weinstein, J.); People v. McKenzie, 458 P.2d 232, 236 (Colo. 1969).

[14] Robinson v. United States, 327 F.2d 618, 624 (8th Cir. 1964) (Blackmun, J.) ("the boundary line, if any, between narcotics and marijuana is indistinct and . . . statutes and interpreting courts do not give much emphasis to it"); Spence v. Sacks, 173 Ohio St. 419, 420, 183 N.E.2d 363, 364 (1962) ("There is no question that the state had, under its police power, the right to classify cannabis as a narcotic drug."); People v. Glaser, 238 Cal. App. 2d 819, 48 Cal. Rptr. 427 (Dist. Ct. App. 1965), *cert. denied*, 385 U.S. 880 (1966).

[15] People v. Stark, 157 Colo. 59, 66, 400 P.2d 923, 927 (1965).

"hard drugs" and the permissive treatment of alcohol form the basis of the "irrationality" argument. Whether grounded in the minimum substantive content of the due process clause, in the overinclusive and underinclusive aspects of the equal protection clause, or in an independent limitation on the police power, the contention is the same: The legislative classification is not reasonably related to a valid legislative purpose.

The initial inquiry ought to focus on the nature of the state's objective. The first possible objective we will call the "rationality" rationale. The state's aim may be to promote productivity, rationality and participation in social processes, and conversely to prevent the citizen from "turning off" or frustrating his ability to function in socially desirable ways. Under this rationale, prohibition of *all* drug use would be rationally related to the state's objective. Similar treatment of "hard" narcotics and marijuana would be justified, since no distinctions need be drawn between moderate and chronic use or between divergent ancillary social and physical effects. The real issues are whether this is a legitimate objective and whether the permissive treatment of alcohol invalidates the scheme.

As to the first issue, we do not believe that American governmental institutions are empowered to impose the Protestant Ethic upon a free people. Although we will explore this question in some detail below from another perspective,[16] we note for now that opposition to mere *use* of euphoriants has never been the focus of legislative inquiry or the public opinion process in the entire history of drug regulation in this country. As we noted earlier,[17] although total abstention was a peripheral concern of some proponents of Prohibition, that movement was directed primarily at the evils associated with excessive use and commercial distribution. Some judges recently have upheld marijuana legislation simply because marijuana is a "mind-altering drug," [18] but it is unlikely that they perceived the implications of their statements.

As to the second issue, if we assume that rationalism is a legitimate objective of drug legislation, it is a long-standing constitutional principle that the legislature need not "cover the waterfront." If the law-makers determine, as a result of the failure of Prohibition for example, that "regulation" is the only feasible approach to alcohol, that judgment does

[16] See text at notes 132-35 *infra*.

[17] See p. 979 *supra*.

[18] *E.g.*, Raines v. State, 225 So. 2d 330 (Fla. 1969).

not vitiate a prohibitionary approach to other intoxicants. That the legislature acts piecemeal does not make its actions any less "rational." [19]

The state's objective in drug legislation may be to prevent excessive or chronic use on the ground that such use totally destroys the user's social utility and is likely to render him dependent on the state for subsistence. Although this "dependency" rationale is designed immediately to protect each citizen from himself, its mediate aim is the public good. In this respect marijuana prohibition resembles legislation requiring motorcycle users to wear crash helmets.[20] Again, there is some dispute regarding the legitimacy of this objective, a question to which we will return below.

Assuming the validity of the "dependency" rationale, however, the relevant factual inquiry focuses on the respective use patterns and effects of "hard" narcotics, marijuana and alcohol. The challengers contend that it is scientifically established that marijuana is not physically addictive, causes no permanent harm, and that its users do not develop a tolerance to the drug. The irrationality of classifying marijuana with the opiates and cocaine is aggravated, they contend, by the fact that there are six million chronic alcoholics in this country. In response to these arguments, some courts have noted that there is *some evidence* for the proposition that marijuana produces a "serious degree of psychological dependence, that it encourages experimentation with other drugs and that it may lead to addiction of narcotics." [21] Accordingly, since "reasonable men may entertain the belief that the use of [marijuana], once begun, almost inevitably leads to excess, such belief affords a sufficient justification for applying restrictions to these drugs." [22] In addition some courts have noted that there is *some evidence* that the smoking of marijuana may induce acute (albeit temporary) "psychotic breaks" in predisposed individuals.[23]

Although the logic of the stepping stone and psychotic break arguments is suspect in determining valid state interest, we believe that contrary medical findings are still too tentative with respect to the psychological effects of marijuana use to sustain an irrationality challenge under the "dependency" rationale. In addition, the piecemeal principle once

---

[19] *See, e.g.*, Commonwealth v. Leis, 243 N.E.2d 898, 905 (Mass. 1969).

[20] *See* Borras v. State, 229 So. 2d 244, 246 (Fla. 1969).

[21] People v. Aguiar, 257 Cal. App. 2d 597, 602-03, 65 Cal. Rptr. 171, 174-75 (Dist. Ct. App.), *cert. denied*, 393 U.S. 970 (1968).

[22] *Id.* at 600, 65 Cal. Rptr. at 173.

[23] Commonwealth v. Leis, 243 N.E.2d 898, 902 (Mass. 1969).

again counters the challengers' underinclusive equal protection argument with respect to alcohol or LSD,[24] allegedly more harmful drugs not classified as "narcotics." To the extent that some courts have searched for differences between alcohol and marijuana to defend directly the legislative scheme, they have usually been on shaky ground. For example, Massachusetts Superior Court Judge Tauro stated in *Commonwealth v. Leis*, after a full factual inquiry on the effects of marijuana:

> The ordinary user of marijuana is quite likely to be a marginally adjusted person who turns to the drug to avoid confrontation with and the resolution of his problems. The majority of alcohol users are well adjusted, productively employed individuals who use alcohol for relaxation and as an incident of other social activities.[25]

Such statements misconstrue prevalent use patterns of both alcohol and marijuana. Moreover, such differentiation is grounded not in the "dependency" rationale but in the dubious "rationality" rationale. Judge Tauro would have been better advised to stick to the piecemeal principle, as have the California intermediate appellate courts.[26]

The third possible objective of marijuana legislation is to prevent harm to others. For four decades, prohibition of marijuana has been based primarily on the "other-regarding" rationale. The relevant factual hypotheses are that marijuana use causes violent crime directly, that it leads to use of hard drugs and thereby causes violent crime indirectly, and that it causes "psychomotor discoordination" and thereby causes accidents by those under its influence.

Contemporary challengers have charged that these assumptions are completely without merit in light of contemporary medical knowledge. Although some courts continue to intone the old myths, relying on police testimony correlating marijuana use and violent crime,[27] others

---

[24] Defendant in People v. McKenzie, 458 P.2d 232 (Colo. 1969), varied the traditional underinclusiveness argument. He contended that the continued classification of marijuana as a "narcotic" drug after a legislative revision in 1968 could not be defended, since LSD, clearly a more harmful drug, was classified as a "dangerous" drug. Possession of LSD was a misdemeanor while possession of marijuana was a felony. Citing its decision in People v. Stark, 157 Colo. 59, 400 P.2d 923 (1965), the Colorado Supreme Court deferred to the unusual classification.

[25] 3 SUFF. L. REV. 23, 31 (1968).

[26] *See, e.g.*, People v. Oatis, 264 Cal. App. 2d 324, 329, 70 Cal. Rptr. 524, 529 (Dist. Ct. App. 1968), *cert. denied*, 393 U.S. 1108 (1969); People v. Aguiar, 257 Cal. App. 2d 597, 602, 65 Cal. Rptr. 171, 176 (Dist. Ct. App.), *cert. denied*, 393 U.S. 970 (1968).

[27] People v. Stark, 157 Colo. 59, 67, 400 P.2d 923, 927-28 (1965); *cf.* People v.

have openly recognized the unsubstantiated character of each of these hypotheses.[28]

Nevertheless, these courts have sustained the legislation because of the continuing uncertainty about the drug's effects.[29] Rather than supporting the hypothesis that marijuana intoxication independently causes violence, the courts have focused on the unpredictable effects of the drug depending on the psychological predisposition of the user. Since there is some evidence that marijuana can be especially volatile when used by despondent, hostile or unstable persons, a prophylactic approach is rational.[30]

Similarly, while recognizing that there is no support for a direct causal link between marijuana use and hard narcotics use, the courts have held that some marijuana users' graduation to more dangerous drugs due to environmental conditions is enough to uphold the legislation.[31] Finally, recognizing that the possibility of reckless use of dangerous instruments while under the influence of marijuana might not ordinarily justify its total prohibition, the courts have relied instead on evidence that there is no scientific means of detecting whether or not a person is under the drug's influence, as there is with alcohol.[32]

Taken individually, each of these justifications leaves something to be desired. First, individuals psychologically predisposed to violent conduct will, in all likelihood, snap under the influence of some other catalyst even if deprived of marijuana. Second, the stepping stone theory is a self-fulfilling prophecy even to the extent that there is a correlation between marijuana use and hard narcotics use. Were it not for prohibitionary marijuana legislation, users of that drug would not come into contact with illegal activity and perhaps consequently with narcotics pushers. Finally, there is persuasive evidence for the proposition that marijuana users are ordinarily rendered immobile and are unlikely to endanger others by driving automobiles.[33]

Oatis, 264 Cal. App. 2d 324, 70 Cal. Rptr. 524 (Dist. Ct. App. 1968), *cert. denied*, 393 U.S. 1108 (1969).

28 *E.g.*, People v. Aguiar, 257 Cal. App. 2d 597, 602-03, 65 Cal. Rptr. 171, 174-75 (1968); People v. Stark, 157 Colo. 59, 66, 400 P.2d 923, 927 (1965).

29 People v. Aguiar, 257 Cal. App. 2d 597, 603, 65 Cal. Rptr. 171, 175 (1968).

30 Commonwealth v. Leis, Nos. 28841-2, 28844-5, 28864-5 (Suffolk Super. Ct. 1968), *excerpted in* 3 SUFF. L. REV. 23, 27-28 (1968), *aff'd*, 355 Mass. 189, 243 N.E.2d 898 (1969).

31 *E.g.*, Commonwealth v. Leis, 243 N.E.2d 898, 903 (Mass. 1969).

32 *Id.*

33 See p. 1105 *supra*.

Taken collectively, however, these hypotheses provide a rational basis for prohibitionary legislation, the objective of which is to prevent harm to others. We conclude that there is not yet sufficient uniformity of medical opinion to overcome any presumption of rationality attaching to marijuana legislation. Those courts directly confronting the issue have responded correctly, regardless of the precise constitutional framework within which they have worked.

2. Cruel and Unusual Punishment: Rationality of the Sanction

Since marijuana penalties were drastically increased in the 1950's, the marijuana laws have been attacked repeatedly on the ground that high mandatory minimum sentences without parole or probation are cruel and unusual punishment. The starting point for resolution of this question is the Supreme Court's highly ambiguous decision in 1910 in *Weems v. United States*.[34] The Court struck down a fifteen-year sentence at "hard and painful labor" imposed under Philippine law for falsifying a public document because the sentence was "cruel in its excess of imprisonment" as well as "unusual in its character." [35] The punishment was condemned "both on account of . . . [its] degree and kind." [36] Because the incidents of the challenged imprisonment were particularly abhorrent—"a chain at the ankle and wrist of the offender, hard and painful labor, no assistance from friend or relative, no marital authority or parental rights or rights of property" [37]—some courts and commentators believe that *Weems* does not depart from the traditional view that the eighth amendment speaks only to mode of punishment, not to length.[38] Yet some members of the Court have stated that the amendment was directed "against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged." [39] And the Court in *Weems* stated that the punishments there in question came "under the condemnation of the bill of rights, both on account of their degree and kind." [40] Accordingly, although the jurisprudence of

[34] 217 U.S. 349 (1910).

[35] *Id.* at 377.

[36] *Id.*

[37] *Id.* at 366.

[38] *E.g.*, Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1075-76 (1964).

[39] 217 U.S. at 371, *quoting* O'Neil v. Vermont, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting).

[40] 217 U.S. at 377.

the eighth amendment is virtually nonexistent, courts and commentators have assumed that the amendment has a proportionality dimension.[41]

The difficult question is the proper standard for testing the constitutionality of allegedly excessive sentences. Although detailed inquiry into the subtleties of this issue is beyond the scope of this Article, the battle is between those who would apply a fringe "decency" test[42] and those who would apply a "rationality" test that essentially extends the minimum substantive content of the due process clause to the relation between crime and punishment.[43] As applied to marijuana legislation, a "decency" inquiry would have been fruitless in the 1950's and 1960's but may yet succeed in the 1970's. Under that test, a punishment is unconstitutional only if "so aberrational as to violate 'standards of decency more or less universally accepted.' " [44] Since the history of marijuana legislation has again and again been characterized by varying degrees of hysteria in differing jurisdictions, there is no available measure of human decency against which to test the action. Moreover, if the legislatures are uniformly harsh, the judicial conscience is not likely to be shocked. However, as increasing numbers of state legislatures and the Congress finally begin to de-escalate the penalties for marijuana offenses, those states that maintain the 1950 punishment levels are likely to find themselves lagging behind "the evolving standards of decency that mark the progress of a maturing society." [45]

One contention that can, and has, been raised in the drug context has been that the penalty must bear a reasonable relation to the seriousness of the offense when compared with the punishments for more serious crimes in the same jurisdiction and for the same crime in other jurisdictions. The evolution of judicial response to this argument in marijuana cases has followed a path consistent with the change in use patterns and in public response.

In the first case raising this cruel and unusual punishment issue, *State v. Thomas*,[46] the Louisiana Supreme Court upheld in 1953 that state's

[41] *See, e.g.*, Gallego v. United States, 276 F.2d 914 (9th Cir. 1960); Turkington, *Unconstitutionally Excessive Punishments*, 3 CRIM. L. BULL. 145 (1967); Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635 (1966).

[42] *See* Packer, *supra* note 38.

[43] *Cf.* Rudolph v. Alabama, 375 U.S. 889, 889-91 (Goldberg, J., dissenting from denial of certiorari).

[44] Packer, *supra* note 38, at 1076.

[45] Trop v. Dulles, 356 U.S. 86, 100-01 (1958).

[46] 224 La. 431, 69 So. 2d 738 (1953).

mandatory minimum sentence of ten years without parole for unlawful possession. The court said that the eighth amendment did not apply to the states and that similar state provisions spoke only to "form or nature of the punishment rather than its severity in respect of duration and amount." [47] Finally, the court noted that, even if *Weems* applied, "[i]n view of the moral degeneration inherent in all aspects of the crime denounced by the Narcotics Act, it cannot be said that the length or severity of the punishment here prescribed is disproportioned to the offense." [48] Five years later, the Texas Supreme Court upheld a life sentence for first offense possession, and stated that the legislature was solely responsible for assessing the permissible limits of punishment and that the jury was solely responsible for affixing sentence in a particular case.[49]

In 1960, the Ninth Circuit in *Gallego v. United States*[50] upheld the provision of the 1956 Narcotic Drugs Import and Export Act imposing a five-year mandatory minimum sentence without suspension, probation or parole for unlawful importation of marijuana. Assuming an excessiveness holding to be implicit in *Weems*, the court noted nevertheless that the penalty was not "so out of proportion to the crime committed that it shocks a balanced sense of justice. At worst," the court continued, "it merely forbids in this kind of case and for good reason the discretionary granting of special benefits which Congress did not have to permit in the first place." [51] The summary treatment of the issue is easily explained by the court's apparent lack of sympathy with marijuana users; it quoted approvingly the moral denouncement delivered in *Thomas*.[52]

Slowly the tide began to turn. A California court recently blanched at upholding the five-year minimum sentence imposed for giving away

---

[47] *Id.* at 435, 69 So. 2d at 740.

[48] *Id.* In State v. Bellam, 225 La. 445, 73 So. 2d 311 (1954), the court rebuffed a similar challenge to a seven-year sentence without parole for a second offense of possession of marijuana by simply citing *Thomas*.

[49] Garcia v. State, 166 Tex. Crim. 482, 316 S.W.2d 734 (1958). The statute provided that a first offense was punishable by not less than two years nor more than life. The court applied the hands-off principle common to state courts, according to which any sentence within the statutory limits is valid. *See, e.g.*, Perkins v. North Carolina, 234 F. Supp. 333 (W.D.N.C. 1964); Saunders v. State, 208 Tenn. 347, 345 S.W.2d 899 (1961); State v. Jiles, 230 S.C. 148, 94 S.E.2d 891 (1956).

[50] 276 F.2d 914 (9th Cir. 1960).

[51] *Id.* at 918.

[52] *Id.* The Ninth Circuit reaffirmed *Gallego* in Halprin v. United States, 295 F.2d 458 (9th Cir. 1961), and Bettis v. United States, 408 F.2d 563 (9th Cir. 1969).

one marijuana cigarette, especially when the case had entrapment overtones.[53] But in 1967 the defendant in *United States v. Ward*[54] asked the Seventh Circuit to declare unconstitutional, as applied to marijuana, the sentencing provisions of the 1956 Act previously upheld by *Gallego* and subsequent cases. The no parole provision was indicted as inconsistent with current medical knowledge. After quoting at length from the then recently released Report of the President's Commission on Law Enforcement and Administration of Justice and from the Task Force Report on Drug Abuse, the court concluded:

> [T]he progress of scientific research in the whole area of narcotics and drug abuse, during the eleven years since [passage of the 1956 Act] has not resulted in the establishment of scientific knowledge to the extent that would enable us to nullify [section 7237] on constitutional grounds, even if we deemed it appropriate to do so.[55]

Thus appeared the perpetual fate of rationality arguments, whether applied to sanction or to classification. Two years later the Fifth Circuit still found the medical data inconclusive[56] and Massachusetts[57] and California[58] courts both summarily dismissed eighth amendment arguments.

Then, in 1968 the Court of Appeals for the District of Columbia took a significant step. In its decision in *Watson v. United States*[59] (*Watson I*), a three-judge panel in an opinion by Judge Bazelon held that a mandatory ten-year sentence for appellant's third conviction for possession of heroin constituted excessive punishment in violation of the eighth amendment.[60] The significance of *Watson I* was shortlived, however, because

---

[53] People v. Marsden, 234 Cal. App. 2d 796, 798, 44 Cal. Rptr. 728, 729 (Dist. Ct. App. 1965).

[54] 387 F.2d 843 (7th Cir. 1967).

[55] *Id.* at 848.

[56] United States v. Drotar, 416 F.2d 914 (5th Cir. 1969).

[57] Commonwealth v. Leis, 355 Mass. 189, 243 N.E.2d 898 (1969).

[58] People v. Sheridan, 271 Cal. App. 2d 429, 76 Cal. Rptr. 655 (Dist. Ct. App. 1969); *cf.* United States *ex rel.* Fink v. Heyd, 287 F. Supp. 716 (E.D. La. 1968) (deprivation of bail pending appeal for person convicted of sale of marijuana to person over twenty-one and sentenced to five year incarceration does not violate eighth amendment).

[59] No. 21,186 (D.C. Cir., Dec. 13, 1968) (panel), *modified*, No. 21,186 (D.C. Cir., July 15, 1970) (en banc). *Watson I* is excerpted in 37 U.S.L.W. 2352 (Dec. 24, 1968) and reprinted in 4 CRIM. L. REP. 3051 (Dec. 25, 1968).

[60] Since the court identified numerous factors germane to its decision, delineation of a precise holding is difficult and the court probably so intended. We would suggest, however, that the court held that the imposition of rigid severe sentences, identified by

upon a rehearing en banc, the court avoided the eighth amendment issue and set aside the sentence on other grounds.[61] In the en banc opinion (*Watson II*), the court does make a strong eighth amendment argument based on *Robinson v. California*.[62] Since this important constitutional point was not fully litigated below, the court did not believe it could adequately rule on the question. Although most of Judge McGowan's opinion in *Watson II* is thus dicta, it does lay the foundation for future overturnings on eighth amendment grounds of possession sentences when applied to addicts.[63]

An additional indication of both the sympathetic attitude of the federal courts and the expanding dimensions of the eighth amendment "excessiveness" argument appears in a recent opinion by Judge Weinstein of the Eastern District of New York. In *United States v. Kleinzahler*,[64] the issue was the applicability of the ameliorative provisions of the Youth Corrections Act[65] to violations of the federal narcotic drug and marijuana laws. Defendant, a college graduate and highly salaried white collar worker, pleaded guilty to acquisition of marijuana without payment of the transfer tax (by any other name, possession for personal use). He was sentenced to a mandatory term of two years' imprisonment, which was suspended, two years' probation and a fine of $1,000. If the Youth

comparison with other offenses and by the absence of sentencing discretion to tailor the penalty to the culpability of the offender, is unreasonable *either* in the context of offenses closely related to if not compelled by disease *or* in the context of victimless crimes.

[61] The court upheld Watson's conviction but remanded for resentencing in light of the Narcotic Rehabilitation Act of 1966. In so doing, the court declared unconstitutional a provision of that Act which exempts addicts with two prior narcotics convictions, holding such a provision to be a denial of equal protection. No. 21,186, at 29 (D.C. Cir., July 15, 1970) (en banc).

[62] 370 U.S. 660 (1962). Judge McGowan noted that

> if *Robinson's* deployment of the Eighth Amendment as a barrier to California's making addiction a crime means anything, it must also mean in all logic that (1) Congress either did not intend to expose the non-trafficking addict possessor to criminal punishment, or (2) its effort to do so is as unavailing constitutionally as that of the California legislature.

No. 21,186, at 19 (D.C. Cir., July 15, 1970) (en banc).

[63] For the future, the addict, whose acquisition and possession of narcotics is solely for his own use and who wishes to defend on these grounds, is surely not at a loss to know how to do so. . . . To the extent that he wishes to assert that the statutes are not to be read as applicable to him . . . [he should] make an alternative claim of the constitutional defectiveness, under *Robinson*, of the statutes as applied to him.

Id. at 21-22.

[64] 306 F. Supp. 311 (E.D.N.Y. 1969).

[65] 18 U.S.C. §§ 4209, 5010(a) (1964).

Corrections Act had applied, he would have been entitled to have the conviction set aside upon successful completion of his period of probation.

The problem was that the Youth Corrections Act was expressly inapplicable to statutes with mandatory penalties. In light of the legislative history of the Narcotics Control Act of 1956, Judge Weinstein felt constrained to hold that the narcotics and marijuana laws imposed mandatory penalties within the meaning of the Youth Corrections Act.[66] He noted, however, that he thought the result absurd.[67] In a passage particularly germane to the constitutional issue and the meaning of *Watson I*, he stated:

> While the result is harsh, it does not appear to rise to the kind of cruel and unusual punishment proscribed by the Constitution, *in light of the possibilities of probation and suspension of sentence here present.* The wisdom or justice of treating those young adults convicted of possession of marijuana in the same way as those convicted of armed bank or mail robbery or those convicted of selling narcotic drugs is doubtful. But revision of the law in this field must be left to Congress.[68]

Unlike Judge Weinstein, however, the Supreme Court of New Jersey was not satisfied with the mere *possibility of suspension* of prison terms meted out to first-offense possessors of marijuana for personal use. In its landmark decision in *State v. Ward*,[69] the supreme court held as a matter of law that prison "sentences for first offenders should be suspended."[70] The court strove manfully to base the decision on its statutory authority to review sentencing suspension decisions for abuse of discretion. However, both the breadth of the holding and its reasoning suggest constitutional underpinnings.

---

[66] Judge Weinstein noted:

> In light of the unique structure and harshness of the penalty provisions of the narcotics and marijuana laws—almost byzantine in their complexity—and previous interpretations of related statutes, it is clear that the penalties are "mandatory" within the meaning of [the Youth Corrections Act].

306 F. Supp. at 315.

[67] *Id.* at 317.

[68] *Id.* (emphasis added).

[69] State v. Ward, No. A-9 (N.J., Oct. 26, 1970). The court affirmed the conviction but modified the sentence. Two justices dissented from the affirmance on the grounds that the defendant did not receive a fair trial. They concurred in the sentencing modification on the grounds that the sentence was "grossly excessive."

[70] *Id.* at 9. Although the court devoted some attention to the defendant's particular record and probation report, *id.* at 7, it did not pretend to limit the decision to the

In the first place, taken on its face, the court's opinion appears to hold that trial court denials of motions to suspend prison sentences for first offenders will always be reversed for abuse of discretion. However, such a "guidance" flies in the face of two basic procedural concepts: the sentencing authority is generally free to impose any penalty within the range permitted by the legislature; and to the extent that an appellate court reviews such judgments, it customarily defers to the proximity of the trial judge and reverses, on a case by case basis, only for gross disregard of the trial record and presentence reports. In effect, the New Jersey Supreme Court determined that where youthful marijuana users are concerned, imprisonment is an excessive sanction even though within the statutory range of alternatives. This is no ordinary decision.

Although the court sloughed over the analytical problem, it did not disguise its rationale. The disturbing number of users, the ambiguous nature of the wrong, and the counterproductive effect of imprisonment each played a part:

> We cannot escape the unhappy fact that our youth have been involved with marihuana in disturbing numbers. That this is so does not palliate the wrong. Nor should we be thought to encourage or condone such conduct. The statute should and will be enforced. But it remains the policy of the law to reform the youthful offender. Sentencing judges should direct the punishments they impose to the goal of reformation. Too severe a punishment will do little towards advancing this goal. Incarceration is a traumatic experience for anyone. The effect must be particularly devastating upon young persons such as the defendant here. A sentence of two to three years in State Prison in a case like this will probably be more detrimental to both the offender and society than some other discipline.[71]

In essence, the court held that incarceration was not a rational sanction for this particular crime.

The sixteen years between *Thomas* on the one hand and *Watson I*, *Kleinzahler* and *Ward* on the other have witnessed a significant expansion of the contours of the eighth amendment and a noticeable change in judicial attitude toward defendants charged with marijuana violations. As constitutional lawyers, we must acknowledge the difficulty of halting a

---

case at bar. At one point the court stated that it was establishing "guidelines for the sentencing of first offenders who were found guilty of possessing marijuana for their own use." *Id.*

[71] *Id.* at 8.

rationality-excessiveness inquiry, once begun. For this reason, the New Jersey court's end run around the constitutional issue is a defensible approach. In any event, we think that the courts will continue to enter this thicket unless the legislatures reduce marijuana penalties to comport with reality.

B. Should the Burden Be Shifted?—Marijuana and Fundamental Rights

The Supreme Court's 1938 decision in *United States v. Carolene Products Co.*[72] is the most frequently cited authority for the presumption of constitutionality, the implications of which were explored in the preceding section. However, Justice Stone's famous footnote four, tentatively cataloging exceptions to the rule of judicial deference, is the philosophical forebear of contemporary contentions that marijuana legislation cannot be presumed constitutional. Recent constitutional history has been characterized by a new judicial activism in defense of "fundamental" human rights.[73] Footnote four was a tentative attempt to anticipate and rationalize that activism while retreating from the old economic activism and its major vehicle—substantive due process.

Still allergic to the substantive due process label and to any form of judicial review not tied to more or less specific constitutional provisions, the modern Court has utilized the doctrine of incorporation and the once dormant equal protection clause to fill in the contours of footnote four. For some of the Justices, substantive due process is limited, theoretically at least, to the specific guarantees of the first eight amendments, and perhaps their collective penumbra. To others, that phrase has an independent potency, sometimes more, sometimes less, than the Bill of Rights, including rights essential to a concept of ordered liberty. In either event, the "rights" protected must have the trappings of permanence. Frequently, however, pressures of new social developments have led the Court to expand the coverage of the specific provisions through unadulterated, but unlabeled, substantive due process. A similar development is the active judicial enforcement of the mandate of the equal protection clause to legislation involving "suspect classifications" or sensitive subjects. In either case, the Court is called upon to define and separate that "fundamental" area of human conduct, the regulation of

---

[72] 304 U.S. 144 (1938).

[73] *See generally* A. MASON, THE SUPREME COURT FROM TAFT TO WARREN (1969); Mason, *Judicial Activism: Old and New*, 55 VA. L. REV. 385 (1969).

which must be justified by the government, and that area where legislative action carries the protection of the deferential presumption.

As advocates, the challengers of marijuana legislation must fit their contentions within the current patterns of constitutional pigeon-holing. To cast off the shackles of the stultifying presumption, they must persuade the courts that marijuana use somehow constitutes a fundamental right. Utilized, thus far unsuccessfully, for this purpose have been the eighth amendment, the first amendment free exercise of religion clause and the penumbral right of privacy. Failing with these approaches, the challengers have found in the ninth amendment a "right to get high."

1. The Robinson-Powell Argument

In *Robinson v. California*,[74] clearly a substantive due process decision cloaked in the protective garb of the eighth amendment,[75] the Supreme Court held that the status of being a narcotics addict could not be made a crime. The Court was careful to note in dictum that the state legislatures were still free to punish addicts for possessing drugs.[76] Subsequent courts found this distinction untenable[77] and the Supreme Court addressed it again in its 1968 decision in *Powell v. Texas*.[78]

Powell, a chronic alcoholic, had been convicted for public drunkenness. His conviction was affirmed in three separate opinions. However, five members of the Court, as then constituted, disavowed the *Robinson* dictum. The four dissenting Justices found it "cruel and unusual" to punish an alcoholic "for a condition—being 'in a state of intoxication' in public—which is a characteristic part of the pattern of his disease and which, the trial court found, was not the consequence of appellant's volition but of 'a compulsion symptomatic of the disease of chronic alcoholism.' " [79] Justice White, casting the deciding vote for affirmance, asserted nevertheless that, "[u]nless *Robinson* is to be abandoned, the use of narcotics by an addict must be beyond the reach of the criminal law." [80]

---

[74] 370 U.S. 660 (1962).

[75] *Id.* at 685 (White, J., dissenting).

[76] *Id.* at 665, 666, 667-68.

[77] *See, e.g.*, Watson v. United States, No. 21,186 (D.C. Cir., July 15, 1970) (en banc); Castle v. United States, 347 F.2d 492, 495 (D.C. Cir. 1964), *cert. denied*, 381 U.S. 929 (1965).

[78] 392 U.S. 514 (1968).

[79] *Id.* at 558 (Fortas, J.).

[80] *Id.* at 548-49. Although Justice White dissented in *Robinson*, he saw no distinction between the status of addiction and acts compelled by that status. He voted to affirm

Assuming for present purposes that a majority of the newly-constituted Supreme Court adheres to the principle that the state may not punish conduct performed under direct compulsion of a disease, application of the principle to marijuana use is extremely unlikely.[81] The challengers themselves assert that marijuana has been scientifically proven not to be addictive, either physically or psychologically. They can nevertheless argue that the state may not have its cake and eat it too: The rationality of the legislation rests upon the allegation that marijuana is at least psychologically "addictive," and the state may not now defend the punishment by arguing that it is not addictive. Superficially appealing, this argument must falter for two reasons. First, the state's interest in prohibiting marijuana use *may* rest on deleterious effects unrelated to psychological dependency. Second, defendants invoking the *Robinson-Powell* argument, even if it is applicable, are unlikely ever to prove by clear and convincing evidence, as they must, that they were without "free will" to desist from using marijuana.[82]

2. Free Exercise of Religion

Several major challenges to marijuana legislation, premised on the first amendment, have relied heavily on the California Supreme Court's 1964 decision in *People v. Woody*.[83] Finding that sacramental use of peyote, a hallucinogenic drug, constituted the cornerstone of Peyotism both as symbol and object of worship, the California Supreme Court held that prohibition of possession constituted a direct burden upon the free exercise of the defendant's religion, as practiced by the Native American Church. Since freedom of religious practices is not absolute, however, the court inquired whether the state had shown a "compelling interest" sufficient to justify the infringement.

First, the state could not support its allegations that use of peyote would lead to use of more dangerous drugs or would cause permanent injury to the user.[84] Assuming such a state interest to be legitimate, it was never proven, and could scarcely be labeled compelling. Second,

---

the conviction in *Powell* because he found nothing in the record to support a finding that Powell had a compulsion to "frequent public places when intoxicated." *Id.*

[81] The contention has already been rejected out of hand in Commonwealth v. Leis, 243 N.E.2d 898, 906 (Mass. 1969), and United States v. Drotar, 416 F.2d 914, 916 (5th Cir. 1969).

[82] *See* Powell v. Texas, 392 U.S. 514, 524-26 (1968).

[83] 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964). *Contra*, State v. Big Sheep, 75 Mont. 219, 243 P. 1067 (1926).

[84] 61 Cal. 2d at 722, 394 P.2d at 818, 40 Cal. Rptr. at 74.

the state insisted that fraudulent claims of religious immunity would frustrate enforcement of the state's narcotics laws. Again, the court found that the state had produced no evidence to that effect.[85] Accordingly, since California had not shown that these presumably "compelling" state interests would be frustrated by the immunity, the narcotics statute was unconstitutional as applied to possession of peyote for religious purposes.

The court distinguished *Reynolds v. United States*,[86] where the Supreme Court had ruled that Congress could constitutionally apply to Mormons a prohibition against polygamy. First, said the California court, polygamy was not essential to the practice of Mormonism, as was use of peyote to the practice of Peyotism. Second, the Supreme Court in *Reynolds* viewed polygamy as destructive of basic tenets of a democratic society, as dangerous and repulsive as human sacrifices. The state interest was therefore compelling and unavoidable.

Several defendants in recent marijuana cases, Dr. Timothy Leary among them,[87] have strenuously contended that the first amendment similarly requires immunity for users who seek in good faith the "religious experience" induced by marijuana and other psychedelic substances. Some users incorporated in 1965 the Neo-American Church, claiming a nationwide membership of twenty thousand.[88] According to the tenets of the faith, psychedelic substances, particularly marijuana and LSD, are the "True Host," and it is the religious duty of all members to partake of the sacraments on regular occasions.[89]

Judicial response to the free exercise argument has been uniform only in result. Some courts, including the Fifth Circuit in the *Leary* case, have simply held that passage of a criminal law per se constitutes a compelling state interest overriding any free exercise claims.[90] These courts think *Reynolds* indistinguishable, and cite the following language:

> Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices . . . .

---

85 *Id.* at 723, 394 P.2d at 819, 40 Cal. Rptr. at 75.

86 98 U.S. 145 (1878).

87 Leary v. United States, 383 F.2d 851, 857-58 (5th Cir. 1967), *rev'd*, 395 U.S. 6 (1969).

88 *See* United States v. Kuch, 288 F. Supp. 439, 443 (D.D.C. 1968).

89 *See id.*; State v. Ballard, 267 N.C. 599, 602, 148 S.E.2d 565, 568 (1966), *cert. denied*, 386 U.S. 917 (1967).

90 383 F.2d at 860-61. *See also* State v. Ballard, 267 N.C. 599, 602, 148 S.E.2d 565, 568 (1966), *cert. denied*, 386 U.S. 917 (1967).

> . . . To permit . . . [a man to execute his practices because of his religious beliefs] . . . would be to make the professed doctrines of religious belief superior to the law of the land, and in effect permit every citizen to become a law unto himself. Government could exist only in name in such circumstances.[91]

The net result of such an approach is that criminalization of conduct which for some is a required religious practice is presumed constitutional. "Congress," said the Fifth Circuit, "has demonstrated beyond doubt that *it* believes marijuana is an evil in American society and a serious threat to its people." [92] Accordingly, "it [is] not incumbent upon the Government to produce evidence to controvert the testimony of witnesses on the controversial question whether use of the drug is relatively harmless." [93]

Other courts have assumed that the *Woody* interpretation of *Reynolds* is correct, but have found that the Neo-American Church is not a bona fide religion[94] and that personal use of psychedelic drugs, untied to a bona fide organized church, cannot constitute the religious exercise protected by the first amendment.[95] Alternatively, these courts have determined that marijuana use is not essential to religious practice as was peyote in *Woody* and that the compelling interests in prevention of violence and self-destruction are rationally supported by current medical knowledge.[96]

We think the courts have correctly rebuffed the free exercise argument but not for the right reasons. First, we do not agree that *Reynolds* holds all criminal legislation to be outside the balancing test ordinarily employed in free exercise cases.[97] Second, we believe that if marijuana use were essential to the practice of a bona fide religion, it *would* be

---

[91] 98 U.S. 145, 166, 167.

[92] 383 F.2d at 861 (emphasis added).

[93] *Id.* at 860-61.

[94] *E.g.*, United States v. Kuch, 288 F. Supp. 439, 452 (D.D.C. 1968).

[95] People v. Mitchell, 244 Cal. App. 2d 176, 52 Cal. Rptr. 884 (Dist. Ct. App. 1966).

[96] United States v. Kuch, 288 F. Supp. 439, 452 (D.D.C. 1968).

[97] Judge Gasch in the *Kuch* case apparently assumed that the customary balancing test would be applicable if the Neo-American Church were a bona fide religion. Before applying the "prevailing doctrine," however, he criticized the Supreme Court:

> No United States District Judge who must act within the confines of a record and available judicial time has the wisdom or means of doing adequately what the cases appear to require. It is to be hoped that there will develop a constitutional doctrine in this field that more closely approximates that contemplated by the framers of the Constitution and that leaves the balancing function in all but obvious cases of clear abuse in the hands of Congress, where it belongs.

Id. at 446.

incumbent on the state to demonstrate that use of the drug would frustrate its interests in preventing violence and individual harm to the user. More than a rational basis would be required. However, we agree with Professor Donald Giannella that the free exercise clause would become dysfunctional were psychedelic philosophy to qualify as a religion.[98] As we will suggest below, there should be some degree of constitutional protection for this allegedly "religious" personal behavior,[99] but severe perversion of the principle embodied in the free exercise clause would occur were it to become a sanctuary for all colorably spiritualistic conduct that otherwise stands condemned.

3. Right of Privacy

Any litigant attempting to secure recognition of any right as "fundamental," no matter how remote, will likely cite *Griswold v. Connecticut*.[100] Marijuana advocates are no exception. Like *Robinson*, *Griswold* was essentially a substantive due process decision.[101] In a decision rationalized by Justice Douglas under the rubric of penumbral rights tied to specific guarantees of the Bill of Rights, the Court held that the states were substantively barred from prohibiting the use of birth control devices. Together with *Stanley v. Georgia*,[102] where the Court held that private possession of obscene material may not be punished, *Griswold* serves as the basis for an argument that private possession and use of marijuana, at least in the home, may not be punished.

Because of the "chilling effect" on privacy necessitated by enforcement techniques where crimes are ordinarily committed in private, the *Griswold-Stanley* argument is appealing. The problem, however, is one of limitation. Surely it cannot be contended that private acts cannot ever constitute crimes. The Court specifically refuted this notion in *Stanley:*

> What we have said in no way infringes upon the power of the State or Federal Government to make possession of other items, such as narcotics, firearms, or stolen goods, a crime. Our holding in the present case turns upon the Georgia statute's infringement of fundamental

98 Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development, Part I: The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1426-27 (1967).

99 See note 5 at p. 1175 *infra*.

100 381 U.S. 479 (1965).

101 *See id.* at 507 (White, J., concurring).

102 394 U.S. 557 (1969).

> liberties protected by the First and Fourteenth Amendments. No First Amendment rights are involved in most statutes making mere possession criminal.[103]

As precedents and on their own terms, *Griswold* and *Stanley* are not enough to support the proposition that private marijuana possession cannot be punished. "Fundamental" rights other than simple privacy were involved—marital freedom and the "right to receive" [104] written materials. In each case the Court was dealing with isolated problems. In *Griswold*, the Court finally grappled with an issue it had avoided for a decade;[105] the multiplicity of opinions and labels manifest the reason for its reluctance.[106] In *Stanley*, the Court probably took a tentative step toward a revision of the obscenity doctrine. The Court may eventually abandon the notion that obscenity is not constitutionally protected, and may establish instead that it may be prohibited only when it is distributed, displayed, or employed in such a way as to create a nuisance to others.[107] Holding that private possession may not be prohibited may represent the first step along that path.

In any event, so long as the fundamental rights framework is utilized, *Griswold* and *Stanley* do not alone make the challengers' case. State and federal courts confronted with the privacy argument have found it lacking.[108] Within the current matrix of constitutional doctrine, the privacy factor functions as a catalytic rather than an active force. Substantive freedoms that may be qualified in public are absolute in private in the same way that exercise of religious beliefs is a relative freedom while freedom of belief is absolute. Marital and perhaps consensual sexual freedom and intellectual liberty were the substantive

---

[103] *Id.* at 568 n.11.

[104] *Id.* at 564.

[105] *See, e.g.*, Poe v. Ullman, 367 U.S. 497 (1961); Tileston v. Ullman, 318 U.S. 44 (1943).

[106] The six *Griswold* opinions are particularly notable for the light they shed on each author's conception of his role in the constitutional system. The philosophical parameters of the marijuana problem and the birth control problem are identical. For this reason alone, *Griswold* is essential reading for all advocates seeking to break new constitutional ground.

[107] *See The Supreme Court, 1968 Term*, 83 HARV. L. REV. 147-54 (1969); Comment, *Karalexis v. Byrne and the Regulation of Obscenity: "I Am Curious (Stanley)"*, 56 VA. L. REV. 1205 (1970).

[108] United States v. Drotar, 416 F.2d 914, 917 (5th Cir. 1969); Borras v. State, 229 So. 2d 244, 246 (Fla. 1969); People v. Aquiar, 257 Cal. App. 2d 597, 65 Cal. Rptr. 171 (Dist. Ct. App.), *cert. denied*, 393 U.S. 970 (1968).

forces in *Griswold* and *Stanley*. In order for privacy to affect the marijuana equation, a right to pursue sensual individuality must pre-exist.

4. The Ninth Amendment—The Forgotten Kitchen Sink

Unable to tie marijuana use to an established "fundamental right," the challengers have resorted to the ninth amendment as a vehicle for defining the necessary protected right. Their advocacy for a "right to get high" [109] or a right "to use one's body as one wishes" [110] is essentially an attempt to equate sensual with intellectual and spiritual freedom. Although there may be some merit in such a contention, its advocates have not yet established a sound constitutional basis. The typical approach is to catalog all civil liberties cases, ignoring the precise constitutional principles involved, and to suggest that rights reserved to the people by the ninth amendment amount to the constitutional equivalent of "personal liberty." [111] Accordingly, any legislation which restricts individual pursuit of happiness must be necessitated by sound state interests.

Obviously the ninth amendment is, in such a context, merely a launching pad for the free-form pursuit of happiness inquiry utilized in the early alcohol Prohibition cases. It surely does not function as an "explicit" constitutional limitation, nor does it suggest a judicial limitation. The challengers scarcely serve their cause well by asking the courts to discard a century and a half of constitutional doctrine as a price for the desired decree.

Even former Justice Goldberg, whose requiem for the ninth amendment in *Griswold* induced the argument, noted that the fundamental rights existing apart from the Bill of Rights must be found in the "traditions and [collective] conscience of our people." [112] In other words, the ninth amendment is simply another way of avoiding the due process label while applying the incorporation doctrine and an expanded version of the traditional historically rooted due process test. "Fundamentality" must have the appearance of permanence. History and perhaps contemporary positive morality provide an acceptable index of permanence.

---

[109] *See, e.g.*, People v. Glaser, 238 Cal. App. 2d 819, 48 Cal. Rptr. 427 (Dist. Ct. App. 1965), *cert. denied*, 385 U.S. 880 (1966); Oteri & Silverglate, *supra* note 3; Note, *Substantive Due Process and Felony Treatment of Pot Smokers*, 2 GA. L. REV. 247, 252-59 (1968).

[110] See note 118 *infra*.

[111] *E.g.*, Note, *supra* note 109, at 257.

[112] 381 U.S. at 493, *quoting* Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (brackets by Goldberg, J.).

Historical inquiry might well reveal a traditional acceptance of the right to become intoxicated so long as others are left alone, and the rash of contrary decisions after 1915 might have constituted temporary constitutional madness. The research reported earlier in this Article provides tentative support for this hypothesis.[113] Further digging into historical sources would appear warranted. At least a palatable constitutional framework would be employed.

Similarly, developing notions of positive morality might provide an acceptable basis for the "right to use one's own body." Laws regarding abortion,[114] nudism,[115] homosexuality[116] and motorcycle crash helmets[117] are already receiving adverse judicial treatment, usually on other grounds. The American Civil Liberties Union plans a continued campaign against these laws and against drug legislation under the "body use" umbrella.[118] Although an extended critique of this approach is beyond the scope of this Article, we do not believe, as a general matter, that the courts are properly advised to keep the legislatures in touch with evolving positive morality, at least while social mores are in a state of transition. Another question would be presented if that evolution had rendered current legislation aberrational, but that is not yet the case with respect to the issues noted above. Abortion, homosexuality and drug abuse are currently being addressed by the public opinion process. In such circumstances, where an articulation of positive morality would be the gravaman of judicial interference, we believe judicial restraint to be in order.

In any event, neither the historical nor the positive morality approach has been utilized and supported by those attacking the marijuana laws. Instead they have been content to cry "fundamental right," "ninth amendment" and "right of privacy," and have expected the courts to go along. Much as we doubt the wisdom of current marijuana legisla-

---

113 See pp. 1005-10 *supra*.

114 *E.g.*, Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wis.), *appeal dismissed*, 39 U.S.L.W. 3144 (U.S. Oct. 12, 1970).

115 *E.g.*, Roberts v. Clement, 252 F. Supp. 835 (E.D. Tenn. 1966).

116 *E.g.*, People v. Roberts, 256 Cal. App. 2d 488, 64 Cal. Rptr. 70 (1967) (sodomy prohibition void as to consenting married couples, questionable as to consenting male adults).

117 American Motorcycle Ass'n v. Davis, 11 Mich. Ct. App. 351, 158 N.W.2d 72 (1968). *Contra*, Commonwealth v. Howie, 354 Mass. 769, 238 N.E.2d 373, *cert. denied*, 393 U.S. 999 (1968).

118 The Board of Directors of the ACLU is now contemplating a policy recommendation that the organization press for judicial recognition of the right to do with one's body whatever he wishes, including using drugs. Washington Post, June 8, 1970, § A, at 3, col. 5.

tion, we think such a facile perversion of constitutional doctrine too large a price to pay for its invalidation.

C. *Another Constitutional Perspective: The Police Power*

All this is not to say, however, that we do not think marijuana legislation to be susceptible to an acceptable constitutional attack. To the contrary, our objections to the usual arguments emanate from a concern for institutional responsibility. So long as the "fundamental rights" perspective is invoked—despite the extant divergent notions of fundamentality—we believe that only extensive historical and philosophical inquiry could and should now persuade a diligent judiciary, conscious of its limited role, that freedom of marijuana use is "essential for the orderly pursuit of happiness by free men." [119] To put it quite simply, the drug revolution is generally perceived as a contemporary phenomenon. When roaming in the vague expanse of substantive due process, however labelled, the courts should continue seeking to root their response in the mandate of history or in some other indicium of the "collective conscience of the people." Fundamentality suggests permanence, and drug use too much resembles a transient social problem to qualify.

At the same time, however, we believe that our central objection to the marijuana laws is of constitutional dimensions. We believe that those laws are irrational. We noted above that if they are entitled to the presumption of rationality, they should stand, at least at the present time. We do *not* think they are entitled to that presumption. We would impose the burden of justification on the state not because any fundamental "right" is affected but because the conduct prohibited is on its face private or self-regarding. Because the police power is designed to promote the *public* health, safety, welfare and morals, it can reach private conduct only if a public detriment is thereby avoided. On the one hand, if the conduct proscribed on its face involves other people or property, the courts must presume that the legislature rationally found an injurious effect. On the other hand, if the conduct proscribed does not prima facie affect others, the state must demonstrate a rational basis in fact.

It should be apparent that this is a modified version of the "inherent limitations" approach popular in the nineteenth century. Unlike the earlier conception, it does not preclude the state from reaching private conduct. Unlike the "rights" framework, it does not impose a heavy

[119] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

burden on the state to justify legislation affecting the protected right. nor does it burden the courts with the onerous balancing responsibility. It simply shifts to the state the original burden of demonstrating a rational factual nexus between the proscribed private activity and the public weal. If the state can sustain that burden, the inquiry is terminated. This requirement would not represent a significant change in current doctrine. First, it affects only a limited class of situations where the physical and social sciences have not yet established the relevant factual propositions but where the hypotheses regarding public effect that underlie the legislation have no rational basis in current data. In short, given the "no-evidence" situation with respect to prima facie private conduct, the state is not entitled to guess. Moreover, the principle is limited to legislation prohibiting allegedly injurious private conduct, and does not extend to a public policy that seeks to deter such conduct through nonprohibitive regulation or taxation.

It should also be noted that this "inherent limitation" approach, which has lain dormant for half a century, has already begun to forge its way into modern constitutional reasoning, especially on the state level. Particularly relevant are the motorcycle helmet cases,[120] to which we will return later.[121] In a recent case[122] holding unconstitutionally vague a Tennessee statute prohibiting nudist colonies,[123] a concurring[124] member of the three-judge district court located the true parameters of the decision:

---

[120] See note 117 *supra*.

[121] See text at note 131 *infra*.

[122] Roberts v. Clement, 252 F. Supp. 835 (E.D. Tenn. 1966).

[123] The court used an increasingly popular escape valve, holding the terms "nudist colony" and "nudist practices" unconstitutionally vague since, in light of the dictionary definition of "nude" and "nudity," they literally might be construed to "prevent nudism in health clubs, YMCA's school gymnasiums or other recreational systems, and possibly in the home." *Id.* at 843.

[124] Concurring in a separate opinion, Judge Darr correctly noted that "nudism" and "nudist" are distinguishable, grammatically and in common parlance, from "nude" and "nudity," and that it is inconceivable that the statute covers people who are temporarily nude. *Id.* at 846-47. Instead he opined that the statute constituted unwarranted invasion of the rights of privacy and of association of those who wish to engage in the cult of nudism. He employed the ninth amendment and the equal protection clause as well, cataloging all the recent Supreme Court cases speaking to privacy and association to support his holdings. But as we noted earlier, context is extremely important in constitutional decision-making, especially in an area as open-ended as "privacy." The sanctity of the marital relation—under any view of fundamentality—and the structural significance of political association and free expression of ideas are the dispositive overtones in the privacy cases. The "right to privacy" is a dependent concept, and this part of the judge's opinion, standing alone, is unconvincing.

> There is nothing in the record to indicate directly or by inference that any nudist colony or member thereof is the source of any injury whatever to the public welfare, health, or morals. To the contrary, the proof in the record asserts that the prime purpose of the nudist movement is to promote health of the body and mind.
>
> . . . .
>
> There is nothing in the proof whatever to indicate that nudism is other than an idiosyncratic, though innocuous, practice which engenders no harm or danger either to its members or society in general.[125]

It is in this "power" rather than the traditional "rights" framework[126] that statutes involving private consensual sexual conduct, abortion and drug abuse should be tested at both state and federal levels of government. Such an approach was theoretically unnecessary at the federal level until quite recently. Unlike the states, the federal government did not possess plenary police powers; since Congress had only delegated powers, it could not conceivably reach private conduct without exceeding permissible Article I bounds. Both the Harrison Act and the Marihuana Tax Act made the prohibited acts revenue-related to avoid this difficulty. However, it would be foolish to suggest in 1970 that there is no federal police power. The Article I grants of power have now become analytical equivalents of "promotion of public health, safety and morals," and the necessary and proper clause imposes no more than the traditional rational basis in fact requirement. The new Comprehensive Drug Abuse Prevention and Control Act of 1970 illustrates the

---

[125] *Id.* at 850.

[126] We do not pretend that the sought-after principle could not be expressed in terms of a right. Indeed the temptation is great to limit the government to the "other-regarding" rationale and to enunciate a correlative right to pursue happiness as one pleases as long as others are not harmed. *See* Note, *supra* note 109, at 254-55.

The difference in attitude is more significant than the semantic difference. The "power" approach in effect demands of the government, "Why on earth do you want to proscribe the conduct; why do you care?" The "right" approach suggests, "You can't do this unless. . . ."

In a highly complex society where little that we do and consider personal does not potentially affect other persons and the environment, a freewheeling statement of personal freedom is dangerous. For the same reasons that it was unwise to shackle the government between 1890 and 1937 so that it was unable to deal with complex economic problems, it would be foolhardy now to adopt a constitutional framework which might inhibit an attempt to deal with complex environmental and social problems. We subscribe to the contention that the police power is inherently limited but we are wary to overemphasize the nature of this limitation.

disappearance of the early limitations by abandoning the revenue masquerade and reaching drug use directly.[127]

If, under the intrinsic limitation theory or some other rationale, the state and federal governments were called upon to establish a rational scientific basis for marijuana legislation, we believe they would fail.[128] If the governmental objective were to prevent harm to others, they would be able to find no reliable scientific support for the proposition that marijuana use itself leads to violent crime or to use of hard narcotics which in turn leads to crime. Although they could prove that the drug has some adverse effect on psychomotor functions, the relationship between this fact and harm to others through automobile accidents is tenuous at best, especially when compared with alcohol.

If the state's objective were to prevent the user from injuring himself on the ground that he would otherwise become a drain on the state's resources rather than a contributor, the essential scientific hypothesis is that marijuana use "inevitably leads to excess" or to permanent physical or psychological incapacitation and therefore to dependency. Again, however, the government would be unable to establish a rational factual basis for this hypothesis. First, marijuana is not physically addictive and creates no serious psychological dependence, at least not as much as alcohol or tobacco. We do not believe the "addictive" qualities of alcohol are "inevitable" enough to justify prohibition and that the harm engendered by tobacco dependence is too remote to justify prohibition under the "dependency" rationale. Moreover, even if the addictive qualities of hard narcotics justify their prohibition, there is insufficient support for the "stepping stone" hypothesis to sustain marijuana prohibition on that ground.

Second, marijuana users do not run a significant risk of physical or psychological harm. Use of the drug produces no significant acute adverse psychological effects and probably contributes to no chronic ill effects as great as those produced by alcohol or tobacco. Nor would the government be able to establish a significant risk of psychological incapacitation. As to the hypothesis that the drug precipitates "psychotic breaks," the evidence is slight and at best establishes the proposition that the drug is not itself a creative force, perhaps accentuating psychological tendencies already present in predisposed individuals. There is no re-

127 Pub. L. No. 91-513 (Oct. 27, 1970).

128 The medical and sociological conclusious used in the following discussion are examined in depth and documented in pt. VIII, *supra*.

liable evidence that marijuana smoking produces any chronic psychological ill effects.

Some commentators have urged that the state has no power to protect the individual from his own stupidity and that the dependency rationale is merely a cover for unwarranted paternalism.[129] We are not prepared to go so far as a matter of constitutional law;[130] there may be circumstances where the risk of incapacitation is so substantial that criminal legislation is warranted. In fact, the line between self-regarding harm and societal harm, drawn in the breach by the dependency rationale, is increasingly difficult to draw as society becomes more complex and its members more interdependent. Moreover, whenever the subject conduct is colored by moral considerations, as are drug practices, where that line is drawn is determined not so much by logic or precedent as by the degree to which the society at a given time is willing to tolerate deviance. The difference between social tolerance in 1915 and 1970 is the best possible proof of this proposition. In short, this is not fertile ground for a neutral principle.

At the same time that we reject the general rule, we contend that in many individual cases the state cannot bear its burden of affirmative proof of the risk of incapacitation or other adverse social effect, albeit indirect. Setting aside for a moment the possible moral considerations, we do not think that either marijuana prohibition or the compulsory motorcycle helmet laws[131] can be justified on this basis. However, even if marijuana use is an appropriate matter for criminal legislation, the

---

129 See articles cited at notes 109, 118 *supra.*

130 See note 126 *supra.*

131 States that have upheld helmet laws have attempted to do so on an "other-regarding" rationale. We believe that such a justification is absurd. Unlike goggle requirements, helmet laws do not increase the motorcyclist's ability to maintain lookout and control. To the contrary, helmets tend to curtail hearing, peripheral vision and comfort. Feeling that persons should be protected whether they care to be or not, courts have fabricated very tenuous arguments to justify these laws.

> It does not tax the intellect to comprehend that loose stones on the highway kicked up by passing vehicles, or fallen objects such as windblown tree branches, against which the operator of a closed vehicle has some protection, could so affect the operator of a motor cycle as to cause him momentarily to lose control and thus become a menace to other vehicles on the highway.

State *ex rel.* Colvin v. Lombardi, 241 A.2d 625, 627 (R.I. 1968). Other courts have not attempted to raise hypotheticals but have merely stated that the law "bears a real and substantial relation to the public health and general welfare and is thus a valid exercise of the police power." Commonwealth v. Howie, 354 Mass. 769, 770, 238 N.E.2d 373, 374, *cert. denied,* 393 U.S. 999 (1968). So too would laws requiring citizens to brush their teeth three times daily.

rationality arm of the eighth amendment should prohibit imprisonment for violation of that legislation, even for five minutes.[132]

Now we come to the heart of the matter. It is the so-called "moral" considerations which we believe truly motivated the preceding generations of legislators responsible for marijuana prohibition. Once the Harrison Act converted narcotics abuse from a medical to a moral problem, marijuana was easily superimposed on the existing framework because of mistaken factual assumptions. At the same time, the undercurrent of American culture opposed to intoxicant use in any form reached the level of positive morality when combined by *criminal law* with the early twentieth century preference for cultural homogeneity. That is, because of the ethnic identity and small number of users, the stamp of illegitimacy successfully made the use of marijuana immoral; at the same time the stamp of illegitimacy had to be withdrawn from alcohol use because the large number of middle-class users were unwilling to comply.

It is because the law created for a half century a positive morality opposed to drug use that the state, defending its laws in court, might now rely on its duty to protect the spiritual and moral well-being of the community. The core of the police power being self protection, the state would adopt Lord Devlin's argument that where societal opposition to certain conduct on moral grounds is so pervasive that its widespread commission would weaken the social fabric and facilitate the breakdown of societal institutions, the society is justified in suppressing that conduct.[133] As applied to marijuana, the law's defense is that marijuana use frustrates productive participation in social, economic and political processes and that its widespread use would bring society grinding to a halt.

Even if we accepted Lord Devlin's justification for the legal enforcement of positive morality, which we do not,[134] it still would not justify marijuana prohibition. In the first place, as we shall note in the concluding section, the moral judgments supporting the early marijuana laws are no longer predominant. Especially at a time when a sizeable segment of society attributes many social ills to a mindless pursuit of material values

---

132 See text at and following notes 59-71 *supra.*

133 Sir P. Devlin, The Enforcement of Morals 9-13 (1965).

134 In H. L. A. Hart's debate with Lord Devlin on this general question, the specific issue being the defensibility of homosexuality laws, we think Hart was victorious. *See* H.L.A. Hart, The Morality of the Criminal Law (1965); Hart, *Social Solidarity and the Enforcement of Morality*, 35 U. Chi. L. Rev. 1 (1967).

and when that society becomes increasingly depersonalized, there is a growing preference for individual search for identity and spiritual renaissance. Second, in light of current use patterns, the effect of marijuana use on productivity and therefore on the social fabric is too speculative to justify criminal sanctions. In fact, the social fabric may suffer greater damage through continued prohibition than from legalization; that is, as the number of deviants continues to increase, the law cannot be successfully enforced and the authority of all law is endangered. As a larger and larger segment of the society ceases to view marijuana use as a moral question (except insofar as it is against the law), marijuana prohibition, like alcohol prohibition before it, cannot be sustained.

In conclusion, we do not believe that a state can sustain its burden of establishing a rational nexus between a person's private use of marijuana and either harm to others or incapacitating harm to himself. Moreover, the state may not legitimately rely on alleged harm to public morals. Public opinion, properly informed, would oppose marijuana no more than it opposes alcohol. And to the extent that marijuana use is inconsistent with prevailing positive morality, compliance with that morality is not a legitimate aim of the criminal law as a matter of political philosophy or constitutional law. As Justice Brandeis eloquently noted in his famous dissent in *Olmstead v. United States:*

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and his intellect. They knew that only a part of the pain, pleasure and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.[135]

XI. Legislative Reconsideration: 1965-1970

With the public opinion process in full operation for the first time in the fifty-year history of American marijuana prohibition, great pressure for legislative reform developed at both state and federal levels.

---

[135] 277 U.S. 438, 478 (1928).

Innumerable public[1] and private[2] organizations have advocated reduction of marijuana penalties; some have urged that the drug be legalized.[3] Several states and the District of Columbia have responded by de-escalating penalties, especially for first offense possession.[4] Unfortunately, however, most of these "reforms" smack of tokenism. On the federal level, the Dodd bill[5] now pending before Congress incorporates many major reforms, but it too remains grounded in many of the old misconceptions and outworn phrases that characterize the earlier legislation.

On the state level, the issue has become stalemated because of growing legislative distaste for student unrest. Consequently, the legislatures have simply reformed the most obnoxious parts of the old laws—the outrageous penalties. Apparently the law-making bodies feel that even an open inquiry into less restrictive legislation would resemble capitulation to another "nonnegotiable demand." The new rationale for this resistance is the possibility that some of the questions unanswered today will be answered tomorrow. As of this writing, the legislatures have stiffened against public opinion in preservation of the status quo.

There are two conspicuous examples of this political retrenchment. In 1968 the Governor of California appointed a blue-ribbon commission to study the state's drug laws. When the news leaked that the commission intended to recommend legalization of marijuana, the commission was forthwith disbanded.[6] Similarly, the National Commission on Reform of Federal Criminal Laws performed the monumental tasks of identifying the governmental interests in drug prohibition and integrating existing drugs into the scheme according to their effects. The Commission classified drugs as dangerous, abusable and restricted on the basis of their potential for harm, requiring an affirmative demonstration of such potential as a precondition for classification. Yet after objectively reviewing the scientific data on marijuana and concluding, "*candidly, we do not know how harmful marijuana is*,"[7] the Commission recom-

[1] *See, e.g.*, THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: NARCOTICS AND DRUG ABUSE 27 (1967); Washington Post, June 20, 1970, § A, at 17, cols. 5-8 (Canadian drug commission).

[2] *See, e.g.*, J. KAPLAN, MARIJUANA—THE NEW PROHIBITION (1970); Washington Post, May 23, 1970, § B, at 9, cols. 7-8 (United Presbyterian Church General Assembly).

[3] J. KAPLAN, *supra* note 2, at 2; Washington Post, *supra* note 1.

[4] See Appendix A.

[5] S. 3246, 91st Cong., 2d Sess. (1970).

[6] San Francisco Chronicle, Aug. 17, 1970, at 4, cols. 1-3.

[7] II WORKING PAPERS OF THE U.S. NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, STUDY DRAFT OF A FEDERAL CRIMINAL CODE 1090 (1970) (emphasis original).

mended its inclusion as an abusable drug. Political acceptability is the only possible explanation for this ruse.

In the succeeding pages, we shall briefly analyze the pending federal legislation and the provisions of the recently enacted Virginia law as illustrations of current legislative response, reserving our suggestions for a desirable legislative approach for our concluding section.

A. Virginia Legislative "Reform": Publicity Begets Tokenism

It is fitting that the most objectionable provision contained in Virginia's drug laws, that pertaining to the illegal possession of marijuana, sparked a controversy which eventually culminated in a general reform of the state's entire scheme of drug control in the spring of 1970.

The controversy centered around a twenty-year-old ex-University of Virginia student, Frank P. LaVarre, who, on February 24, 1969, was arrested in a Danville, Virginia, bus station while enroute to Atlanta from Charlottesville, Virginia.[8] In his possession were four plastic containers of marijuana valued at $2,500 plus smaller amounts in a tobacco pouch and a shoe. Refusing to "cooperate" by disclosing the names of all university students whom he knew were using drugs, LaVarre's bond was set at $50,000.

Following a plea of guilty to possession of marijuana, LaVarre was sentenced on July 31, 1969, in the Danville Corporation Court to twenty-five years in the state penitentiary, five years suspended, and fined $500. The sentencing judge admonished him, "Now I want to say to you, young man, that you still have time to mend your ways and make a useful citizen out of yourself." [9] Presumably this meant that under Virginia law LaVarre, "who had never so much as stolen a hubcap," [10] would be eligible for parole in five years.

Although the trial was reported on the front page of the *Richmond Times-Dispatch*, the conscience of the citizens of Virginia was not awakened until several months later following the publication of an article in *Life* magazine,[11] which used the LaVarre case as an illustration of the nation's antiquated and inhumane drug laws. One suspects that

[8] The following account is taken from LIFE, Oct. 31, 1969, at 30-31; N.Y. Times, Jan. 3, 1970, at 14, cols. 1-2; Richmond Times-Dispatch, July 31, 1969, at 1, col. 6; *id.*, Dec. 19, 1969, § B, at 1, cols. 1-2; *id.*, Jan. 3, 1970, at 1, cols. 4-6; *id.*, Jan. 5. 1970, at 12, cols. 1-2 (editorial).

[9] LIFE, *supra* note 8, at 30.

[10] *Id.* at 31.

[11] *Id.*

all this publicity embarrassed the people of Virginia,[12] thus fostering general agreement that marijuana penalties were far too harsh.[13]

Such was clearly the belief of the Governor, who pardoned LaVarre on January 2, 1970, placing him on five years probation. This act was noted nationally[14] and applauded locally.[15] The existing law was criticized and reform was urged.[16]

The General Assembly responded, and a subcommittee of the House General Laws Committee held hearings.[17] At these hearings, both legislators and experts generally agreed that drug laws should be aimed primarily at dealers and should allow more leeway "for youngsters caught following a current fad." [18] Testimony also indicated that many persons arrested were never prosecuted because some Commonwealth's Attorneys felt that even the minimum penalty for unlawful possession was too great.[19] Many of the legislators believed that lighter penalties would encourage more uniform enforcement of the law.

Responding to these and similar pressures, the General Assembly enacted the Drug Control Act,[20] which was signed into law on April 5, 1970. The Act replaces the old Uniform Narcotic Drug Act[21] and is itself a comprehensive narcotic control measure. We shall deal here only with those provisions of the Act pertaining to cannabis sativa. The Act defines as separate substances marijuana and hashish. The former includes all parts of the plant, excluding the resin extracted from any part thereof; the latter is defined to include ouly such resin.[22] Such drugs may be manufactured and sold only subject to certain restrictions.[23]

The Act further provides for penalties for the unlawful manufacture,

[12] Mention was made of it in the Richmond Times-Dispatch, Dec. 19, 1969, § B, at 1, col. 1; *id.*, Jan. 3, 1970, at 1, col. 1.

[13] In December 1969 the Virginia Commission for Children and Youth recommended that penalties for the possession, use and sale of marijuana be sharply reduced and that the substance not be classified with "hard" drugs such as heroin. *Id.*, Jan. 15, 1970, § C, at 1, col. 7.

[14] N.Y. Times, *supra* note 8.

[15] Richmond Times-Dispatch, Jan. 5, 1970, at 12, col. 1 (editorial entitled "The Pardon").

[16] *Id.*

[17] *Id.*, Feb. 26, 1970, § B, at 4, col. 1.

[18] *Id.*, col. 3.

[19] *Id.*, Mar. 3, 1970, § B, at 1, col. 5.

[20] VA. CODE ANN. § 54-524 (Supp. 1970).

[21] Ch. 86, [1934] Va. Acts 81, *formerly* VA. CODE ANN. §§ 54-487 to -519.

[22] VA. CODE ANN. § 54-524.2(b)(16) (Supp. 1970).

[23] *Id.* § 54-524.58:1.

sale and possession of marijuana and hashish. Section 54-524.101 prohibits the knowing or intentional manufacture, sale or possession with intent to sell of a controlled drug, except as authorized under the Act. A conviction for a violation of this provision "may be based solely upon evidence as to the quantity of any controlled drug or drugs unlawfully possessed." [24] The penalty for first violation of this provision is imprisonment in the penitentiary for not less than one nor more than forty years, or a fine of not more than $25,000, or both. A second or subsequent offender is subject to imprisonment for not less than ten years to life, or a fine of up to $50,000 or both.[25]

The Act also prohibits the unlawful possession of marijuana and hashish; possession of hashish carries a more severe penalty than possession of marijuana. The initial conviction of any person illegally possessing marijuana is a misdemeanor punishable by a fine of not more than $1,000, or confinement in jail not to exceed twelve months, or both. Unlawful possession of hashish is designated as a felony carrying a penalty of not less than one nor greater than ten years in the penitentiary or, at the discretion of the jury or the court sitting without a jury, confinement in jail not to exceed twelve months and a fine of up to $5,000. A conviction for a second or subsequent offense involving the unlawful possession of either marijuana or hashish is punishable by imprisonment in the penitentiary for between two and twenty years or, at the discretion of the jury or the court sitting without a jury, confinement in jail up to twelve months and a fine of not more than $10,000.[26] The sale of marijuana or hashish by any person over eighteen to one below that age is punishable by imprisonment in the penitentiary for not less than five nor more than forty years, or a fine of not more than $50,000, or both.[27]

Although the Act has remedied the worst provision under the Virginia drug laws—that governing first offense penalties for the unlawful possession of marijuana—it did little else. The most disturbing aspect of the legislation is its continuation of one classification that includes both cannabis and the "hard" drugs. With the exception noted above, the illegal manufacture, sale (including sale to those under eighteen) and possession of marijuana and hashish are treated with equal severity as violations involving heroin, opium, morphine or cocaine. Only con-

[24] *Id.* § 54-524.101(a)(2).
[25] *Id.* § 54-524.101(b)(1).
[26] *Id.* § 54-524.101(c).
[27] *Id.* § 54-524.103.

tinuing ignorance about the pharmacological effects of marijuana could explain the failure to declassify. Embarrassed by the LaVarre case and its attendant publicity, Virginia legislators took the smallest possible step. They clearly continue to view the drug as vicious and consider those using it highly culpable.[28]

The legislation has two additional weaknesses even on its own terms. One of the main criticisms of the old law was that it was inflexible; in an obvious attempt to relieve the prosecution of proving intent to sell, the law provided that a person who unlawfully possessed more than 25 grains of the forbidden drug was subject to the most severe penalties.[29] Although the new Act requires an intent to distribute for possession offenses with severe penalties and does not stipulate a presumptive quantity, it too is bound to produce "embarrassing" results, since a conviction may be "based solely upon evidence as to the quantity of any controlled drug or drugs unlawfully possessed."[30] To avoid unjust punishment, such modifying language should be deleted, thus rightly placing upon the state the burden of proving intent to sell beyond a reasonable doubt.

Finally, the sentencing discretion left to the finder of facts has no meaningful bounds. The legislation reflects one of the most abominable conjunctions of mandatory minimum sentences and excessive, discretionary maximums that could have been devised. What can be said of legislative rationality when sale of marijuana is punishable by one to forty years at the whim of the trier of fact?

Similarly, by escalating the penalty drastically between first and second offense possession and retaining a distinction between possession and sale, the legislation reflects a continuing misconception about marijuana use and traffic patterns. Finally, the perpetuated severity of penalties is totally unsupportable under any interpretation of modern medical data. Only if marijuana use caused the user to murder instan-

---

[28] Delegate Walter B. Fidler summed up the argument for relatively light sentences for first offense possession and extremely tough ones for second and subsequent violations:

> This misdemeanor penalty on the first offense will straighten out most of the kids fooling with it . . . make them stop and think . . . scare them. . . .
>
> The ones who are really hooked on it will be back . . . we'll get them on repeat business [and imprison them upon a second offense].

Richmond Times-Dispatch, Mar. 3, 1970, § B, at 4, col. 6. *See also id.*, Mar. 15, 1970, § F, at 6, col. 1 (editorial).

[29] Ch. 535, [1958] Va. Acts 674-75, *formerly* VA. CODE ANN. § 54-516 (1966).

[30] VA. CODE ANN. § 54-524.101(a)(2) (Supp. 1970).

taneously would a second possession offense justify a twenty-year sentence and a first sale offense justify a forty year jail term.

B. The Dodd Bill: Half a Loaf

The House version[31] of the Dodd bill,[32] which had been shepherded through the Senate by Senators Dodd and Hruska in February, finally passed the House of Representatives on September 24, 1970.[33] If a conference version of the Dodd bill is enacted, it will take several small steps toward sanity in the area of narcotics abuse. Beginning with the Narcotics Rehabilitation Act of 1966,[34] Congress began reversing the progressively absurd extensions of the Harrison Act's original conversion of drug abuse from a medical problem to a law-enforcement problem. The 1966 Act included extensive provisions regarding the care and rehabilitation of the narcotics addict.[35] To a lesser degree the Dodd bill continues this trend of viewing drug abuse as a medical problem.[36]

The bill abandons the traditional method of control—taxation—in favor of direct regulation under the interstate commerce clause.[37] Dangerous substances are classified in different schedules according to criteria such as potential for abuse, acceptability for medical use, and degree of safety in use.[38]

The Attorney General, acting on the medical and scientific advice of the Secretary of Health, Education and Welfare, and a special Scientific Advisory Committee created by the law has complete power to remove or reclassify drugs within the four different schedules.[39] Each schedule has its own set of criteria for determining which drugs it should include. The schedules not only classify drugs but also determine, by reference to Title V of the bill, what penalties will be incurred by violators of the laws dealing with drugs of a particular schedule. Marijuana is included within Schedule I and is subject to the most stringent controls, largely on the grounds that it and the other drugs of Schedule I,

---

[31] H.R. 18583, 91st Cong., 2d Sess. (1970).

[32] S. 3246, 91st Cong., 2d Sess. (1970).

[33] 116 CONG. REC. 9162 (daily ed. Sept. 24, 1970).

[34] Narcotic Addict Rehabilitation Act of 1966, Pub. L. No. 89-793, 80 Stat. 1438 (codified in scattered sections of 18, 26, 28, 42 U.S.C.).

[35] 42 U.S.C. §§ 3401-42 (Supp. V, 1970).

[36] See note 47 *infra* and accompanying text.

[37] S. 3246, 91st Cong., 2d Sess. § 101 (1970).

[38] *Id.* § 202.

[39] *Id.* § 201. The Attorney General's power is limited in the House version. H.R. 18583, 91st Cong., 2d Sess. § 201(b) (1970).

like heroin and LSD, have little medical value and a high abuse potential.[40] The law does provide lower maximum penalties for trafficking in nonnarcotic Schedule I and II drugs, such as marijuana, than narcotic drugs—five years and $15,000 instead of twelve years and $25,000.[41] In addition, there is a special provision stating that distribution of a "small amount of marihuana for no remuneration" is punishable by imprisonment for a maximum of one year, a fine of $5,000, or both.[42] Possession offenses are divided into two types: simple possession, which is treated as a misdemeanor regardless of the drug involved,[43] and possession with intent to distribute, which is a felony and treated as a trafficking offense.[44] The bill also provides for controls on import and export[45] and for industry regulation.[46]

With respect to marijuana, the bill finally acknowledges the need for medical research and establishes a Committee on Marihuana to study the drug's pharmacological effects.[47] Second, with respect to drugs generally, and marijuana in particular, the bill reduces the outrageous penalties enacted in the 1950's. It would appear that Congress has finally recognized that severe punishments have little or no deterrent value.[48] The lawmakers may also have abandoned the "stepping stone" notion. The testimony of Dr. Stanley Yolles, former Director of the National Institute of Mental Health, that less than five percent of marijuana smokers go on to hard drugs, was stressed during debate on the bill.[49] The fact that this testimony was not seriously challenged indicates that Congress has finally focused on the possible harm *of marijuana* to the user as the primary rationale for its prohibition.

It is precisely on this point, however, that we find the first major defect in the Dodd bill. Marijuana continues to be classified with hard narcotics as a Schedule I drug, contrary to repeated testimony that marijuana is not a narcotic drug and has little or no harmful effects on the user.[50] Dr. Yolles, although opposed to legalization on the ground that

[40] 116 Cong. Rec. 797 (daily ed. Jan. 28, 1970).
[41] S. 3246, 91st Cong., 2d Sess. §§ 501(c)(1), (2) (1970).
[42] *Id.* § 501(c)(4).
[43] *Id.* § 501(e).
[44] *Id.* §§ 501(a)(1), (5), (c)(1), (2).
[45] *Id.* §§ 401-04.
[46] *Id.* §§ 301-09.
[47] *Id.* § 801.
[48] 116 Cong. Rec. 798 (daily ed. Jan. 28, 1970). *See also* Washington Post, July 23, 1970, § B, at 4, cols. 2-6.
[49] 116 Cong. Rec. 781 (daily ed. Jan. 28, 1970).
[50] *Id.* at 790-91.

medical knowledge was too tentative, particularly with regard to the drug's effects on a chronic adolescent user, stated:

> To equate its risk—either to the individual or to society—with the risks inherent in the use of hard narcotics is—on the face of it—merely an effort to defend an indefensible, established position that has no scientific basis.[51]

Our second major objection to the bill is its perpetuation of grossly dissimilar penalties for possession and sale.[52] As we noted above, users and traffickers tend to be the same people, and the professional pusher has little if any place in the distribution of marijuana, as the pattern of hand-to-hand exchange among friends is repeated on college campuses throughout the country. The relative fortuity that law enforcement officers may be able to obtain evidence of intent to sell in some instances of possession does not justify the disparity of penalties. Third, we agree with Senator Hughes that in matters of scheduling and in certain other areas, the Attorney General should not have the power to classify drugs without the permission of the Department of Health, Education and Welfare.[53] The classification of drugs as dangerous substances is a medical-scientific question, not a law enforcement problem. Although the Dodd bill calls for the Attorney General to act with the advice of HEW and the Scientific Advisory Committee, it does not require him to heed that advice.[54] Under the Dodd scheme the law enforcement mentality continues. An amendment, such as the one that was proposed by Senator Hughes during the Senate debate on the bill, allowing the Attorney General to reschedule only on a recommendation by HEW and the Scientific Advisory Committee, would insure that medical and scientific considerations would be definitive. The defeat of that proposal was a serious setback in making this bill a meaningful reform. The House version, however, includes most of the Hughes amendment, making HEW's recommendations binding on medical findings and expressly forbidding the Attorney General from overriding an HEW

---

[51] *Id.* at 791.

[52] *Compare* S. 3246, 91st Cong., 2d Sess. § 501(e) (1970) (possession) (one year, $5,000, or both) (probation without entry of judgment available under § 507 for those guilty of a first offense), *with id.* § 501(a)(1), (c)(2) (sale or possession with intent to sell) (five years, $15,000, or both).

[53] 116 CONG. REC. 770 (daily ed. Jan. 28, 1970).

[54] S. 3246, 91st Cong., 2d Sess. § 201 (1970).

recommendation that a drug not be controlled.[55] We can only hope that the House version prevails in conference.

In conjunction with a requirement that HEW have the ultimate control over essentially scientific and medical questions, the Committee on Marihuana which the bill would establish should be composed of individuals chosen by HEW with the advice of the Attorney General, instead of jointly.[56] The function of the Committee would be almost exclusively medical, social and scientific, and as such it should be constituted under the direction of HEW. The subjects of the Committee's research as outlined by the Dodd bill[57] should include a more definite set of matters on which the Committee must report including a specific determination about the real nature of marijuana and the degree of control, if any, required. It is absolutely necessary, given the tremendous public and official concern about marijuana, that we have a definitive statement on the drug as quickly as possible so that an intelligent public policy might finally be designed. Simple ignorance about the drug persists in the United States Congress, despite the overwhelming evidence of the relatively harmless nature of marijuana. Even the bill's sponsor went overboard: "Certain types of marihuana do dreadful things to people . . . . Marihuana is a personality changer. It is a mind destroyer." [58] Senator Dodd supported his statement by the latest sensationalist accounts of marijuana's crime-provoking and incapacitating tendencies—case studies on toxic psychoses suffered by soldiers in Vietnam.[59]

In conclusion, the Dodd bill, when compared with earlier statutes, reflects some of the major changes in the official view of marijuana which took place during the sixties. By 1970 it has been almost universally recognized that the number of users of marijuana has increased tremendously and that harsh penalties, including minimum mandatory sentences, do not deter. Also abandoned is the notion that marijuana is the "stepping stone" to hard drugs. Unfortunately the Dodd bill fails to reflect many other findings. There still persists a strong feeling that marijuana is seriously harmful, evidenced by the bill's classification of marijuana with heroin. Furthermore, the bill's punishment of "traffick-

[55] H.R. 18583, 91st Cong., 2d Sess. § 201(b) (1970).

[56] *See* S. 3246, 91st Cong., 2d Sess. § 801 (1970).

[57] *Id.* § 801(a)(1).

[58] 116 CONG. REC. 782 (daily ed. Jan. 28, 1970).

[59] *Id.* at 783. These studies may be meaningless. At one point Senator Hughes commented that under combat conditions he had become trigger happy without the aid of marijuana. *Id.* at 782.

ers" in marijuana more harshly than possessors reflects a continued misapprehension about the nature of the marijuana trade.[60] However, despite its shortcomings, the Dodd bill, especially through its Committee on Marihuana, leaves open the possibility of substantial changes in the legal status of marijuana in the future.

C. Postscript: The Dodd Bill Becomes the Comprehensive Drug Abuse Prevention and Control Act of 1970

As this Article was going to press, the House version of the Dodd bill was enacted by Congress and signed into law by the President as the Comprehensive Drug Abuse Prevention and Control Act of 1970.[61]

XII. Conclusion: Before the Fall

Many pages ago we promised that the legal history of marijuana prohibition was in itself an interesting story; we hope we have kept that promise. We also suggested that marijuana prohibition would be an appropriate vehicle for study of two broader phenomena—the public policy formation process and the evolution of American cultural values in the twentieth century. Having indulged, insofar as law review style would permit, in the sheer joy of telling a good story, we now turn to the more pretentious purposes of our Article.

A. Public Policy Formation Process

The legal history of marijuana prohibition may reasonably be divided into four phases. The first phase, roughly from 1915 to 1930, witnessed sporadic localized legislation in a substantial number of states criminalizing sale and/or possession of marijuana. This phase followed hard on the heels of nationwide anti-narcotics legislation and coincided almost perfectly with the ascendency of alcohol prohibition. During the second phase, from 1932 to 1937, the drug was suppressed nationally, by every state and by the federal government. The third phase, the decade of the 1950's, was characterized primarily by escalation of the

[60] *See* Joint Legislative Committee for the Revision of the Penal Code, California Legislature, Drugs—Part I: Marihuana (Proposed Tent. Draft & Commentary 1968).

> Our data indicate that over 20% of the users of marihuana have sold the drug on occasion in small quantity to friends who tacitly agree they will return the favor if the drug becomes available to them in the future.

Id. at 153.

[61] Pub. L. No. 91-513 (Oct. 27, 1970).

penalties: The final phase, beginning around 1965 and still continuing, is characterized by vigorous public debate and deescalation of the penalties, and may eventually result in legalization.

During the first phase, the initial emergence of the anti-marijuana public policy, the public opinion process was inoperative. Since the group of people directly affected was small and inaccessible, the matter attained the lowest possible visibility in the decision-making process.[1] Yet the early marijuana legislation probably comported with latent public opinion, or perhaps even general community consensus, in several respects.

In the first place, the lawmakers assumed that the drug was addictive and that its consumption precipitated crime, pauperism and insanity. Accordingly, public interest in, and desire for, its suppression might well have been considered settled by the earlier anti-narcotics legislation. At the same time, however, there does not appear to have been any interest in substantiating these assumptions. Although primary source materials on the question are scarce and difficult to locate, we have found no indication that the legislators consulted scientific data; instead they relied on sensationalistic police and newspaper identification of marijuana with crime. Naturally these assumptions went unchallenged; the only segment of the public likely to challenge them was small and outside the public opinion process.

From another perspective, however, the true pharmacological effects of the drug may have been immaterial to a decision to suppress it. Since marijuana was an intoxicant consumed only by immigrant Mexicans in the South and West and by ghetto Blacks in the East, the legislators might have accurately reflected a public hostility to the drug wholly without regard to its pharmacological effects. It should be noted in this respect that this first phase of marijuana prohibition occurred simultaneously with the successful thrust of alcohol prohibition. During this period, the legislators might well have assumed that public policy condemned the use of intoxicants in any form.

Moreover, to the extent that alcohol prohibition was motivated, or at least quickened, by ethnic prejudice against the Irish, marijuana prohibition, once proposed, was an inevitable by-product of anti-Mexican

[1] Either a large number of affected persons or high public visibility, and usually both, is a necessary condition for public interest. And, of course, public interest is a necessary condition for the operation of the public opinion process by which the interested segment of the public communicates its opinions or attitudes directly or indirectly to the decision-maker.

feeling. In fact, the ethnic factor might well have been the *primary* force. Since marijuana was so strongly tied to the newly immigrant Mexican minority, and to a lesser degree to urban Blacks, the melting-pot syndrome, so prevalent at this stage of American history, predisposed the issue without regard to the drug's effects. Designed to foster cultural homogeneity, and in particular the Protestant Ethic, marijuana legislation may well have reflected an automatic public antipathy to any deviant tendency of newly immigrant, sometimes despised, minorities.

At the time of its passage, therefore, early marijuana legislation may have fit well in a society assigning moral condemnation to use of narcotics, apparently opposing any consumption of intoxicants, and striving either to suppress or to assimilate deviant minorities. With the repeal of Prohibition, however, the bubble of the anti-intoxicant rationale burst. Too many people who acquiesced in alcohol prohibition to eliminate the abuses of excessive consumption were unwilling to comply with a public policy prohibiting any use at all. Perpetuation or extension of marijuana prohibition in light of this new alignment of public attitudes now depended either on the drug's allegedly insidious effects or on the melting-pot syndrome. Yet, there was still no visible public interest in marijuana, and the courts were moved neither to scrutinize the legislatures' factual suppositions nor to question their motives.

And so it was that by 1931, twenty-two states had enacted prohibitionary marijuana legislation. It was during the ensuing decade—what we have labelled the second phase of this history—that this primarily regional phenomenon twice achieved national proportions. That is not to say, however, that the question even once received national *attention;* in fact, anti-marijuana public policy was established on a national scale even more effortlessly than it had been on the local scale.

The first of these two events was the inclusion of marijuana in the Uniform Narcotic Drug Act, submitted for state adoption by the National Commissioners on Uniform State Laws in 1932. The war against the evils of narcotics had by now become old hat and was waged in this forum by a few doctors interested in establishing uniform obligations and by the newly created Federal Bureau of Narcotics. A low-keyed, uncomplicated drafting process transpired in committee, the basic provisions having been appropriated from the 1927 New York narcotics statute. The final committee draft, including an optional marijuana provision, was rubber-stamped by the Commissioners and subsequently

passed as a uniform afterthought by thirty-five states in the succeeding five years.

The same factual suppositions and ethnic aspersions characterizing the earlier state laws now colored the limited references to marijuana accompanying passage of the Uniform Act. There were two significant differences, however. First, legislative unawareness of marijuana as a separate substance was exacerbated by its inclusion as just another "narcotic" in everyone's new anti-narcotics law. Second, although the Federal Bureau of Narcotics played a superfluous role in the passage of the Uniform Act, it initiated an educational campaign against narcotic drugs, and included marijuana.

Once the Uniform Act had been successfully inscribed on the statute books, the Bureau turned its propaganda arsenal on marijuana alone. Although largely unsuccessful in arousing public interest in the marijuana "problem," the Bureau created *in the Congress* a "felt need" for federal legislation.[2] Again the public opinion process remained dormant while Congress passed still another law, the Marihuana Tax Act—this time to fill a nonexistent enforcement void against the abuse of a drug known only to a small, isolated segment of the population. Once again, the republic's duly authorized decision-makers nonchalantly criminalized possession of a drug without a factual inquiry even though this shortcoming was brought to their attention. The Act was hastily drawn, heard, "debated" and passed.

Thus, by 1937, marijuana had joined heroin, cocaine, morphine and opium in state and federal codes as a prohibited substance. As in 1914, new "stateways" were created and "folkways" gradually followed; users of the "killer weed" joined the despicable "dope fiend" as purveyors of evil in the public mind as well as in the public law.

The 1950's witnessed an explosion of the psychology of fear—repression of political and cultural deviation was the order of the day. It is not surprising, then, that the criminal law orientation toward drug

[2] Differences in intensity of commitment can explain how stateways can create new folkways. For example, the many may have no view at all and be influenced by intense leaders. Such was the case with Congress, and in turn the public in 1937, when the intensely committed Bureau of Narcotics singlehandedly created the Marihuana Tax Act. One scholar of the public opinion process has stated that even where many people have convictions opposed to the law,

> the law may be carried through by a comparatively small body of very earnest men, who produce a disproportionate effect by the heat of their conviction; while the bulk of the people are apathetic and unwilling to support the effort required to overcome a steady passive resistance to the enforcement of the law.

A. LOWELL, PUBLIC OPINION AND POPULAR GOVERNMENT 15 (1926).

use, initiated with regard to narcotics at the turn of the century and to marijuana two decades later, reached full cresendo at the same time. For the first time in our national history, there was public interest in narcotic drugs. There apparently was an increase in drug abuse in the late forties, and the public mind was ripe for the onslaught of propaganda disseminated by the Bureau of Narcotics. In the paranoid atmosphere of the period, the Bureau's call for harsher penalties was a soothing one. Congress responded with the Boggs Act and many states followed suit.

At the same time, however, the primary rationale for the illegal status of marijuana—the assumption that it was an addictive, debilitating drug—was disproved. In its stead, a new factual premise appeared—that the use of marijuana was a stepping stone to the use of heroin and other "hard" drugs—a rationale that the Bureau had expressly rejected in 1937. Despite medical testimony unequivocally differentiating marijuana from hard narcotics, the legislatures were in no mood to quibble; marijuana's pernicious effects, although once removed, equally warranted escalated penalties. The peak was reached with the passage of the Narcotic Control Act of 1956. This time public interest had disappeared, earlier doubts about the nature of marijuana had subsided, and Congress mindlessly escalated the penalties indiscriminately for narcotics *and* marijuana laws. Several states followed suit, and the courts, both state and federal, unquestioningly administered these harsh laws and sanctioned the dubious techniques by which they were enforced.

Thus, by 1956, possession of marijuana was a felony practically everywhere, and judges were generally precluded from mitigating the long prison terms prescribed by statute. Such legislation had never been supported by authoritative scientific inquiry regarding the pharmacological effects of the drug.

Then it was 1965. As more and more middle-class campus youths experimented with the drug with no apparent ill effects, so did their friends . . . and theirs . . . and so on. By 1970 between ten and fifteen percent of the American middle class had violated the marijuana laws, sometimes overtly.[3] For the first time since the anti-marijuana policy initially appeared, a substantial segment of the public was directly affected. Public interest naturally increased even beyond those immediately affected as the marijuana issue achieved higher visibility. The public opinion process had finally lurched into motion.

---

[3] See pp. 1096-1100 *supra.*

In calmer times, the authors believe that legislators would not be resisting reconsideration of the marijuana issue to the degree that they have thus far. A significant crosscurrent of public opinion, colored by preference for individuality and privacy, has swept aside many of the public policies which took root in the same soil as twentieth century drug policy. Today while we have expanded government's role in the economy of the nation, we have seen a consistent retreat from the glib paternalism that underlay laws restricting sexual practices among husband and wife, harsh definitions of pornography and the development of specialized courts for juveniles in which the state would, without benefit of established legal procedures, guard and protect the best interest of the child. To a large degree, the federal courts have been the vehicle by which this crosscurrent has affected public policy. Yet, in deference to the political process, the courts have thus far refused to intervene on the marijuana issue.

As the number of deviants continues to increase, fundamental alteration of drug policy, particularly with regard to marijuana, is inevitable. Because of the volatility of the issue and the current overextension of the courts, we believe that such alteration should be achieved in the legislatures. Yet despite an overwhelming volume of scientific criticism of existing law, legislatures have taken only token action. The source of the law is now its defense—ignorance. Even though independent researchers have disproved all of the old assumptions, the status quo is maintained on the ground that the evidence is not yet in on long-range effects of repeated use. A poor basis for a criminal law in any case, this argument is defectively open-ended. Because concerted scientific research is occurring only for the first time, waiting for these conclusions could preserve the status quo for a decade or more, even though no positive evidence supports prohibition.

If the legislative process continues to stall, however, we predict that the judiciary will no longer restrain itself. As some comments and peripheral rulings from the bench have already demonstrated, the courts too have been affected by the changing use patterns, media commentary, and commission and academic recommendations. Although we would prefer that the courts not be forced to enter still another political thicket, we do believe, as illustrated above, that a declaration of unconstitutionality is analytically justifiable.

To summarize, during the two criminalization stages, 1915 to 1937, the public opinion process was not invoked because of the number and

identity of marijuana users. Accordingly, the political decision-makers made incorrect factual assumptions which went unquestioned by the judiciary and the general public. Nevertheless, criminalization probably comported with general community values if those assumptions were made, and even perhaps if they were not.

Apart from its general consistency with community instincts for paternalism and preference for cultural homogeneity, the new law had a significant independent effect. As had been the case with the earlier anti-narcotics laws, the very existence of a criminal law generated a positive morality where none had existed before. In Sumner's terms, the new stateway *did* create a new folkway with respect to marijuana. This could occur with regard to marijuana and not to alcohol precisely because of the wholly different number and character of the users. We conclude that where a deviant group is outside the public opinion process and the dominant group is unfamiliar with their deviant conduct, stateways, in the form of prohibition of such conduct, *can create folkways* because of the presumption of immorality attaching to violation of the criminal law.

So long as the class of users remained constant, the public opinion process remained inoperative, the factual assumptions remained unquestioned (or new ones were advanced to support the law), and the moral judgment fed upon itself. Thus, the 1950's witnessed an incredible escalation of penalties and withdrawal of judicial discretion unmatched at any other time in American jurisprudence.

In the late 1960's, however, the number and social identity of the deviants changed radically. The public opinion process became operative on the marijuana issue for the first time in its history, generating massive scientific inquiry into the drug's effects. As a product of this process, it is at least clear that there is no longer a community consensus in favor of marijuana prohibition. First, the continuing consensus regarding narcotics use has been demonstrated conclusively to be factually inapposite to marijuana. Second, there is a strong crosscurrent of cultural values preferring privacy, individuality and cultural pluralism inconsistent with the value preferences underlying the marijuana laws. Although we will explore the effect of this phenomenon below, it is important to note now the growing legal recognition of these values in related substantive areas like sexual practices and in the rules of criminal procedure.

It is too soon to state with any assurance that the crosscurrent will

become the consensus. The law itself still exerts a continuing influence; many a middle-class parent intones haplessly that marijuana use is against the law and must therefore be bad; indeed, so does the Attorney General of the United States.[4] The current polarization of society has tended to defer final resolution of this value clash and therefore of the marijuana problem.

Nevertheless, we do not believe that the broader social polemics should obscure rational consideration of the marijuana problem. This Article was designed to provide the historical perspective which we believe so material to this consideration; hopefully, an understanding of the origins of the law will set aside some irrelevant issues and permit incisive consideration of the core issues, one of which is the nature of the contemporary value crosscurrent, to which we now turn.

B. Twentieth Century Values and the Marijuana Laws

As we suggested at the outset and again in the preceding discussion of the policy formation process, the history of marijuana regulation presents an ideal case study of the evolution of American cultural values in the twentieth century. Basically it describes an alteration in the individual's sphere of independence in the society.

In a time when the individual's economic and political independence had not yet been suffocated by the weight of massive impersonal institutions, society insisted on conformity to the dominant personal moral code. Because of the blessings of a free economy, economic eccentricity was encouraged in the ideological trappings of the self-made man. Similarly, the political reforms of this period—the initiative, referendum and recall—manifested faith in individual political judgments of every man.

At the same time, however, each individual's fulfillment of his political and economic promise demanded his adherence to the tenets of the Protestant Ethic—hard work and productivity. To insure a continuing march toward political and economic progress, society tightened the reins on personal behavior. Every new immigrant class had to be integrated into the system, to learn the American way. There was no room for "misfits." Society had the *duty* to keep the individual from

[4] "One thing young people should really recognize is the fact that marijuana is illegal, even possession is illegal, and they should realize that their future in society can be damaged severely." Attorney General John N. Mitchell, *quoted in* NEWSWEEK, Sept. 7, 1970, at 22.

falling by the wayside. Thus, the juvenile court movement began in 1899 to reach out early and reform the errant youth; society was his true parent. Similarly, the temperance and anti-narcotics movements, and the later anti-marijuana "movement," were designed to protect the individual, particularly the new immigrant classes, from inhibiting their own capacity to reap the benefits of the American economic and political system.

Naturally, restraints on individuality were not always rationalized in this way. There was a certain self-righteousness about the moral superiority of the American way. Thus, the insistence on assimilation of immigrant ethnic groups was designed not only to stimulate their own success but also to protect the superior, divinely inspired, American way from contamination. For example, as we noted above, many Americans who supported alcohol prohibition were opposed not so much to the drinking of alcohol but rather to the licensed saloon and the political power of the Italian and Irish minorities who used the saloons as the center of their social orders in the new country. In the same way strong ethnic bias against the Chinese on the West Coast was the prime motivation for those states' early anti-opium laws. Likewise in the Southwest the primary impetus for the criminalization of marijuana use was prejudice against the growing Mexican communities in those states. Laws were passed against the Mexicans and "their weed."

The point cannot be understated that much of the "reform" legislation at the turn of the century, including the sumptuary laws, was designed to protect and extend the dominant way of life—that of Protestant, rural, white, Scotch-Irish and English America. That way of life was making the country great, and the succeeding waves of immigrants had to be assimilated as quickly as possible, for they posed a threat to the dominant order. Much of the prohibitionary movement was designed to meet that threat—to root out cultural differences and impose the dominant values. Open prejudice and public ethnic slurs commonly accompanied passage of the drug and liquor laws and other paternal legislation. Similarly, in 1912, Theodore Roosevelt could run for President with "Onward Christian Soldiers" as his campaign song.

Utilizing a police power defined broadly in terms of self-protection, the dominant segment of society sought to protect itself from contamination and to promote homogeneity. Legislatures and reviewing courts focused ouly on society's interests, not on the "right" of the individual to deviate from the majority's cultural norms; the courts were

essentially closed to assertions of minority rights. Similarly, the criminal process was administered not from the perspective of protecting the "rights" of the criminal defendant but rather of protecting the society against deviance. Thus, during the period of Prohibition enforcement, fourth and fifth amendment rights were consistently ignored.

This, then, was the cultural milieu in which early twentieth century drug legislation took root and the continuing effect of which also fostered the later suppression of marijuana. The society imposed severe restraints on individual personal and social conduct in order both to reap the societal benefits from the individual's supposed economic and political independence and to perpetuate the dominant cultural outlook.

In contemporary society, however, the perspective is quite the reverse. Economic and political institutions have become increasingly omnipotent; the individual is increasingly dependent on the system rather than the system dependent on him. More and more the individual views himself as a cog in the massive, impersonal, technological machine, the gears for which are beyond his grasp. Consequently, a higher value has been placed on personal fulfillment in the noneconomic, nonpolitical sphere; a new emphasis has been placed on personal identity, and the individualized, deinstitutionalized pursuit of happiness. Concurrently, as economic productivity demands less of each individual's time and energy, and the work-week continues to shorten, a leisure value has emerged. The society has less and less economic interest in what the individual does with his leisure time.

Particularly in the last decade, this new value preference has been recognized in laws and judicial decisions recognizing the individual's right to differ—intellectually, spiritually, socially and sensually. A new, sometimes extreme, emphasis is placed on individual privacy; as an incredibly sophisticated technology continually expands society's control over the individual, he is insisting that the wall around his private life be fortified. Similarly, the search for identity has extended to groups of individuals; in stark contrast to the fervent implementation of the melting-pot syndrome fifty years ago is the increasing group awareness in an admittedly pluralistic society. The proliferation of Black and "Chicano" awareness groups and the resurgence of the American Indian testify to the renaissance of group identity and the bankruptcy of the assimilation ideology.

We believe that marijuana prohibition is as inconsistent with this new cultural climate as it was predictable under the old. As illustrated in

related areas, the focus has shifted decidedly from society's interest in protecting itself from deviance to the individual's right to deviate. Laws proscribing deviant forms of private sexual conduct—nudism, homosexuality—are being repealed or invalidated. Laws interfering with familial decision-making—abortion, contraception, miscegenation—are meeting the same fate. Laws rigidly defining the woman's place in the society and restricting her individual pursuit of happiness are under attack. Society's highly paternalistic treatment of adolescents—reflected in the pre-1967 juvenile court system and in the hands-off policy regarding school administration—is being reversed. Society's highly moralistic treatment of narcotics addiction, generated by the Harrison Act in 1914, is being replaced by a more humane medical outlook. Finally, official and unofficial suppression of ethnic and racial differences—and the related prejudice—has been replaced by official encouragement of such differences and suppression of discrimination, both public and private.

In sum, then, we believe that values which fostered and sustained the criminalization of marijuana have changed radically in the last decade. In fact, the widespread violation of the marijuana laws is itself proof of that proposition; the users and many nonusers see no possible societal objection to an individual's use of an apparently harmless euphoriant. In the words of Leroy Mitchell, whose combat with the law provides an interesting comment on the modern dangers of the "killer weed," [5]

[5] People v. Mitchell, 244 Cal. App. 2d 176, 52 Cal. Rptr. 884 (Dist. Ct. App. 1966). Advised by Leroy's distraught wife that he smoked marijuana every evening, the police, with her consent, entered the house and arrested Leroy. He was very cooperative with the officers, showing them his hidden supply and his growing plants. Forgiving his wife, Leroy readily admitted using and growing marijuana. At trial, his sole defense was that marijuana was an integral part of his daily life, forming the crux of his religious practice.

> "In the sense that I believe that religion is related to law or constitutionality, I was exercising freedom in my own home to smoke something actually better than tobacco." His religious ritual was, "Get up in the morning and have breakfast, lunch at 12:30 evening meal, say between 6:00 and 7:00 and a pipe of marijuana about 8:00 or 9:00."

Id. at 180-81, 52 Cal. Rptr. at 885.

To Leroy's free exercise claim, the court responded that he had "offered no evidence that his use of marijuana is a religious practice in any sense of that term." *Id.* at 182, 52 Cal. Rptr. at 886. The first amendment protects only institutionalized religion. Poor Leroy. "In defendant's discourse to the jury," the court continued, "he did refer to the Bible and to the practices of some Hindus, but in essence *he was expressing only his own personal philosophy and way of life.*" *Id.* (emphasis added).

In Leroy's defense, we might then ask, why not? Is there no constitutional precept that the state cannot make his "way of life" a crime, much less a felony unless his private

> I have heard the problems of marijuana discussed many times and it has come to my attention that actually the only problem that we are having with marijuana is that young people are being faced with the attitude of criminality . . . .[6]

As we noted above, there is not yet a community consensus on this new value crosscurrent, and there probably will be none until the society becomes depolarized. At the same time, we do predict that the marijuana laws will not long exist in the current climate of changing values *and* increased use among a sizeable segment of the "respectable" public. We should emphasize this latter point. As lawyers by profession, we may tend to focus on and occasionally overestimate the force of the evolution of statutory and case law in changing the legal and social order. For that reason, we note without hesitation that the most potent force for change in the drug laws is the incredible increase in drug use, especially among the middle-class young. No society can long afford to define so large a segment of its population as criminal. It is highly unlikely that this one will continue to do so. This current increase in marijuana use stands in stark contrast to the public attitudes and opinions about drug use which were prevalent as late as 1956. And it is this phenomenon which in turn will hasten a wider community recognition of the emerging values.

Perhaps the single best illustration of the mutual influence of these two factors on public attitudes toward drug use in the last ten years is a recent broadcast commentary on the apprehension of Robert Kennedy, Jr. and R. Sargent Shriver, III, for possession of marijuana. After showing pictures of the boys and their prominent families emerging from a Massachusetts juvenile court, the commentator noted[7] that this case was unusual only in that famous families were involved. He continued that today it is commonplace indeed for parents to accompany their children to court on drug charges. Today a drug charge is "com-

---

pursuit of happiness bears some reasonable relationship in fact to some public evil. Sure, Leroy might have been bugging his wife. But she had recourse to civil remedies. Is the chance that Leroy's social and personal use of marijuana would hurt him or anyone else great enough to warrant a felony conviction? We think not; at least we think the courts should ask.

[6] *Id.* at 180, 52 Cal. Rptr. at 888.

[7] "This case is not unusual; more and more parents across the nation find themselves going to court with their children on drug charges. It's becoming an incident of modern living." Walter Cronkite, CBS Evening News, August 8, 1970.

monplace;" in 1958, it was unthinkably criminal. A later commentator wondered whether we could afford "a whole generation of criminals."[8]

As must be clear by now, we do not think this society will or ought to perpetuate this disastrous situation. Either by nonenforcement, repeal or judicial invalidation, the law will be changed. Throughout the earlier discussion of possible constitutional objections to the marijuana laws we expressed our policy preference for judicial restraint in this area; although existing constitutional doctrines would support a judicial invalidation, we prefer legislative reevaluation. We believe that rational legislative reconsideration would result in partial or total repeal and that this task should be commenced immediately. For that reason we will suggest what we consider the minimal acceptable legislative response and the optimum response.

1. The Premise

Whatever the constitutional mandate, we believe legislators ought to begin as a matter of policy with the assumption that conduct harmful only to the actor is not a legitimate subject for the criminal law. In the first place, notions of blameworthiness, if not immorality, should underlie any criminal statute. Yet contemporary western man increasingly regards as blameworthy only that which directly or indirectly harms others; the presumption ought therefore to be that conduct harmful only to the actor should be deterred through means other than the criminal law.

Second, to the degree that the society continues to render moral judgments regarding purely personal conduct, we do not agree with Lord Devlin that the criminal law is ever the appropriate vehicle for the imposition of the dominant personal moral code. In this day of rampant relativism, imposition on the minority of the dominant personal morality is presumptuous and suspicious.

We subscribe the emergent value preference for individuality and freedom of choice described above and share Justice Brandeis' warning that government is most dangerous when it purports to "help" the individual citizen.[9] In fact, we believe that contemporary society is ill advised to insist on homogeneity of conduct, even where the majority continues to attach moral blame. The danger of regimentation and stul-

[8] CBS Evening News, August 19, 1970. *See also* K. Erickson, Wayward Puritans (1966).

[9] Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

tifying conformity is one of the paramount disutilities of modern technological society. We feel it encumbent on the legislators as designers of the social order to promote the widest possible latitude for private conduct so as to encourage the diversity that fosters the creative element in any productive society.

A third related reason for this policy premise is that the benevolent societal goal of protecting the actor from his own folly, if it should be effectuated at all, can be achieved by means other than the criminal law. Indeed, use of the criminal law for this purpose is generally less effective than other means because of the difficulty of enforcement, which itself is our final rationale for the initial premise. Laws prohibiting purely personal or consensual conduct have an ancillary effect which causes more harm to the social fabric than the mere offensiveness of deviant personal conduct—the inevitable collision of law enforcement techniques with constitutional limitations. Sacred protection of the individual's right to privacy is, to us, a far more noble end than the protection of the individual from his own folly, as defined by the dominant segment of society.

We do not pretend to have settled or even enriched the continuing philosophic debate regarding "crimes without victims." However, since the ouly rationale remaining for marijuana prohibition is that it is harmful to the user, legislative adoption of our position on this issue would dictate partial or total repeal of existing law. It should be noted that an increasing number of lawyers, philosophers and social scientists have taken this position. We recommend it to the state and federal legislatures.

2. Statutory Recommendations

We offer first a statutory scheme which might be palatable to legislators who still fear that further study will reveal that marijuana use has long-range ill effects. While we do not think this fear justifies perpetuation of the existing statutes, it will justify a scheme which permits those who choose to smoke marijuana to do so but which inhibits spread of the conduct; that is, it simply takes the user of marijuana out of the criminal process.

For this minimal solution, we propose:

a) prohibiting possession of more than four ounces of marijuana unless the defendant can show that it was possessed solely for personal use;

b) prohibiting public use of the drug;

c) proscribing driving or operating any other dangerous machine while under the influence of the drug;

d) proscribing transfer to any one party of more than four ounces of marijuana;

e) prohibiting transfer of any amount to persons below the age of sixteen;

f) punishing all violators as misdemeanants.

The prohibition of possession or sale of more than four ounces of the drug fulfills the possibly justified legislative goal of limiting mass distribution and proselytizing the use of marijuana. We feel that none of the important values of right to privacy or individual freedom are involved when one individual goes beyond his own private use of the drug to proselytize. However, as we have seen above, the realities of the marketplace are such that the average user might sell to friends to support his own use. Our arbitrary choice of four ounces as the cut-off point for the criminal process reflects an assumption, based on current trade practices, that it will keep the small seller out of the criminal process while ensnaring the mass distributor. Of course, this figure should be raised or lowered if prevalent market conditions change.

Two explanatory notes are in order. First, we choose a presumptive amount approach in order to avoid the complexities of affirmative proof of intent to sell and yet to allow some flexibility for the court to release a defendant unjustly trapped by our arbitrary figure. Second, we acknowledge the inconsistency of legalizing possession for personal use and yet criminalizing conduct which must necessarily precede such possession at some point. However, we believe that this inconsistency is justified as an interim measure both by the need to keep users out of the courts and by the salutary effect of keeping most users out of contact with organized dealers through legitimization of some channels of distribution.

Similarly, the provision outlawing public use, driving under the influence and transfer to minors each serve legitimate public interests. These provisions and the penalty provision are each designed to reflect the treatment accorded the alcohol offender.

It should be reiterated that we view the above statutory scheme as a minimal response that protects what might be perceived as legitimate public goals while not infringing the right to privacy. However, some form of legal dissemination of the drug accords philosophically and practically with the logic of the authors' views. To this end we both

predict and urge that each state adopt a regulatory scheme—either the licensing or state monopoly models—to control cultivation, distribution and consumption of marijuana in the same way those states now regulate the use of alcohol. The benefits of such a system, especially if a state monopoly controls cultivation and distribution, are manifold. First, the state can regulate the quantity and the potency of the drug produced. Second, the state can restrict the age and other eligibility of the purchaser. Third, and most important, the state can tax the purchaser providing a valuable source of revenue to the states in a time when lack of revenues is becoming a more and more serious problem. As a corollary, to the limited extent that organized crime is involved in the marijuana trade, any such regulatory scheme would both divert the revenue from the coffers of the Mafioso and eliminate possible contact between the marijuana user and its henchmen.

APPENDIX A*

TABLE I. STATUTORY SCHEMES FOR MARIJUANA PROHIBITION

Jurisdiction	*Distinction between marijuana and other narcotics*	*First offense possession classified as felony*	*Suspended sentences, parole, and probation*
Alabama	Yes	Yes	Only for 1st offense possession
Alaska	Yes	No	Only for 1st offense possession
Arizona	Yes	No	Only for 1st offense possession
Arkansas	No	Yes	Only for 1st offense
California	Yes	No	Only for 1st offense possession
Colorado	No	Yes	No parole
Connecticut	Yes	No	Only for 1st three offenses
Delaware	No	No	Only for 1st offense
Florida	No	Yes	Only for possession and 1st offense sale
Georgia	No	Yes	Only for 1st offense
Hawaii	No	No	Only for 1st offense possession
Idaho	No	Yes	No prohibition
Illinois	No	No	Only for 1st offense possession
Indiana	No	Yes	Only for 1st offense
Iowa	No	No	Only for 1st offense possession
Kansas	No	Yes	No prohibition
Kentucky	No	Yes	Only for 1st offenses, except sale to a minor—no probation
Louisiana	No	Yes	Only for 1st offense possession
Maine	Yes	No	No prohibition
Maryland	No	Yes	Only for possession and 1st offense sale
Massachusetts	No	No	Only for possession and 1st offense sale
Michigan	No	Yes	Only for 1st offense possession
Minnesota	No	Yes	No prohibition

* The data appearing in these tables is current as of June 1970. Since that time, some states, such as New Jersey, Georgia and California, have amended their marijuana laws. It should be noted that, in condensing complicated statutory schemes to tabular form, many of the nuances of these schemes are not reported.

TABLE I. STATUTORY SCHEMES FOR MARIJUANA PROHIBITION—CONTINUED

Jurisdiction	*Distinction between marijuana and other narcotics*	*First offense possession classified as felony*	*Suspended sentences, parole, and probation*
Mississippi	No	Yes	Only for 1st offense possession
Missouri	No	Yes	Only for 1st offense possession
Montana	Yes	Yes	No prohibition
Nebraska	Yes	No	No prohibition
Nevada	No	Yes	Only for possession and 1st offense sale (except by an adult to a minor)
New Hampshire	Yes	No	No prohibition
New Jersey	No	Yes	No prohibition
New Mexico	No	No	Only for 1st offense possession of less than one ounce
New York	No	No	No prohibition
North Carolina	No	No	Only for possession and 1st offense sale (except by an adult to a minor)
North Dakota	Yes	No	No prohibition
Ohio	No	Yes	Sale offenses not probational
Oklahoma	Yes	Yes	No prohibition
Oregon	No	Yes	No prohibition
Pennsylvania	No	Yes	Only for 1st offense
Rhode Island	No	Yes	No probation for sale to a minor
South Carolina	No	Yes	Only for 1st and 2d offenses
South Dakota	Yes	No	Only for 1st offense
Tennessee	No	Yes	Only for 1st offense
Texas	No	Yes	Only for 1st offense
Utah	No	No	Only for possession offenses
Vermont	Yes	No	No prohibition
Virginia	Yes	No	No prohibition
Washington	Yes	No	No prohibition
West Virginia	No	Yes	Only for 1st offense
Wisconsin	Yes	No	Only for 1st offense
Wyoming	No	No	No prohibition
District of Columbia	No	No	No prohibition

TABLE II. PENALTY PROVISIONS FOR MAJOR MARIJUANA OFFENSES

A. POSSESSION

	1st Offense	*2d Offense*	*Subsequent Offense*
Alabama	2-10 yrs./$20,000 maximum	5-20 yrs./$20,000 maximum	10-40 yrs./$20,000 maximum
Alaska	0-1 yr./$1,000 or rehabilitation treatment by state for 1 year	— —	— —
Arizona	0-1 yr. in county jail/$1,000 max. or 1-10 yrs.	2-20 yrs.	5-life
Arkansas	2-5 yrs./$2,000 maximum	5-10 yrs./$2,000 maximum	10-20 yrs./$2,000 maximum
California	County jail for up to 1 year or 1-10 years	2-20 yrs.	5-life
Colorado	2-15 yrs./$10,000 maximum	5-20 yrs./$10,000 maximum	10-30 yrs./$10,000 maximum
Connecticut	0-1 yr./$1,000 max. or up to 3 yrs. to cust. of commissioner	— —	— —
Delaware	0-2 yrs./$500 maximum	0-5 yrs./$3,000 maximum	— —
Florida	0-5 yrs./$5,000 max. or hospital until cured	0-10 yrs./$10,000 max. or hospital until cured	0-20 yrs./$20,000 maximum or hospital until cured
Georgia	2-5 yrs./$2,000 maximum	5-10 yrs./$3,000 maximum	10-20 yrs./$5,000 maximum
Hawaii	0-5 yrs.	0-10 yrs.	— —
Idaho	0-10 yrs.	— —	— —
Illinois	Less than 2.5 grams 0-1 yr./$1,500 max., over 2.5 grams, 2-10 yrs./$5,000 maximum	Less than 2.5 grams 2-10 yrs./$5,000 max., over 2.5 grams, 5-life	— —
Indiana	2-10 yrs./$1,000 maximum	5-20 yrs./$2,000 maximum	— —
Iowa	Personal use, 0-6 months/$1,000 max., otherwise, 2-5 yrs./$2,000 maximum	5-10 yrs./$2,000 maximum	10-20 yrs./$2,000 maximum
Kansas	0-7 yrs.	— —	— —
Kentucky	2-10 yrs./$20,000 maximum	5-20 yrs./$20,000 maximum	— —
Louisiana	Under 21, 0-10 yrs.; over 21, 5-15 yrs.	— —	— —
Maine	0-11 mos./$1,000 maximum	0-2 yrs./$2,000 maximum	— —
Maryland	2-5 yrs./$1,000 maximum	5-10 yrs./$2,000 maximum	10-20 yrs./$3,000 maximum
Massachusetts	0-3½ yrs. (prison), or 0-2½ yrs. (jail)/$1,000 maximum	— —	— —
Michigan	0-10 yrs./$5,000 maximum	0-20 yrs./$5,000 maximum	20-40 yrs./$5,000 maximum
Minnesota	5-20 yrs./$10,000 maximum	5-20 yrs./$10,000 maximum	— —

TABLE II. PENALTY PROVISIONS FOR MAJOR MARIJUANA OFFENSES—CONTINUED

A. POSSESSION

	1st Offense	*2d Offense*	*Subsequent Offense*
Mississippi	2-5 yrs./$2,000 maximum	5-10 yrs./$2,000 maximum	10-20 yrs./$2,000 mandatory fine
Missouri	6 mos. to 1 yr. in county jail or 20 yrs. max. in state penitentiary	5 yrs.-life	10 yrs.-life
Montana	If person is under 21 and 1st offense then gets deferred imposition of sentence, 0-5 yrs.	0-5 yrs. maximum	— —
Nebraska	25 or more cigarettes, 1-5 yrs. Less than 25, 7 days	1-5 yrs.	— —
Nevada	1-6 yrs./$2,000 maximum	1-10 yrs./$2,000 maximum	1-20 yrs./$5,000 maximum
New Hampshire	0-1 yr./$500 maximum	0-3 yrs./$1,000 maximum	— —
New Jersey	2-15 yrs./$2,000 maximum	5-25 yrs./$5,000 maximum	10-life/$5,000 maximum
New Mexico	Possession of 1oz. or less, 0-1 yr. in county jail/$1,000 maximum 2-10 yrs./$2,000 maximum	1-5 yrs./$5,000 maximum	2-10 yrs./$5,000 maximum
New York	Less than 25 cigarettes up to 1 yr., 25-99, 1-7 yrs., 100, 1-15 yrs.	5-20 yrs./$2,000 maximum — —	10-40 yrs./$2,000 minimum fine — —
North Carolina	Less than 1 gm., misdemeanor with fine or imprisonment left to court 0-5 yrs./$1,000 maximum	— — 5-10 yrs./$2,000 maximum	— — 15-life/$3,000 maximum
North Dakota	6 mos. min. in county jail/$2,000 max. or 0-2 yrs. in penitentiary/ $2,000 maximum	0-5 yrs./$2,000 maximum	— —
Ohio	2-15 yrs./$10,000 maximum	5-20 yrs./$10,000 maximum	10-30 yrs./$10,000 maximum
Oklahoma	0-7 yrs./$5,000 maximum	— —	— —
Oregon	0-1 yr./$5,000 maximum or 0-10 yrs./ $5,000 max.	— —	— —
Pennsylvania	2-5 yrs. separate or solitary confinement and $2,000 maximum	5-10 yrs. separate or solitary confinement and $5,000 maximum	10-30 yrs. separate or solitary confinement and $7,500 maximum
Rhode Island	0-15 yrs. and $10,000 maximum	0-20 yrs. and $10,000 maximum	0-30 yrs. and $10,000 maximum
South Carolina	0-2 yrs./$2,000 maximum	2-5 yrs./$2,000-$5,000	10-20 yrs.

South Dakota	Less than 1 oz.—0-1 yr. in county jail/$500 max. More than 1 oz.—2-5 yrs./$5,000 maximum	10-15 yrs./$10,000 maximum	15-40 yrs./$20,000 maximum
Tennessee	2-5 yrs./$500 maximum	5-10 yrs./$500 maximum	10-20 yrs./$500 maximum
Texas	2 yrs.-life	10 yrs.-life	— —
Utah	6 mos. min. in county jail	— —	6 mos. min. in county jail or 1-5 yrs. in penitentiary
Vermont	0-6 mos./$500 maximum	0-2 yrs./$2,000 maximum	— —
Virginia	0-12 mos./$1,000 maximum	0-12 mos./$10,000 max. or 2-20 yrs./$10,000 max.	— —
Washington	0-6 mos./$500 maximum	0-1 yr./$1,000 maximum	0-10 yrs./$10,000 maximum
West Virginia	2-5 yrs./$1,000 maximum	5-10 yrs./$5,000 maximum	10-20 yrs./$10,000 maximum
Wisconsin	0-1 yr. in county jail/$500 maximum	0-2 yrs./$1,000 maximum	— —
Wyoming	0-6 mos./$1,000 maximum	0-5 yrs./$2,000 maximum	0-10 yrs./$2,000 maximum
District of Columbia	0-1 yr./$100-$1,000	0-10 yrs./$500-$5,000	— —

B. POSSESSION WITH INTENT TO SELL

	1st Offense	2d Offense	Subsequent Offense
Alabama	No such offense		
Alaska	0-25 yrs./$20,000 maximum	0-life/$25,000 maximum	0-life/$25,000 maximum
Arizona	2-10 yrs.	5-15 yrs.	10-life
Arkansas	No such offense		
California	2-10 yrs.	5-15 yrs.	10-life
Colorado	10-20 yrs.	15-30 yrs.	20-40 yrs.
Connecticut	5-10 yrs./$3,000	10-15 yrs./$5,000	25 yrs.
Delaware	No such offense		
Florida	No such offense		
Georgia	No such offense		
Hawaii	0-10 yrs./$1,000 maximum	0-20 yrs./$2,000 maximum	— —
Idaho	0-15 yrs.	— —	— —
Illinois	No such offense		
Indiana	5-20 yrs./$2,000 maximum	5 yrs.-life/$5,000 maximum	— —
Iowa	2-5 yrs./$2,000 maximum	5-10 yrs./$2,000	10-20 yrs./$2,000 maximum
Kansas	No such offense		
Kentucky	No such offense		
Louisiana	No such offense		
Maine	No such offense		
Maryland	No such offense		
Massachusetts	5-10 yrs.	10-25 yrs.	— —
Michigan	No such offense		
Minnesota	No such offense		
Mississippi	No such offense		
Missouri	No such offense		
Montana	No such offense		
Nebraska	1-5 yrs.	— —	— —
Nevada	1-6 yrs./$2,000 maximum	1-10 yrs./$2,000 maximum	1-20 yrs./$5,000 maximum
New Hampshire	0-10 yrs./$2,000 maximum	0-15 yrs./$5,000 maximum	— —
New Jersey	No such offense		
New Mexico	10-20 yrs./$5,000 maximum	20-40 yrs./$10,000 maximum	life/$20,000 maximum
New York	1-4 yrs.	— —	— —
North Carolina	0-5 yrs./$1,000 maximum	5-10 yrs./$2,000 maximum	15-life/$3,000 maximum
North Dakota	No such offense		

Ohio	10-20 yrs.	15-30 yrs.		20-40 yrs.	
Oklahoma	0-7 yrs./$5,000 maximum	— —		— —	
Oregon	No such offense				
Pennsylvania	No such offense				
Rhode Island	0-20 yrs.	0-30 yrs.		0-40 yrs.	
South Carolina	No such offense				
South Dakota	No such offense				
Tennessee	No such offense				
Texas	No such offense				
Utah	2-10 yrs.	5-15 yrs.		— —	
Vermont	100 cigarettes or more 0-5 yrs./ $5,000 max., 25 cigarettes or more 0-2 yrs./$2,000 maximum	— —		— —	
Virginia	1-40 yrs./$25,000 maximum	10-life/$50,000 maximum		— —	
Washington	3-10 yrs./$5,000 maximum	— —		— —	
West Virginia	No such offense				
Wisconsin	0-5 yrs./$5,000 maximum	0-10 yrs./$5,000 maximum		— —	
Wyoming	0-6 mos./$1,000 maximum	0-5 yrs./$2,000 maximum		0-10 yrs./$2,000 maximum	
District of Columbia	No such offense				

C. SALE

	1st Offense	2d Offense	Subsequent Offense
Alabama	5-20 yrs./$20,000 maximum	10-40 yrs./$20,000 maximum	— —
Alaska	0-25 yrs./$20,000 maximum	0-life/$25,000 maximum	— —
Arizona	2-10 yrs.	5-15 yrs.	10-life
Arkansas	2-5 yrs./$2,000 maximum	5-10 yrs./$2,000	10-20 yrs./$2,000 maximum
California	5-life	— —	10-life
Colorado	10-20 yrs.	15-30 yrs.	20-40 yrs.
Connecticut	5-10 yrs./$3,000 maximum	10-15 yrs./$5,000 maximum	25 yrs.
Delaware	3-10 yrs./$500-$3,000	7-12 yrs./$1,000-$3,000	10-20 yrs./$2,000-$5,000
Florida	0-10 yrs./$10,000	0-20 yrs./$20,000 maximum	20-life/$20,000 maximum
Georgia	2-5 yrs./$2,000 maximum	5-10 yrs./$3,000 maximum	10-20 yrs./$5,000 maximum
Hawaii	0-10 yrs./$1,000 maximum	0-20 yrs./$2,000 maximum	— —
Idaho	0-10 yrs.	— —	— —
Illinois	10-life	life	— —
Indiana	5-20 yrs./$2,000 maximum	20-life/$5,000 maximum	— —
Iowa	2-5 yrs./$2,000 maximum	5-10 yrs./$2,000 maximum	10-20 yrs./$2,000 maximum
Kansas	0-7 yrs.	— —	— —
Kentucky	5-20 yrs./$20,000 maximum	10-40 yrs./$20,000 maximum	— —
Louisiana	Seller under 21, 5-10 yrs., Seller over 21, 10-50 yrs.	— —	— —
Maine	To people over 21, 1-5 yrs., By people under 21, 1-5 yrs.	4-10 yrs.	— —
Maryland	2-5 yrs./$1,000 maximum	5-10 yrs./$2,000 maximum	10-20 yrs./$3,000 maximum
Massachusetts	5-10 yrs.	10-25 yrs.	— —
Michigan	20 yrs.-life	— —	— —
Minnesota	5-20 yrs./$10,000 maximum	— —	— —
Mississippi	5-10 yrs./$2,000 maximum	10-20 yrs./$2,000 mandatory fine	life
Missouri	5 yrs.-life	10 yrs.-life	— —
Montana	1 yr.-life	— —	— —
Nebraska	2-5 yrs.	— —	— —
Nevada	By minor then 1-20 yrs. w/possible probation	No difference for minor	No difference for minor
	1-20 yrs./$5,000 maximum	life/$5,000 maximum	— —
New Hampshire	0-10 yrs./$2,000 maximum	0-15 yrs./$5,000 maximum	— —
New Jersey	2-15 yrs./$2,000 maximum	5-25 yrs./$5,000 maximum	10-life/$5,000 maximum

New Mexico	10-20 yrs./$5,000 maximum	20-40 yrs./$10,000 maximum	life/$20,000 maximum
New York	1-15 yrs.	— —	— —
North Carolina	0-5 yrs./$1,000 maximum	5-10 yrs./$2,000 maximum	15-life/$3,000 maximum
North Dakota	6 mos. min. in county jail/$2,000 maximum or 0-2 yrs. in penitentiary/$2,000	0-5 yrs./$2,000 maximum	— —
Ohio	20-40 yrs.	— —	— —
Oklahoma	0-7 yrs./$5,000 maximum	— —	— —
Oregon	0-1 yr./$5,000 maximum or 0-10 yrs./$5,000 max.	— —	— —
Pennsylvania	5-20 yrs. separate or solitary confinement and $5,000 maximum	10-30 yrs. separate or solitary confinement and $15,000 maximum	life/$30,000 maximum
Rhode Island	40 yrs. maximum	— —	— —
South Carolina	0-2 yrs./$2,000 maximum	5-10 yrs./$2,000-$5,000	10-20 yrs.
South Dakota	5-10 yrs./$5,000 maximum	10-15 yrs./$10,000 maximum	15-40 yrs./$20,000 maximum
Tennessee	2-5 yrs. and $500 maximum	5-10 yrs. and $500 maximum	10-20 yrs. and $500 maximum
Texas	5 yrs.-life	10 yrs.-life	— —
Utah	5 yrs.-life	— —	10 yrs.-life
Vermont	0-5 yrs./$10,000 maximum	10-25 yrs./$25,000 maximum	— —
Virginia	1-40 yrs./$25,000 maximum	10-life/$50,000 maximum	— —
Washington	3-10 yrs./$5,000 maximum	— —	— —
West Virginia	2-5 yrs./$1,000 maximum	5-10 yrs./$5,000 maximum	10-20 yrs./$10,000 maximum
Wisconsin	0-5 yrs./$5,000	0-10 yrs./$5,000	— —
Wyoming	0-10 yrs.	0-25 yrs.	— —
District of Columbia	0-1 yr./$100-$1,000	0-10 yrs./$500-$5,000	— —

D. SALE TO A MINOR

	1st Offense	2d Offense	Subsequent Offense
Alabama	10-40 yrs./$20,000 maximum	— —	— —
Alaska	0-life/$25,000 maximum	— —	— —
Arizona	10-life	— —	15-life
Arkansas	No such offense		
California	10-life	— —	15-life
Colorado	life	life or death	— —
Connecticut	No such offense		
Delaware	No such offense		
Florida	10-life/$10,000 maximum	10-life/$20,000 maximum	20-life/$20,000 maximum
Georgia	life or 10-20 yrs.	death or 10-20 yrs.	— —
Hawaii	0-20 yrs./$1,000 maximum	life/$2,000 maximum	life/$2,000
Idaho	0-15 yrs.	— —	— —
Illinois	10-life	life	— —
Indiana	No such offense		
Iowa	5-20 yrs.	— —	— —
Kansas	No such offense		
Kentucky	20-life/$20,000 maximum	— —	— —
Louisiana	Seller over 21, death or 30-99 yrs.	— —	— —
Maine	To people 18-20, 2-6 yrs. To people under 18, 3-8 yrs.	4-10 yrs.	— —
Maryland	5-20 yrs./$1,000 maximum	— —	— —
Massachusetts	10-25 yrs.	20-50 yrs.	— —
Michigan	20 yrs.-life	— —	— —
Minnesota	10-40 yrs./$20,000 maximum	— —	— —
Mississippi	20 yrs.-life/$20,000 maximum	— —	— —
Missouri	5 yrs.-life or death	10 yrs.-life or death	— —
Montana	1 yr.-life	— —	— —
Nebraska	2-5 yrs.	— —	— —
Nevada	If sold by minor 1-20 yrs. with possible probation life/$5,000	Minor receives no privileges after 1st offense life	— — — —
New Hampshire	0-10 yrs./$2,000 maximum	0-15 yrs./$5,000 maximum	— —
New Jersey	2-life/$2,000-$10,000 maximum	— —	— —
New Mexico	20-life/$10,000 maximum	— —	— —

New York	1-25 yrs.	—	—	—	—
North Carolina	10-life/$3,000 maximum	—	—	—	—
North Dakota	5-10 yrs.	—	—	—	—
Ohio	30 yrs.-life	—	—	—	—
Oklahoma	0-20 yrs.	5 yrs.-life		—	—
Oregon	No such offense				
Pennsylvania	No such offense				
Rhode Island	0-life	—	—	—	—
South Carolina	(To a minor under 18 only) 0-5 yrs./ $5,000 maximum	(To a minor under 18 only) 10 yrs.		—	—
South Dakota	10-20 yrs./$10,000	20-30 yrs./$20,000		30-80 yrs./$40,000	
Tennessee	No such offense				
Texas	5 yrs.-life	10 yrs.-life or death		—	—
Utah	10 yrs.-life	—	—	15-life	
Vermont	0-5 yrs./$10,000 maximum	10-25 yrs./$25,000 maximum			
Virginia	5-40 yrs./$50,000 maximum	—	—		
Washington	0-20 yrs./$50,000 maximum	—	—		
West Virginia	No such offense				
Wisconsin	0-15 yrs.	30-life		life	
Wyoming	0-20 yrs.	0-50 yrs.		—	—
District of Columbia	No such offense				

TABLE III. COMPARISON OF PENALTY PROVISIONS FOR MAJOR MARIJUANA OFFENSES

	POSSESSION		SALE	
Jurisdiction	*1st Offense*	*2d Offense*	*1st Offense*	*2d Offense*
Alabama	2-10 yrs./$20,000 maximum	5-20 yrs./$20,000 maximum	5-20 yrs./$20,000 maximum	10-40 yrs./$20,000 maximum
Alaska	0-1 yr./$1,000 max. or rehabilitation treatment by state for 1 year	— —	0-25 yrs./$20,000 maximum	0-life/$25,000
Arizona	0-1 yr. in county jail/$1,000 max.; or 1-10 yrs.	2-20 yrs.	2-10 yrs.	5-15 yrs.
Arkansas	2-5 yrs./$2,000 maximum	5-10 yrs./$2,000 maximum	2-5 yrs./$2,000 maximum	5-10 yrs./$2,000 maximum
California	County jail for 1 yr. max. or 1-10	2-20 yrs.	5-life	— —
Colorado	2-15 yrs./$10,000	5-20 yrs./$10,000	10-20 yrs.	15-30 yrs.
Connecticut	0-1/$1,000 max. or no more than 3 yrs. to custody of commissioner of correction	— —	5-10 yrs./$3,000 maximum	10-15 yrs./$5,000 maximum
Delaware	0-2 yrs./$500 max.	0-5 yrs./$3,000 maximum	3-10 yrs./$500-$3,000	7-12 yrs./$1,000-$3,000
Florida	0-5 yrs./$5,000 or confinement in hospital until cured	0-10 yrs./$10,000 max. or confinement in hospital until cured	0-10 yrs./$10,000 maximum	0-20 yrs./$20,000 maximum
Georgia	2-5 yrs./$2,000 maximum	5-10 yrs./$3,000 maximum	2-5 yrs./$2,000 maximum	5-10 yrs./$3,000 maximum
Hawaii	0-5 yrs.	0-10 yrs.	0-10 yrs./$1,000 maximum	0-20 yrs./$2,000 maximum
Idaho	0-10	— —	0-10	— —
Illinois	Less than 2.5 grams 0-1 yrs./$1,500 max.; over 2.5 grams 2-10 yrs./ $5,000 max.	Less than 2.5 grams 2-10 yrs./$5,000 max.; over 2.5 grams 5 yrs.-life	10-life	life
Indiana	2-10 yrs./$1,000 maximum	5-20 yrs./$2,000 maximum	5-20 yrs./$2,000 maximum	20-life/$5,000 maximum

Iowa	Personal use, 6 mos./ $1,000; max.; otherwise, 2-5 yrs./$2,000 maximum	5-10 yrs./$2,000 maximum	2-5 yrs./$2,000 maximum	5-10 yrs./$2,000
Kansas	0-7 yrs.	— —	0-7 yrs.	— —
Kentucky	2-10 yrs./$20,000 maximum	5-20 yrs./$20,000 maximum	5-20 yrs./$20,000 maximum	10-40 yrs./$20,000 maximum
Louisiana	Under 21, 0-10 yrs.; over 21, 5-15 yrs.	— —	Seller under 21, 5-10 yrs. Seller over 21, 10-50 yrs.	10-50 yrs.
Maine	0-11 mos./$1,000 maximum	0-2 yrs./$2,000 maximum	To people over 21, 1-5 yrs. To people 18-20, 2-6 yrs. To people under 18, 3-8 yrs. By people under 21, 1-5 yrs.	4-10 yrs
Maryland	2-5 yrs./$1,000 maximum	5-10 yrs./$2,000 maximum	2-5 yrs./$1,000 maximum	5-10 yrs./$2,000 maximum
Massachusetts	0-3½ yrs. (prison), 0-2½ yrs. (jail)/ $1,000 maximum	— —	5-10 yrs.	10-25 yrs.
Michigan	0-10 yrs./$5,000 maximum	0-20 yrs./$5,000 maximum	20 yrs.-life	— —
Minnesota	5-20 yrs./$10,000 maximum	— —	5-20 yrs./$10,000 maximum	— —
Mississippi	2-5 yrs./$2,000 maximum	5-10 yrs./$2,000 maximum	5-10 yrs./$2,000 maximum	10-20 yrs./$2,000 maximum
Missouri	6 mos.-1 yr. in county jail or 20 yrs. max. in state penitentiary	5 yrs.-life	5 yrs.-life	10 yrs.-life
Montana	5 yrs. max. prison under 21 gets a deferred imposition of sentence	0-5 yrs. maximum	1 yr.-life	— —
Nebraska	25 or more cigarettes- 1-5 yrs. Less than 25, 7 days	1-5 yrs.	2-5 yrs.	— —
Nevada	1-6 yrs./$2,000 maximum	1-10 yrs./$2,000 maximum	By minor 1-20 yrs. w/ possibility of probation 1-20 yrs./$5,000 maximum	No difference for this offense Life and $5,000 maximum
New Hampshire	1 yr. max./$500 maximum	3 yrs. max./$1,000 maximum	10 yrs. max./$2,000 maximum	15 yrs. max./$5,000 maximum
New Jersey	2-15 yrs./$2,000 maximum	5-25 yrs./$5,000 maximum	2-15 yrs./$2,000 maximum	5-25 yrs./$5,000 maximum

TABLE III. COMPARISON OF PENALTY PROVISIONS FOR MAJOR MARIJUANA OFFENSES—CONTINUED

	POSSESSION		SALE	
Jurisdiction	*1st Offense*	*2d Offense*	*1st Offense*	*2d Offense*
New Mexico	Possession of 1oz. or less, up to 1 yr. in county jail and $1,000 max.	1-5 yrs./$5,000 maximum	10-20 yrs./$5,000 maximum	20-40 yrs./$10,000 maximum
New York	Less than 25 cigarettes up to 1 yr.; 25-99, 1-7 yrs.; 100, 1-15 yrs.	— —	1-15 yrs.	— —
North Carolina	Less than one gm., misdemeanor with fine or imprisonment left to court. More than 1 gm., 0-5 yrs./$1,000 maximum	5-10 yrs./$2,000 maximum	0-5 yrs./$1,000 maximum	5-10 yrs./$2,000 maximum
North Dakota	6 mos. min. county jail or 0-2 yrs. penitentiary/ $2,000 maximum	0-5 yrs./$2,000 maximum	6 mos. min. county jail or 0-2 yrs. penitentiary/ $2,000 maximum	0-5 yrs./$2,000 maximum
Ohio	2-15 yrs./$10,000 maximum	5-20 yrs./$10,000	20-40 yrs.	— —
Oklahoma	0-7 yrs./$5,000 maximum	— —	0-7 yrs./$5,000 maximum	— —
Oregon	0-1 yr./$5,000 max. or 0-10 yrs./$5,000	— —	0-1 yr./$5,000 max. or 0-10 yrs./$5,000 maximum	— —
Pennsylvania	2-5 yrs. separate or solitary confinement and $2,000 maximum	5-10 yrs. separate or solitary confinement and $5,000 maximum	5-20 yrs. separate or solitary confinement and $5,000 maximum	10-30 yrs. separate or solitary confinement and $15,000 maximum
Rhode Island	0-15 yrs. and $10,000 maximum	0-20 yrs. and $10,000 maximum	40 yrs. maximum	— —
South Carolina	0-2 yrs./$2,000 maximum	2-5 yrs./$2,000-$5,000	0-2 yrs./$2,000 maximum	5-10 yrs./$2,000-$5,000
South Dakota	Less than 1 oz., 0-1 yr. county jail/$500 max. More than 1 oz., 2-5 yrs./$5,000 maximum	10-15 yrs./$10,000 maximum	5-10 yrs./$5,000 maximum	10-15 yrs./$10,000 maximum
Tennessee	2-5 yrs. and $500 maximum	5-10 yrs. and $500 maximum	2-5 yrs. and $500 maximum	5-10 yrs. and $500 maximum
Texas	2 yrs.-life	10 yrs.-life	5 yrs.-life	10 yrs.-life

Utah	6 mos. min. county jail	— —	5 yrs.-life	— —
Vermont	0-6 mos./$500 maximum	0-2 yrs./$2,000 maximum	0-5 yrs./$10,000 maximum	10-25 yrs./$25,000 maximum
Virginia	0-12 mos./$1,000 maximum	0-12 mos./$10,000 max. or 2-20 yrs./$10,000 maximum	1-40 yrs./$25,000 maximum	10 yrs.-life/$50,000 maximum
Washington	0-6 mos./$500 maximum	0-1 yr./$1,000 maximum	3-10 yrs./$5,000 maximum	— —
West Virginia	2-5 yrs./$1,000 maximum	5-10 yrs./$0-$5,000	2-5 yrs./$1,000 maximum	5-10 yrs./$5,000 maximum
Wisconsin	0-1 yr./$500 maximum	0-2 yrs./$0-$1,000	0-5 yrs./$5,000 maximum	0-10 yrs./$5,000
Wyoming	0-6 mos./$1,000	0-5 yrs./$0-$2,000	0-10 yrs.	0-25 yrs.
District of Columbia	0-1 yr./$100-$1,000	0-10 yrs./$500-$5,000	0-1 yr./$100-$1,000	0-10 yrs./$500-$5,000

TABLE IV. MARIJUANA PROHIBITION CITATIONS

Jurisdiction	*Anti-Marijuana Statute Citation*	*General Drug Statute Citation (if different from anti-marijuana statute)*	*Most Recent Amendment*
Alabama	ALA. CODE tit. 22, §§232-258 (1958), *as amended*, (Supp. 1969).	Same	1969
Alaska	ALASKA STAT. §§17.10.010-.240 (1953), *as amended*, (Supp. 1970)	Same	1968
Arizona	ARIZ. REV. STAT. ANN. §§36-1001 to -1002.10,-1017 (Supp. 1969).	Same	1961
Arkansas	ARK. STAT. ANN. §§82-1001 to -1020 (1937), *as amended*, (Supp. 1969).	Same	1955
California	CAL. HEATLH & S. CODE §§11530-11533 (West 1964), *as amended*, (Supp. 1970).	Same	1968
Colorado	COLO. REV. STAT. ANN. §§48-5-1 to -21 (1963).	Same	1963
Connecticut	CONN. GEN. STAT. ANN. §§19-443 to -485 (1958). Conn. Pub. Act No. 753, §§ 1-42 (1969).	Same	1969
Delaware	DEL. CODE ANN. tit. 16, §§4701-4722 (1953), *as amended*, (Supp. 1968).	Same	1969
Florida	FLA. STAT. ANN. §§398.01-.24 (1959), *as amended*, (Supp. 1969).	Same	1965
Georgia	GA. CODE ANN. §§79A-802 to -822, -9910, -9911 (Supp. 1969).	Same	1967
Hawaii	HAWAII REV. LAWS §§329-1 to -32 (1968).	Same	1969
Idaho	IDAHO CODE ANN. §§37-2701 to -3321 (Supp. 1969).	Same	1967
Illinois	ILL. ANN. STAT. ch. 38, §§22-1 to -53 (Smith-Hurd 1964), *as amended*, (Supp. 1970).	Same	1970
Indiana	IND. ANN. STAT. §§10-3519 to -3552 (1956), *as amended*, (Supp. 1970).	Same	1969
Iowa	IOWA CODE ANN. §§204.1-.23 (1969), *as amended*, (Supp. 1970).	Same	1969
Kansas	KAN. STAT. ANN. §§65-2501 to-2522 (1964).	Same	1959

Kentucky	KY. REV. STAT. ANN. §§218.010-.245 (1969).	Same	1966
Louisiana	LA. REV. STAT. ANN. §§40.961-.984 (1965).	Same	1963
Maine	ME. REV. STAT. ANN. tit. 22, §§2381-2386 (Supp. 1970).	ME. REV. STAT. ANN. tit. 22, §§ 2361-2380 (1964), *as amended*, (Supp. 1970).	1969
Maryland	MD. ANN. CODE art. 27, §§276-302 (1957)	Same	1964
Massachusetts	MASS. GEN. LAWS ANN. ch. 94, §§197-217E (1958), *as amended*, (Supp. 1970).	Same	
Michigan	MICH. COMP. LAWS ANN. §§335.51-.77 and 335.151-.154 (1967), *as amended*, (Supp. 1970).	Same	1952
Minnesota	MINN. STAT. ANN. §§618.01-.25 (1964), *as amended*, (Supp. 1970).	Same	1957
Mississippi	MISS. CODE ANN. §§6844-6869 (1942), *as amended*, (Supp. 1969).	Same	1966
Missouri	MO. REV. STAT. §§195.010-.210 (1970).	Same	1957
Montana	MONT. REV. CODES Ann. §§54-129 to -138 (Supp. 1969).	Same	1969
Nebraska	Ch. 197, [1969] Neb. Acts	Same	1969
Nevada	NEV. REV. STAT. §§453.010-.240 (1967).	Same	1969
New Hampshire	Ch. 421, [1969] N. H. Laws	Same	1969
New Jersey	N. J. REV. STAT. §§24.18-1 to -47 (1937), *as amended*, (Supp. 1969).	Same	1966
New Mexico	N. M. STAT. ANN. §§54-7-1 to -51 (1962), *as amended*, (Supp. 1969).	Same	1965
New York	N. Y. PENAL LAW §§220.00-.95 (1967), *as amended*, (Supp. 1970).	Same	1969
North Carolina	N. C. GEN. STAT. §§90-86 to -113 (1965), *as amended*, (Supp. 1969).	Same	1969
North Dakota	N. D. CENT. CODE §§19-03-01 to -32 (1960), *as amended*, (Supp. 1969).	Same	1969
Ohio	OHIO REV. CODE §§3719.01-3719.99 (Page 1953), *as amended*, (Supp. 1969).	Same	1969
Oklahoma	OKLA. STAT. ANN. tit. 63, §§451-457 (1961).	OKLA. STAT. ANN. tit. 63, §§ 401-425 and 461-470.12 (1961), *as amended*, (Supp. 1970-71).	1970
Oregon	ORE. REV. STAT. §§474.010-.990 (1969).	Same	1969
Pennsylvania	PA. STAT. tit. 35, §780 (1964), *as amended*, (Supp. 1970).	Same	1963

TABLE IV. MARIJUANA PROHIBITION CITATIONS—CONTINUED

Jurisdiction	*Anti-Marijuana Statute Citation*	*General Drug Statute Citation (if different from anti-marijuana statute)*	*Most Recent Amendment*
Rhode Island	R. I. GEN. LAWS ANN. §§21-28-1 to 21-28-68 (1956), *as amended*, (Supp. 1969).	Same	1962
South Carolina	S. C. CODE Ann. §§32-1461 to -1495 (1962), *as amended*, (Supp. 1969).	Same	1958
South Dakota	S. D. COMP. LAWS ANN. §§39-17-44 to -155 (Supp. 1970).	Same	1970
Tennessee	TENN. CODE ANN. §§52-1301 to -1323 (1966), *as amended*, (Supp. 1969).	Same	1955
Texas	TEX. PEN. CODE art. 7256 (1960), *as amended*, (Supp. 1969-70).	Same	1969
Utah	UTAH CODE ANN. §§58-13a-1 to -44 (1963), *as amended*, (Supp. 1969).	Same	1969
Vermont	VT. STAT. ANN. tit. 18, §§4201-25 (1968), *as amended*, (Supp. 1970).	Same	1969
Virginia	VA. CODE ANN. §§54-524.1 to .109 (Supp. 1970).	Same	1970
Washington	WASH. REV. CODE ANN. §§69.40.1-69.40.100	WASH. REV. CODE ANN. §§69.33.010-69.33.960 (1962), *as amended*, (Supp. 1969).	1969
West Virginia	W. VA. CODE §§16-8A-1 to -24 (1966).	Same	1963
Wisconsin	WIS. STAT. ANN. §§161.01 to .275 (1957), *as amended*, (Supp. 1969).	Same	1969
Wyoming	WYO. STAT. §§35-348 to -371 (1957), *as amended*, (Supp. 1969).	Same	1969
District of Columbia	D. C. CODE ANN. §§33-401 to -425 (1968).	Same	1966

TABLE V. STATUTES AMENDED SINCE 1967

Jurisdiction	Year	1ST OFFENSE POSSESSION		1ST OFFENSE SALE	
		Old Statute	*New Statute*	*Old Statute*	*New Statute*
Alabama	1969	5-20 yrs./$20,000 maximum	2-10 yrs./$20,000 maximum	5-20 yrs./$20,000 maximum	5-20 yrs./$20,000 maximum
Alaska	1968	2-10 yrs./$5,000 maximum	0-1 yr./$1,000 maximum or treatment in hospital for 1 yr.	2-10 yrs./$5,000 maximum	0-25 yrs./$20,000 maximum
California	1968	1-10 yrs.	County jail for 1 year maximum or 1-10 yrs.	5-life	5-life
Connecticut	1969	0-10 yrs./$3,000	0-1 yr./$1,000 max. or no more than 3 yrs. custody of comm'r.	5-10 yrs./$3,000	5-10 yrs./$3,000 maximum
Delaware	1969	3-10 yrs./$500-$3,000	0-2 yrs./$500 maximum	3-10 yrs./$500-$3,000	3-10 yrs./$500-$3,000
Georgia	1967	Same	2-5 yrs./$2,000 maximum	Same	2-5 yrs./$2,000 maximum
Hawaii	1969	0-5 yrs.	0-5 yrs.	To a minor 0-20 yrs./$1,000 max. otherwise, 0-10 yrs./$1,000 maximum	0-20 yrs./$2,000 maximum
Idaho	1967	1-14 yrs./$1,000 maximum	0-10 yrs.	1-14 yrs./$1,000 maximum	0-10 yrs.
Illinois	1970	2-10 yrs./$5,000 maximum	Less than 2.5 grams 0-1 yr./$1,500 max. over 2.5 grams, 2-10 yrs./$5,000 maximum	10-life	10 yrs.-life
Indiana	1969	2-10 yrs./$1,000 maximum	2-10 yrs./$1,000 maximum	5-20 yrs./$2,000 maximum	5-20 yrs./$2,000 maximum
Iowa	1969	2-5 yrs./$2,000 maximum	Personal use, 0-6 mos./$1,000 max., otherwise, 2-5 yrs./$2,000 max.	2-5 yrs./$2,000 maximum	10-20 yrs./$2,000 maximum
Maine	1969	2-8 yrs./$1,000 maximum	0-11 mos./$1,000 maximum	2-8 yrs./$1,000 maximum	To people over 21, 1-5 yrs.; to people 18-20, 2-6 yrs.; To people under 18, 3-8 yrs.
Montana	1969	1-5 yrs.	5 yrs. max. Person under 21 gets deferred imposition of sentence	1-5 yrs., 5-life for sale to minor	1 yr.-life. Person under 21 gets deferred imposition of sentence for 1st offense

TABLE V. STATUTES AMENDED SINCE 1967—CONTINUED

Jurisdiction	Year	1ST OFFENSE POSSESSION		1ST OFFENSE SALE	
		Old Statute	*New Statute*	*Old Statute*	*New Statute*
Nebraska	1969	2-5 yrs./$3,000 maximum	25 or more cigarettes–1-5 yrs.; less than 25-7 days	2-5 yrs./$2,000 maximum	2-5 yrs.
New Hampshire	1969	2-5 yrs./$2,000 maximum	1 yr. maximum/ $500 maximum	5-10 yrs./$2,000 maximum	10 yrs. maximum/ $2,000 maximum
Nevada	1967	2-5 yrs./$2,000 maximum	1-6 yrs./$2,000 maximum	To 21 yr. old or over, 20-40 yrs.; to under 21 yrs., life/$10,000	To 21 yrs. or over, 1-20 yrs./$5,000 maximum; to under 21 yrs., life/$5,000
North Carolina	1969	0-5 yrs./$1,000 maximum	Misdemeanor at discretion of court	0-5 yrs./$1,000 maximum	0-5 yrs./$1,000 maximum
North Dakota	1969	0-5 yrs./$2,000 maximum	6 mos. min. county jail/ $2,000 max. or 0-2 yrs./ $2,000 maximum	0-5 yrs./$2,000 maximum	6 mos. min. county jail/ $2,000 max. or 0-2 yrs./ $2,000 maximum
Ohio	1969	2-15 yrs./$10,000 maximum	2-15 yrs./$10,000 maximum	2-15 yrs./$10,000 maximum	20-40 yrs.
Oregon	1969	0-10 yrs./$5,000 maximum	0-1 yr./$5,000 max. or 0-10 yrs./$5,000	0-10 yrs./$5,000 maximum	0-1 yr./$5,000 max. or 0-10 yrs./$5,000 maximum
South Dakota	1970	0-90 days/$500 maximum	Less than 1 oz.-0-1 yr. county jail/$500 max. More than 1 oz.-2-5 yrs./$5,000 maximum	0-20 yrs.	5-10 yrs./$5,000 maximum
Texas	1969	2 yrs.-life	2 yrs.-life	2 yrs.-life	5 yrs.-life
Utah	1969	0-5 yrs./$1,000 minimum	6 mos. min. in county jail	0-5 yrs./$1,000 minimum	5 yrs.-life
Vermont	1969	N/A	0-6 mos./$500 maximum	N/A	0-5 yrs./$10,000 maximum
Virginia	1970	3-5 yrs./$1,000 maximum	0-12 mos./$1,000 maximum	3-5 yrs./$1,000 maximum	1-40 yrs./$25,000 maximum
Washington	1969	5-20 yrs./$10,000 maximum	0-6 mos./$500 maximum	5-20 yrs./$10,000	3-10 yrs./$5,000 maximum
Wisconsin	1969	2-10 yrs.	0-1 yr./$500 maximum	2-10 yrs.	0-5 yrs./$5,000 maximum
Wyoming	1969	2-5 yrs./$2,000 maximum	0-6 mos./$1,000 maximum	2-5 yrs./$2,000 maximum	0-10 yrs.

APPENDIX B: BIBLIOGRAPHY

BOOKS

E. BLOOMQUIST, MARIJUANA (1968).
H. NOWLIS, DRUGS ON THE COLLEGE CAMPUS (1969)
J. KAPLAN, MARIJUANA—THE NEW PROHIBITION (1970).
J. ROSEVEAR, POT—A HANDBOOK OF MARIHUANA (1967).
MARIJUANA, MYTHS AND REALITIES (J. Simmons ed.).
THE BOOK OF GRASS (Grove Press ed. 1967).
THE MARIHUANA PAPERS (D. Solomon ed. 1966).
THE PHARMACOLOGICAL BASIS OF THERAPEUTICS (3d ed. L. Goodman & A. Gilman 1968).

MEDICAL JOURNAL ARTICLES

Abelson, *LSD & Marijuana,* 159 SCI. 1189 (1968).
Advisory Committee on Cannabis, *Report,* 1 LANCET 268 (1969).
Alserver, *An Evaluation of Marihuana for School Physicians, Nurses and Educators,* 38 J. SCHOOL HEALTH 624 (1968).
Baker, *Some Hospital Admissions Associated with Marihuana* pts. 1-2, 1 LANCET 148, 246 (1969).
Benforands, *The Cannabis Controversy,* 281 N. ENG. J. MED. 1371 (1969).
Berg, *Pot and Booze,* 280 N. ENG. J. MED. 1077 (1969).
Brill, *Marijuana Problems,* 30 PSYCHIATRY DIGEST 9 (1969).
Burke, *The Cannabis Controversy,* 281 N. ENG. J. MED. 1372 (1969).
Carakushansky, *Lysergide and Cannabis As Possible Teratogens in Man,* 1 LANCET 150 (1969).
Council on Mental Health, *Marihuana and Society,* 204 J.A.M.A. 1181 (1968).
Council on Mental Health and Committee on Alcoholism and Drug Dependence, *Dependence on Cannabis (Marihuana),* 201 J.A.M.A. 368 (1967).
Crancer, Dille, Delay, Wallace & Haykin, *Comparison of the Effects of Marijuana and Alcohol on Simulated Driving Performances,* 164 SCI. 851 (1969).
Defer, *Acute Psychosis Due to Cannabis,* 2 ANNUAL MEDICOPSYCHOL. 260 (1968).
Farnsworth, *The Drug Problem Among Young People,* 61 J. OKLA. ST. MED. ASS'N 461 (1968).
Gary, *Intravenous Administration of Marihuana,* 211 J.A.M.A. 501 (1970).
Glatt, *Is It All Right to Smoke Pot?,* 64 BRITISH J. ADDICTION 109 (1969).
Goode, *Marijuana and the Politics of Reality,* 10 J. HEALTH & SOCIAL BEHAVIOR 83 (1969).
Goodwin, *Marihuana,* 163 SCI. 1144 (1969).
Graff, *Marihuana and Scopolamine "High,"* 125 AM. J. PSYCHIATRY 1258 (1969).
Grinspoon, *Marihuana,* 221 SCIENTIFIC AM., Dec. 1969, at 17.
Hecht, Beals, Lees, Jolly & Roberts, *LSD and Cannabis As Possible Teratogens in Man,* 2 LANCET 1087 (1968).
Joubert, *Marihuana,* 163 SCI. 1144 (1969).
Kalant, *Marihuana and Simulated Driving,* 166 SCI. 640 (1969).
Kaplan, *Criminal Laws and the Control of Drug Abuse: The Special Case of Marijuana,* 9 J. CLINICAL PHARMACOLOGY 349 (1969).
Kaufman, Allen & West, *Runaways, Hippies and Marihuana,* 126 AM. J. PSYCHIATRY 717 (1969).
Keeler, *What Are the Questions Concerning Marijuana,* 30 N.C. MED. J. 41 (1969).
Keeler, Reifler & Liptzen, *Spontaneous Recurrence of Marihuana Effect,* 125 AM. J. PSYCHIATRY 384 (1968).

Keup, *The Legal Status of Marihuana (A Psychiatric Opinion Poll)*, 30 DISEASES OF THE NERVOUS SYSTEM 517 (1969).
Kew, Bershn & Siew, *Possible Hepatotoxicity of Cannabis*, 1 LANCET 578 (1969).
King, *Marijuana and LSD Usage Among Male College Students: Prevalence Rate, Frequency, and Self-estimates of Future Use*, 32 PSYCHIATRY 265 (1969).
Lapol, *Marijuana in Vietnam*, 9 J. AM. PHARMACOLOGY ASS'N 615 (1969).
Leonard, *Cannabis: A Short Review of Its Effects and the Possible Dangers of Its Use*, 64 BRITISH J. ADDICTION 121 (1969).
Lister, *Cannabis Controversy and Other Sundry Troubles*, 280 N. ENG. J. MED. 712 (1969).
Marten, *Adverse Reaction to the Use of Marijuana*, 62 J. TENN. MED. ASS'N 627 (1969).
McGlothlin & West, *The Marihuana Problem: An Overview*, 125 AM. J. PSYCHIATRY 370 (1968).
Merchoulam, Ber-Zvi & Ganoi, *Hashish–13 (On the Nature of the Beam Test)*, 24 TETRAHEDRON 5615 (1968).
Mikuriya, *Need for Just Marihuana Laws*, 125 AM. J. PSYCHIATRY 852 (1968).
Milman, *Approach to the Study of the Effects of Marihuana*, 75 J. PEDIATRICS 342 (1969).
Milman, *The Role of Marihuana in Patterns of Drug Abuse by Adolescents*, 74 J. PEDIATRICS 283 (1969).
Neu, Powers King & Gardner, *Cannabis and Chromosomes*, 1 LANCET 675 (1969).
Perna, *Psychotogenic Effect of Marihuana*, 209 J.A.M.A. 1085 (1969).
Radovsky, *Marihuana Foolishness*, 280 N. ENG. J. MED. 620 (1969).
Schwarz, *Toward a Medical Understanding of Marihuana*, 14 CAN. PSYCHIATRIC ASS'N J. 591 (1969).
Silberman & Levy, *A Preliminary Survey of 24 Victorian Marijuana Users*, 2 MED. J. AUSTL. 286 (1969).
Talhat, *Marihuana Psychosis, Acute Toxic Psychosis Associated with the Use of Cannabis Derivatives*, 210 J.A.M.A. 299 (1969).
Vaughan, *Sharp Criticism of the English Cannabis Report*, 66 LAKARTIDNINGEN 586 (1969).
Vollner, Bierniek & Korte, *Hashish. XX. Cannabidivarin, A New Hashish Constituent*, 3 TETRAHEDRON LETTERS 145 (1969).
Waldman, *Marihuana Bronchitis*, 211 J.A.M.A. 501 (1970).
Werkman, *What Next?–Youth and Drugs*, 66 ROCKY MOUNT MED. J., Nov. 1969, at 32.
Wolk, *Marijuana on the Campus: A Study at One University*, 17 J. AM. COLLEGE HEALTH ASS'N 144 (1968).
Zunin, *Marijuana: The Drug and the Problem*, 134 MILITARY MED. 104 (1969).
Cannabis, 1 LANCET 139 (1969).
Cannabis, 37 MEDICO-LEGAL J. 3 (1969).
Cannabis, Lords Debate Drugs, 222 NATURE 8 (1969).
Drug Dependence–Marijuana, 38 MED. ANNALS D.C. 105 (1969).
Effects of Marihuana and Alcohol on Simulated Driving Performance, 2 MED. J. AUSTL. 732 (1969).
Keep Off the Grass, 221 NATURE 205 (1969).
Legalized Marihuana, 18 MD. MED. J. 60 (1969).
Marijuana, 52 R.I. MED. J. 337 (1969).
Marihuana and LSD, 2 MED. J. AUSTL. 165 (1969).
Marihuana and Our Youth (A Practical Appraisal), 8 CLINICAL PEDIATRICS (PHILA.) 253 (1969).
Marijuana in Medicine: Past, Present and Future, 110 CAL. MED. 34 (1969).
The Case Against Marijuana, 38 J. SCHOOL HEALTH 522 (1968).

NEWSPAPER ARTICLES

Drugs on Campus: Portrait of Users, N.Y. Times, Aug. 29, 1969, at 26, col. 5.
Curbs on Marijuana Laid to Puritanism, N.Y. Times, June 7, 1969, at 31, col. 2.
Scientific Report—The Effects of Marijuana on Human Beings, N.Y. Times, May 11, 1969, § 6 (Magazine), at 12, col. 1.

ILLEGAL DRUGS; MARIJUANA

Although the 1960s and 1970s seemed to hail a new level of legal tolerance toward recreational drug use, the movement became mired in reality in the 1980s when society as a whole grew intolerant of drug use of any kind, largely due to the destructive nature and violent criminal character of the drug trafficking and distribution business.

As a result, what little ground gained toward the legalization of recreational drugs was either lost or frozen, and drug traffickers and dealers now face increasingly stiffer penalties. Notwithstanding the religious use of peyote, virtually no state recognizes legal possession or use of any "recreational drug." Alaska is apparently the most liberal state, with no prescribed penalty for the personal use or possession of marijuana. (Many states have made possession of small amounts of marijuana a misdemeanor. In most of these states, there are also stiff penalties for possession near school grounds or sale to minors—even an offense called "reckless" possession near school grounds.)

Drug laws are among the most complex criminal laws on the books. Often certain offenses are given class designations whereby any number of specific criminal offenses are grouped into various classes and sentences prescribed according to mandated terms, called "sentencing guidelines." Sentencing guidelines set absolute minimum and maximum sentences for specific crimes and take much of the discretion for setting sentences away from judges. Sentencing guidelines have become very controversial lately as legislatures attempt to assert more control over punishments imposed on criminals. From year to year, punishments, it seems, vary often enough not to put them on the books.

One recent trend in drug legislation is the growing incorporation of special enhancements directed at selling to or from minors. Several states have recently amended these particular laws by incorporating mandatory sentencing to adults selling to minors. While such laws have been common, some of the new amendments are becoming more specific by including language such as that found in California. That state's new laws note particularly that enhancements attach when the seller is over 18 and the buyer is a minor 4 years younger. The intent of the legislation to protect minors from influence by corrupt adults is easy to see. The specific age and number of years difference between the parties is less clear.

In most cases in the following table, reference to the code sections give a picture of the potential punishments for the violation of a specific crime. Since the class schedules among illegal drugs overlap and because the penalties are often extremely involved and difficult to summarize, reference is often made only to the class designation. In these cases, however, it is still possible to draw comparisons among states by studying the degrees assigned to the violation. In addition, quick reference to the individual state code listed should provide easy access to more detailed information.

Table 1: Illegal Drugs: Marijuana

State	Code Section	Possession	Sale	Trafficking

ALABAMA	20-2-1, *et seq.*; 20-2-23 3 (j); 13A-12-210 to 215, 231(i)	Personal use: Class A misdemeanor; Subsequent offense or possession of marijuana for other than personal use: Class C felony	Class B felony; Class A for sale to minor; Sale on school campus or within 3 mile radius: 5 yrs.	1 kilo-100 lbs: minimum 3 yrs. and mandatory $25,000; 100-500 lbs.: minimum 5 yrs. and mandatory $50,000; 500-1000 lbs.: minimum. 15 yrs. and mandatory $200,000; Over 1000 lbs.: life without parole
ALASKA	11.71.010, *et seq.*	To possess marijuana with reckless disregard that possession occurs within 500 feet of a school or recreation/ youth center or on a school bus or to knowingly maintain storage or transportation facilities for keeping/ distributing or to render a drug counterfeit or to possess 25 or more plants: Class C felony; 1 oz–4 oz: misdemeanor; up to 90 days and fine up to $1000; more than 4 oz: up to five years and/or fine up to $50,000		
ARIZONA	13-3401, 3405; 36-2501, *et seq.*	Under 2 lb.: Class 6 felony; 2-4 lbs.: Class 5 felony; 4 lbs. and over: Class 4 felony; fine of not less than $750 or 3 times the value of the controlled substance, whichever is greater	Under 2 lbs.: Class 4 felony; 2-4 lbs.: Class 3 felony; over 4 lbs.: Class 2 felony: fine of the greater of $750 or 3 times value of substance; Sale within drug-free school zone: add 1 yr. to sentence and fine of $2000	Producing marijuana: less than 2 lbs.: Class 5 felony; 2-4 lbs.: Class 4 felony; Over 4 lbs.: Class 3 felony; Transporting/importing: less than 2 lbs.: Class 3 felony; Over 2 lbs.: Class 2 felony
ARKANSAS	5-64-101, *et seq.*	1st offense: Class A misdemeanor; 2nd offense: Class D felony; 3rd offense: Class C felony	Delivery or intent to deliver marijuana is a Class C felony, 4-30 yrs., depending on the amount sold, and/or fine of $25,000 to $100,000; increased penalty within 1000 ft. of school	1 oz. possession of marijuana creates rebuttable presumption or intent to deliver

CALIFORNIA	Health & Safety §11000, *et seq.;* 11357, *et seq.;* §11362.5 medical use of marijuana	Possession of any concentrated cannabis: prison in county jail up to 1 yr. or fine up to $500 or both; Up to 28.5 grams: misdemeanor and fine of up to $100; Over 28.5 grams: prison up to 6 months or fine up to $500 or both; If over 18 and possession under 28.5 grams on grounds of school: misdemeanor and fine up to $500; Under 18 and possession under 28.5 grams on grounds of school: misdemeanor and fine up to $250; Second offense: up to $500 or up to 10 days in juvenile home program	Possession for sale: imprisonment in state prison 2-4 yrs. for transporting, selling, etc. If under 28.5 grams: misdemeanor and fine up to $100; Adults who give or sell to, hire or use, or induce a minor under 14 in transporting, selling, giving away, preparing or peddling any marijuana: state prison for 3, 5, 7 years; to a minor over 14: state prison for 3, 4, 5 years	
COLORADO	18-18-101, *et seq*., 18-18-406	Under 1 oz.: Class 2 petty offense, $100 fine; 1-8 oz.: Class 1 misdemeanor or Class 5 felony with prior conviction; Over 8 oz.: Class 5 felony or Class 4 felony with prior conviction; Public use: Class 2 petty offense, $100 fine and 15 days	Class 4 felony (transferring under 1 oz. for no consideration is possession, not a dispensing offense); Subsequent offense: Class 3 felony, fine up to $10,000; Over 18 yrs. old selling to minor under 15: Class 4 felony, fine up to $5,000	
CONNECTICUT	21a-278, 279	Under 4 oz.: 1 yr. and/or $1000; Over 4 oz.: 5 yrs. and/or $2000; Over 1 kilo: 5-20 yrs. to life; Subsequent offense: Under 4 oz.: 5 yrs. and/or $3000; Over 4 oz.: 10 yrs. and/or $5000; add 2 yrs. if within 1500 ft. of school or child day care center	Over 1 kilo: 5-20 yrs.; Subsequent offense: 10-25 yrs.; If sale within 1500 ft. of school or child day care center: additional mandatory 3 yrs.; Sale to minor or person 2 yrs. junior: additional mandatory 2 yrs.; court may suspend mandatory minimum sentence if person is under 18 or lacks mental capacity	

DELAWARE	Tit. 16 §4701, *et seq.;* 4753A	Class A misdemeanor (If applicable, can be subject to First Offenders Controlled Substances Diversion Program §4764); Knowingly making a purchase from a minor under 18: Class E felony. Purchasing from a minor under 16, 6 months no suspension, probation, parole. Seller is under 14 yrs. 1 year mandatory sentence	Class E felony: 5 yrs. and $1000 to $10,000 (more severe if near school §4767-68)	5 lbs. or more: class B felony; 5-100 lbs.: $25,000 and minimum 2 yrs.; 100-500 lbs.: $50,000 and minimum 4 yrs.; Over 500 lbs.: $100,000 and minimum 8 yrs.
DISTRICT OF COLUMBIA	48-901.02 *et seq.*; 48-904.01 *et seq.*	Misdemeanor, up to 1 yr. and/ or $1000; Subsequent offense: double penalties	Crime with penalty of 1 yr. and/ or $10,000; Subsequent offense: double penalties; Within drug-free zone or sale to minor: up to twice the punishment	
FLORIDA	893.13, *et seq.*	3rd degree felony; Under 20 g.: 1st degree misdemeanor; In excess of 25 lbs. is trafficking (1st degree felony)	3rd degree felony, unless less than 20 g. for no consideration, then 1st degree misdemeanor: penalty as in §§775.082, 083, 084; Subsequent offense: 10 yrs.	All sentencing done pursuant to sentencing guidelines: 25-2000 lbs.: mandatory $25,000 and 3 yrs.; 2000-10,000 lbs.: mandatory $50,000 and 7 yrs.; Over 10,000 lbs.: 15 yrs. and mandatory $200,000
GEORGIA	16-13-30, *et seq.*	Over 10 lbs. is trafficking; possession at all is a felony with penalty of 1-10 yrs.	Felony: 5-30 yrs.	10-2000 lbs.: 5 yrs. and mandatory $100,000; 2000-10,000 lbs.: 7 yrs. and mandatory $250,000; Over 10,000 lbs.: 15 yrs. and mandatory $1,000,000

HAWAII	329-14, *et seq.*; 712-1240, *et seq.*	Possession of 25 or more marijuana plants or possession of 1 lb. or more of anything containing marijuana: Class C felony; 2 lbs. or more: Class B felony; 25 lbs. or more: Class A felony; Possession of over 100 plants: Class A felony; Distribution of any small amount or possession of any small amount: misdemeanor	Sale of any amount: Class C felony; 1 lb. or more: Class B felony; 5 lbs. or more: Class A felony	
IDAHO	37-2701, *et seq.*	Under 3 oz.: misdemeanor with penalty of up to 1 yr. or $1,000 or both; Over 3 oz.: felony, 5 yrs. and $10,000; Subsequent offense: double penalty	Felony: 5 yrs. and $15,000; Subsequent offense: double penalty	1 lb. or more or 25 plants or more: felony; 1-5 lbs. or 25-50 plants: mandatory 1 yr. and $5,000; 5-25 lbs. or 50-100 plants: mandatory 3 yrs. and $10,000; 25-100 lbs. or over 100 plants: mandatory 5 yrs. and $15,000; Maximum number of yrs. 15 and maximum fine $50,000
ILLINOIS	720 ILCS 570/ 100, *et seq.*, Uniform Controlled Substances Act; 720 ILCS 550/1, *et seq.* "Cannabis Control Act"	Under 2.5 g.: Class C misdemeanor; 2.5-10 g.: Class B misdemeanor; 10-30 g.: Class A misdemeanor; 30-500 g: Class 4 felony; 500-2,000 g.: Class 3 felony; 2,000-5,000 g.: class 2 felony; >5,000 g.: class 1 felony; Subsequent offense: 10-30 g.: Class 4 felony; 30-500 g.: Class 3 felony; Producing plants: 1-5: Class A misdemeanor; 5-20: Class 4 felony; 20-50: Class 3 felony; Over 50: Class 2 felony with fine up to $100,000	Under 2.5 g.: Class B misdemeanor; 2.5-10 g.: Class A misdemeanor; 10-30 g.: Class 4 felony; 30-500 g.: Class 3 felony and up to $50,000 fine; 500-2,000 g.: Class 2 felony for which a fine not to exceed $100,000 may be imposed; 2,000-5,000 g.: class 1 felony and up to $150.000; >5,000 g.: class X felony and up to $200,000; Enhanced penalties for sale to person 3 yrs. junior or on school grounds	Over 2500 g. is trafficking: penalty is double that of sale

INDIANA	35-48-2-1, *et seq.;* 35-48-4-10, 11	Under 30 g.: Class A misdemeanor; Over 30 g.: Class D felony; Subsequent offense: Class D felony	Class A misdemeanor; 10 lbs. or more or delivered on school property or bus or within 1000 feet of either: Class C felony; Class C felony: 10 lbs or more on a school bus; Sale of 30 g. to 10 lbs. and recipient a minor and person has prior conviction involving marijuana: Class D felony	
IOWA	124.101, *et seq.*		Under 50 kg.: Class D felony, fine $1000 to $5000; 50 to 100 kg.: Class C felony, fine $1000 to $50,000; 100 to 1000 kg.: Class B felony, $5000 to $100,000; Over 1000 kg.: Class B felony with penalty of up to 50 yrs. and $1,000,000; Subsequent offense: triple penalties; more severe penalties for distribution to minor or to person 3 yrs. younger	
KANSAS	65-4101, *et seq.*	Class A nonperson misdemeanor; Subsequent offense: Level 4 felony	Level 3 felony; Sell within 1000 ft. of school or to minor: Level 2 felony	
KENTUCKY	218A.010, *et seq.*	Class A misdemeanor (includes less than 5 plants); over 5 plants: Class D felony	Under 8 oz.: Class A misdemeanor; Subsequent offense: Class D felony; 8 oz. to 5 lbs.: Class D felony; Subsequent offense: Class C felony Over 5 lbs.: Class C felony; Subsequent offense: Class B felony; Possession of over 8 oz. is *prima facie* evidence of intent to sell	
LOUISIANA	§40:961, *et seq.*	Up to 6 mos. in parish jail and/or up to $500; Second conviction of this amount: up to 5 yrs. and/or up to $2000; Subsequent convictions: up to 20 yrs; 60-2000 lbs.: 10-60 yrs. hard labor and $50,000 to $100,000; 2000-10,000 lbs.: 20-80 yrs. hard labor and $100,000 to $400,000; Over 10,000 lbs.: 50-80 yrs.		

		hard labor and $400,000 to $1,000,000		
MAINE	Tit. 17A §1101, *et seq.*	Over 1 lb. creates presumption of trafficking: Class E crime	Over 1.25 oz. creates presumption of furnishing: Class D crime	Class D crime; Possession of over 1 lb. or over 100 plants: Class C crime; Over 20 lbs. or over 500 plants: Class B crime
MARYLAND	Art. 27 §276, *et seq.*	1 yr. and/or $1,000; Bringing 100 or more lbs. into state is felony with penalty of up to 25 yrs. and/or fine up to $50,000; Subsequent offense: double penalties	Felony with penalty of 5 yrs. and/or fine of $15,000; 50 lbs. or more: felony with not less than 40 yrs.; Subsequent offense: double penalties, mandatory 2 yrs.	If "drug kingpin": 20-40 yrs. and/or $1,000,000 fine
MASSACHUSETTS	Ch. 94c §1, *et seq.*	6 months and/or $500; Subsequent offense: 2 yrs. and/or $2000; Over 50 lbs. is trafficking	1-2 yrs. and/or $500 to $5000; Subsequent offense: 1-2.5 yrs. and/or $1000 to $10,000	50-100 lbs.: 2.5-15 yrs and $500 to $10,000; 100-2000 lbs.: 3-15 yrs. and $2500 to $25,000; 2000-10,000 lbs.: 5-15 yrs. and $5000 to $50,000; Over 10,000 lbs.: 10-15 yrs. and $20,000 to $200,000
MICHIGAN	333.7401, *et seq.;* 333.7212	Misdemeanor with penalty of 1 yr. and/or $2000	Felony: less than 5 kg. or 20 plants: up to 4 yrs. and/or $20,000; 5-45 kg. or 20-200 plants: up to 7 yrs. and/or $500,000; Over 45 kg. or over 200 plants: up to 15 yrs. and/or $10,000,000; Sale to minor or near school property: up to double penalties	

MINNESOTA	152.01, *et seq.*	Small amount: petty misdemeanor $200 and maybe drug education program; 10+ kg.: up to 20 yrs. and/or $250,000; 50-100 kg.: up to 25 yrs. and/or $500,000; 100+ kg.: up to 30 yrs. and/or $1,000,000; Subsequent offense: depends on level of prior offense; if misdemeanor, may be required to participate in chemical dependency evaluation and treatment	Any small amount for sale: up to 5 yrs. and/or $10,000; Small amount without remuneration: petty misdemeanor with fine of up to $200 and maybe drug education program; 5+ kg.: up to 20 yrs. and/or $250,000; 25+ kg.: up to 25 yrs. and/or $500,000; 50+ kg.: up to 30 yrs. and/or $1,000,000; 5 kg. or more in school or park or public housing zone: up to 25 yrs. and/or $500,000	
MISSISSIPPI	41-29-101, *et seq.;* 41-29-139	<30 g.: $100–$250; second conviction: $250 and 5–60 days jail; third conviction: $250–$500 and 5 days–6 months jail; 30–250 g.: $1000 and/or 1 yr. jail, or $3000 and/or 3 yrs. prison; 250–500 g.: 2–8 yrs. and up to $50,000; 500 g.–1 kg.: 4–16 yrs. and up to $250,000; 1–5 kg.: 6–24 yrs. and up to $500,000; >5 kg.: 10–30 yrs. and up to $1 million	Under 1 oz.: up to 3 yrs. and/or $3000; First-time offender with over 1 oz. but less than 1 kg.: up to 20 yrs. and/or $30,000; Over 1 oz.: up to 30 yrs. and/or $5,000 to $1,000,000; Subsequent offense: double penalties	Anyone over 21 selling 10 lbs. or more of marijuana during any 12 month period shall have life in prison without suspension/parole
MISSOURI	195.010, *et seq.*	Under 35 g.: Class A misdemeanor; Over 35 g.: Class C felony; Subsequent offense: subject to prior & persistent offenders statute §195.295	Less than 5 g.: Class C felony; More than 5 g.: Class B felony; Subsequent offense: subject to prior & persistent offenders statute §195.295; Distribution to minor 17 years old or 2 yrs. junior: Class B felony; Within 2000 ft. of school or public housing: Class A felony	Trafficking drugs 1st degree: Distribution / attempt to deliver: 30-100 kg.: Class A felony; 100+ kg.: term of prison for Class A felony without parole; Trafficking in 2nd degree: Buying/ attempt to purchase: 30-100 kg.: Class B felony; 100+ kg. or over 500 plants: Class A felony

MONTANA	45-9-101, *et seq.*; 50-32-101, *et seq.*	Under 60 g.: misdemeanor with penalty of 6 months in county jail and fine of $100 to $500; Subsequent offense: $1000 fine and 1 yr. in county jail or up to 3 yrs. in state penitentiary	1 yr. to life and $50,000; Subsequent offense: 2 yrs. to life and $50,000; Offense of criminal sale of dangerous drugs on or near school property: 3 years to life and/or $50,000 fine	Criminal production/ manufacture: Less than 1 lb. or 30 plants: up to 10 yrs. and $50,000; Over 1 lb. or 30 plants: 2 yrs. to life and/or $50,000; Subsequent offense: up to double penalties
NEBRASKA	28-401, *et seq.*	Under 1 oz.(if first offense): Citation, $100, and attend a course; 2nd offense: Citation, $200, up to 5 days in jail, and Class IV misdemeanor; 3rd offense: Class IIIA misdemeanor, $300, and up to 7 days jail Over 1 oz.: Class IIIA misdemeanor; Over 1 lb.: Class IV felony	1 oz.-1 lb.: Class IIIA misdemeanor; Over 1 lb.: Class IV felony	
NEVADA	453.011, *et seq.*; NAC 453.510	For someone under 21: 1-6 yrs. and $2000 or 1 yr. in county jail; $1000 and 6 mos. driver's license suspension (same for 2nd and 3rd offenses); For someone over 21: up to 1 yr. and up to $1000; Subsequent offense: 1-6 yrs. and $5000	1-10 yrs. and up to $10,000; 2nd offense: 2-15 yrs. and up to $15,000; 3rd offense: 5-20 yrs. and up to $20,000	100-2000 lbs.: 3-20 yrs. and maximum $25,000; 2000-10,000 lbs.: 2-10 yrs. and minimum $50,000; Over 10,000 lbs.: 15 yrs. to life and minimum $200,000
NEW HAMPSHIRE	318-B:1, *et seq.*	Misdemeanor (class A)	Under 1 oz.: up to 3 yrs. and/or $25,000; 1 oz. to 5 lbs.: up to 7 yrs. and/or $100,000; Over 5 lbs.: up to 20 yrs. and/or $300,000; Subsequent offense: Under 1 oz.: up to 6 yrs. and/or $50,000; 1 oz. to 5 lbs.: up to 15 yrs. and/ or $200,000; Over 5 lbs.: up to 40 yrs. and/or $500,000	

NEW JERSEY	24:21-1, *et seq.*; 2C:35-2, *et seq.*	Under 50 g.: disorderly person and 100 hrs. of community service (if within 1000 ft. of school); Over 50g.: 4th degree crime, $25,000	Less than 1 oz.: 4th degree crime; 1 oz. to 5 lbs.: 3rd degree crime, up to $15,000; 5–25 lbs.: 2nd degree crime; Over 25 lbs.: 1st degree	Leader of narcotics trafficking network: life (25 year minimum before parole) and/or $500,000
NEW MEXICO	30-31-1, *et seq.*	Under 1 oz.: petty misdemeanor, 15 days and $50-$100; 1-8 oz.: misdemeanor, 1 yr. and $100-$1000; Over 8 oz.: 4th degree felony; Subsequent offense: Under 1 oz.: misdemeanor, 1 yr., $100-$1000	4th degree felony; If over 100 lbs., 3rd degree felony; Subsequent offense: 3rd degree felony; If over 100 lbs.: 2nd degree felony; Higher penalties if in drug-free school zone	
NEW YORK	Penal §220, *et seq.*; Pub. Health §3306, 3307	Under 25g: $100; Over 25 g. or public use: Class B misdemeanor; Over 2 oz.: Class A misdemeanor; Over 8 oz.: Class E felony; Over 16 oz.: Class D felony; Over 10 lbs.: Class C felony; Subsequent offense: Under 25 g.: $200; Third offense: $250 and 15 days	Under 2 g. or 1 cigarette: Class B misdemeanor; Under 25 g.: Class A misdemeanor; Over 25 g.: Class E felony; Over 4 oz. or sale to a minor: Class D felony; Over 16 oz.: Class C felony	
NORTH CAROLINA	90-86, *et seq.*	Class 3 misdemeanor; Over .5 oz.: Class 1 misdemeanor, $100 fine; Subsequent offense over .5 oz.: Class I felony Over 1.5 oz.: Class I felony;	Class I felony but not when under 5 g. for no consideration	10-50 lbs.: Class H felony, 25-30 mos. and/or $5000; 50-2000 lbs.: Class G felony, 35-42 mos. and/or $25,000; 2000-10,000 lbs.: Class F felony, 70-84 mos. and/or $50,000; Over 10,000 lbs.: Class D felony, 175-219 mos. and/or $200,000
NORTH DAKOTA	19-03.1-01, *et seq.*	Under .5 oz.: Class B misdemeanor; Under 1 oz.: Class A misdemeanor (may be expunged from record if no further conviction for 2 yrs.); Under .5 oz. while operating a motor vehicle: Class A	Class B felony; 100 lbs. or more: Class A felony; Delivery to a minor by an 18 year old.	

		misdemeanor		
OHIO	2925.01, *et seq.*; 3719.01, *et seq.*	Under 20 g. and gift: minor misdemeanor; Subsequent offense: misdemeanor of 3rd degree; Under 100 g.: minor misdemeanor; 100-200 g.: 4th degree misdemeanor; 200-1000 g.: 5th degree felony; 1000-5000 g.: 3rd degree felony; 5000-20,000 g.: 3rd degree felony with presumption of prison term; over 20,000 g.: 2nd degree felony	5th degree felony; 200-1000 g.: 4th degree felony; 1000-5000 g.: 3rd degree felony; 5000-20,000 g.: 3rd degree felony with presumption of prison term; Over 20,000 g.: 2nd degree felony; Stricter penalties if sale within 1000 ft. of school or 100 ft. of juvenile	
OKLAHOMA	Tit. 63 §2-101, *et seq.*	Misdemeanor with penalty of up to 1 yr. or fined $10,000; Subsequent offense: felony, 2-10 yrs. Fine not to exceed $25,000; Within 1000 feet of school or in presence of child under 12: up to double penalties; subsequent offense: up to triple penalties	Felony, 2 yrs. to life and/or up to $5000; Subsequent offense: double penalties	Between 25-1000 lbs.: $25,000 to $100,000; Over 1000 lbs.: $100,000 to $500,000
OREGON	Chapter 475	Less than 1 oz.: $500-$1000	110-150 g.: commercial drug offense if over $300 cash, firearm, packaging materials, customer list, stolen property, or using public lands; Over 150 g.: Category 6 crime	Class B felony (Category 8 if over 150 g.); 5 g.-1 oz.: Class A misdemeanor; less than 5 g.: $500-$1000 fine; Within 1000 ft. of school: Class C misdemeanor
PENNSYLVANIA	Tit. 35 §780-101, *et seq.*	Under 30 g.: misdemeanor, 30 days and/or $500; Over 30 g.: misdemeanor, 1 yr. and/or $5000 Subsequent offense over 30g.: 3 yrs. and/or $25,000	Over 1000 lbs.: felony, up to 10 yrs. and/or $100,000 or enough to recoup drug profit; Subsequent offense or sale to minor: double penalties	

RHODE ISLAND	21-28-1.01, *et seq.*	Misdemeanor, up to 1 yr. and/or $200 to $500; 1-5 kg.: 10-50 yrs. and/or $10,000-$500,000 Over 5 kg.: 20 yrs. to life and $25,000 to $1,000,000	1-5 kg.: 10-50 yrs. and/or $10,000-$500,000 Over 5 kg.: 20 yrs. to life and $25,000 to $1,000,000; Sale within 300 yds. of school: double penalties; Sale to minor or person 3 yrs. junior: minimum 2-5 yrs. and $10,000	
SOUTH CAROLINA	44-53-110	Misdemeanor: up to 6 mos. and/or $1000; Subsequent offense: misdemeanor, 1 yr. and/or $2000 Under 1 oz.: 30 days and/or $100 to $200; Over 1 oz.: *Prima facie* guilty of sale; Subsequent offense under 1 oz.: 1 yr. and/or $200 to $1000	Felony: up to 5 yrs. and/or $5,000; Subsequent offense: felony, up to 10 yrs. and/or $10,000; Third offense: felony, 5-20 yrs. and/or $20,000; Sale to minor: misdemeanor, up to 10 yrs. and $10,000	10-100 lbs.: 1-10 yrs. and $10,000; 2nd offense: 5-20 yrs and $15,000; Subsequent offense: mandatory 25 yrs. and $25,000; 100-2000 lbs. or 100-1000 plants: mandatory 25 yrs. and $25,000; 2000-10,000 lbs. or 1000-10,000 plants: mandatory 25 yrs. and $50,000; Over 10,000 lbs. or over 10,000 plants: 25-30 yrs. and $200,000
SOUTH DAKOTA	22-42-6, *et seq.*; 34-20B-1 to 114	Under 2 oz.: Class 1 misdemeanor; 2 oz. to .5 lb.: Class 6 felony; .5 to 1 lb.: Class 5 felony; 1to 10 lbs.: Class 4 felony; Over 10 lbs.: Class 3 felony; May be civil penalty for violation up to $10,000 in any of the above cases	Under .5 oz. or without consideration: Class 1 misdemeanor; Under 1 oz.: Class 6 felony; 1 oz.-.5 lb.: Class 5 felony; .5-1 lb.: Class 4 felony; Over 1 lb.: Class 3 felony; Sale to a minor: Class 4 felony; Sale in drug-free zone: Class 4 felony, minimum 5 yrs. Also may be civil penalty up to $10,000 in any of above cases; All felonies: mandatory 30 days without suspension; Subsequent offense: mandatory 1 yr.	

TENNESSEE	39-17-401, *et seq.*	Possession or casual exchange of: Less than .5 oz.: Class A misdemeanor and attendance at drug offender school and minimum $250 fine; Casual exchange to a minor from an adult 2 yrs. his senior and adult knows minor is a minor: felony; Subsequent offense: $500 minimum; Third: $750 minimum; Two or more prior convictions, then Class E felony; 20 plants to 99 plants: Class C felony, fined up to $100,000.	.5 oz. to 10 lbs.: Class E felony and/or $5000; 10 lbs. + 1 g. to 70 lbs.: Class D felony and/or $50,000; 70 lbs. + 1 g.: Class B felony and/or $200,000; Over 700 lbs.: Class A felony and/or $500,000; Sale to minor under 18 or in drug-free zone: one class higher than amount required; Minimum penalty amounts: 1st drug felony offense: $2000; 2nd: $2500; 3rd: $3000	
TEXAS	Health & Safety §481.032, *et seq.*	Under 2 oz.: Class B misdemeanor; 2-4 oz.: Class A misdemeanor; 4 oz. to 5 lbs.: State jail felony; 5-50 lbs.: 3rd degree felony; 50-2000 lbs.: 2nd degree felony; Over 2000 lbs.: Texas Dept. of Criminal Justice institution for life or 5-99 yrs. and $50,000	.25 oz. or less: Class B misdemeanor (if no remuneration); .25 oz. or less: Class A misdemeanor (with remuneration); .25 oz. to 5 lbs.: state jail felony; 5 lbs. to 50 lbs.: 2nd degree felony; 50-2000 lbs.: 1st degree felony; Over 2000 lbs.: Texas Dept. of Criminal Justice institution for life or 10-99 yrs. and/or $100.000; Delivery to minor under 17 who is enrolled in school and over .25 oz.: 2nd degree felony; Within drug-free zone: penalties doubled	
UTAH	58-37-1, *et seq.*	Under 1 oz.: Class B misdemeanor; 1-16 oz. not yet extracted from plant: Class A misdemeanor; Over 1 lb.-100 lbs.: 3rd degree felony; Over 100 lbs.: 2nd degree felony; Subsequent offense: one degree greater penalty than provided for	3rd degree felony; subsequent offense: 2nd degree felony; Within 1000 ft. of school or sale to a minor: one degree more than provided except 1st degree felony is 5 yrs. mandatory	

VERMONT	Tit. 18§4230	Under 2 oz. and/or less than 3 plants: up to 6 months and/or $500; More than 2 oz. and/or more than 3 plants: up to 3 yrs. and/or $10,000; More than 1 lb. or more than 10 plants: up to 5 yrs. and/or $100,000; More than 10 lbs. or more than 25 plants: up to 15 yrs. and/or $500,000; Subsequent offense: Under 2 oz.: up to 2 yrs. and/or $2000	Under .5 oz.: 2 yrs. and/or $10,000; .5 oz.-1 lb.: up to 5 yrs. and/or $100,000; More than 1 lb.: up to 15 yrs. and/or $500,000; Subsequent offense: double penalties	(Permissive Inference) 50 lbs or more with intent to sell: up to 30 yrs. and or $1 million
VIRGINIA	54.1-3445, 18.2-247	Misdemeanor, jail up to 30 days and/or $500; Subsequent offense: Class 1 misdemeanor: up to 1 yr. and/or $2500	Up to .5 oz.: Class 1 misdemeanor; .5 oz.-5 lbs.: Class 5 felony; Over 100kg: mandatory 20 years and $1,000,000; Proof that person gave drug only as an accommodation not for remuneration or to induce him to become addicted shall be guilty of Class 1 misdemeanor; Sale to minor or within 1000 ft. of school: stricter penalties	5 lbs. or more: 3–40 yrs. and $1,000,000;
WASHINGTON	69.50.101, *et seq.*	Up to 5 yrs. and/or $10,000; 40 g. or less is misdemeanor; Subsequent offense: double penalties	Less than 40 g.: misdemeanor, up to 5 yrs. in correctional facility and $10,000; Subsequent offense: up to double penalties; Unlawful delivery of controlled substance used by person delivered to and resulting in user's death: deliverer guilty of controlled substance homicide: Class B felony	
WEST VIRGINIA	60A-1-101 to 8-13	Misdemeanor, 90 days-6 mos. and/or $1000; Court may mitigate first offense of under 15 g.; Subsequent offense: double penalties	Felony, 1-5 yrs. and/or $15,000; Subsequent offense: double penalties; Sale to minor or within 1000 ft. of school: mandatory 2 yrs.	Transport into state with intent to deliver: felony, 1-5 yrs. and/or $15,000
WISCONSIN	§961.41 *et seq.*	Misdemeanor, up to 6 mos. and/or fine up to $1000; Subsequent offense: class I felony	Felony. 500g or less: up to 4 ½ years and/or $500–$25,000; 500g to 2500g: 3 months to 7 ½ years and/or $1000–$50,000; 2500g or more: 1–5 years, $1000–$100,000; Sale within 1000 ft. of school of less than 25 g. or 5 plants: additional five years	

WYOMING	35-7-1001 to 1057	Less than 3 oz.: misdemeanor, up to 1 yr. and/or $1000; Over 3 oz.: felony, up to 5 yrs. and/or $10,000; Subsequent offense: up to 5 yrs. and/or $5000 or double penalties	Up to 10 yrs. and/or $10,000; Subsequent offense or sale to minor or sale in drug-free zone: double penalties	