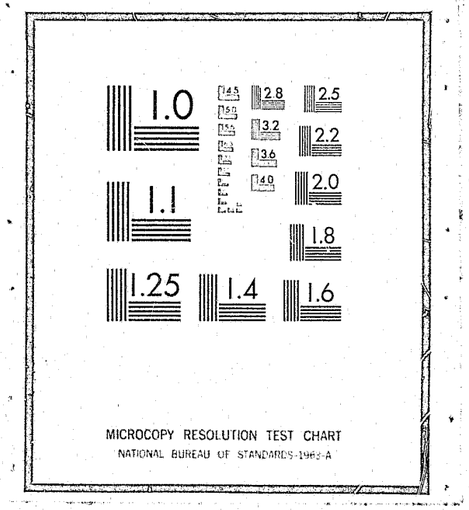

MARIJUANA:

A Study of State Policies and Penalties

Volume 2
Findings and Analysis

National Governors' Conference
Center for Policy Research and Analysis

MARIJUANA:

A STUDY OF STATE POLICIES AND PENALTIES

VOLUME 2 - FINDINGS AND ANALYSIS

Prepared by

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For the

NATIONAL GOVERNORS' CONFERENCE

Center for Policy Research and Analysis

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FOREWORD

Marijuana: A Study of State Policies and Penalties is a three-volume analysis of issues concerning marijuana that are of importance to state policymakers. The study reviews the medical, legal, and historical dimensions of marijuana use and examines the range of policy approaches toward marijuana possession and use which state officials have considered. Attention is directed to the experience of eight states that have eliminated incarceration as a penalty for private possession of small amounts of marijuana as well as to the experience of states that have not passed such decriminalization laws.

Governor Brendan T. Byrne of New Jersey proposed in 1975 that this study be initiated to provide state policymakers with better information on issues concerning marijuana. The Executive Committee of the National Governors' Conference authorized the NGC Center for Policy Research and Analysis to undertake the study. The Center obtained financial support from the National Institute of Law Enforcement and Criminal Justice of the Law Enforcement Assistance Administration and selected the firm of Peat, Marwick, Mitchell & Co. to conduct the study. An expert Interdisciplinary Review and Assessment Panel provided guidance and quality control throughout the research process.

Two aspects of the study should be emphasized at the outset. First, the study provides a comprehensive, independent, and objective analysis of the issues under examination. It does not, however, make policy recommendations, but instead leaves the evaluation of data and the development of specific policy options to state officials. Second, the assessment of the experience with decriminalization laws, which have been passed only recently, is based on the best data now available rather than on trend data or longitudinal analysis. Further assessments, based on more substantial and longer-term data, will determine whether or not the impact of the new laws over time on the criminal justice and health care systems and on usage is consistent with the patterns observed to date.

The efforts of many persons have made this study possible, including the PMM&Co. study team and the Interdisciplinary Review and Assessment Panel. John Lagomarcino of the NGC staff has made major contributions. The counsel of Dr. Helen Erskine of the National Institute of Law Enforcement and Criminal Justice has also been of great benefit.

Stephen B. Farber, Director
National Governors' Conference

PREFACE

There has been no Governor of any state in the nation over the past decade who has not felt some pressures--and often very strong pressures--to enact some change or other in the law affecting the use and possession of marijuana.

It is to help present and future Governors deal with these pressures knowledgeably and reasonably that I proposed this study and the National Governors' Conference Executive Committee agreed to undertake it. The study was underwritten by the Law Enforcement Assistance Administration.

There is an abundance of literature on what marijuana is and isn't and on the medical and sociological results of its use. We have not attempted any exhaustive evaluation of these questions, other than to summarize that body of literature.

We have instead focused attention on the experience of several states that have taken or attempted action of one kind or another to deal with the problem. In eight states the legislature has changed the law to decriminalize the use or possession of small quantities of marijuana; in one of those states the court also mandated a change in approach.

Even Governors who have no intention of initiating action with their legislatures in this area may have to anticipate a court-mandated re-evaluation of the situation.

This report is an attempt to evaluate how and where the legal approach to marijuana use and possession has changed; what the measurable effects of those changes have been on law enforcement and other government functions in the state making the change; and what sort of response by the executive branch appears to be necessary or advisable in order to cope with those changes successfully.

I hope that this study will prove to be a useful tool in the hands of Governors who will be coming to grips with changes in this area in the years ahead.

Brendan T. Byrne
Governor of New Jersey

ACKNOWLEDGMENTS

Peat, Marwick, Mitchell & Co. conducted this study for the National Governors' Conference under funding provided by the Law Enforcement Assistance Administration of the Department of Justice. The written contributions of Professor Richard J. Bonnie of the University of Virginia School of Law, and Dr. Peter G. Bourne, appointed since the study as a Special Assistant to President Carter, are acknowledged in the reports. In addition, we would especially like to express our appreciation and give appropriate recognition to two members of the PMM&Co. study team: Morten Engstrom, who as lead consultant on the study labored long and hard in the research, field interviews, and compilation of drafts; and Judith A. Cass, the PMM&Co. technical editor, who perspicaciously refined the drafts into final form.

Raymond T. Olsen, Project Director

Lawrence S. Herman, Project Manager

INTRODUCTION

The debate on the marijuana issue during the last half century has been characterized by the use of exaggerated and erroneous data by both sides. Generally, however, the use of the drug was limited to relatively small segments of the population that were not part of major political or constituency groups.

During the last decade, personal use and possession of marijuana have escalated dramatically, transcending nearly all geographic, social, and economic categories. Today, for the first time in our nation's history, the majority of senior high school students and young adults between the ages of 18 and 25 have tried marijuana, and the "current use" portion of these populations is near 25 percent. Nor is use negligible in other age categories; individuals in all age groups and from all social backgrounds have tried or are regular users of marijuana.

Concurrent with this growth in use has been an increased concern over the validity and efficacy of current laws, particularly at the state level. Are the laws effective in minimizing marijuana use? Are the personal and criminal justice system costs incurred in enforcing the laws justified by the seriousness of the crime? In general, are the laws morally (and even politically) valid?

In 1973 the Presidentially appointed National Commission on Marihuana and Drug Abuse recommended the elimination of penalties for simple possession of the drug. The Commission on Uniform State Laws concurred with this recommendation, and numerous other national groups have also advocated some form of penalty reduction for simple possession of marijuana.

In addition, substantial research has been conducted recently on the medical, scientific, and social aspects of marijuana use, and the nature and effects of marijuana are now better understood than they have ever been. Although many unanswered questions remain, the areas of medical uncertainty have been rapidly narrowed.

And finally, President Carter has recommended the lessening of penalties for simple possession. In a statement during the recent campaign, President Carter said:

> Based on present evidence I am not convinced that marijuana use is completely free from any health hazard. However, I

am deeply concerned that over the past two years between 400,000 and 450,000 Americans have been arrested on marijuana charges, comprising an average of 69 percent of all drug arrests which occurred in this country. These were individuals who in other respects were normal law abiding citizens. I am in favor of decriminalization of small amounts (1 oz. or less) of marijuana and am watching closely recently implemented programs to decriminalize possession in Oregon, Alaska, Maine, Colorado, South Dakota, Minnesota, California, and Ohio. I believe that if there is no evidence of increased use, such an approach could usefully be considered elsewhere in the country on a state-by-state approach.

Views on marijuana, of course, are quite divergent. Strongly held opposing views are also expressed. This study is intended to help state governments effectively examine their marijuana laws. In the recent past, eight states have passed new laws eliminating incarceration as a penalty for private possession of small amounts of marijuana. These eight states have used a broad variety of levels, approaches, and conditions. In most states, however, the potential for substantial incarceration exists, but the penalty is not evenly applied to all offenders who come in contact with the criminal justice system.

This study is not advocative. It does not recommend a single policy approach to marijuana. Governors, legislators, and executive policymakers must make their own decisions as to the legal structures which best correspond to their own needs, conditions, and perceptions.

The specific objectives of Volume 2 are to:

- provide a summary of the informational background which must serve as a base for objective policy assessment;
- describe a framework for assessing existing and potential policy and legislation;
- summarize the findings of a study of selected states which have undertaken significant marijuana policy reevaluation; and
- provide a legislative guide of alternative marijuana policy approaches for state policymakers.

Chapter I summarizes the historical, social, and medical information that can serve as a base for rational policymaking. Chapter II discusses a framework which allows policymakers to simultaneously focus attention on the currently relevant policy choices and provide a perspective on the more general marijuana issues.

Chapter III discusses the immediate issues, together with the positions of advocates and opponents, on marijuana policy. Chapter IV presents the findings and evidence of this study concerning these issues, so that the experience of several states can be used to test the strength of various arguments for and against penalty reductions. Finally, Chapter V provides a legislative guide for policymakers who wish to consider change in their state's marijuana law. This guide will discuss the ramifications of various detailed approaches to the law.

I. MARIJUANA: BACKGROUND OF THE ISSUE

This chapter summarizes some of the relevant medical, social, and usage information that is required to analyze the major issues facing marijuana policymakers. It is not intended as a complete summation of all available information. More detailed presentations and references are provided in Volume 3 of this study.

HISTORICAL OVERVIEW

The first marijuana prohibition laws were passed by several states in 1914 and 1915, and a majority of the other states followed in the succeeding two decades. Although little was known about the effects of marijuana, these laws were a response to fears that marijuana caused severe psychological and physical damage as well as antisocial and criminal behavior. It was felt that marijuana was related to the narcotic drugs (i.e., heroin and opium) more than to alcohol and tobacco. This perceived relationship was based to a great extent on the nature of the user rather than on factual information concerning the pharmacological and behavioral effects of the drug. During this period, marijuana was used primarily by minority groups, such as Hispanics and blacks, and it had not been assimilated in the culture of majority groups in the way that alcohol and tobacco had.

Marijuana prohibition became a part of federal legislation in 1937 when the Marijuana Tax Act was passed. The strongest and most active proponent of this act was the Federal Bureau of Narcotics, which presented marijuana as a drug that induced insanity, addiction, and criminal behavior. These beliefs persisted well into the 1960s and are still held by many unfamiliar with the recent research on marijuana. Between the 1930s and the 1960s marijuana penalties became increasingly severe partly as a result of the classification of marijuana as a narcotic. In the 1960s, however, marijuana became a drug of the middle-class youth. As influential individuals became acquainted with marijuana through research reports and its use in their own community, attitudes began to change. Since 1970, marijuana penalties have generally been lessened in severity, and increasing amounts of research have

been performed. In the last 3 years, the Federal Government has expended approximately $13 million in marijuana research alone.[1]

MEDICAL/SCIENTIFIC INFORMATION

The physiological effects of marijuana are highly complex and are dependent on dose, physical health of the user, previous history of use, psychological characteristics of the user, and the social setting of use. Because of this complexity, many of the statements below are generalizations that may not be applicable in specific instances.

The most common medical response to acute doses of marijuana is an increased heart rate and reddening of the eyes. Usage-related changes in brain waves occur, although this effect is apparently significantly dependent on the dose to which the user is accustomed. On rare occasions, adverse psychological reactions are experienced, although this appears to be related primarily to the psychological health of the individual and the social setting in which the drug is ingested.

All medical and scientific evidence indicates that marijuana is not physically addictive in doses achievable in normal use. Some evidence indicates that heavy users may develop a type of psychological dependency, although this is difficult to both define and document. Some concern has also been expressed about the possibility of marijuana use (and abuse) leading to the use of other drugs, particularly heroin. This progression theory, however, has not been documented. Marijuana users are likely to use other drugs, both licit and illicit, with a positive correlation between level of marijuana use and the variety of drugs used. This correlation, however, represents a psychological predisposition, and the evidence suggests that the use of other drugs would not be reduced if marijuana were unavailable.

The evidence is conflicting with respect to the genetic and immunological effects of marijuana. Although some researchers have reported inhibitions of the immune response, with a consequent potential for heightened susceptibility to disease, other researchers have found no such effect. (It may be that there is a

short-term inhibition that later corrects itself.) Populations with a higher usage rate do not show any increased evidence of disease.

Similarly, the evidence with regard to marijuana and genetic hazards is inconclusive, primarily because of design and methodological imperfections of most human studies. However, there is no conclusive evidence that marijuana consumption causes either chromosome damage or birth defects in humans, although several generations may be needed to detect any defects. (The data on the existence of these defects in animals are conflicting.)

The scientific findings of the effects of marijuana on the sexual hormones, particularly testosterone, are also conflicting. More work is apparently needed in this area. Current research suggests that since the body appears to tolerate a wide range of variability in testosterone levels, it may be that if a reduction in testosterone does occur as a result of marijuana use, it affects only those with previous sexual dysfunction. Although clinical evidence is absent, frequent, intensive use of marijuana during critical stages of pregnancy might result in disruption of the normal sexual differentiation patterns of the male embryo. Therefore this research indicates that marijuana use by pregnant women may be damaging.

The effects of smoking marijuana on the lungs are also uncertain. Marijuana may have adverse effects similar to tobacco. However, some evidence indicates that marijuana improves the passage of air by expanding the airways and therefore may be useful in treating diseases such as asthma.

Because marijuana does change the perceptual orientation and stimulus response time of individuals, numerous studies have found that it reduces performance in activities such as driving an automobile. Almost all evidence suggests that it is unquestionably dangerous to drive while under the influence of marijuana. A number of techniques are available for assessing the level of marijuana in the body, including blood or urine testing and breath analysis. However, these techniques are complex and require equipment that is both bulky and expensive. There is no current technology which is suitable for use by highway patrolmen.

Marijuana may have a number of potentially beneficial medical uses. For example, it has been found useful in the treatment of glaucoma patients because marijuana reduces intraocular pressure. At least one glaucoma patient is currently formally prescribed

marijuana with the active consent of the Federal Government. Positive results have also been obtained by using marijuana to prevent nausea and vomiting and to reduce pain in cancer patients being treated with chemotherapy.

Compared to most pharmaceuticals, marijuana is quite low in biological toxicity. Thus, it is doubtful that deaths could be directly attributed to an overdose of hashish or marijuana.

In conclusion, therefore, in spite of the extensive research that has been performed since 1970, there is still no clear evidence of serious physiological or psychological effects as a result of occasional use. Evidence is conflicting on the more subtle potential adverse effects. Some such effects have been found, but the research has subsequently been contraindicated or the methodology challenged. To a number of researchers, alcohol and tobacco may have more directly harmful effects. This is not to say, of course, that marijuana is harmless and that such effects may not be found in the future.

USAGE PATTERNS

Current evidence indicates a significant increase in marijuana use by Americans during the last 5 years. The evidence also indicates that this increase may be slowing or may have already reached its peak, although it is premature to make this conclusion with any certainty.

Currently, approximately 22 percent of the United States population over the age of 12 has used marijuana at least once, which represents some 37 million individuals. Perhaps a more important statistic is that approximately 8 percent of all adults (over the age of 18) and 12 percent of all youths (ages 12-17) are current users (i.e., have used marijuana at least once in the last month).

Marijuana use is highly age specific. The largest group of users is in the 18-25 age range, of which 53 percent have used marijuana at least once and 25 percent have used it within the last month. Use is also high among high school youths, who have an almost identical use pattern. A recent study of high school seniors indicates that more than 19 percent have used marijuana more than 20 times in the last year. Use among adults drops off sharply after age 25. In the

age group 26-34, only 11 percent are current users, and only 1 percent of those 35 and older are current users. Perhaps the two major factors for this decreasing use with age are:

- a change in life style that results from maturation, marriage, and employment; and
- an insufficient time period for the younger groups, in which the largest growth in marijuana use occurred during the past decade, to progress to this age category.

It is not clear which of these two factors will prove to be most important; that is, whether use will increase in the older age categories as young people familiar with marijuana grow older, or whether these individuals will refrain from using as they mature. Without question, however, use by individuals over 25 has continued to increase.

Among individuals under 21, increases in the level of use have stabilized. In the latest survey by the National Institute of Drug Abuse, no age group has shown a significant increase. Although at least one other study conflicts with this survey, it is possible that use has stabilized.

It is important to retain a perspective concerning the size of the increase in recent years. A 1967 poll reported that only one in 20 students had ever used marijuana. By 1975 over half (55 percent) reported use in a similar poll. Within 7 years, what was once clearly statistically deviant behavior had become the norm for this age group.

With the increased use during the last decade, marijuana is no longer the drug of a single social group. Although marijuana use was originally associated with the "counterculture" and was symbolic of its opposition to traditional values and to the prevailing political climate, its use has spread to large numbers and more conservative segments of the American population.

RECENT TRENDS IN STATE MARIJUANA POLICY

In the period between 1965 and the early 1970s, almost all states reduced the penalties for possession of small amounts of marijuana from felonies to misdemeanors. The Uniform Controlled Substances Act of 1970 contained a provision for misdemeanor penalties for possession of controlled substances.

A National Commission on Marihuana and Drug Abuse was established in 1970 and was broadly mandated to investigate "the nature and scope of marijuana use, the effect of the drug, the relationship of marijuana use to other behavior, and the efficacy of existing law." The Commission recommended, among other things, that:

- under state law, cultivation, sale, or distribution for profit and possession with intent to sell remain felonies;
- possession in private for personal use no longer be an offense;
- distribution in private of small amounts for no or insignificant remuneration no longer be an offense;
- public possession of less than 1 ounce no longer be an offense, but that marijuana be subject to summary seizure and forfeiture; and
- public possession of more than 1 ounce be a criminal offense punishable by a $100 fine.

In 1973, the National Conference on Uniform State Laws instituted amendments to the Uniform Controlled Substances Act that followed in substance the recommendations of the National Commission. Some form of decriminalization has been supported by a number of national organizations, including the Governing Board of the American Medical Association, the American Bar Association and numerous state and local bar associations, the National Education Association, Consumers Union, the American Public Health Association, and the National Council of Churches.

In 1973, Oregon became the first state to decriminalize possession of small amounts of marijuana. Since that time, a total of eight states have eliminated incarceration as a penalty for simple possession. The exact specifications of these laws differ substantially and are described in greater detail in Chapter IV of Volume 3. Some of these states have made possession a civil offense; in others it remains a criminal offense, but frequently the law contains provisions for expungement of criminal records after specified periods of time. In Alaska, because of an Alaskan Supreme Court ruling, possession by adults in the home for personal use is not an offense at all.

There have been other trends in marijuana policy since 1970:

- Sale penalties have been gradually decreasing, but the offense is still a felony in the vast majority of jurisdictions, typically carrying a maximum sentence of 5 years or more.
- "Accommodation" transfers of marijuana are increasingly punished like simple possession offenses rather than sale offenses.
- Cultivation is usually subject to the same sentence as sale.
- Amount classifications are used in some states to exempt users from criminal dispositions, and in others to ensure that possession of large amounts can be punished as a felony.
- Discretionary conditional discharge is still the most widely legislated noncriminal disposition; however, eight states have enacted mandatory fine-only provisions covering possession of small amounts.
- Expungement (or the equivalent) of arrest and conviction records is now possible in 20 states for certain categories of marijuana users.
- Marijuana and hashish are treated differently in 18 states, either through parallel amount classifications or through noncriminal disposition provisions covering marijuana only.

PUBLIC ATTITUDES AND BELIEFS

Among nonsmokers, the most frequent reasons for not using marijuana are a simple lack of interest and fear of harmful medical effects. Fear of arrest is frequently given as a reason but seldom given as the primary reason.

Reasons for marijuana use are difficult to categorize, except that marijuana is considered by many to be a pleasurable experience, and that it is used by friends and acquaintances in an individual's peer

group. Marijuana is a social drug and is used more frequently at social gatherings than alone.

A majority of the adult public still considers marijuana to be addictive (approximately 70 percent) and to lead to the use of harder drugs (approximately 50 percent). As late as 1973, a majority (58 percent) also believed that marijuana led to the commission of crimes not otherwise committed, although this belief was held primarily by those without personal marijuana experience. As reported earlier, these beliefs are contraindicated by current research.

Public attitudes toward penalties for marijuana possession are equivocal, although a clear majority supports the retention of jail sentences for sale. Many, but not all, of the recent national surveys on this issue indicate that a majority supports the elimination of jail sentences for simple possession. However, only a small percentage of the public (17.8 percent in the 1975/76 National Institute on Drug Abuse survey) favors elimination of all penalties for simple possession. The strength of public attitudes (that is, whether opinions were held firmly or marginally) has not been measured by any of these surveys.

During the course of the current survey, the study team contacted a number of major organizations that have some interaction with the marijuana issue. The positions of those who responded are tabulated in Table I-1. In large measure, the criminal justice system groups opposed decriminalization, while the others supported minimization of penalties for simple possession.

SUMMARY

The major conclusions of this chapter are:

- Few, if any, serious adverse effects of marijuana taken in moderation are currently proven. Although there have been scientific allegations of such effects, such allegations have been subsequently disproven or the methodology challenged. However, longer-term impacts on such things as genetic effects, the effects of marijuana use on pregnant women, the effect on individual sexual hormones, and the effect of long-term marijuana smoking on the smoker's lungs cannot be conclusively determined at this time. In addition, information concerning driving

TABLE I-1

POSITION ON MARIJUANA OF SELECTED NATIONAL ORGANIZATIONS

ORGANIZATION	DATE OF RESOLUTION	POSITION
National Conference of Commissioners on Uniform State Laws	1973	Decriminalize possession for personal use (1 oz.) and gratuitous transfer. Public possession or distribution a misdemeanor.
National Education Association	1972	Support National Commission recommendations (No penalty for private simple possession)
National Association of Attorneys' General		Currently no official position.
International Association of Chiefs of Police, Inc.	1975	Oppose attempt to decriminalize or reduce penalties because of medical harm and relationship to other drugs and other criminal behavior.
American Bar Association	1972	No criminal laws punishing simple possession or casual transfer.
American Medical Association	1973	At most a misdemeanor.
National District Attorneys' Association	1973	Should remain illegal and subject to criminal prosecution.

while under the influence of marijuana requires further research.

- The use of marijuana has increased tremendously over the past decade but may now be stabilizing.

- The public believes that marijuana should not be legalized but may support the elimination of incarceration for simple possession.

FOOTNOTES

[1]National Institute of Drug Abuse, Bureau of Research, personal communication, February 7, 1977.

II. MARIJUANA: A POLICYMAKING FRAMEWORK

OVERVIEW

Consideration of alternative marijuana policies and approaches by state-level policymakers (the Governor and staff and legislators and their staffs) requires a philosophical and conceptual framework.

Detailed summaries of the extensive historical, legal, medical, and use data required for thorough consideration of the issue are provided in Volume 3. These data serve as a factual base for constructing an analytical model, which is the purpose of this chapter.

This framework is intended specifically for consideration of marijuana policy but may be useful for other drugs with potential for abuse, including alcohol and tobacco. Marijuana is, however, a unique drug in this country. As noted earlier, attitudes toward its use and control have been influenced by historical tradition and cultural biases as well as by scientific and medical research. Although often grouped with other drugs that historically have been abused in our society, a number of factors suggest that marijuana requires separate consideration:

- Personal use and acceptance of the drug have escalated substantially in recent times and cut across most socio-economic and cultural boundaries.

- During the last half century, marijuana was considered, in both common and legal use, as a "narcotic," although it differs from narcotics in its derivation and pharmacology, and especially in the fact that it is not physically addictive.

- Major segments of society have increasingly come to the conclusion that existing policies for marijuana use (as relative to other substances of potential abuse) are in need of reform.

- Medical and scientific research have generally concluded that the adverse effects of marijuana use are far less severe than traditionally thought, although more research is required on such things as genetic effects, the effects of marijuana use on pregnant women, the effect on individual sexual hormones, and the effect of long-term marijuana smoking on the smoker's lungs.

THE APPROACH

The analytical framework can be introduced very simply. Policy decisions regarding marijuana are perceived to occur at various levels of generality. Each level contains its own set of issues and options. Decisions must be made at the broadest level first, based upon the values and philosophical predispositions of the decisionmaker, and then on successively more focused levels. However, decisions at the broadest level are frequently implicit; in some cases policymakers may not be aware that such decisions have been made at all. Therefore one important objective of this chapter is to present an overview of the full decision process, as outlined in Figure II-1.

The decision process has been telescoped into three steps: (1) the decisionmaker must articulate philosophical premises and policy objectives; (2) assuming a "discouragement" policy is articulated, a basic scheme for implementing it must be selected; and (3) assuming choice of a discouragement policy implemented by a prohibition of non-medical availability, the decisionmaker must decide whether to impose sanctions on the user.

Articulating a Philosophical Premise

Although philosophical perceptions cover a continuous spectrum, they may be divided into three categories for our purposes. At one end of this spectrum, several "libertarian" philosophical premises are frequently expressed in support of this society's current posture toward alcohol and tobacco, and might be thought applicable to marijuana:

- The decision to use a recreational intoxicant is a personal moral decision in which the government has no authority to interfere.

- The decision to risk one's own health through use of a psychoactive substance is a personal decision; and the government has authority to intervene only if the use of the drug has incapacitated the user or has induced behavior causing harm to others.

Under this set of assumptions, identified with John Stuart Mill, the government has no authority to suppress the consumption of marijuana. Instead the only legitimate role of the government is to provide disincentives for (1) drug-induced behavior posing risks to others or

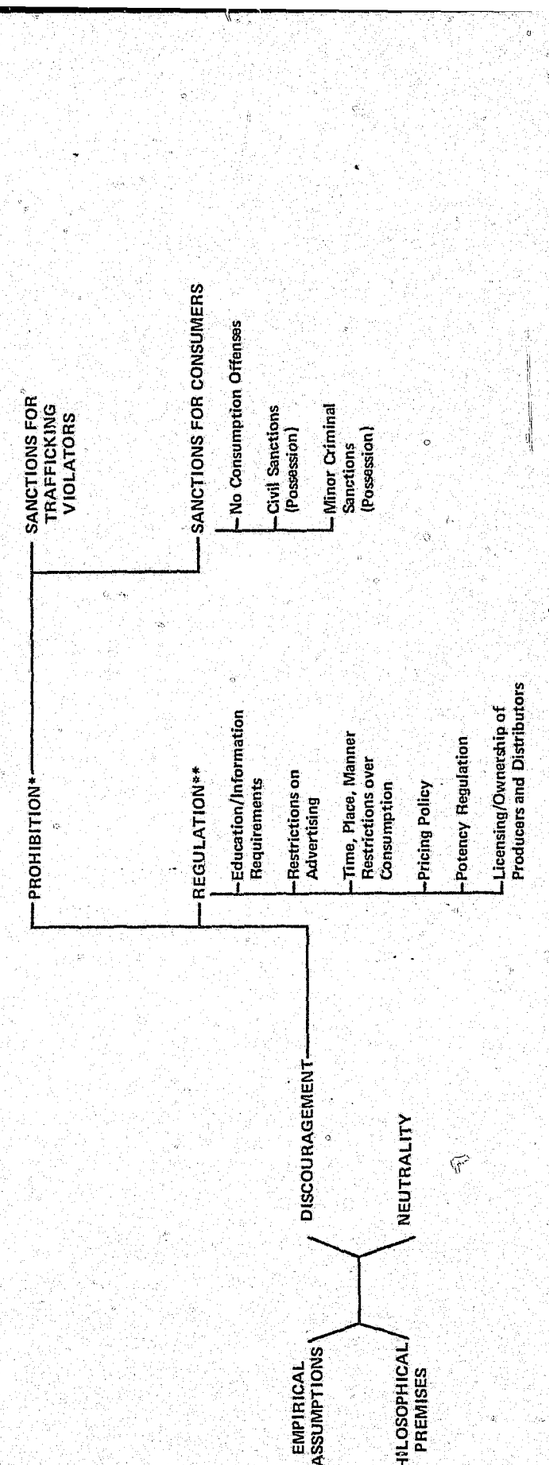


FIGURE II-1: THE POLICYMAKING FRAMEWORK

(2) intensified patterns of use which, in the aggregate, impose burdens on society's health care and welfare systems.

At the other end of the spectrum, those policymakers who do not accept these categorical philosophical premises may articulate alternative categorical premises:

- The government may aim to suppress and discourage use of any intoxicant considered immoral by a majority of the populace.

- The government may aim to suppress and discourage any behavior that could be harmful to the individual.

Under either of these premises, it is legitimate for the government to try to discourage marijuana consumption, even if it does not take a similar stance toward alcohol and tobacco. Whether the government ought to do so in all cases becomes a more pragmatic question that is dependent on political, economic, and cultural factors. Ultimately, these pragmatic questions may be crucial in determining how a discouragement policy should be implemented, the second level inquiry to be addressed below.

Third, a policymaker might adopt an intermediate philosophical stance under which the legitimacy of government intervention would be dependent on the magnitude and gravity of the harm associated with use of the drug. This intermediate view would reject the notions that (1) government could aim to suppress use simply on moral grounds and (2) a mere risk of harm to the individual justifies government intervention. This view might be articulated in any number of ways, including, for example: Government has no authority to suppress the simple use of an intoxicant unless the medical or behavioral consequences of use involve a substantial probability of impaired individual functioning and a derivative burden on the society's health care and social service systems.

This balancing philosophical view is contrasted with the categorical views noted above. For this reason, it has no clear implications regarding marijuana policy in the absence of data regarding the individual and social consequences of use. The question is simply when does the impact of excessive use of the public health and welfare become great enough to justify the discouragement of all consumption, even recreational or moderate use.

On the basis of what we know about marijuana today, many observers believe that the social risk is too slight to support a discouragement policy and to justify a suppression of personal choice. This belief is by no means universal, however, and current governmental policy is premised on the view that the health and behavioral consequences of long-term, chronic use are sufficiently uncertain that all use should be discouraged.[1]

Assuming that, philosophically, the government may legitimately seek to suppress and discourage consumption, the question arises whether it should in fact do so. For example, some argue that the use of intoxicants is inevitable and that society is better off, in the aggregate, if persons seeking drug-induced alterations of mood do so with marijuana instead of alcohol. Others have suggested that marijuana use is pleasurable and might serve a useful social function in trimming the aggressive edges from this highly competitive society.

On the other hand, defenders of existing policy have speculated that heavy users of marijuana (who represent most of the public health problem) would not be drawn from the population of persons who would otherwise have been alcoholics or alcohol abusers; instead they predict that society will bear the burden of both casualty groups. Defenders of existing policy also point out that national policy is moving in the direction of discouraging tobacco use and that national and state leaders may want to reconsider the current neutral posture toward alcohol use. This is no time, they say, for modifying the current approach to marijuana.

Implementing a Discouragement Policy

Assuming that government may legitimately choose to suppress and discourage marijuana consumption and that policymakers have chosen to do so, the next level of inquiry concerns how best to implement that policy.

For current purposes, the crucial choice regarding means of implementing a discouragement policy is whether to permit the substance to be legitimately available for nonmedical, recreational, or self-defined purposes. The alternative approach (in effect in this country for a half century) is to restrict the legal market to medical and research needs and prohibit all other cultivation, importation, and distribution. If prohibition were to be repealed and marijuana were to be legitimately available for self-defined use, as alcohol and tobacco now are, then the policymaker must also devise a regulatory

scheme that establishes the conditions under which the drug may legally be produced, distributed, and used.

It is important to emphasize that regulatory approaches are not inconsistent with discouragement policies. The current national objective regarding tobacco use seems to be to reduce consumption. To put it the other way, a decision to discourage use does not compel a decision to prohibit availability.

The best way to analyze this is to recognize that marijuana will be available and will be used regardless of the law. Current patterns of distribution suggest that law enforcement officials can intercept only one-tenth of the marijuana illegally imported into this country. If domestic cultivation were increased, the ratio would be even smaller. Thus, one of the elements of the policymaker's equation is the comparison of use patterns and social consequences under a prohibitory approach with the likely patterns and consequences under more or less restrictive regulatory approaches.

Proponents of legalization have argued that the costs of the current prohibition are substantial and could be eliminated by a regulatory system. For example, potency, purity, and quality control are now impossible. They also emphasize the fact that black market distribution puts otherwise law-abiding consumers in touch with lawbreakers who may also be pushing other, more harmful illicit substances.[2]

Opponents of legalization argue that the public health risks of substantially increased availability (which they consider inevitable under any regulatory scheme) are so significant that the costs of a partially unsuccessful prohibition are tolerable. This was, in essence, the position taken by the National Commission on Marijuana and Drug Abuse in 1972 when it rejected a regulatory approach and recommended retention of the current prohibition:[3]

> We noted above that institutionalizing availability of the drug would inevitably increase the incidence of use, even though that incidence might otherwise decrease. Of greater concern is the prospect that a larger incidence of use would result in a larger incidence of long-term heavy and very heavy use of potent preparations.
>
> There are now approximately 500,000 heavy users of less potent preparations in this country, representing

> about 2% of those who ever tried the drug. Even if the prevalence of heavy use remained the same in relation to those who ever used, this at-risk population would inevitably increase under a regulatory scheme. If the emotional disturbances found in very heavy hashish users in other countries were to occur in this country, the adverse social impact of marihuana use, now slight, would increase substantially.
>
> We have acknowledged that society, nonetheless, chose to run such a risk in 1933, when Prohibition was repealed. But alcohol use was already well-established in this society, and no alternative remained other than a regulatory approach. In light of our suspicion that interest in marihuana is largely transient, it would be imprudent to run that risk for marihuana today.

The Commission also noted that the regulatory approaches toward alcohol and tobacco needed revision and that any application of such an approach to marijuana should be preceded by careful study.[4] The Commission concluded by observing:

> Future policy planners might well come to a different conclusion if further study of existing schemes suggests a feasible model; if responsible use of the drug does indeed take root in our society; if continuing scientific and medical research uncovers no long-term ill-effects; if potency control appears feasible; and if the passage of time and the adoption of a rational social policy sufficiently desymbolizes marihuana so that availability is not equated in the public mind with approval.

In some ways, the policymaker choosing between a regulatory approach and a partially successful prohibition (which might best be regarded as a containment approach) is called on to compare apples and oranges. The public health, welfare, and criminal justice burden of current use must be subtracted from what might occur under some hypothetical regulatory approach; this constitutes that "benefit" of the prohibition. Against this, the "costs" of the prohibition must be weighed in terms of reduced freedom of choice, reduced respect for law, enforcement of the prohibition, the adverse impact on individual (and public) health and welfare of black market distribution of an unregulated drug, and other less tangible factors.

This is not an easy choice, especially in light of what we still do not know about the consequences of long-term heavy use. For purposes of the current study, however, adoption of a regulatory approach is not a sufficiently feasible alternative to merit additional attention. We say this because:

- A vast majority of the population opposes this approach for a variety of historical, socioeconomic, and cultural reasons, not the least of which is the traditional linkage of marijuana with the narcotics trade and its tradition of illegality.

- Legalization would conflict with an international treaty to which the United States is a party.

- For the state policymakers, such an option would conflict with federal prohibition laws regarding controlled substances.

Imposing Sanctions for Consumption-Related Behavior

The question, therefore, on the current agendas of state policymakers is whether a discouragement policy should include legal sanctions against the user--a person who has chosen to use the drug despite the government's discouragement efforts. The National Commission on Marihuana and Drug Abuse concluded that sanctions against the user were not necessary to implement a discouragement policy and that their enforcement caused more individual and social harm than could be possibly offset by the consumption thereby deterred. Accordingly, the Commission recommended the repeal of criminal sanctions against consumption-related behavior.

Since the Commission issued its report, eight states have enacted decriminalization schemes, and similar bills are pending in many other states. The rest of this study will be devoted to an analysis of (1) the impact of these changes in the states that have adopted them, (2) the process by which such reforms have been enacted or defeated, and (3) the technical issues that arise in connection with drafting a decriminalization scheme.

Before doing so, however, it is useful to integrate the decriminalization issue into the policymaking framework. Again, several categorical premises might well preclude sanctions against the consumer no matter what the data show. Thus, even if a policymaker supports

a discouragement policy which prohibits commercial activity, he/she may also believe that:

- the state has no authority to coerce individuals (on pain of legal sanctions) to behave in their own best interest; or

- the state may not make conduct a crime simply because it is regarded as immoral or because it might injure the actor's health even if, in the aggregate, individual injuries would pose a social burden.

These arguments have frequently been heard in courts in connection with constitutional challenges to mandatory motorcycle helmet laws and the marijuana possession laws. On occasion, the courts have invalidated these laws precisely on these grounds; the constitutional doctrine usually articulated in such cases is a violation of the right of privacy and personal autonomy.

Even if no categorical bar is posed against consumption sanctions, the policymaker must also weigh the benefits of criminal sanctions against their costs. Again, this is difficult to estimate. On the benefit side, one is presumably measuring deterrence and its derivative social benefits. Deterrence is measured by determining how many fewer persons use marijuana or use it less frequently because of the sanctions against use, how many adverse health reactions or behavioral problems are thereby avoided, and how much in the way of public health and welfare resources are thereby saved.

On the cost side, one must consider the individual costs of perceived injustice, loss of liberty and any unfairness and stigma associated with involvement in the criminal process. In addition, the policymaker must consider the institutional costs of disrespect for law when an offense is widely ignored and arbitrarily enforced. Finally, there are the efficiency costs--the criminal justice resources that are consumed in connection with the enforcement of possession laws and the processing of these cases, resources which might be better spent on more serious crimes.

FOOTNOTES

[1] These same "how much" questions are also relevant in determining how best to implement a discouragement policy.

[2] For discussions of the costs of marijuana prohibition, see Kaplan, Marijuana: The New Prohibition (1970) and Hellmer, The Marijuana Laws: The Price We Pay (1975).

[3] See Marihuana: A Signal of Misunderstanding, p. 146-150 (1972).

[4] For further elaboration of the case for evolutionary reform, see Bonnie and Whitebread, The Marihuana Conviction, p. 299-304 (1974).

III. MARIJUANA: THE IMMEDIATE ISSUES

INTRODUCTION

International obligations, federal law, and current political realities preclude enactment of a regulatory approach toward the availability of marijuana (including any variant of the so-called alcohol model) in the immediate future (see Volume 3, Chapter IV). Although a state could conceivably repeal its laws against cultivation and distribution of marijuana, leaving only the federal prohibitions in effect, such an overt departure from the prevailing national sentiment seems unlikely, at least in the foreseeable future. We assume, then, that commercial activities will remain prohibited by state law.[1]

Within these contours, the range of public policy choice involves both statutory and administrative dimensions. The statutory issue pertains to the appropriate penalty structure for noncommercial activity--possession of marijuana for personal use and other consumption-related behavior. The options include criminal penalties of varying severity as well as the several forms of decriminalization, including civil sanctions. Although administrative choices by police and prosecutors are extremely important and should not be overlooked by policymakers,[2] this report focuses mainly on legislative options.

Although a wide range of penalties for consumption-related behavior is conceivable, all but one state have already reduced simple possession to a misdemeanor (usually up to a year in jail). Eight states have reduced the penalty still further--to a fine only--and four of them do not even call the offense a crime. Proposals to enact similar penalty revisions--which generally go under the label decriminalization--are pending in virtually every other state.

During the deliberations concerning decriminalization, arguments both pro and con are frequently made on the basis of predictions about the likely impact of such a change. These arguments raise empirical questions that generally fall into three categories:

- impact on patterns of use (changes in incidence and intensity and circumstances of consumption);
- impact on public health and welfare (the derivative effect of increased adverse health reactions and traffic- and

job-related accidents on the society's health care and social service systems); and

- impact on the criminal justice system (derivative savings in the costs of enforcing the marijuana laws, including the costs of law enforcement, judicial, prosecutorial, defense, and corrections resources).

Not all of these questions are researchable; and even if researchable, many of them would take years and considerable effort to unravel. For purposes of this study, we have reviewed existing statistical data in those states that have enacted decriminalization and have conducted on-site interviews to assess the direction and gross magnitude of the changes.

IMPACT ON PATTERNS OF USE

As indicated above, a change in the legal status of consumption-related behavior may be associated with a change in the incidence (number of users) and intensity (frequency and amount) of use and circumstances of use.

Incidence and Intensity of Use

The primary concerns about the incidence and intensity of use are based upon the potential harmful effects of marijuana use. Opponents of decriminalization often contend that withdrawing criminal sanctions for consumption will undermine the discouragement policy and result in increased consumption. In their view, a repeal or substantial reduction of sanctions for personal possession will signal formal approval of a dangerous drug of potential abuse, eliminate the fear of arrest as a deterrent, and lessen the moral restraints on those who are uncertain about using the drug. The opponents thus contend that the adoption of decriminalization will encourage consumption, even if the prohibitions against manufacturing and commercial distribution remain in effect.

Conversely, proponents of decriminalization reject the contention that removing legal sanctions against consumption will result in substantial increases in consumption. In their view, the major deterrent exerted by legal controls is the lessened availability, which forces distribution underground, making it both inconvenient and costly to

obtain the drug. This deterrent would not change if prohibition against commercial distribution were maintained. They further contend that if experimentation increases (which, as history has demonstrated, does occur at substantial levels even with the current criminal sanctions in force), the number of regular users or the intensity of consumption will not be commensurately increased. Proponents also point out that the adoption of a decriminalization policy for marijuana consumption would basically duplicate the alcohol prohibition model of the 1920s. At that time, policymakers did not adopt criminal sanctions against persons who were able to obtain alcohol despite efforts to prohibit commercial legal distribution.

Consequently, one issue to be addressed in Chapter IV is whether any significant increase in the incidence or intensity of consumption has occurred in the jurisdictions that have decriminalized possession.

Circumstances of Use

Opponents of decriminalization policy approaches also contend that regardless of the general level of consumption, the loosening or removal of sanctions against consumption will result in altered patterns or circumstances of consumption, thereby increasing the adverse social consequences of marijuana use. They maintain that not only will users consume more marijuana (perhaps increasing adverse health reactions, particularly secondary reactions) but also users will be more likely to use marijuana in public, on the job, or in vehicles, and thereby endanger the public safety.

Proponents of decriminalization contend that there will be little or no increase in public use or dangerous marijuana-induced behavior, or that such problems can be better addressed through specific laws prohibiting, for example, driving while under the influence of marijuana. Proponents further argue that costs to the health care system resulting from marijuana use may diminish rather than increase as a result of decriminalization.

Thus a second issue to be addressed in Chapter IV is whether any measurable change in the consequences or circumstances of marijuana use can be attributable to altered penalties for possession.

IMPACT ON THE PUBLIC HEALTH AND WELFARE

Opponents of decriminalization approaches often argue that the increased incidence and intensity of use and the change in the circumstances of use will result in a derivative increase in the burden on the health care system by increasing:

- the number of individuals who need treatment because of acute adverse psychological reactions to the drug, as well as other adverse medical effects; and

- the incidence of traffic- and job-related accidents attributable to irresponsible use.

Proponents of decriminalization contend no significant increase will occur in public health costs (attributable, for example, to adverse health reactions or to industrial or automobile accidents). Indeed, some proponents suggest that the proportion of public health resources devoted to marijuana use might well decrease for two reasons:

- many acute adverse reactions to marijuana among experimenters may be attributable in part to the law rather than to the effects of the drug itself, due to the psychological atmosphere in which use or experimentation generally occurs; and

- many marijuana users have been diverted to the health care and drug treatment system to avoid the stigmatizing consequences of the criminal conviction.

Thus, a third issue to be addressed in Chapter IV is whether any measurable change will occur either in demands made on the health care system or in incapacitated driving attributable to altered penalties for marijuana use.

IMPACT ON THE CRIMINAL JUSTICE SYSTEM

Proponents of decriminalization frequently point out the individual injustices allegedly perpetrated by the existing scheme of criminal sanctions. They emphasize:

- the loss of liberty attendant to arrest, detention, and any incarceration imposed upon conviction;

- the stigma and social damage to the individual caused by a criminal record, including the inability to be considered for certain jobs, licenses, and educational placements; and

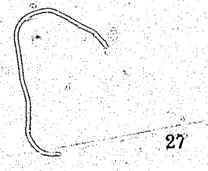
- the potential infringement upon civil liberties through improper search and seizure in the enforcement of current laws.

Proponents of decriminalization also frequently mention a perceived institutional harm wrought by the marijuana possession laws: the general disrespect for the law engendered by legislation that is not enforced against all offenders, and which often is disobeyed by a large number and even a majority of individuals in certain age groups.

By definition, decriminalization would reduce these individual and institutional costs by forbidding incarceration, removing the criminal label from the offense, and removing marijuana cases from the criminal justice system altogether.

Generally, if a law is adequately drafted and implemented, criminal justice costs in terms of individual inequity, injustices, and loss of respect for law will be alleviated simply by virtue of adopting the change in the law. However, proponents of decriminalization also claim that the changes in sanctions will result in derivative social benefits. They argue that the use of the criminal justice system for marijuana-related offenses diverts needed resources from matters of greater social importance.

Because law enforcement activity is fluid and difficult to quantify, it is not possible to ascertain if law enforcement resources are being diverted to more serious public concerns as a result of decriminalization. For the same reason, it is also impossible to determine whether crime rates for robbery, theft, and other serious crimes have been reduced by virtue of redirecting police attention to these matters. However, it should be possible to ascertain empirically whether less resource re being consumed by police in the detection of marijuana offenses and by police, prosecutors, and courts in the processing of marijuana cases, and whether these resources are therefore available for other activities in other areas. This issue will also be discussed in Chapter IV.



THE PROCESS OF CHANGE

Apart from the impact of decriminalization, another area of interest to Governors and legislators is the process of change. Understanding the political environment surrounding marijuana decriminalization requires a somewhat different approach than the other issues discussed above, because the questions involved are more conceptual than quantitative. Nevertheless, they are equally important to policymakers who are interested not only in the political liability of support or opposition to decriminalization, but also in broader questions involving the political process. Eight states have essentially decriminalized simple possession, and a number of other states have defeated similar law changes. It is important to learn from their experiences and to analyze questions such as:

- Has the support for, or opposition to, the decriminalization alternative been a political liability?

- For those state policymakers who are committed to significant change of personal possession laws, what are the political conditions that appear to most influence passage of decriminalization legislation?

- Which of the various political conditions described above are essential to the ultimate success or failure of decriminalization legislation?

- What factors are influential in the passage or failure of a bill? Historically, are certain factors common to states that decriminalized, but not to those that did not?

- What positions did key individuals take, such as the Governor, legislative leaders, medical or legal societies, state agencies, law enforcement groups, the press, special interest or lobby groups, and the courts?

- What special features of decriminalization bills were important to their passage/failure, such as educational provisions, private and public use distinctions, and amount level distinctions?

- What conceptual views framed individual support or opposition to a bill?

- What was the perceived public or media response in terms of support for the political process of change?

Chapter IV also presents the findings of this study concerning these issues.

FOOTNOTES

[1] An analysis of the various regulatory mechanisms under which marijuana could be legitimately available for self-defined uses appears in First Report of the National Commission on Marihuana and Drug Abuse, Marihuana: A Signal of Misunderstanding, Appendix Vol. II, pages 1145-1197 (1972).

[2] Whatever the prescribed penalties for commercial activities on the one hand and consumption-related activities on the other, enforcement officials at each level must also make decisions concerning the implementation of these prohibitions. These enforcement choices include allocations of investigative resources, guidelines for responses by uniformed patrolmen to detected violations, and guidelines for exercises of prosecutorial discretion.

To the extent that the Governor and other policymakers at the state level can influence the behavior of local police and prosecutors, decisions regarding enforcement priorities and practices can result in substantial reductions in the social costs of the prohibitory policies. And because they may be implemented without the heightened public visibility associated with the legislative process, administrative choices may substantially alter the operation of the legal system without sacrificing the deterrent benefits of the prohibition itself and thereby incurring the symbolic costs of repeal. This includes both decreased "deterrence" as well as heightened anxieties among those who are frightened by the change. See generally Bonnie and Whitebread, The Marihuana Conviction, pp. 273-293 (1974).

IV. CASE STUDY FINDINGS

The primary data sources for this study were nine site visits to selected states and national statistics derived from a general literature search. A detailed description of the study methodology is provided in Volume 3. The state level site visits were divided into two groups. The first group involved an analysis of both the process of change and the impact of penalty reductions in the following states:

- California;
- Texas; and
- Ohio.

The second component involved an analysis of the process of change in the following states:

- Colorado;
- Iowa;
- Louisiana;
- Maine;
- Minnesota; and
- New Jersey.

Of the states visited, the following have decriminalized (effective date in parenthesis):

- Colorado (July 1, 1975);
- Maine (May 1, 1976);
- Ohio (November 21, 1975);
- California (January 1, 1976); and
- Minnesota (April 10, 1976).

In addition, Texas substantially reduced its penalties effective August 27, 1973, although simple possession remains a misdemeanor. Because most of these laws have been effective for a relatively short time period, definitive conclusions at this time are in large measure not possible. However, trends and indicators of impact and process can be ascertained through both subjective and objective inquiries. Consequently, the first part of this chapter provides the results of our analysis of the impact of penalty reduction legislation, and the second part provides the results of our analysis of the process of change or attempted change.

Three decriminalized states were not visited: Alaska (3/1/76) because the important role of the judiciary makes its experience somewhat less extensible to other states; Oregon (10/5/73) because a number of studies have already been performed and reported in the literature; and South Dakota (4/1/77) because its decriminalization law has not yet become effective.

IMPACT OF CHANGE FINDINGS

Impact on Consumption Patterns

The study methodology did not include direct public surveys of usage patterns, and therefore changes in consumption patterns were primarily assessed through:

- secondary survey sources; and
- subjective perceptions developed during interviews with officials.

Further, with the exception of Oregon, all states that have decriminalized have done so since early 1975. Recognizing, therefore, that these states are literally in the midst of their legal system change, it is too soon to assemble completely satisfactory impact data. Of the states included in the survey, only one, California, conducted an official survey of usage patterns both before and after the change in law. This survey is not statewide, however, and involves an annual study of use among junior and senior high school students in San Mateo County. However, in a recent report of statewide usage patterns, California estimated that a relatively small proportion of new users tried marijuana because legal penalties had been reduced. Also, a post-decriminalization study was conducted in Oregon which

attempted to determine whether marijuana use increased as a result of the law. (Data from both studies are summarized in Volume 3.)

San Mateo Study

The San Mateo study, consisting of approximately 20,000 junior and senior high school students, suggests no significant increase in use since 1974. The study reflects the impact of the new law that became effective on January 1, 1976, and which was preceded by substantial publicity (see Table IV-1). However, these surveys are conducted in the spring of each year and reflect only the initial months of the 1976 law. Although definitive conclusions cannot be drawn, it is a preliminary indication that no substantial increase has taken place in San Mateo County.

Oregon Study

A different evaluation approach was taken in Oregon because of a lack of pre-law usage pattern statistics. Therefore, users were asked retrospective questions on how long they had smoked, and whether they had changed their habits subsequent to the new law. Two years after the change in the law, some 87 percent of current users said they had been using marijuana more than 2 years and only 11 percent had begun using marijuana during that time. The survey results are shown in Table IV-2. These data indicate no substantial increase in use in the two years subsequent to the law; furthermore, the number of current users actually declined from 9 percent to 8 percent between 1974 and 1975.

However, the third annual Oregon study indicates an increase in use in 1976, from 20 percent to 24 percent among ever-users and from 8 percent to 12 percent among current users. These levels now approximate the average level of use in the other western states. The increase is probably not attributable to a delayed perception that incarceration was no longer a penalty for possession of less than an ounce since the decriminalization law was widely publicized in Oregon. The change in law may have had a more subtle effect by symbolizing a perception that the effect of the drug is relatively inconsequential and that private use in limited amounts is not offensive. This suggests that the most probable reason for the increase in use is not directly related to decriminalization per se. According to the Oregon data, the number of individuals who do not smoke marijuana and who gave "possible health dangers" as a reason dropped sharply from 28 percent in 1975 to 7 percent in 1976. The usage increase is

TABLE IV-1

PERCENT OF STUDENTS USING MARIJUANA

(Grades 9-12)

YEAR	PERCENT OF USERS
1973	54.8
1974	55.5
1975	55.0
1976	55.3

Source: Summary Report, Surveys of Student Drug Use, San Mateo, California, 1976.

TABLE IV-2

CHANGE IN MARIJUANA USE IN OREGON

CHANGE IN USE	PERCENT OF CURRENT USERS	
	1974	1975
Decrease	40	35
Increase	5	9
No Change	52	54

SOURCE: *Survey of Marijuana Use and Attitudes, State of Oregon,* Drug Abuse Council, December 1, 1975.

therefore most probably related to a change of perceptions about the potential health consequences of marijuana.

Interview Results

Perceptions of usage patterns were elicited from criminal justice system officials and others with substantial experience or contact with the drug-using public. A majority of officials in every state perceived no significant change in use, either an increase or a decrease. Although in a number of states the fear had been specifically expressed that decriminalization would cause both an influx of marijuana users from other states and an increase in use among current residents, this increase was not perceived to have occurred. These perceptions are, of course, only subjective and may not properly reflect actual patterns. Nevertheless, they give an informal indication of changes in the extent of use.

As in any study, certain qualifications are necessary. Los Angeles was an exception to our general findings. Los Angeles police officials felt that use was increasing, and this increase was attributed in part to a change in the California law. Also, public officials are most likely to see changes that occur in heavy use, sale, and public use and are least likely to observe changes in experimentation or limited private possession and personal use. Therefore, these conclusions are least applicable to the experimental user.

Nevertheless, on the basis of both our objective and subjective interviews and fact-finding, it appears that reduced criminal penalties for possession do not generally lead to an immediate increase in total marijuana use, although the long-term effects of penalty reductions are less clear. The apparent short-term stability of use in the face of penalty reductions implies that harsh penalty structures do not in themselves deter personal possession and private use of the drug. This conclusion is supported by public polls, discussed in Volume 3, Chapter II, which indicate that fear of arrest is not usually given as the primary reason for not using marijuana. However, penalty reductions may cause, as well as symbolize, changes in public moral and social attitudes, which over time result in an increase in use. Although the Oregon data may show such a change, it is difficult to determine whether this phenomenon does in fact typically occur.

Impact on Public Use

Two primary issues are involved in the impact on public use:

- Does decriminalization result in loosened behavioral restraints that increase irresponsible and dangerous behavior, such as driving while intoxicated?
- Does marijuana decriminalization result in an increase in public intoxication and offensive behavior?

These concerns have been frequently expressed in the debates about marijuana policy. For example, Colorado specifically included a section in its marijuana law that provided more stringent penalties for public possession than for private possession because of these concerns.

The first concern, dangerous driving, is difficult to measure, because no efficient and inexpensive method exists to determine marijuana intoxication. California was the only state that statistically showed increased experience with intoxicated driving. Arrests for driving under the influence of any drug increased 46 percent for adults and 71.4 percent for juveniles[1] during the first half of 1976 over the first half of 1975. However, the validity of these data is uncertain because the data (1) refer to all drugs and are not differentiated for marijuana; (2) may reflect the purely demographic phenomenon in California of an increase in individuals coming into the driving age group; and (3) may reflect a change in arrest charge emphasis under the new law from possession to driving while intoxicated. For this reason, and because the law has been in effect such a short time, the California data do not suggest a strict causal relationship between the new law and the increase in drug-related traffic arrests. Nevertheless, this trend is disturbing and merits close scrutiny.

None of the other states in the study had statistical information available on the relationship between marijuana and traffic offenses.[2] Law enforcement officials did not describe any increased experience with this problem, although again it must be remembered that tests for marijuana intoxication are not widely available.

In terms of increased offensive use of marijuana in public, none of the states studied perceived this as a problem. Oregon did report some initial difficulties with public use by young people; however, this did not seem to be permanent. In all states (with the exception of Texas), the number of arrests for marijuana possession appears to

have diminished[3] subsequent to the effective date of the penalty reduction law. This decrease is probably a result of lessened law enforcement interest, although it may also provide partial corroboration of a lack of increase in public use.

In summary, insufficient time has elapsed since the revised laws went into effect although there is no indication as yet of substantial increase in public use or display of marijuana, nor are there sufficient data on the relationships between reduced penalties and dangerous driving. In fact, this latter area is the primary one where many believe additional research is warranted.

Impact on the Health Care System

The impact of the recent increase in marijuana use on the nation's health care system is extremely hard to measure. Despite the widespread use of the drug, very little evidence exists of the adverse physiological effects once feared. However, if even a small percentage of the estimated 9 million regular users are affected adversely, this must have an effect on the overall health care system.

Recent data from the National Institute on Drug Abuse suggest that 5 percent of persons in federally supported drug treatment programs identify marijuana use as their primary drug problem. The figure may well be higher in state and locally supported programs, which tend to be oriented more towards non-narcotic drug users. However, in a NIDA survey of patients listing marijuana as their primary drug of abuse, the overwhelming majority stated they were in treatment only because it was offered as an alternative to jail. A few individuals clearly had emotional problems, but it is difficult to assess whether marijuana was contributing or merely incidental to their other difficulties. Overall, it appears the number of individuals in drug treatment programs for marijuana-derived problems is negligible.

The extent to which marijuana use contributes to broader physical health problems is similarly hard to quantify, but marijuana appears to have little effect. However, as today's younger and regular marijuana users become older, impacts may become visible. Most likely, the effects will occur in the area of pulmonary problems, where the evidence suggests that the ingestion of marijuana into the lungs may have damaging effects similar to those associated with tobacco.

Few data exist on the number of acute panic or other emotional reactions that are occurring secondary to marijuana use and that require clinical intervention. As the drug using population has become

more sophisticated, these problems are increasingly handled within the peer group social settings rather than through professional consultation. Paraclinical "rap centers" or "crisis intervention centers" are the preferred facilities for those who need more help than their friends can provide. In general, these facilities are effective in handling the adverse psychological reactions to marijuana.

Our interviews indicated no perception among health officials of increases in acute effect contacts with health facilities. This stability is consistent with our usage pattern findings which indicate little increase in use in most areas, although other factors may be involved, such as a reduction in panic reactions resulting from increased familiarity with the drug.

In summary, the overall short-term impact caused by adverse health reactions of marijuana use on the health care system is likely to be minor, even with broad-scale decriminalization. Longer-term impacts, however, cannot be conclusively determined at this time.

The courts often suggest or mandate a diversion to drug treatment facilities in lieu of incarceration, although practice varies significantly among states. Of the states that reduced penalties, California and Minnesota report substantial reductions in the number of marijuana users who use health facilities and in the costs to those facilities. In 1973, a drug offender diversion program was legislatively authorized in California which encompassed the majority of marijuana possession offenders. Since the decriminalization law became effective on January 1, 1976, diversion is no longer used for simple possession. In the first half of 1975, 61.5 percent of all marijuana possession defendants were diverted; in the first half of 1976 this figure dropped to 20.6 percent with related decreases in costs.

Minnesota did not have a formal diversion program before decriminalization, although the courts did have an education or treatment option. Although no exact diversion data exist, the Minnesota Behavioral Institute estimates treatment cost savings of approximately $2,877,090[4] as a result of replacing the previous treatment diversion with the mandatory 4- to 5-hour educational program under the current law.

These data suggest that in states or localities with diversion programs, decriminalization reduces costs to the health care

system by eliminating this diversion. This is also consistent with federal priorities:

> While the number of heroin-using clients referred to treatment by the criminal justice system should increase, the number of casual or recreational marijuana users referred for "treatment" as an alternative to jail should decrease in order to reserve limited treatment capacity for those who need it more.[5]

Impact on Criminal Justice System

The impact of marijuana laws on the criminal justice system is reviewed separately for the law enforcement system; prosecution, public defender, and court system; and corrections system.

Law Enforcement Resource Impact

Marijuana law changes can affect the law enforcement community by changing both the number of arrests, and the arrest procedures. Most states that have passed decriminalization laws report a reduction in arrests subsequent to the effective date of the law (see Table IV-3). This impact, however, is not uniform. Maine reports a significant reduction in arrests; Oregon has reported essentially no change in their arrest patterns during the year following decriminalization.

In general, however, actual arrest changes are difficult to assess because:

- Marijuana arrests have begun to decrease nationally (e.g., from approximately 445,000 in 1974 to 415,000 in 1975). Therefore any perceived state-level reductions may reflect overall trends based upon reordered enforcement priorities rather than the effects of decriminalization itself.

- The decriminalization laws have not been in effect long enough to warrant definitive conclusions.

- Decreased arrests may be understated in those states where marijuana offenders were charged with other lesser penalty crimes (such as disorderly conduct)

TABLE IV-3

MARIJUANA ARRESTS

JURISDICTION	TIME		CHANGE
California (1/1/76)	First Half, 1975: 24,351	First Half, 1976: 12,913	–47.0%
Columbus, Ohio (11/21/75)	1975: 899	1976: 690	–23%
Denver, Colorado[1] (7/1/75)	1974: 2,413	1975: 1,434	–40.6%
Texas[2] (8/27/73)	1973: 19,266	1974: 24,327	+26.0%
	1974: 24,327	1975: 23,602	– 3.0%
Minnesota[1] (4/10/76)	1975: 4,409	1976 (est.): 2,500	–43.3%

[1] All adult marijuana offenses.

[2] All adult marijuana offenses. Texas did not decriminalize but reduced the penalty from a felony to a misdemeanor in 1973.

to avoid the relatively more severe marijuana penalties.

- Decreases may be overstated if, as in California, a person who was previously charged with marijuana possession as the primary offense is now charged with a nonmarijuana offense as primary.

- Altered marijuana arrest practices may have begun early in anticipation of the changes in the law.

Nevertheless, the data from many decriminalized states do indicate a decrease in arrests subsequent to the new law. This change probably reflects changes in enforcement activity rather than usage. In any case, marijuana enforcement costs have certainly decreased; the only question is by how much.

The second major potential savings in police resources results from altered police arrest procedures. These savings appear to be highly dependent on the exact specification of the law. In particular, those states that have a mandatory citation procedure are likely to save more than those states in which the complete arrest "package" (which usually includes arrest, accompanying the suspect to the station, booking, fingerprinting, and temporary incarceration pending release on bail or personal recognizance) is used. Under a citation provision, police are not removed from the field and may simply issue a summons, confiscate the marijuana, and continue with their other duties. Savings resulting from citation procedures are of course determined by the specification of the law rather than by decriminalization per se.

Whether the citation provision is optional or mandatory may be an important distinction. In some states where the citation is only optional, such as Ohio, the police do not uniformly use it, thus incurring additional cost in these instances.

Savings generated by changed arrest procedures are difficult to quantify because of the complexity of daily police routine. No data were available specifically on this issue. Nevertheless, it is clear from extant data and the subjective perceptions of officials interviewed, that the combination of reduced arrests and simplified procedures can and has generated substantial savings in most decriminalized states. California, for example, estimates a reduction in law enforcement costs from $7,600,000 in the first half of 1975 to $2,300,000 in the first half of 1976, for a savings of $5,300,000

or 70 percent. Similarly, Minnesota estimates a reduction in police costs of approximately $100,000.

An indirect effect of the decriminalization laws on the law enforcement community, which some feared, was the loss of a useful bargaining device. For example, the elimination of criminal penalties for possession could also eliminate the effectiveness of plea bargaining in gaining access to major drug traffickers, thus increasing the costs of reaching these individuals. The extent to which this has happened is unclear, however.

In summary, substantial savings in law enforcement costs can occur as a result of decriminalization. The magnitude of these savings, however, depends upon the extent to which police enforce the new law and the specific features of the law relating to police procedures (e.g., citation provisions).

Prosecution, Public Defender, and Court Resources Impact

As in other areas, the exact extent of savings from decriminalization is difficult to measure, since changes in prosecution may have occurred prior to the effective date of the law, the laws have been in effect only a short time, and most court systems do not maintain marijuana-specific data. Generally, however, the impact in the judicial system (i.e., the combination of prosecution, public defenders, and courts) occurs in three ways:

- Change in the number of individuals entering the system. As described previously, the number of marijuana possession arrests generally decreased subsequent to the passage of decriminalization, which naturally results in a decreased court caseload with consequent cost savings.

- Change in defendant response. A change in defendant response has also resulted in substantial judicial system resource savings. Because in most cases the defendant is no longer faced with a permanent criminal record or incarceration, all states report a reduction in contested guilt. As a result, the court system avoids evidentiary hearings (on suppression motions) and lengthy trials. The majority of defendants simply plead guilty and are sentenced at arraignment.

- Change in judicial system procedures. Savings resulting from changed judicial system procedures are more variable. In some states, such as Maine, the prosecution has reduced its effort; in other states, such as Ohio, all cases routinely continue to be fully prosecuted. Savings could also occur through the use of a noncourt fine system, such as that used in traffic offenses: a given amount is simply submitted by mail if guilt is not contested. Although such a system is not excluded under the provisions of many of the decriminalization laws, it has not yet been used widely in any state.

The only state to attempt an evaluation of actual court system savings is California. Including prosecutor, public defender, probation, and court costs, but excluding court disposition costs, the total cost for marijuana offenses in the first half of 1975 was approximately $9.4 million and about $2 million in the first half of 1976, for a savings of more than $7 million or 78 percent. Although Colorado does not have similar cost figures, total drug and narcotics cases (of which the majority are marijuana related) have dropped substantially in recent years.

In Minnesota, the Minnesota Behavioral Institute estimates that the new law has produced judicial system cost savings of at least $500,000. The other decriminalized states exhibited similar decreases in court resource use and costs.

Corrections System Resources Impact

All eight states reducing penalties have eliminated incarceration for first offense simple possession of marijuana. However, because incarceration was rarely used for such offenses before the changes, the decrease in the number of offenders incarcerated has probably not been substantial, although clearly in those situations where detention can be eliminated, cost savings do occur. States which use a citation system rather than a full arrest procedure do save on incarceration costs by eliminating prearraignment detention. Since most incarcerations for marijuana offenses occur in local and county jails rather than in state institutions, the actual extent is difficult to determine. (In fact, no state had such data readily available at the state level.)

PROCESS OF CHANGE FINDINGS

A major aspect of this study involved examination of the factors that affected the passage or defeat of legislation reducing marijuana-related penalties. This task required the identification of the personal and political forces which shape such legislation. An understanding of these forces is of value to state policymakers who are considering change in their own states.

Political Positions

Decisionmakers on the marijuana issue held a wide variety of positions, which differed from state to state and from individual to individual. Nevertheless certain views were widely held; some positions were nearly universal among supporters and opponents of decriminalization.

The positions most widely held by supporters were:

- Occasional marijuana use has not been found to be seriously harmful and therefore severe penalties are not justified.
- Criminal justice system resources should be used for more serious crimes.
- Incarceration and a permanent criminal record are too harmful to the marijuana user who has committed no other crime and only participated in an activity undertaken by many of his peers.

The positions most widely held by opponents were:

- Marijuana is physically or psychologically harmful and therefore should be prohibited.
- Marijuana use leads to the use of other drugs.
- Marijuana use leads to other criminal activity.
- Decriminalization would be a signal of societal approval and therefore would lead to increased use, particularly among the young.

Although the National Commission on Marihuana and Drug Abuse discounted the relationship between marijuana on one side and "harder" drugs and criminal activity on the other, opponents of reduced penalties have consistently cited contrary viewpoints or public positions. For example, the International Association of Chiefs of Police has stated:

> As the branch of government which most frequently encounters the abuser of illegal substances, the police have readily seen the matriculation from cannabis to more dangerous and potent narcotics combined with an increase in crime and useless destruction of human life.[6]

Interestingly, opponents of the decriminalization concept only infrequently mentioned the possibility of secondary effects such as vehicular or occupational accidents as a reason for their opposition. A moral stance against the use of marijuana was mentioned fairly frequently.

Political Implications of Decriminalization

Perhaps of primary importance to elected officials is whether support for or opposition to decriminalization has proved to be a political liability. This question is complex because the political impact of an issue is dependent upon a number of factors, including:

- the political philosophy of the politician's constituency;
- the visibility of the issue in terms of media coverage;
- the number of other concurrent major issues that draw attention from or to the issue in question;
- the virulence of the debate on the issue; and
- the politician's history and status in the political hierarchy.

As a part of this study, interviews were held with elected public officials or their representatives, including legislators, Governors,

attorneys general, and local officials. Care was taken in the selection of the states for analysis not only to include those with relevant marijuana laws, but also to develop a sample that was politically and geographically disparate. In this way it was possible to determine whether the political consequences of a given position on the marijuana issue differed depending on the state or region.

In the course of our interviews, elected officials were asked about the direction and strength of constituency reaction to their position, both in terms of correspondence received and in terms of their perception of voter reaction at the polls. Attempts were also made to get subjective reactions to general public opinion on the subject.

In addition, the general political environment in which the marijuana debate took place was assessed, including the legislative context of the marijuana bill, the political strengths of supporters and opponents, and the role of the press in affecting the legislative process.

Although it was found that the majority of the legislative supporters of decriminalization tended to be from urban or suburban communities or from special interest districts such as college communities, it was found that this was by no means universally true. Many supporters were also from rural communities or from districts that were considered conservative on similar issues. Similarly, opponents of decriminalization represented a wide variety of constituencies ranging from conservative rural districts to minority urban districts.

Supporters of decriminalization were more likely to voice apprehension over the political consequences of their position than were opponents. They also were more likely to prefer that the debate receive minimal public scrutiny. Again, however, these generalizations were not universally true. Some supporters felt that the public would accept arguments on that side of the issue and were not apprehensive about making their position known.

In spite of the variability in constituency philosophy, both within and among states, and in spite of apprehensions by decriminalization supporters, this study found that the political liability of a strong position on marijuana policy has been overrated as an issue.

None of the elected officials or their representatives whom we interviewed reported a strong public response to their position,

whether it was for or against decriminalization. Most indicated receiving only a small number of communications on the issue, and these communications were divided fairly evenly between approval and disapproval.

The ingredients of political victory and defeat are complex and therefore causality and lack of causality are difficult to assess. Nevertheless, no political defeat or victory was identified during the interview process which was attributed principally to a position on the marijuana issue.

In the Louisiana attorney general's race, the incumbent attorney general was highly vocal in his support for decriminalization, and this was made a major campaign issue by his opponent. However, the incumbent won and did not feel that the outcome of the election was affected by the marijuana issue. Other races, such as several for House seats in Iowa, were extremely close; yet the marijuana issue did not become important for either side.

These results indicate, then, that a position on the marijuana issue did not generally constitute a political liability. This appears to be true regardless of the geographical location or political philosophy of the state.

Common Patterns of Process

While each state surveyed underwent deliberation and change somewhat differently, some patterns were in evidence:

- The active support of legislative leaders was crucial in those states that successfully passed legislation reducing penalties. This support was missing in those states where legislation was introduced but defeated.

- In those states where decriminalization legislation passed, the law enforcement agencies either did not take a strong position, were split on the issue, or were satisfied with certain compromises in the law. In both California and Colorado, the district attorneys association provided support that was influential in the passage of the bill.

- The relationship of the marijuana legislation to related pending bills varied significantly. In Ohio and Maine, decriminalization was part of an overall revision of the

criminal code. In Ohio, this helped minimize any adverse reaction by the public; in Maine, it gave the decriminalization bill the added credibility of the support of the revision commission.

However, in Colorado and California, the decriminalization bill was presented and passed without being a part of a large bill. And in at least two states, Iowa and New Jersey, decriminalization legislation failed in spite of the potential for inclusion in a general criminal code revision.

- The severity of the existing penalty structure provided the impetus for change in California and Colorado. In Minnesota, the fact that previous reductions in marijuana penalties had occurred without severe consequences was considered important to the passage of the bill.

- In some instances, the extent of background research on the marijuana issue undertaken by policymakers or their staff was directly related to the success of the bill; such extensive work was done in Maine, California, and Ohio (which passed legislation) but not done in Iowa and Louisiana (where legislation failed). However, in New Jersey, nearly every major drug-related agency, as well as the legislature, undertook marijuana studies, but no significant legislation was passed.

- Generally, the study indicated that the Governors of the nine states did not play a significant role in the debate on the issue or with respect to the bill's final outcome. This neutral stance, however, was important, in that the threat of veto was, in most cases, clearly absent and the "signal" from the Governor indicated generally tacit support or willingness to accept the legislative decision.

- The perceived and publicized success of the Oregon law was significant and well-known in each state surveyed.

- In three states--Minnesota, Ohio, and California--individuals and/or public interest groups were significant in the decriminalization process. Generally,

however, internal legislative debate and decision-making was more important.

- In each state surveyed, the press generally reported the legislative deliberations objectively. A majority was supportive of the decriminalization effort editorially. However, this was true in states which did and did not pass decriminalization legislation. Most legislators indicated, however, that the press reaction was not influential in formulating their position.

- Generally, state agencies did not play an important role, either supportive or critical, in the decriminalization effort. In some states (e.g., Maine and Minnesota), however, they did provide information. One exception is New Jersey, where both the Department of Health and the Attorney General's Office took positions supporting decriminalization legislation, which to date has been unsuccessful in the legislature.

FOOTNOTES

[1] A First Report of the Impact of California's New Marijuana Law (SB95), State Office of Narcotics and Drug Abuse, December 1976.

[2] The U.S. Department of Transportation conducted a study of 300 fatal traffic accidents in Boston from 1971-1974, in which 16 percent of the drivers admitted to or were said to have been smoking marijuana within 3 hours of the accident, although more than 50 percent of these had also been using alcohol or some other drug. The findings are reported in a three-volume report available from the National Technical Information Service, Springfield, Virginia, 22161:

I. Psychosocial Identification of Drivers Responsible for Fatal Vehicular Accidents in Boston.

II. An Analysis of Drivers Most Responsible for Fatal Accidents vs. a Control Sample.

III. Marijuana and Driver Behavior; Historic and Social Observations Among Fatal Accident Operators and a Control Sample.

Contract No. DOT HS-310-3-595, May 1976.

[3] Data are inconclusive on Ohio.

[4] This figure is based upon extrapolation from national figures for percentage of treatment monies spent on marijuana offenders in treatment programs, rather than on specific data from Minnesota.

[5] Strategy Council on Drug Abuse, Federal Strategy, Drug Abuse Prevention, November 1976, p. 43.

[6] Glen D. King, Executive Director, International Association of Chiefs of Police, letter dated November 11, 1976.

7. A GUIDE TO POLICY DECISIONMAKING

This chapter provides a "drafter's guide" for policymakers (whether executive or legislative) who have concluded that some portion of marijuana-related behavior should be decriminalized--meaning that traditional criminal penalties for consumption-related behavior should be substantially reduced. Field interviews during this study demonstrated that neither legislators nor criminal justice personnel share a common conception of the precise content of "decriminalization," which is to say, of course, that the meaning of the "criminal" sanction itself is ambiguous. For current purposes, however, the term will be employed to refer to a threshold concept rather than a definitional one: decriminalization is any statutory scheme under which the "least serious" marijuana-related behavior is not punishable by incarceration.

Incarceration is a useful threshold device because the elimination of the possibility of imprisonment and its attendant social stigma reflects a significant change in official attitudes toward marijuana offenses, because "total confinement" is a sanction different in kind, not only in degree, from other legal sanctions, and because the lesser sanction suggests or requires a less severe and less elaborate application of "criminal" processes.

Beyond this threshold, many important questions must be resolved. These questions fall into two general categories:

(1) What behavior should be "decriminalized"? Only possession of small amounts? How small? Gifts of small amounts to friends? Non-profit "accommodation" sales to friends? Cultivation of a few plants in the home?

(2) What residual sanctions, if any, should be retained to implement the state's interest in discouraging that behavior? Behavior that is "decriminalized" may or may not remain subject to lesser sanctions. In each of the eight states which have already enacted "decriminalization" reforms, the behavior in question is still punishable by a fine. In some of those states the behavior is still labeled a "criminal offense"--but even in some of these a person "convicted" of the offense has no "record." Should the commission of a decriminalized offense be punishable by a monetary penalty? By participation in some educational or counseling program? Should the person be booked and taken into custody after detection of a "decriminalized" offense? Should such a person be stigmatized by an "arrest" or "conviction" record?

DEFINING DECRIMINALIZED OFFENSES

Assuming that some, but not all, marijuana-related behavior is to be decriminalized (or at least that penalties should be substantially reduced), policymakers must define precisely which behavior is no longer subject to the criminal sanction. Several methods may be used to determine the area of marijuana-related behavior for which the criminal sanction is deemed appropriate. The polestar by which legislators should be directed in choosing among these alternatives is the impetus behind the drive for decriminalization. Thus, if, for reasons of fairness, justice, or institutional integrity, the goal of reform is to withdraw the criminal sanction from mere consumers of marijuana, the statutes should be revised in a way that most accurately distinguishes between consumption-related activity and commercial activity. On the other hand, if the goal of reform is primarily to promote the efficient administration of criminal justice by lightening the burden imposed by the processing of petty marijuana cases, the issues raised below may be resolved by restricting decriminalization to the narrowest range of behavior consistent with this goal.

For the most part, drug offenses are separately defined for possessory conduct, distributional conduct, and manufacturing (cultivation). Legislators have traditionally recognized that possessory activity may be indicative of either intended consumption or intended distribution depending on the amount possessed and other indicia of intent. Similarly, legislators have been sufficiently aware of the patterns of marijuana use that they have distinguished since the late 1960s between gratuitous (or nonprofit) transfers among friends and purely commercial activity. A similar distinction may be drawn between forms of cultivation which may range from growing one plant in a window box to a large scale agricultural enterprise.

The material below will sketch the drafting alternatives for defining decriminalized or least serious marijuana-related behavior in three parts: possessory conduct, noncommercial transfers, and noncommercial cultivation.

Possessory Conduct

Traditionally the possession offense has been divided into at least two gradations: simple possession and possession with intent to sell. The penalties authorized for the latter category are more severe than those authorized for the former. In addition, a clear-cut legislative trend in recent years has been to dispense with proof of intent and to substitute gradations of amount with correspondingly graded penalties.

Thus in discriminating between less serious and more serious possessory activity, legislatures have two devices at their disposal--intent to sell and amount possessed--which can be combined in several different ways. The following discussion will present various options and will assess the relative merits of each.

The Pure Intent Approach

This approach decriminalizes possession of any amount of marijuana unless the prosecution proves intent to sell. The principal advantage of this approach is that it mirrors the essential difference between commercial activity[1] and possession for personal consumption. The primary drawback is that the prosecution very seldom has any independent evidence of intent to sell and therefore usually relies on inferences from the amount of marijuana possessed.

The pure intent approach, by not utilizing a "bright line" distinction ("bright line" refers to the amount level used to legislatively distinguish between simple possession and possession with intent to sell), does little to reduce the cost or enhance the fairness of enforcing marijuana prohibitions. The user cannot reap the benefits of decriminalization, unless he is able to adjust his conduct with assurance that he will avoid criminal sanctions. Even if lesser sanctions remain applicable to noncriminal possession, criminal justice resources may be unnecessarily squandered, because the police cannot recognize the decriminalized offense. Eventually the communication of prosecutorial charging guidelines can solve this problem. But defendants charged with criminal possession are more likely to go to trial under the pure intent approach, because the prosecutor must prove actual intent--a much harder task than proving that the amount possessed was above a certain quantity. Since the defendant has a greater chance of prevailing under the pure intent approach, the prosecutor will not possess as much leverage to plea bargain.

A variation of the pure intent approach which would increase the prosecutor's leverage is to shift the burden of proof to the defendant. Under this scheme, possession of any amount is presumed to be criminal unless the defendant proves that the possession was solely for personal use.[2] The primary objection to this approach is that it is subject to serious constitutional challenges.

A Virginia statute that classified possession as a misdemeanor and intent to sell as a felony was held unconstitutional on substantive due process grounds, because it created a rebuttable presumption of intent to sell from the possession of any amount of marijuana.[3] The court

stated that no rational connection existed between the proved fact (possession) and the ultimate fact to be established (intent to distribute).

The second type of constitutional attack that has been leveled against similar statutes is that the presumption violates the privilege against self-incrimination. The argument is that since the presumption concerns the accused's state of mind, the only way he can rebut the presumption is to testify himself. Thus the presumption forces the defendant to take the stand; if he exercises his constitutional right to remain silent, the presumption will require the jury to draw the inference of intent to sell.[4]

The final constitutional impediment to the creation of the presumption is that it may violate the Due Process Clause of the Fourteenth Amendment by shifting the burden of proof to the defendant, thereby destroying the presumption of innocence.[5]

None of the eight states that have adopted decriminalization provisions employed either version of the pure intent approach.

The Pure Amount Approach

This approach would decriminalize possession below a specified amount and retain the criminal penalty for possession of any quantity in excess of that amount, without regard to intent to sell. Seven of the eight states which have decriminalized marijuana have utilized this approach. The principal advantages of this "bright line" scheme are fairness and efficiency: defining the offense by the amount possessed permits both possessors and police to know precisely what conduct is "criminally" prohibited; moreover, it gives the prosecutor greater leverage to plea bargain with those who possess above-the-line amounts.

The principal disadvantage of the bright-line method is that it may be at once over- and under-inclusive. That is, this scheme may decriminalize the behavior of some sellers who possess amounts below the line and make criminal the behavior of some consumers who possess above-the-line quantities.[6]

The Combined Approaches

If the legislature wants the advantages of the bright-line method but wishes to alleviate either the under-inclusion or the over-inclusion, a scheme may be selected to combine the intent and the amount approaches. However, the same combined scheme cannot ameliorate

both problems. Therefore policymakers who opt for the combined method must be careful to select the one which is consonant with their decriminalization goals.

If the major impetus behind decriminalization is to remove only the most petty consumption offenses from the system, then a statute could be drafted to make possession of above-the-line amounts always criminal and possession of below-the-line amounts criminal only if the prosecution proved intent to distribute. However, such a statute would retain all of the deficiencies of the pure intent approach for possession of below-the-line amounts. That is, this statute poses problems of fairness and cost in the below-the-line cases, since in the absence of definitive prosecutorial guidelines, the seriousness of the arrestee's offense is indeterminate at the time of the offense. The main advantage of this approach is that police and prosecutors have a tool (proof of intent) to use against "dealers" who are careful to possess only below-the-line amounts. Also a "criminal" above-the-line offense gives the prosecutor a plea-bargaining tool for persons charged with possession with intent to sell.

Alternatively, if the objective of decriminalization is to ameliorate the unfairness of criminalizing an activity that is engaged in and approved by a large segment of the populace, then the legislature's bias would be to decriminalize all consumption-related behavior, and a different statute would be fashioned. Possession of below-the-line amounts would always be noncriminal, while above-the-line possession would be noncriminal unless the prosecution proved intent to distribute.

If it is feared that this approach will result in either too many commercial dealers going free or too many contested cases due to the prosecutor's reduced leverage, the legislature could shift to the defendant the burden of proving "intent" (to consume) in cases involving possession of above-the-line amounts. This variation was adopted by Maine in its decriminalization statute. A number of courts have held such statutes constitutional on the ground that a rational relationship exists between the proved fact (the amount possessed) and the presumed fact (intent to distribute).[7] It is essential to distinguish the statute that creates the presumption of intent for possession of above-the-line amounts from the one that creates the presumption for <u>any</u> quantity. The case for finding no rational connection between the proved fact and the presumed fact is much stronger in the latter instance.[8] Nonetheless, at least one court struck down a statute that established a presumption of intent to sell with possession of more than 2 ounces of marijuana.[9] The court held that the presumption,

even when only applied to above-the-line amounts, shifted the burden of proof to the defendant, destroyed the privilege against self-incrimination, and violated the due process clause, since there was no rational connection between the proved fact and the presumed fact.[10]

The advantage of this latter approach over the pure amount approach is that it provides the possessor with an opportunity to contest the "presumed" fact--intent to distribute. Thus the person who possesses marijuana for personal use only in amounts near the borderline will not be punished if the quantity is slightly in excess of the designated amount. The disadvantage is that intent to distribute will be part of the prosecution's case in every trial, even when the police are convinced that it was not intended solely for personal use. Thus trials will be more complicated (and more expensive), and some retail dealers may be able to avoid serious sanctions even if they are detected.

If policymakers wish to alleviate this problem and at the same time retain the advantage of the modified approach, a statute creating a "buffer zone" might be drafted. This scheme would set two amounts, X and Y. Possession of less than X would never be a criminal offense, while possession of more than Y would always be a criminal offense. Possession of more than X but less than Y would be criminal only if the prosecution proved intent to sell.[11]

Amount Designations

Assuming that a state has decided to decriminalize some marijuana-related behavior and that the state will implement that choice through the vehicle of one specific amount line, two subsidiary questions must be answered: (1) where should the amount line be drawn? (2) should a distinction be drawn between public and private behavior? In analyzing the spectrum of choices available to the states, it will be useful to the state policymakers to examine how the eight states which have recently adopted decriminalization measures addressed these issues, which is described in the Volume 3 case studies.

Drawing a statutory amount line will necessarily be somewhat arbitrary. It is obviously clear that a person possessing over a kilogram of marijuana is intending to sell it and that one in possession of less than half an ounce is holding it for his personal use and that of his friends. Between these extremes, however, there is no precise line for decriminalization which is a priori more appropriate than another.

Nonetheless, the precise line should be selected with the specific goal of decriminalization in mind. If the goal is merely to cut down on

the most petty "nuisance" arrests and to retain the criminal sanction for as much marijuana-related conduct as possible, then the amount should be relatively small. One ounce would appear appropriate, since between 90 and 95 percent of all arrests are for simple possession, and of these, approximately two-thirds are for 1 ounce or less.[12] Thus decriminalizing possession of 1 ounce or less would clearly result in a considerable savings in terms of police and court time. The 1 ounce approach would also conform to current retail distribution patterns of marijuana.[13] Of the eight states which have decriminalized some marijuana-related behavior, five states draw the line at 1 ounce;[14] two others draw it at 1-1/2 ounces.[15]

If, on the other hand, the purpose of decriminalization is to approximate the distinction between commercial and consumer behavior, a higher amount seems justified. Unfortunately available data are not responsive to any effort to distinguish a seller from a user on the basis of the amount possessed. However, from both free access studies (where marijuana users are kept under observation and told to smoke as much as they wish) and survey studies (in which users are asked how much marijuana they consume), it is known that even a heavy user would not use more than an ounce of marijuana in a week.[16] Nevertheless, it is probable that those engaging in strictly consumer activity (including casual, not-for-profit distribution to friends) would be in possession of amounts well in excess of 1 ounce. This is because marijuana is usually smoked communally; thus possessing more than 1 ounce does not necessarily mean it is intended for sale. If the policymakers' bias is to err on the side of decriminalizing most consumption-related behavior, perhaps Ohio would be an appropriate example; Ohio decriminalized possession of less than 100 grams (which is a little more than 3-1/2 ounces).

One problem which the higher amount line leaves unresolved is that of the commercially-oriented retailer who only carries amounts of 4 ounces or less but returns frequently to his source. A remedy for this situation would be the "buffer zone" statute described above. Thus possession of less than 1 ounce would be decriminalized and possession of over 4 ounces would remain a crime; possession of an amount in the "buffer zone" would be a crime if the prosecution proved intent to sell.

The Potency Problem

Once the legislature has decided upon an amount (perhaps 4 ounces) the question remains "4 ounces of what?" Cannabis is a plant, and

different parts of the plant contain the psychoactive substance, delta-9-THC, in different proportions. The drug content in various parts of the plant is variable, generally decreasing in the following sequence: resin, flowers, and leaves. Almost no THC is contained in the stems, roots, or seeds.[17] In addition, the level of THC varies among plants, depending upon agricultural conditions. Thus Mexican-grown marijuana usually contains 1 percent THC by weight; Colombian or Jamaican marijuana can go as high as 3 to 5 percent; and marijuana grown domestically almost always contains less than 1 percent.[18] "Marijuana" refers to a preparation of the flowers, leaves, seeds, and small stems; "hashish" contains only the resin and flowering tops of the plant, and its potency may range from 0.1 percent to 14 percent.

Because of the varying amounts of the psychoactive ingredient contained in various preparations of the drug, it has been suggested that a decriminalization scheme distinguish between more and less potent preparations to exert a greater deterrent to using the more potent ones. Two methods of making this distinction have been proposed:

- The Potency Approach. Under this method, criminal liability would depend upon the percentage of THC contained in the particular preparation. Possession of less than 4 ounces of any cannabis would no longer be a crime if the potency were, for example, less than 1 percent. Possession of any amount containing more than 1 percent THC would remain a crime.

- The Form Approach. This approach would decriminalize possession of 4 ounces of marijuana and retain the criminal sanction for any amount of hashish.

These two approaches are discussed below.

The Potency Approach

This approach poses three basic problems: fairness, cost, and frustration of the goals of decriminalization. The fairness aspect is seen in the fundamental requirement of our criminal law that actus reus and mens rea coincide; that is, a person is generally not held criminally liable unless he has the intention to commit the proscribed act. A person smoking marijuana clearly cannot know the potency of his supply, and therefore a potency distinction would impose the criminal sanction on those who could not have known that they were committing a crime.[19]

The cost of the potency approach is also a barrier. Implementation would require that each police department equip its chemical laboratories for THC assays. Scientists at the National Institute on Drug Abuse suggest that it is now technologically feasible to assay every compound seized, but that the cost would be prohibitive.[20]

The most serious indictment which can be leveled against the potency approach is that it will frustrate the goals of decriminalization. It would always be possible that any marijuana sample contained an excessive percentage of THC. Therefore the police theoretically would have to apprehend all persons possessing marijuana and send the drug to the lab for analysis. This would result in a greater, not a lesser, expenditure of scarce police resources in enforcing marijuana laws. In addition, the potency approach does not distinguish the commercial seller from the consumer. The potency approach would also retain the potential for harassment and selective enforcement that plagues the current system. Since the possessor would be in a legal limbo pending outcome of the assay, a number of procedural problems would be presented. The courts would have to decide, for instance, whether custody of the possessor were authorized pending the analysis.

Finally, the potency distinction would apparently be much ado about nothing. In the past several years, the Drug Enforcement Administration has analyzed street samples of marijuana compounds. The mean potency has been 0.6 percent, and virtually every sample has fallen in the 0.5 percent to 1 percent range.[21]

Apparently the policymakers in each of the eight jurisdictions that have enacted decriminalization provisions were convinced of the merits of the arguments against the potency approach, because none of the states adopted it.

The Form Approach

The form approach has two problems: one definitional and one substantive. The definitional problem has largely been ignored. The 1972 National Commission on Marihuana and Drug Abuse noted that while nine states at that time distinguished between marijuana and hashish for punishment purposes, only Virginia defined hashish:

> The resin extracted from any part of the plant cannabis sativa, whether growing or not, and every compound, manufacture, salt derivative, mixture or preparation of such resins, or any resin extracted from the mature stalks of said plant.

The National Commission continued:

> Naturally, the key word is "resin." But rather than representing a clear physical distinction, "resin" is merely a convenient label for describing certain substances exuded by many plants, all of which have certain properties in common. For example, they are brittle in solid form and melt when heated.
>
> The problem is that "marihuana" mixtures contain some resins and "hashish" preparations often contain plant parts other than resins. So, for legal purposes, resin is not the only factor. How could it be defined? Predominantly resin? Substantially resin? Any such formulation might well fall to a vagueness attack.[22]

The substantive challenge arises from the fact that there are weak samples of hashish that contain less THC than some strong marijuana compounds.[23] Although the DEA has located hashish samples that contain as much as 14 percent THC, the mean of the samples was 2.6 percent. Moreover, two-thirds of the preparations analyzed were below this mean percentage. The person possessing weak hashish might successfully mount a due process challenge to a statute that punishes him while permitting the person possessing a more potent marijuana mixture to escape criminal liability. Moreover, the distinction serves no rational purpose. It clearly does not separate sellers from consumers; and since there is very little potency distinction between the mean sample of each form, the distinction cannot be justified on the potential for disparate effects on health.

Despite these objections, five of the eight states that have decriminalized some marijuana-related behavior have nonetheless retained the criminal sanction for possession of hashish.[24] In addition, South Dakota, while decriminalizing possession of 1 ounce of marijuana, retained the criminal sanction for possession of over 10 grams of hashish (about one-third of an ounce).

If policymakers are determined to exert a greater deterrent against the use of the most potent preparations, a more sensible approach would be to distinguish between hash oil and other forms of cannabis. Since hash oil is in liquid form, such a distinction would be a facile one to make, both for users and for police. Furthermore, there is a significant difference in terms of average potency between hash oil and the other two forms of the drug. Although nearly all samples of both marijuana and hashish contained less than 3 percent

THC, the lowest potency found for hash oil is 10 percent, and the mean is 17 percent. Of the two states which decriminalized possession of "hashish" as well as that of marijuana, only Ohio excluded hash oil from the decriminalization provisions.

The Location Problem

The final issue to be addressed regarding possessory activity is whether a distinction should be drawn between public and private behavior. To the extent that "decriminalization" is designed to conserve enforcement resources and to preserve values of privacy by reducing the likelihood of intrusion by law enforcement in the home, a strong case can be made for reserving any residual sanction (e.g., fines) for only public behavior. Public behavior would include public use (which should be penalized in any event like public use of alcohol is in most jurisdictions) and possessionof less than the specified amount in public (which should be defined to include possession in moving vehicles).

The main reason for excluding possession in a "private" location from the sanctioning provision is that the threat of intrusions into the home is of limited deterrent value under any foreseeable enforcement circumstances. Indeed, the overwhelming proportion of marijuana arrests under current minimal statutes occurs in the context of police patrol activities--on the street or in connection with vehicle searches. In addition, the detection of marijuana consumption in the home should be a low priority for police investigative resources in any event. An explicit decriminalization of private possession would both establish a clear legislative guideline on this point and eliminate the risk of harassment and discriminatory enforcement practices attendant to private raids.

It should be noted that retention of "civil" penalties for private possession will not eliminate these problems. If private possession of less than the statutory amount remains a noncriminal offense, users can still be apprehended in the home. Moreover, possession of a small amount might be used as a pretext for searching the home for larger amounts, or even for arrest on suspicion of possessing larger amounts. To prevent these intrusions, private possession of less than the designated amount could be excluded from the definition of noncriminal as well as criminal marijuana offenses. (Alternatively, the designated amount for private possession could be increased or replaced by a requirement of "intent to sell.") Such a statutory scheme would tend to channel marijuana use into private locations, which would have the effect of reducing the likelihood of intoxication and incapacitated behavior in public, including driving.

Only two of the states that have decriminalized some marijuana conduct have discriminated between public and private behavior. In Alaska, there is no criminal sanction for private personal use or possession of any amount (without intent to sell). In fact, it has been held that imposition of criminal liability for mere possession in private is unconstitutional.[25] Any public use and public possession of more than 1 ounce is a misdemeanor in Alaska. Colorado labels public "display" or use of cannabis as a crime. While the other six states did not address the problem of public use directly, all states have statutes prohibiting intoxication in public, and public use of any amount of marijuana would undoubtedly give the police probable cause to apprehend the individual. Nonetheless, if the legislature has decided that public use should be prohibited, that intention should be made manifest in the statute.

Distributive Conduct

As in the classification of possession, division of the sale or distribution offense into two or more categories is necessary to distinguish between commercial activity and activity that is primarily "consumption-related." Not all marijuana transactions are commercial in character. Casual transfers are commonplace in the experience of most users, partly because of the difficulty of obtaining the drug, and partly because, unlike the use of narcotics, marijuana use is a social experience. The most frequent type of transfer is probably the gift of a small amount for immediate use (e.g., when a marijuana cigarette is passed around). However, other kinds of transfers are also quite common. Collective purchases of up to 1 pound may be distributed via transactions in which each buyer pays his share of the aggregate cost. In addition, students and other users with limited income sometimes sell small amounts at a slight profit to pay for their own use.

The "casual" distribution of small amounts of marijuana is the functional equivalent of possession of small amounts of the drug. In recognition of this fact, Congress and 18 states treat transfers of small amounts of marijuana "without remuneration" or "without profit" as misdemeanor rather than felonious sales. In 1972 the National Commission on Marihuana and Drug Abuse concluded that, under the same rationale, these casual transfers should be decriminalized if they occur in private.[26]

Undoubtedly it is possible to distinguish these "casual" distributive transactions (at least on a quantitative basis) from smuggling and other commercial activity that involves large amounts of marijuana and, consequently, large profits. If, for the same reasons that have

prompted decriminalization of noncommercial possessory activity, legislators wish to draw a line at some point along the spectrum of distribution activity, and to decriminalize below-the-line transfers, the primary decisions to be made are how and where to draw the line.

The "how" problem has two aspects. One is the nature of the transaction itself and the second is the amount transferred. A legislator attempting to identify consumption-related transfers might provide more lenient penalties if the transfer is a gift and does not result in a profit, or if the profit is less than a specified minimum. In terms of proof, the most convenient place to draw the line is at gifts. "Cost-only" transfers arguably should not remain criminal. However, efforts to distinguish nonprofit transactions from profitable ones will prove difficult (although not impossible, especially if evidence about current market conditions is easily obtained).[27] It is important to consider whether case-by-case adjudications on "profit" are worth the effort when only small amounts are involved.

The second relevant aspect of distribution activity is the amount transferred. A statute that employs a designated amount could avoid the proof problems by in effect creating a statutory presumption, as with possession offenses; it is also easy to amend such a statute to increase or decrease the number of offenders who will be subject to the lesser penalty, simply by increasing or decreasing the designated amount. However, the competing consideration is that retail dealers may adjust their behavior to the contours of the law, never transferring more than the specified amount.

Given the available classification devices (giftprofit and amounts), several policy choices are possible. Decriminalization of gifts only is probably the minimum revision that is consistent with decriminalization of possession. Therefore it can be argued that gifts, which are rarely detected and rarely involve substantial amounts of marijuana, should be accorded the same penalty status as possession of small amounts. Clearly the transferor is an "accommodating" user, and it can be argued that different legal consequences would be unfair.

Whether the scope of the decriminalized offense should be extended beyond gifts (i.e., to include nonprofit sales, sales of small amounts, or both) is a decision that should be guided by the fundamental goals of the policymaker. The danger always exists that decriminalization of any kind of sale will create a loophole for professional retailers. By adjusting his trading patterns so as to make many small sales instead of a few large ones, a small-time retailer might be able to continue a

profitable commercial operation without risking any sanctions more severe than an occasional fine.

A policymaker whose primary goal is to decrease criminal justice costs by cutting down on prosecutions of insignificant offenses would probably want to adopt a gifts-only provision and avoid the loophole problem. Policymakers who, for reasons of fairness or compassion, are interested in withdrawing unnecessarily harsh criminal sanctions from most offenders whose activity does not pose a serious threat to public order, may want to extend the coverage of the decriminalized offense beyond gifts. Such a legislator would be aiming to remove the criminal sanction from as much unequivocably consumption-related behavior as possible while remaining consistent with a social policy of discouraging marijuana use.

If the latter policy alternative is chosen, the problem is how to design legislation that covers most consumer activity without opening a wide loophole for commercial activity. Sales are much more ambiguous than gifts. A sale of 2 ounces may be a simple "accommodation" between two users, one purchasing part of another's supply at cost; or it may be part of a large-scale, profitmaking retail enterprise. Because the amount of profit on a sale is not easily proved and is only generally related to the amount sold, the available classification methods (profit and amount) will not succeed in distinguishing every accommodation sale from every commercial sale.

The legislator must simply aim to devise a realistic classification that can be applied with reasonable convenience. One approach is to choose a relatively low amount (e.g., 1/2 ounce or 1 ounce). Another approach is to choose a somewhat higher amount and combine the profit and amount methods. For example, legislation could provide that a sale of less than 2 ounces is not a criminal offense and that a sale of more than 2 ounces is not a criminal offense if the defendant proves that he made no profit.

After an appropriate method of classifying sales has been chosen, the amount of marijuana, or the percentage of profit, must be designated that will qualify as an accommodation sale. Clearly, increasing the designated amount also increases the concern about the loophole effect; and conversely, decreasing the amount decreases the number of consumers whose customary marijuana behavior has been decriminalized. Resolution of this dilemma depends, in part, on an assessment of the practical significance of the loophole effect. Decriminalization of sales of small amounts may in fact induce retailers to decrease the risk of apprehension by adjusting distribution patterns,

and it may also induce enterprising consumers to enter the marijuana trade at the retail level. But neither of these effects willl be significant unless the criminal penalties already in force, as well as those that will remain after decriminalization, have a significant deterrent effect on persons who are inclined to engage in commercial activity. The deterrent effect of criminal sanctions depends to a large extent on the level of enforcement. Thus, if enforcement of laws against commercial sale is weak and is likely to remain weak, closing loopholes is probably not as important as giving fair treatment to the few who are caught. On the other hand, if enforcement is strict, something may be gained by setting a low designated amount to ensure that retailers do not escape punishment.

Another consideration that may influence the selection of a designated amount is the importance that policymakers attach to prosecution of retailers who profit from the sale of small amounts. Obviously, a designated amount of 2 ounces cannot possibly affect the operations of dealers who customarily transfer amounts over 5 pounds. It would be much too inconvenient to divide up a transaction of that magnitude into enough separate transfers to qualify as decriminalized activity. If policymakers decide that marijuana enforcement efforts should be directed overwhelmingly at major sources of supply, the existence of a loophole for small-scale retailers becomes a matter of little concern.[28]

Those who perceive the creation of a loophole as a serious problem will want to limit the scope of decriminalization to small amounts, nonprofit transactions, or gifts only. Making this policy choice does not, however, mean that all "commercial" marijuana offenses must be treated the same. Depending on the relative importance attached to proportionality as a limiting principle in the application of criminal sanctions to commercial activity, policymakers may decide to subdivide the criminal offense of sale into categories that reflect the relative seriousness of the offense. Thus, it is possible to have legislation that classifies as a misdemeanor those transfers that are too serious to qualify for decriminalization but not serious enough to merit felony treatment.

Cultivation for Personal Use

The overwhelming majority of marijuana consumed in the United States has been imported from Mexico, the Caribbean, or Central and South America. Although visitors to these countries may smuggle small amounts for their own use, most illicit importation is commercial in nature and involves substantial amounts.

Although domestic cultivation of marijuana has never been a serious problem (because its THC content is relatively low), the plant is easily cultivated and can even be grown indoors. Because it is a relatively simple matter to prepare marijuana for use, small-scale cultivation of the weed is a relatively widespread practice in the United States.

Under current penalty schemes, cultivation of any amount is punishable in most statutes as a serious felony with penalties usually as severe as those for sale. It seems clear that legislators interested in rationalizing their marijuana penalty statute could, at a minimum, revise and "grade" cultivation penalties to distinguish between commercial and noncommercial activity. Assuming that cultivation of small amounts for personal use should be subjected to lesser sanctions than commercial cultivation, the familiar problem remains of setting the amount limitation. This problem is addressed below after discussion about whether the reduced sanction for cultivation for personal use should be a "criminal" one or encompassed within the class of decriminalized behavior.

A legislator interested in conserving criminal justice resources while maximizing the deterrent value of the law probably would not be interested in decriminalizing cultivation. Not many arrests are made for this activity, and any increase in arrests after decriminalization of possession would be slight. However, a legislator who wants "disproportionate" criminal penalties removed from private, consumption-related behavior, would presumably decide to decriminalize cultivation for personal use because it falls within the rationale for decriminalization. It could be argued that since cultivation of small amounts of marijuana is not a serious threat to society, enforcement of criminal sanctions against the few who are detected may appear unnecessarily harsh and unfair. It could further be argued that discreet cultivation of marijuana on one's own property for home consumption is within the ambit of behavior that could be immunized from what many believe are intrusions by law enforcement authorities into the privacy of the home.

It might be argued, however, that decriminalization of home cultivation would increase the availability of marijuana and result in an increased frequency of consumption. Under this view, there is a difference in kind (not only in degree) between decriminalization of possessory conduct and decriminalization of cultivation. Decriminalization of possessory conduct makes it possible for marijuana users to keep a limited supply on hand without risking serious penalties. Decriminalization of cultivation, however, will increase the number of

users who maintain a potentially unlimited source of supply. If cultivation for personal use were decriminalized, it would be theoretically possible for every user to grow and consume, in relative safety, as much marijuana as he pleased. Even the risk of incurring a fine or having the plants confiscated would not be very great if the cultivation was carried out on private property out of public view.[29]

One answer to this contention may be that the ultimate social goal of marijuana prohibition (reducing the adverse social consequences of marijuana use) is better served by a sanctioning system which encourages home consumption by users than in one which deters it. Most homegrown marijuana is less potent than imported contraband and its use would presumably diminish any adverse health consequences that might occur as a result of use. In addition, since users who grow their own marijuana would not be supporting the commercial market, decriminalizing personal cultivation might reduce the aggregate demand for smuggled contraband and thereby increase the price and reduce the demand still further. Finally, users who choose to "grow their own" are no longer in constant contact with dealers who may offer them other illicit items for sale.

However this issue (decriminalization) is resolved, legislators could attempt to grade the penalties for cultivation, reducing the penalty for private cultivation of small amounts to a misdemeanor.

Whether decriminalized or reduced to a misdemeanor, the question arises how this "small amount" line should be drawn. Since much of the marijuana plant cannot be consumed, it may be advisable to designate a number of plants, rather than weight, as the unit of measure that will yield approximately the amount of usable marijuana which is the basis for decriminalization of possession. Alternatively, policymakers may want to set a smaller number to reflect the importance they attach to discouragement of cultivation, or a larger number to reflect the fact that a single batch of plants is often intended to yield a year's supply of marijuana.

SELECTING SANCTIONS FOR MARIJUANA USERS: "NONCRIMINAL" SANCTIONS IN CONTEXT

For purposes of the following analysis, it is assumed that the decisionmaker, whether it be the Governor or the legislature, has already concluded that possession of marijuana for personal use and other consumption-related activity (however defined) should not be punishable by incarceration. In other words, it will be assumed that

the decisionmaker has concluded that the possible deterrent value of a threat of incarceration is outweighed by the individual injustices and the procedural inefficiencies that are introduced into the system by authorizing imprisonment for the "least serious" marijuana behavior. In addition, the legislator may also have concluded that incarceration, as a sanction, is disproportionate to the offense in terms of its relative seriousness. Within this framework, many additional issues must be resolved in terms of both the post-conviction consequences of conviction for the least serious marijuana-related activity, and the post-arrest consequences of being detected and apprehended for such an offense, both of which are addressed in later parts of this section. First, however, it is useful to place the sanctioning choices now being made for marijuana use against the backdrop of two generic reform trends in the criminal law.

"Overcriminalization" and Law Reform

For some years now, criminal law reformers and commentators have called attention to the adverse institutional effects of "overcriminalization," recommending that many disapproved behaviors (such as consensual sexual behavior, public drunkenness, marijuana use, gambling, and abortion) be removed from the sphere of the criminal law. The "limits" of the criminal sanction are numerous. First, a diminished respect for the law is occasioned by society's retaining the criminal sanction for these activities in name but not enforcing them. That is, the behavior is condemned in words (the law) but not in deeds (prosecutions). As Professor Kadish asserts in a 1967 article in Annals: "Moral adjurations vulnerable to a charge of hypocrisy are self-defeating no less in law than elsewhere."[30]

Second, criminalization of less serious behavior may actually breed crime rather than reduce it. Recent studies leave little doubt that imprisonment sometimes aggravates an individual's propensities toward crime.[31] Thus, in the case of the perpetrators of "less serious" actions, it may well be that imprisonment itself generates future "more serious" offenses. For this reason, several major authorities (including the National Advisory Commission on Criminal Justice Standards and Goals and the American Bar Association Standards) have recommended that probation be the standard penalty, with incarceration reserved for cases in which special reasons for imposing it exist.[32] With respect to marijuana, the very illegality of the drug itself--without regard to incarceration--may lead to "more serious" behavior. That is, since the drug is illegal, users must secure it in an illicit marketplace, which heightens the risk that marijuana users will be

exposed to the "harder" drugs which are also available in the marketplace.[33]

Third, marijuana use, like other private, consensual conduct, is difficult to detect (and, thus, to deter) within the boundaries of constitutional norms governing police behavior. Because there is no injured party to bring violations to the attention of the police, the police are forced to resort to apprehension strategies--such as entrapment, the use of informants, or illegal searches and seizures which may later be the subject of perjured police testimony in court--which demean not only the officers personally but also the process of law enforcement itself.[34] This unenforceability in turn gives rise to opportunities for corruption of and selective enforcement by police, both of which are institutionally damaging to the process of law enforcement.

Finally, there is the tremendous cost of enforcing prohibitions against "consensual" crimes. Efforts to release public resources from the duty of enforcing these laws should not be discounted, particularly in light of the steadily increasing volume of violent crime and the ever-diminishing capacity of the law enforcement agencies to deal with it. Recognizing that the efforts to enforce the laws against prostitution, gambling, and drug use have not significantly reduced the availability of those vices, and weighing this against the tremendous cost and adverse institutional effects of that effort, Professor Kadish concludes: "It seems fair to say that in few areas of the criminal law have we paid so much for so little."[35] In response to these considerations several states have recently decriminalized homosexuality, fornication, and other consensual sexual offenses, and major steps have been taken in most states to decriminalize public drunkenness. In particular, most states have adopted the provisions of the Uniform Alcohol Intoxication and Treatment Act that substitutes noncriminal bases for intervention in cases involving alcoholics and persons incapacitated by alcohol use.

The trend toward decriminalization of marijuana use and consumption-related behavior must be seen against the backdrop of these generic efforts to redefine the scope of the criminal law. In 1972, when the National Commission on Marihuana and Drug Abuse recommended that the criminal sanction be withdrawn from possession and other consumption-related behavior, the commission placed its recommendation in the context of these broader trends of criminal law reform. Similarly, the American Bar Association, the National Conference of Commissioners on Uniform State Laws, the National Advisory Commission on Criminal Justice Standards and Goals, and other expert bodies concerned with the administration of criminal justice, have

viewed marijuana decriminalization as merely one aspect of the "over-criminalization" problem.

The Search for "Noncriminal" Sanctions

A related trend in criminal law reform pertains to the search for noncriminal sanctions for behavior which is disapproved but is not thought to be serious enough to warrant punishment by incarceration and stigmatization implicit in criminal sanction. For several decades, drafters of criminal codes and interested commentators and legislators have acknowledged that the criminal sanction may be too potent, too stigmatizing, and too cumbersome from a procedural standpoint for much disapproved behavior. Particular emphasis has been placed on regulatory offenses and other kinds of conduct which, though disapproved and discouraged, are not regarded as morally offensive. For example, the National Advisory Commission on Criminal Justice Standards and Goals, whose mandate was to formulate national standards for crime reduction and prevention at the state and local level, suggested removal of certain offenses from the criminal justice system when the harms governed by them might be more properly controlled by civil regulatory bodies. Included in this category are minor traffic violations, violations of building codes, zoning ordinances, health and safety regulations, and evasion of state taxes. The Advisory Commission also suggested removing drug offenses from state criminal codes, if diversion options were feasible.[36]

In 1962, the drafters of the Model Penal Code proposed that legislatures create a "civil violation," punishable solely by a fine whose maximum amount is $500, and resulting in none of the adverse legal consequences which are attendant upon conviction of a criminal offense. Several states (e.g., Oregon, Connecticut, and Minnesota) have adopted the Model Penal Code civil violation concept, extending it to offenses such as marijuana possession, employment of minors in places of entertainment, driver training school regulations, and traffic offenses. Several other states have created a lesser offense which is not punishable by incarceration and which is not called a crime, even though nothing specific is said about the legal consequences of "conviction": Delaware (violation), Kentucky (violation), Illinois (petty offense), and Utah (infraction). Finally, it is noteworthy that New York classifies some offenses as "violations," which are not crimes but are nonetheless punishable by up to 15 days in prison. (It may be that the major purpose of this "decriminalized sanction" is not being achieved, since a violation is punishable by a jail term.) Vehicle offenses and violations of construction regulations are examples of behavior punishable as violations rather than as crimes in New York.

In addition, juvenile offenses and proceedings for civil commitment have for many years been handled in a manner that departs significantly from the standard criminal pattern. Thus juvenile offenders are "delinquent" rather than "criminals," the records of their misdeeds are sealed, and procedures are more informal and primarily geared toward rehabilitation. Once again, the theory behind the difference is a recognition that the blunt instruments of the criminal justice system are both inappropriate and unfair in attempting to deal with certain kinds of behavior.

There is a pragmatic reason--quite apart from notions of fairness--why such problems should not be dealt with in the criminal mode. Herbert Packer argues that much of the criminal law's deterrent value derives from its stigmatic effects, and the imposition of the criminal label in contexts, such as regulatory offenses, which are viewed by large segments of the population as nonculpable dilutes that stigma: "The ends of the criminal sanction are disserved if the notion becomes widespread that being convicted of a crime is no worse than coming down with a bad cold."[37] In the same manner, the drafters of the Model Penal Code felt that the violation concept ". . . will serve the legitimate needs of enforcement, without diluting the concept of crime or authorizing the abusive use of sanctions of imprisonment."[38]

Again, the recent legislative movements in several states to substitute civil sanctions for criminal ones in connection with possession of marijuana for personal use and other consumption-related activity should be viewed against the backdrop of this generic effort to utilize noncriminal sanctions. Indeed, several (four of 13) members of the Marihuana Commission who concluded that they were unwilling to withdraw all sanctions from marijuana-related activity, were nonetheless unwilling to continue to utilize the criminal sanction. They specifically recommended that marijuana possession and other consumption-related activity be punishable by a civil fine.

An Overview of "Less Criminal" Sanctions

Alternative sanctioning devices, which may be used in connection with marijuana-related activity, are analyzed later in this chapter. Unfortunately, as is indicated by the summary of current state laws in Volume 3, the traditional distinction between civil and criminal sanctions is inadequate from both a descriptive and a prescriptive standpoint. Once legislators or other decisionmakers have concluded that a particular behavior is not as deserving as more serious behavior of criminal stigma and imprisonment, the sanctioning consequences of violating the law may be ameliorated without changing the statutory

label. Thus, a criminal offense may be punishable by a fine only.[39] Also, even if the offense is punishable by imprisonment, use of systematic diversion programs may undermine the original classification as a crime. Finally, specific provisions may be made to minimize the likelihood of deprivation of liberty after arrest (through citation programs), and the consequences of conviction may be ameliorated through specific provisions permitting record expungement and a statement of "no record" on job applications.

The ambiguity runs in the other direction also. Thus, even when an offense is classified as a civil violation for purposes of record consequences, the legislature might provide that the offense is still punishable by a period of confinement. For example, the Senate Judiciary Committee's 1976 bill revising the federal criminal law created a category of civil infractions (noncriminal) but authorized the judge to sentence a violator to up to 15 days in jail. The New York provisions described earlier have the same effect.

As should be apparent, there is currently no "bright line" between criminal and civil sanctions; instead, legislators have at their disposal a continuum of sanctions which are more or less severe and more or less "criminal" along a number of different dimensions. To facilitate the analysis in the following pages, we will approach the matter functionally. In this connection, it is useful to recognize that involvement in the sanctioning process begins after apprehension for the offense, and that some sanctions take effect even before an adjudication:

- post-arrest consequences:
    - injury to reputation (record consequences of arrest);
    - deprivation of physical liberty (custody); and
    - deprivation of property/inconvenience (associated with appearance in court and defending oneself).
- post-conviction consequences:
    - deprivation of physical liberty (jail or lesser deprivation);

    - deprivation of property (fine); and
    - injury to reputation (record consequences of conviction).

It is important also to recognize that the choice of a particular sanctioning device carries procedural implications from a constitutional standpoint, and that these implications do not necessarily parallel the use of criminal or civil labels. For example, the possibility that a jail term may be imposed, even for a day, means that indigent defendants must be provided counsel; on the other hand, no jury trial is required unless the defendant can be sentenced to more than 6 months in jail. The confusion is reflected in the fact that it is not clear whether and under what circumstances the standard of proof must be "beyond a reasonable doubt" (the criminal standard) as compared with "clear and convincing" evidence or a "preponderance of the evidence" (the more or less civil standards).

MODIFYING THE CRIMINAL SANCTION: POST-CONVICTION CONSEQUENCES

Assuming that imprisonment is regarded as an unjust and/or inefficient sanction for consumption-related conduct, several remaining questions must be resolved regarding the legal consequences of the occurrence of such conduct.

- Should the conduct be punishable by any type of legal sanctions? If so, what type of sanction is appropriate?
- In addition to whatever deprivation of property is assessed, should a violation also be punishable by the imposition of a criminal record? If so, to what extent should the ordinary consequences of such a record be ameliorated?
- If the sanction is a fine, how much should it be and what should be the consequences of nonpayment?
- Should the sanction be increased for subsequent offenses by the same offender?
- Assuming that least serious consumption-related behavior by adults is punishable by a fine, must any special provisions be made for minors?

The Necessity of Legal Sanctions

Two of the traditional purposes of penal provisions--incapacitation of dangerous offenders and punishment of intrinsically immoral behavior--are wholly inapplicable to these marijuana offenses. Instead the possible utility of a sanction for this conduct lies in its implementation of a policy aiming to discourage marijuana consumption. In theory, legal coercion (less severe than the threat of imprisonment) can do this by:

- deterring the prohibited behavior;
- symbolizing social disapproval of the behavior and thereby reinforcing attitudes unfavorable to consumption; and
- providing legal leverage to channel detected users into specific programs designed to discourage consumption.

As a practical matter, the incremental deterrent effect of a fine is probably not substantial. For the most part, individual decisions to experiment with marijuana have not been influenced in recent years by the fear of legal sanctions. Instead, the prohibitions against distribution force the traffic underground and thereby circumscribe the population with an opportunity to experiment. In addition, these prohibitions, which establish the conditions of availability, have a much more significant impact on containing the population of continuing users (at less than 50 percent of the experimenters) than does the threat of sanctions for possession. A fine applied with certainty would depress the rate of increased experimentation among previously uninitiated populations. Although there are no data measuring the increased rate of experimentation when sanctions are removed, the data in states which have enacted fines are consistent with this analysis. The opportunity to consume occurs mainly in private. At best the continuing sanctions against possession will serve to discourage committed users from transporting their marijuana on their person or in their vehicles when they venture into public.

While the "leverage" value of legal sanctions may be significant in connection with alcoholism and heroin addiction, it would appear minimal where marijuana is concerned. The overwhelming majority of persons who experiment with marijuana and use it recreationally are not in need of "treatment." They are indistinguishable from their nonmarijuana-using peers by any criterion other than their marijuana use. Instead, the main value of leverage is "educational" and preventive rather than therapeutic. But the question arises whether the

costs of enforcing such a sanction and maintaining an educational program (like driver education classes) are worth the likely payoff. If the point is to counsel against the use of more harmful substances, this seems a more costly and unnecessarily coercive method of doing so; indeed, it seems unwise to pervert the criminal justice system to serve functions that ought to be performed by the public school system.

This is not to say that children and adolescents apprehended for marijuana possession should not be channelled into appropriate counselling and/or educational programs. Indeed, this "leverage" approach is a distinguishing feature of the juvenile justice system and should be employed in individual cases as indicated. But "leverage" is an inadequate justification, in itself, for imposing legal sanctions on consumption-related activity by all marijuana offenders, including responsible adults.

The most convincing argument for some legal sanction for consumption-related behavior lies in its presumed symbolic effect. By this is meant the generalized "educative" or "moralizing" influence generated by a formal expression of social disapproval. The thought is not so much that the threat of being sanctioned "deters" but rather that the formal prohibition ("it's against the law") will reinforce other environmental forces that shape the desired attitudes toward consumption of psychoactive drugs in general and marijuana use in particular. Again, from a purely empirical standpoint, the question is whether the penalty for consumption itself significantly augments the message conveyed by the total prohibition against cultivation, importation, and distribution. Society's attitudes, as indicated through its laws, would appear to be well-stated. It is noteworthy in this regard that during alcohol prohibition, all but five states saw no need to extend penal sanctions to possession of illicit liquor for personal use. On the other hand, some observers contend that the absence of a sanction makes it legal and therefore connotes approval despite the continuing enforcement of prohibitions against availability.

In any event, the question is whether the incremental deterrent and symbolic effects of the legal sanction (at a minimum a fine) is depressing the number of users and the frequency of their use warrants the administrative costs necessary to enforce the law and apply the sanction and the invasions of personal privacy thereby engendered. Accounts of legislative processes in states that have enacted (and defeated) decriminalization proposals suggest that the major contending considerations are, indeed, perceived symbolic importance of maintaining a "penalty" (and, in some cases, calling it a crime for purely

symbolic reasons) for marijuana possession on the one hand, and concerns about violations of personal privacy on the other.

As far as pure cost factors are concerned, the administrative expenses of enforcement and processing of the fine will probably exceed substantially the amount of money collected in most jurisdictions. Two qualifications should be entered, however. First, the costs of criminal justice processing can be reduced substantially by foregoing all customary incidents of the criminal process (i.e., booking, custody, and personal appearance in court). Second, a large number of detected and sanctioned violations can produce a sizeable payoff in fines (e.g., the California experience). For the most part, however, the administrative cost is not a determinative factor, especially since it can be reduced substantially through appropriate procedural reforms.

In sum, these observations suggest that a policymaker interested in the benefits of decriminalization and who believes that some legal penalty for marijuana consumption is a necessary feature of discouragement policy, may prefer to select a fine, not a leverage sanction, and to facilitate its efficient and least "intrusive" administration. On the other hand, a policymaker who believes that the incremental symbolic and deterrent benefits of a consumption penalty do not significantly exceed the preventive effects of continuing prohibitions against distribution (or who believes that any penalty for possession is disproportionate to the harm engendered by the conduct), should withdraw all legal sanctions from least serious consumption-related behavior. (For a more detailed discussion of state responses, see Volume 3, Chapter V.)

For purposes of the remainder of this chapter, it will be assumed that the policymaker has decided to retain least serious marijuana-related behavior as a prohibited offense, punishable by a fine. The first question then is whether, and in what way, commission of such an offense involves the criminal process.

The Record Consequences of Arrest and Conviction

A criminal arrest, even if no conviction follows, will normally be a traumatic experience, particular for the first offender. Even if the defendant is ultimately released without charge or is acquitted, he will suffer the inconvenience and embarrassment of being brought to the police station and booked, photographed, and fingerprinted. This deprivation of liberty could last a significant length of time, especially if bail is required and the defendant is unable to post it immediately. He also may miss work while being detained and even if he loses no working time, his employer may dismiss him upon learning of the arrest.

The existence of an arrest record can also work to the detriment of the arrestee in subsequent encounters with the criminal justice system. At any level of the criminal justice system, an arrestee with a prior arrest record is likely to be prejudiced by that fact: he is less likely to receive leniency from the prosecutor than a person without a record in terms of dropping or reducing charges; likewise the defendant with a record may receive a harsher sentence than a similarly situated first offender.

The mere existence of an arrest record may also injure the arrestee in the marketplace. His most serious problem will be an inability to truthfully respond "no" to the question "Have you ever been arrested or convicted of a crime?" It is the rare employment application that does not contain this question, and perhaps rarer still is the employer who will look favorably upon the applicant whose response is "yes."

If the arrestee is subsequently convicted of a criminal offense, all of these record consequences are, of course, exacerbated. A host of legal disabilities flows from criminal convictions, even of a misdemeanor. The records may be accessible to both public and private employers. The convicted misdemeanant may be precluded by licensing laws from engaging in certain occupations and from securing public employment. A convicted felon in virtually all states is ineligible for occupational licenses and public employment and is usually disenfranchised as well.

A number of state legislatures have enacted generic provisions for reducing these consequences of criminal arrest and conviction records. The goal here is to analyze some of the alternative avenues for ameliorating the record consequences of arrest and conviction as part of a reduction or elimination of criminal penalties for consumption-related marijuana behavior. As in previous discussions of other drafting issues, this analysis may differ according to the rationale for adopting a change in the sanctions applied to the use of marijuana.

Minimal Sanction

First, the legislature may determine in essence that the punishment does not fit the crime; that is, that smoking or possessing a marijuana cigarette for one's own use simply is not a sufficiently serious offense to warrant the imposition of all the legal, economic, and social disabilities ordinarily implied by the criminal sanction. Apart from this elementary notion of proportionality, a related rationale may be the unfairness to the individual and the counterproductive

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social effect of stigmatizing marijuana offenders with criminal labels. In either context, a legislator may well believe that any type of criminal stigma associated with marijuana use engenders a disrespect for the criminal justice system as a whole.

Criminal Recordkeeping Cost

Second, even if the offense is considered important enough for some serious (even stigmatic) sanction, the incremental deterrent value of retaining the sanctions associated with criminal records may not be justified by the administrative cost. A legislature might easily determine, for example, that the police resources now employed in booking, recording, and maintaining the records of marijuana offenders could be better expended in the enforcement of more serious crimes, especially violent crime. Similarly, legislators might well find that the procedural system necessary to process criminal offenses is too costly, and may be willing to sacrifice the stigmatic aspects of the sanction to facilitate expeditious and convenient processing of offenders. Although any reform adopted will most likely be motivated by a combination of these factors, the precise content of the remedial measures may be adjusted according to which of these policies was the predominant factor behind the reform.

Potential Civil Violation

If the dominant motivating force behind the reform is the perception that the criminal stigma is unfair and disproportionate to the offense, the best legislative course may be to remove the stigma entirely by labelling the offense a civil infraction or by using some similar noncriminal appellation. No record consequences would flow from apprehension and adjudication at all. Any records (of citations, etc.) maintained for research or other administrative purposes could be designated as civil and segregated from criminal records. Access should be restricted to serve only those limited administrative purposes that may include searches for prior citations, if the legislature provides for increased penalties for subsequent offenses.

Potential Reforms

In the event that the reform is designed primarily to accommodate the presumed deterrent and symbolic value of the criminal penalty with the need to reduce the cost of administering it, several devices are available. First, clear benefits can be obtained by eliminating formal booking procedures, thus saving police the time and arrestees the inconvenience associated with fingerprinting and photographing

minor marijuana offenders. Persons apprehended could simply be issued citations to appear in court. Beyond this, two basic approaches are available to adjust the severity of the penalty to the less serious nature of the offense, involving various degrees of destigmatization: (1) expunging or sealing records immediately after conviction, or (2) expunging or sealing the records after expiration of a stipulated period of time. Either of the options could be supplemented with the right to state the nonexistence of arrest or conviction for a criminal offense.

The choice among immediate or postponed expungement or sealing depends upon how the legislature accommodates the presumed deterrent effect of the criminal penalty with the unfairness of stigmatizing minor marijuana offenders in the economic sector. If the legislature is seriously concerned about the economic disutility of criminalization, a crucial feature of the reform would be to permit the offender to state "no record" in connection with pre-employment inquiries. To be effective, the remedy should take effect immediately after arrest.

The central consideration in choosing between expunging and sealing is whether future access to the records is considered necessary for certain limited purposes. For example, if penalties are to be increased for subsequent offenses by the same offender, immediate expungement could not be employed. Another potential reason for record retention is for research purposes. However, if a sealing provision is enacted, measures could be taken to prevent unauthorized dissemination. This could be accomplished by segregating sealed files from others and restricting access to them. If the only purpose of choosing sealing is to facilitate research, then the information identifying the offenders could be removed from the files and then left with the general files.

If, as is very likely, the decision to ameliorate the record consequences of arrest and conviction for consumption-related marijuana offenses is motivated by considerations of unfairness as well as cost, full decriminalization is the most effective remedy. It eliminates unfairness to the offender by never attaching the criminal stigma with its concomitant legal, social, and economic disabilities. It also eradicates the administrative cost completely by eliminating the need for recordkeeping and removing the incentives for violators to contest their guilt. Even immediate expungement or sealing would put the police through unnecessary record production exercises. On the other hand, the symbolic importance of retaining the criminal label has been apparent in the legislative processes of several reform jurisdictions

(e.g., California, Ohio, and Colorado), each of which continues to classify minor marijuana offenses as crimes, while they have attenuated or eliminated the stigmatic incidents of the criminal sanction.

The Imposition of "Noncriminal" or "Less Criminal" Sanctions

Whether the sanctioning process has criminal overtones, several operational questions are raised regarding the administration of sanctions other than incarceration: the amount of any fine, the consequences of nonpayment, and the structure of any educational program.

Amount of Fine

If a fine is chosen as the sanction for least serious consumption-related behavior, the next question is "how much should it be?" There are a number of reasons for limiting the maximum fine to an amount comparable to the penalty for a serious traffic offense (e.g., no more than $100). First, there is no evidence that the deterrent effect will differ according to the amount of the fine once it reaches a certain non-nuisance level (e.g., $25). Second, the symbolic effects are retained by any fine, no matter what its amount--again so long as it is not de minimis. Third, the practical and legal difficulties associated with administering the sanction are mitigated if the amount of the fine is held to a minimum.

Consequences of Nonpayment

Several important issues must be considered in connection with the administration of a financial penalty for marijuana offenses. The most efficient way to collect, of course, is to insist upon payment immediately after apprehension and conviction. However, decisions of the United States Supreme Court have placed limits on the use of incarceration as a means of insuring immediate payment. It is no longer constitutional to imprison a defendant who is financially unable to pay his fine.[40]

Thus, any procedure for enforcement of payment against defendants who are able to pay must begin with a hearing for the purpose of determining ability to pay. Although the Supreme Court has not spelled out the procedural requirements of such a hearing, it seems likely that they include the right to counsel and the right to present witnesses in defense of a claim of indigency.[41] Moreover, at least as a matter of policy, it has been held that, prior to the indigency hearing, the defendant cannot be confined at all.[42]

If a defendant is able to make immediate payment and refuses to do so, or if after he is given a "reasonable opportunity" to pay the fine "consistent with his financial situation" and fails to take advantage of this opportunity, he can be incarcerated for a period of time whose constitutional limits are not yet settled.[43] However, a defendant who is unable to pay the fine must be allowed a period of time that affords him a realistic opportunity, under the circumstances of his case, to make payment through installments or otherwise.

In the hypothetical case of the defendant who, through no fault of his own, is unable to make payments under a plan that gave him a "reasonable opportunity" to do so, courts have offered differing speculations. One court has suggested that imprisonment solely on grounds of inability to pay would deprive the poor of equal protection of the law.[44] On the other hand, another court has suggested that discharge of an indigent defendant, while better-off defendants are forced to pay a penalty, would deprive the affluent defendant of equal protection.[45] This difficult case is likely to be rare if courts make use of their discretionary powers to reduce fines and postpone payments in cases where defendants are truly without means.

An additional alternative means of collecting fines from indigent defendants is to require them to report for work on some public project for the number of days necessary to satisfy the fine. Although this approach may also involve constitutional problems to the extent that the work is perceived as "custody," if it is presented as an alternative to installment payments it may simplify collection from defendants who are tempted to use indigency as an excuse for future nonpayment.

The best method of dealing with the problem of indigency may be to permit judges to offer any person who pleads inability to pay the option of attending an appropriate education program or performing some public service involving an equivalent sacrifice of time. This "optional" approach can also be employed in cases involving offenders whose drug involvement is significant enough to suggest that participation in some "education" program would be beneficial. If such programs have any educative effect at all, that effect is likely to be greater to the extent that the defendant's participation is voluntary. If defendants are given a realistic choice, i.e., the option to pay a fine or attend the program, those who enter the program will be attending, at least in part, of their own volition and will be that much more likely to benefit.

Structure of Educational Program

If the preferred sanction is an education program, it could resemble (in time and in convenience) the driver education programs required for youthful violators or multiple adult offenders. It is clear from all we have learned about drug education programs that the objective cannot be to "teach" the evils of marijuana use. Instead, the objective must be to instill responsible and mature attitudes toward the use of psychoactive substances, including both marijuana and alcohol.

It was suggested earlier that it may be legislative overkill to make a leverage sanction (in lieu of a fine) mandatory in all cases involving the least serious consumption-related behavior. On the other hand, it should be emphasized that an education program may be a useful optional sanction for persons unable to pay the fine and may also be an appropriate dispositional alternative for some (though not all) repeat offenders or youthful offenders. In each of these latter situations, however, policymakers must address generic questions regarding the desirability of different (and more burdensome) sanctions for subsequent offenses and for minors, each of which will be discussed below.

Subsequent Offense Penalties

Assuming a state has decided to decriminalize some marijuana behavior and to impose a civil fine for these least serious offenses, the question arises whether the sanction applied should vary according to the number of such offenses committed by the same offender. There are three alternatives: (1) retain the same penalty for subsequent offenses as for first offenses, (2) impose a larger fine for subsequent offenses, or (3) apply more severe criminal sanctions for subsequent conduct in the form of either stigma or incarceration.

Once again the number of rational choices is circumscribed by the rationale that underlies the initial decision to reform the marijuana prohibitions. If the legislature's concern is to minimize the involvement of marijuana users in the criminal system because of concerns about fairness of enforcement and about the disproportionality of criminal sanctions (incarceration and stigma) to the offense, then it makes no sense to increase the penalty for second offenders. That is, the same notions of fairness apply whether it is the first or the second time an individual is apprehended for a marijuana violation.

On the other hand, if the legislators' primary goal is simply to decrease the cost of enforcing marijuana prohibitions and at the same time to retain measures to deter as much marijuana behavior as is possible consistent with the goal of cost reduction, then increasing penalties for subsequent offenses may be a rational course. Nonetheless, it is quite clear that to increase penalties at all for subsequent offenses will deviate from the cost-reduction principle to a significant degree in that records of the initial violations will have to be maintained to determine whether a violator is a second offender.

In the event that policymakers opt for stricter penalties for subsequent offenses, the two goals of fairness and cost reduction may be better served if a larger civil fine is imposed in lieu of criminal sanctions.

If the legislature has decided that a first offender should receive only a civil fine, some might then argue that it is unfair, especially in light of the high degree of selectivity and arbitrariness prevalent in marijuana law enforcement, to bring into force the full panoply of criminal sanctions (the embarrassment of arrest and booking and the economic and social consequences of having a record and especially incarceration) merely because a casual marijuana user has been caught a second time.

It is also clear that authorizing imprisonment for subsequent offenses will exact the greatest toll in terms of cost of enforcement. Aside from the obvious expense of incarceration itself, one principal advantage of the fine-only scheme--the elimination of costly trials--will be lost if incarceration is authorized. Defendants will be less likely to plead guilty if they face possible confinement than if the only penalty is a fine. The threat of imprisonment may also engender more technical search and seizure claims both at trial and on appeal, all of which will operate to drain judicial resources which are generally scarce already.

Even a criminal sanction that excludes imprisonment as a penalty will add significantly to the cost of deterring marijuana behavior. More formal procedures will have to be utilized during arrest in that the offender must be brought to the station, fingerprinted, and photographed; criminal records will have to be maintained; some defendants may be inclined to contest the charge either to avoid the higher fine or the criminal stigma; and notions of due process may require that publicly paid counsel be offered to indigent offenders.[46]

In the final analysis, even if the goal of reform is to deter as much marijuana behavior as possible without regard to fairness, policy-makers must decide whether an uncertain incremental degree of deterrence is worth its cost. Of the states that have decriminalized marijuana, seven decided it was not worth the price and provided no additional sanctions for subsequent offenses.[47] Only Minnesota increased the penalty for a subsequent violation. In that state the first time one is convicted of possession of up to 1-1/2 ounces the maximum penalty is a $100 civil fine, while subsequent offenses are subject to a criminal fine of up to $300 and a jail term not to exceed 90 days.

Apart from fairness and relative deterrence and cost, one additional consideration here is the possible utility of the sanctioning system as a leverage device in cases involving recidivists. It is possible that repeated apprehension for marijuana offenses may indicate, in some cases, that the individual has progressed beyond purely recreational use of marijuana to more intensified patterns of psychoactive drug use. Again, a judicious use of discretion to utilize optional educational or counselling programs may be a more effective way of dealing with this problem than the enactment of categorical increases in sanctions for subsequent offenses.

Applicability to Minors

One question that has been raised with respect to proposals for decriminalizing the possession and sale of small amounts of marijuana is whether the reforms should recognize a distinction according to whether the same offense is committed by a juvenile or by an adult. Some legislators may wish to permit greater intervention in the case of a juvenile. That is, the same legislator who finds no objection to permitting the penalty for possession for personal use to be reduced to a mailed-in fine when the offender is an adult, may wish to grant the juvenile court jurisdiction where the offender is a juvenile. The issue is whether decriminalizing possession of marijuana for personal use will require a change in the definition of juvenile delinquency to allow possession of marijuana to remain an allegation sufficient to support a juvenile delinquency petition.[48]

In general a juvenile court has jurisdiction in four situations: (1) where the juvenile has committed an act that would be a crime if done by an adult, (2) where the child is beyond the control of his parents or is engaging in conduct which, though not criminal, is thought to be deleterious to himself, (3) where the youth's parents, though able to offer proper care and guidance, fail to do so, and (4) where the

child's parents are unable to care for him.[49] Possession of marijuana will clearly not justify juvenile court intervention under numbers (3) and (4). Possession of marijuana may give the juvenile court jurisdiction under numbers (1) and (2), depending upon the type of marijuana law reform enacted, as well as upon the wording of the statutory definition of juvenile delinquency.

Some states, in reducing the criminal penalties for possession and sale of small amounts of marijuana, still label such acts criminal.[50] In those states, no change in the definition of juvenile delinquency will be needed to achieve the goal of greater intervention in the case of juveniles, since the commission of an act that would be criminal if committed by an adult is already sufficient to give the juvenile court jurisdiction.

Even if a legislature were to completely remove the criminal stigma from possession and sale of marijuana for personal use, such activity by a juvenile could provide the basis of a juvenile delinquency petition on the theory that the youth is engaged in activity which may be harmful to himself. For example, in New Jersey the statutory definition of juvenile delinquency consists of a series of acts and includes "(d) Deportment endangering the morals, health or general welfare of said child."[51] A court could easily find that possession of even small amounts of marijuana comes within the broad scope of this provision.

Almost every state has a statute which vests the juvenile court with jurisdiction to entertain a petition alleging noncriminal conduct by a child injurious to his "health, welfare or morals." Different states have different labels for this jurisdiction--persons in need of supervision (New York), ungovernability (Virginia), children in need of supervision (Maryland). Some states provide by statute that such children may not be incarcerated. However, in most states today a child found within this jurisdiction can be the subject of any of the three generic juvenile dispositions--incarceration, probation, or unconditional release. Whether occasional marijuana use would fall within this jurisdiction is uncertain; for example, some cases have held that occasional use of alcohol or tobacco does not. However, a court could easily find that possession of even small amounts of marijuana comes within the broad scope of this jurisdiction, and it is almost certain that chronic marijuana use would fall within this jurisdiction.

On the other hand, if the statutory definition of juvenile delinquency is more narrowly drawn and the criminal label is removed from possession of small amounts of marijuana, it is difficult to see how a

court could find possession to constitute a sufficient allegation to issue a juvenile delinquency petition. For example, the California provisions on the jurisdiction of the juvenile court leave no room for intervention unless possession of marijuana for personal use is a crime:

> § 602. Minors violating laws defining crime; minors failing to obey court order
>
> Any person who is under the age of 18 years when he violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime or who, after having been found by the juvenile court to be a person described by Section 601, fails to obey any lawful order of the juvenile court, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court.[52]

In a state with such a narrowly drawn definition of juvenile delinquency, the legislator who wishes the juvenile court to retain jurisdiction over youths who possess small amounts of marijuana after such an offense has been classified as a civil infraction must pursue one of two courses: (1) amend the juvenile delinquency definition to include possession and sale of even small amounts of marijuana, or (2) add to the marijuana decriminalization bill a provision that possession of marijuana for personal use by a juvenile permits the juvenile court to exercise jurisdiction. Indeed, even in a state like New Jersey where the statutory definition of juvenile delinquency is broad enough to encompass noncriminal possessory activity, it would be wise for the legislature to make manifest its intention to permit juvenile court jurisdiction over such activity. This would foreclose any possibility that a court may refuse to find noncriminal possession to constitute an allegation sufficient for issuance of a juvenile delinquency petition.[53]

Furthermore, the legislature, if it decides that greater intervention in the case of juveniles is desirable, may wish to specify precisely what kind of disposition is permissible. For example, it is doubtful that a legislature which adopts a fine-only policy for adults would intend to permit confinement in a reformatory for a juvenile engaging in the very same activity. However, the legislature may decide that appearance in juvenile court should be mandatory or that attendance at a drug education course is the appropriate disposition. Additionally the legislature, while not authorizing confinement for noncriminal possession alone, may wish to specify that such activity is one factor to be assessed along with others in determining whether confinement is justified. Many other possible dispositions--whether

mandatory or discretionary--are conceivable; the important point is that unless the legislature specifies the disposition, the courts will of necessity perform that task, and in so doing they may achieve results at variance with unexpressed legislative intent.

MODIFYING THE CRIMINAL PROCESS: DETECTION AND POST-ARREST CONSEQUENCES

The selection of the appropriate post-conviction sanctions for least serious marijuana behavior does not exhaust the legislator's inquiry. The need to modify the criminal process (police behavior to detect offenses and arrest violators and post-arrest processing by police, prosecutors, and courts) in marijuana cases has been a crucial factor in movements for reform.

For those who seek mainly to reduce the amount of criminal justice resources in marijuana cases, the procedural payoff is really the crucial one. In addition, for those who believe that society's interests in suppressing marijuana use do not warrant the invasion of privacy and deprivation of liberty normally implicit in the criminal process, a central goal in decriminalization is to minimize the offender's involvement in the criminal justice system.

Thus, assuming that the legislature has decided to enact a decriminalization scheme which, at the least, removes incarceration as an authorized penalty for the least serious marijuana behavior, the following procedural questions must be addressed:

- How is the police search authority affected by decriminalization?
- Under what circumstances may a person be taken into custody and detained upon apprehension?
- May the offender be required to appear in court?
- If the case is contested, under what process and with what safeguards should be case be adjudicated?

These issues will be discussed from both constitutional and policy perspectives.

Detection and Arrest

The discussion of post-conviction consequences referred mainly to considerations of personal liberty, fairness, institutional integrity, and conservation of criminal justice resources. Another interest that may be important to legislators is protection of individual privacy. To policymakers concerned with privacy, the following discussion will be especially relevant.

Even if legislative reform prevents severe deprivations of liberty (such as imprisonment) from being inflicted on marijuana users after conviction, that group may still be subjected to serious invasions of privacy associated with arrest, detention, and search procedures. Obviously, the most effective way of protecting the privacy of the class of marijuana users whose activity is the subject of decriminalization is to remove all legal sanctions for possession of less than the designated amount. Although the marijuana itself would still be subject to seizure as contraband under both state and federal law, a state could still prohibit its own magistrates from issuing search warrants for the seizure of small quantities of marijuana, and the indignities associated with arrest and detention would be eliminated.

As noted above, however, legislators may believe that removal of all sanctions from consumption-related activity is inconsistent with society's interest in discouraging marijuana use and may therefore retain some civil penalty. Assuming that possession of small amounts, as well as other consumption-related activity, remains an offense punishable by a fine, protection of privacy can still be enhanced by enacting statutory provisions designed to discourage unnecessarily zealous and intrusive law enforcement efforts.

The decision to decrease the penalty for marijuana offenses may itself influence the police to place a lower priority on its detection and therefore have the effect of conserving police resources as well as protecting personal privacy. Aside from changes in the substantive offense, however, privacy can also be protected through limitations on the power of police to detain suspects and search property in connection with the enforcement of prohibitions of the least serious offenses. Naturally, the appropriate avenues of regulation are the authority of magistrates to issue search warrants and the authority of police to make arrests.

Limiting the Issuance of Search Warrants

Traditionally, a citizen's person and property cannot be searched against his will unless a search warrant, describing the place to be searched and the things to be seized, has been issued, "upon probable cause." When the "thing to be seized" is marijuana, the primary requirement for the issuance of a search warrant is a showing of "probable cause" that marijuana will be found in the place to be searched.

In addition, a warrantless search may be made, where probable cause exists to support the issuance of a warrant, if delay might well result in loss of the evidence (e.g., if the "things to be seized" are in a moving automobile).[54]

To protect the property of persons who commit decriminalized offenses from these kinds of searches, a provision such as the following could be enacted:

> A search warrant will not issue for the seizure of marijuana or of evidence in connection with a marijuana related offense, if the amount of marijuana to be seized is less than [the designated amount], or if the offense in question is [include reference to "least serious offenses"]. Furthermore, the presence on a person or premises of less than [the designated amount] of marijuana, or the commission of [include reference to "least serious offenses"], does not, in the absence of additional evidence of a substantial nature, constitute probable cause for the issuance of a search warrant authorizing the seizure of larger amounts of marijuana, or the seizure of evidence in connection with more serious marijuana-related offenses; nor shall it constitute reasonable grounds, for purposes of an arrest, to believe that any marijuana offense other than [include reference to "least serious offenses"] has been committed.

Note that such a provision applies to warrantless automobile searches as well as searches under warrant, because the legality of the former depends on the existence of "probable cause" for the issuance of a warrant, even though no warrant need be issued. The second sentence of the sample provision is designed to prevent searches and arrests in connection with more serious offenses from being made solely on the basis of evidence that the decriminalized offense was committed. This part of the provision is somewhat ambiguous, since it leaves open to case-by-case determination the question of how much

additional evidence is needed. If additional protection is thought necessary, it can be achieved by prohibiting searches of private homes unless there is probable cause to believe that the home is used for the sale of marijuana. A similar provision was included in the National Prohibition Act of 1919.[55]

Arrests and Incidental Searches

Warrantless searches of an offender's person and the area under his immediate control can be conducted, "incident to a lawful arrest," to prevent him from either obtaining a weapon or destroying evidence while he is in custody.[56] To authorize a full search, the arrest must be based on probable cause, and it must be a "full-custody arrest." A full-custody arrest is apparently one that includes transportation to the stationhouse for booking or any equivalent prolonged contact with the suspect.[57]

Since police do not ordinarily have time to obtain a search warrant, they place great reliance on their authority to conduct searches incident to an arrest. In many jurisdictions, it is a matter of routine for the police to search a suspect when they arrest him, and it may even be required by departmental regulations.[58]

In this instance, because the authority to search depends on the fact of detention, protection of privacy and protection of liberty go hand in hand. Both may be protected by making "full-custody arrest" an inappropriate response to decriminalized offenses. A citation procedure (see below) may suffice for the apprehension of most offenders. Of course, there may be occasions when prolonged detention is unavoidable. But these occasions can be named as specific exceptions to the statutory rule that under normal circumstances an offender is not to be subjected to a "full-custody arrest" (in the light of the Robinson opinion, use of that term is advisable) and is not to be detained longer than is necessary for citation purposes. For example, if an offender has inadequate identification, it may be necessary either to transport him to a magistrate to post bond, or to detain him at the stationhouse until his identity has been established. Although neither of these procedures necessarily involves "booking" the offender, they probably amount to "arrests" for the purpose of authorizing a search, since they both require prolonged contact between officer and offender.[59] Since the occasions for such detention procedures and the searches incident to them cannot be eliminated, they could be held to a minimum and designated in the statute as exceptional situations.

Of course, the decision of whether an offender's identification is "adequate" must be left in most cases to the police officer's sound judgment. Once the legislature has made its judgment that marijuana offenders should not be routinely booked like other arrestees (and, by implication, subject to searches incident to "full custody arrests"), the police are unlikely to abuse their authority. If they do, however, constitutionally based remedies may be available. As far as the legal effect of the statute is concerned, it is quite possible that an arrest which, though based on probable cause, is unnecessary to ensure an appearance in court, is an "unreasonable seizure" under the Fourth Amendment.[60] Thus, police conduct that is clearly unreasonable under the circumstances may result in the suppression of evidence.

Custody After Arrest

If minor marijuana offenses are to be punishable by a fine, the apprehending officer must be authorized to detain the offender long enough to at least issue a citation that explains the options concerning paying or contesting the fine. The remaining question is whether any further custody should be authorized.

At one extreme, the statutory scheme could provide for "full custody," the marijuana offender being treated like any felon or misdemeanant who, upon apprehension, may be brought "downtown" to be fingerprinted, booked, and photographed. At the other end of the spectrum, the legislature might permit no intervention beyond the initial apprehension and issuance of a citation. Between these extremes lie a variety of options: there may be additional custody for the limited purpose of identification, full custody unless the defendant can post collateral, and discretion to invoke full custody if the defendant does not give adequate identification or has no local address.

Any of these options would probably withstand a constitutional challenge. At least two of the states which have adopted the Model Penal Code's "violation" concept nonetheless authorize arrest without a warrant and also permit custody when an offense is committed in an officer's presence.[61] Thus far no constitutional challenges have been brought. It is arguable, however, that a state may not deprive a person of liberty for committing an offense which is not defined as a crime and which has been destigmatized and is not punishable by a loss of liberty. One might rely, for example, on Supreme Court decisions holding summary seizure of property before an adjudication of liability to be a denial of due process.[62] That is, the due process notions which forbid a state from temporarily depriving a debtor of property to ensure his payment of his debt on that property should

apply a fortiori when the state is attempting to enforce the payment of a purely civil fine through a deprivation of personal liberty. On the other hand, the court might conclude that the relatively minor deprivation of liberty occasioned by a full custody arrest is not, in itself, a denial of due process when the offense had been personally observed by the apprehending officer. The court might emphasize the state's interest in adopting procedures to ensure that its prohibitions--criminal or civil--are enforced, and the reasonableness of taking the defendant into custody to guarantee either his appearance at a subsequent trial or payment of a fine as a means to that end. (For example, juvenile proceedings are not denominated criminal and yet the power to take the juvenile offender into custody has never been questioned.)

Since the Supreme Court has never addressed this issue, a definitive answer cannot be given here. The important point to note is that authorizing full custody implicates values of constitutional dimension. This factor, when considered with others discussed below, may lead to the policy judgment that custody should not be authorized, irrespective of the merits of the constitutional challenge.

Whether the impetus for decriminalization is a belief in the unfairness of the present prohibitions, a cost-benefit analysis, or a combination of the two, mandating full custody for every offender apprehended may be inconsistent with the goals of decriminalization. Full custody exacts significant costs in police resources in terms of both processing the offender at the time of arrest and maintaining his records thereafter. Arrest and custody also serve as sanctions in themselves, regardless of the subsequent disposition of the case. The offender is subject to the potentially demeaning process of booking. Moreover, the formal record of his arrest as well as the greater notoriety occasioned by bringing the violator to the station also serve as informal punishments.

Thus, at least in the vast majority of cases, it may be that the most effective procedure would be to permit intervention only to the degree necessary to issue a citation. However, in some cases the officer, due to the failure of the defendant to provide either adequate identification or a local address, may be justifiably concerned that the defendant will neither appear in court nor pay the fine. In such cases, a policy of leaving the officer discretion to bring the defendant into custody seems warranted.

To be consistent with the twin goals of fairness and efficiency, the sole purpose of custody may be to obtain adequate identification. While the state admittedly has an interest in enforcing and collecting

its civil penalties, it is doubtful that that need justifies further intervention. Once apprehended and identified, few individuals will later flee the jurisdiction to avoid going to court or paying a fine. This risk is too slight to justify an elaborate custody procedure, especially when it is recalled that this decriminalization scheme applies only to the least serious behavior in the first place.

Court Appearance

With respect to the question of whether the defendant should be required t appear in court, a number of alternatives are available. In decreasing order in terms of degree of intervention and cost, they are: mandatory court appearance; court appearance authorized, with discretion to be exercised by the arresting officer; posting of collateral which is forfeited if the defendant does not appear; and payment by mail.

To some, the appearance requirement may be regarded as a reasonable means of implementing the policy of discouraging use. Appearance in court imposes a greater burden on the offender than mere payment by mail and thus may impress upon him the relative seriousness of official disapprobation for his conduct. On the other hand, removing these minor offenses from already severely overloaded state court dockets is one reason behind the drive for reform. Whether the marginal deterrence to be derived from the court appearance is worth this extra cost in court time is an issue which policymakers will have to address.

In the interest of effecting some cost savings, policymakers may be tempted to give police discretion to require court appearance in certain instances. The problem with this approach is that meaningful standards may be difficult to frame (i.e., in the best interest of the offender, for those offenders who would benefit from further intervention, for past offenders?). Only in the case of the last standard will the scheme not introduce an additional potential for selective punishment. Absent such a clearly definable standard, policymakers would do well to either mandate court appearance in every instance or in none.

If the policymakers choose not to authorize court appearance at all, the choice between the final two alternatives is very likely one of little significance. When the scheme envisions posting collateral followed by forfeiture for nonappearance or mailing the fine, most defendants can be expected to forfeit the collateral or pay the fine rather

than contest the charge. Requiring payment of collateral before release may result in a greater number of fines being paid. However, this procedure seems to impose unfair burdens on those offenders who do not carry sufficient money on their persons for that purpose. Moreover, payment of a fine may be encouraged by adopting a procedure which has been used in the collection of parking tickets: the fine is doubled if it is not paid or contested within a certain time following the violation, after which a civil proceeding may be brought to collect the judgment.

Adjudicatory Process

Legislative choices about appropriate adjudicatory procedures are tied closely to the post-conviction consequences discussed earlier. Once the criminal post-conviction consequences of a marijuana violation (stigma and incarceration) have been eliminated, most defendants will not contest their guilt by seeking to suppress the evidence or insisting on an evidentiary trial. Indeed, the defendant in such circumstances is not constitutionally entitled to the cumbersome and costly procedural safeguards designed to protect him against unwarranted "criminal" convictions. On the other hand, if a conviction can result in incarceration or stigma, defendants will be more likely to invoke procedural protections to which they are constitutionally entitled.

The range of legislative choice is thus fairly constricted. If the post-conviction consequences have been decriminalized, the legislature will undoubtedly wish to capture the cost savings by providing summary procedures, much like those at traffic court, or none at all. Neither prosecutors, criminal court judges, nor defense attorneys need to be involved. On the other hand, if the post-conviction consequences remain more or less criminal, then the legislature will have no choice but to utilize formal misdemeanor processes involving some prosecutorial official and probably defense attorneys as well.

Before addressing the available policy options, it will be useful to describe three constitutional propositions which establish the outer boundaries for procedural choices.

First, two key (and costly) procedural protections are required only if the offense is punishable by incarceration. Decisions like Argersinger v. Hamlin[63] and In re Gault[64] indicate that the right to a court-appointed attorney, which was first announced in Gideon v. Wainwright,[65] arises only in cases where incarceration is authorized. Therefore even if the offense is labelled a crime and has not been destigmatized, the state is not required by the Constitution to provide

indigents with state-paid counsel, provided imprisonment is not authorized.[66] Similarly, the Court has also held that there is no right to jury trial if the potential sanction is imprisonment of less than 6 months[67] or a small money fine.[68]

Second, if the legislature reduces the penalty for the least serious marijuana behavior to a fine but retains the criminal label together with adverse record consequences, the state will have to establish some formal trial process, affording the defendant the right to confront adverse witnesses, the right not to have a verdict directed against him, and the right not to be tried for the same offense in another proceeding.[69] (The Court has never determined whether the accused must also be given the additional Sixth Amendment rights to a speedy trial and to compulsory process and the due process right to be tried under the "beyond a reasonable doubt" evidentiary standard.)

Third, the legislature can probably invoke summary procedures without most of these procedural rights by labelling the offense non-criminal and destigmatizing its record consequences. The Supreme Court would probably determine that the statute is not punitive,[70] in the sense that the "dominant purpose" of the statute, as derived from its legislative history or the severity of the fine,[71] is not to punish. One commentator has concluded, based upon his review of the relevant cases, that it is highly unlikely that the Court will decide that a civil money penalty is anything other than what it purports to be.[72] Even under summary civil[73] procedures, however, the defendant cannot be denied his Fifth Amendment right against self-incrimination.[74]

To summarize, if the legislature classifies the least serious marijuana offense as a civil violation, punishable only by a fine and without stigmatic record consequences, it may constitutionally provide only "summary" adjudication procedures; the defendant will not be entitled to have appointed counsel, to subpoena witnesses, to confront adverse witnesses, to put the state to a "criminal" burden of proof, or to be tried by a jury or legally trained judge.

It should be added, of course, that the absence of a constitutional entitlement does not imply that the legislature should, as a matter of policy, establish purely summary procedures. In some respects, this choice will depend on whether a summary (traffic) court system (separate from the misdemeanor court system) is already in place. If so, the legislature will undoubtedly want to expand that court's jurisdiction to cover these least serious marijuana offenses, according these defendants the same "rights" that traffic defendants have. On the other hand, if traffic cases are handled within the lower criminal

court system, the accommodation between efficiency and procedural rights will be made as a matter of practice, just as it is in more or less serious traffic cases. If the legislature (or city council) has defined a separate, less formal set of procedures for petty traffic cases, it could simply enter a cross-reference in the decriminalization bill.

(This chapter was written primarily by Professor Richard J. Bonnie.)

FOOTNOTES

[1]"Commercial" activity refers only to transfers in which the transferor realizes a profit. It may be more appropriate to place casual, not-for-profit transfers in the same category as mere possessory activity.

[2]By increasing the prosecutor's leverage, this approach will probably conserve prosecutorial and judicial resources. However, it will do nothing to reduce the costs associated with police enforcement, since every possessor will remain a potential criminal. Moreover, this approach will not alleviate unfairness to possessors of marijuana who will never be sure whether they can rebut the presumption and thereby escape criminal liability.

[3]Sharp v. Commonwealth, 213 Va. 269, 192 S.E.2d 217 (1972).

[4]See People v. Serra, 55 Mich. App. 514, 223 N.W.2d 28 (1974). This case actually struck down a statute which only created a presumption with possession of more than 2 ounces. If such a statute violates the privilege against self-incrimination, then a fortiori a statute which creates the presumption upon possession of any amount would be held unconstitutional.

The self-incrimination holding was disavowed by the Michigan Supreme Court two years later; however, the alternative holding of Serra that the 2-ounce presumption violated due process because it lacked a rational basis remains intact. People v. Gallagher, 68 Mich. App. 63, 241 N.W.2d 759 (1976).

[5]Cole v. State, 511 P.2d 593 (Okla. Crim. App. 1973). This case struck down a statute which shifted the burden to the defendant to show a lawful purpose once the state had proven possession of paraphernalia. The logic is equally applicable regardless of whether the presumption relates to unlawful purpose or to intent to sell.

[6]Since this method does not involve presumptions of intent to sell, no constitutional challenge can be mounted on the basis of denial of either the privilege against self-incrimination or the presumption of innocence. Moreover, it has been held, on a substantive due process attack, that there is a rational basis for grading the seriousness of the offense according to the weight of the cannabis possessed. See People v. Campbell, 16 Ill. App. 3d 851, 307 N.E.2d 395 (1974); People v. Kline, 16 Ill. App. 3d 1017, 307 N.E.2d 398 (1974).

[7]See, e.g., Stone v. State, 254 Ark. 1011, 498 S.W.2d 634 (Ark. 1973); State v. Garcia, 16 N.C. App. 344, 192 S.E.2d 2 (1972); Williams v. State, 506 S.W.2d 193 (Tenn. Crim. App. 1973).

[8]Sharp v. Commonwealth, 213 Va. 269, 192 S.E.2d 217 (1972).

[9]People v. Serra, 55 Mich. App. 514, 223 N.W.2d 28 (1974).

[10]See also Perry v. State, 303 A.2d 658 (Del. 1973); but see People v. Gallagher, 68 Mich. App. 63, 241 N.W.2d 759 (1976), overruling the self-incrimination aspect of the Serra holding.

[11]Once again the burden of disproving intent to sell might be shifted to the defendant, and once again this alternative is subject to constitutional challenge.

[12]Goode, "Sociological Aspects of Marijuana Use," 4 Contemporary Drug Problems 397, 441 (1975).

[13]See National Commission on Marihuana and Drug Abuse, Marihuana: A Signal of Misunderstanding, Appendix Vol. II at 1171 (1972).

[14]California, Alaska, Oregon, South Carolina and Colorado.

[15]Maine and Minnesota.

[16]Telephone conversation with Dr. Robert Willette of the National Institute on Drug Abuse on October 15, 1976.

[17]See National Commission on Marihuana and Drug Abuse, Marihuana: A Signal of Misunderstanding, Appendix Vol. II at 1171 (1972).

[18]Goode, "Sociological Aspects of Marijuana Use," 4 Contemporary Drug Problems 397, 404 (1975). The author also notes that marijuana is almost never laced with more expensive and dangerous drugs, since these substances--mescaline and opium--are unprofitable to sell in this manner. Id. at 404-5.

[19]This does not imply that a potency distinction would necessarily be violative of due process; there are a small number of "strict liability" regulatory offenses for which the prosecution need not show mens rea.

[20]As alternatives, departments might pool their resources to establish a central lab, or the chemical evaluation could be done on the state level. There would be considerable expense both in terms of setting

up the apparatus and in terms of conducting each assay, regardless of which alternative was chosen.

[21]Telephone conversation with Dr. Robert Willette of the National Drug Institute on October 15, 1976. The DEA has found rare instances of compounds consisiting of up to 5 percent THC.

[22]National Commission on Marihuana and Drug Abuse, Marihuana: A Signal of Misunderstanding, Appendix Vol. II at 1173 (1972).

[23]See Goode, "Sociological Aspects of Marijuana Use," 4 Contemporary Drug Problems 397, 405 (1975).

[24]Oregon, Minnesota, California, Colorado, and Maine.

[25]Ravin v. State, 537 P.2d 494 (Alaska 1975).

[26]The Commission noted:

> With regard to the [decriminalization of] casual distribution of small amounts of marijuana for no remuneration or insignificant remuneration not involving a profit we are following the approach taken in the Comprehensive Drug Abuse Prevention and Control Act of 1970 which in essence treats such casual transfers as the functional equivalent of possession. In doing so, Congress recognized that marijuana is generally shared among friends and that not all people who distribute marijuana are "pushers."
>
> The accuracy of Congress' appraisal is underscored by the National Survey. When people who had used marijuana were asked how they first obtained the drug, 61 percent of the adults and 76 percent of the youth responded that it had been given to them. Only 4 percent of the adults and 8 percent of the youth said that they had bought it. When asked who their source had been, 67 percent of the adults and 85 percent of the youth responded that it had been a friend, acquaintance, or family member.

National Commission on Marihuana and Drug Abuse, Marihuana: A Signal of Misunderstanding, pp. 157-58 (1972).

[27]The proof problems associated with a profit-nor profit distinction can cut both ways. If the burden is on the prosecution to prove that a sale resulted in a profit, conviction of commercial dealers becomes that

much more difficult; on the other hand, if the burden is on the defendant to prove that the sale was not for profit, it becomes more difficult for "accommodating" users to reap the benefits of decriminalization.

[28] This view was taken by Senators Javits and Hughes, who, as members of the National Commission on Marihuana and Drug Abuse, unsuccessfully urged the Commission to recommend withdrawal of the criminal sanction from all nonprofit transfers; instead, the commission limited its recommendation to the "distribution of small amounts for insignificant remuneration." National Commission on Marihuana and Drug Abuse, Marihuana: A Signal of Misunderstanding, pp. 154-156 (1972).

[29] Cultivation in these circumstances would be entitled to some measure of protection from confiscation under the Fourth Amendment, and could obtain additional protection from decriminalization provisions designed to protect privacy.

[30] Kadish, "The Crisis of Overcriminalization," 374 Annals 157 (1967).

[31] See Eichman, Impact of the Gideon Decision Upon Crime and Sentencing in Florida: A Study of Recidivism and Socio-Cultural Change, Florida Div. of Corrections: Research and Statistics Section, Research Monograph No. 2, pp. 71-73 (1966).

[32] National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Corrections, 159 (1973).

[33] Bonnie & Whitebread, The Marihuana Conviction, 239 (1974).

[34] See generally Bonnie & Whitebread, The Marihuana Conviction, 237-247 (1974); see also Project, "The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement in Los Angeles County," 13 UCLA L. Rev. 643 (1966).

[35] Kadish, "The Crisis of Overcriminalization," 374 Annals 157 (1967).

[36] National Advisory Commission on Criminal Justice Standards and Goals, Criminal Justice System, 177-178 (1973).

[37] Packer, The Limits of the Criminal Sanction, 261 (1968).

[38] American Law Institute, Model Penal Code Tentative Draft #2, Commentary to § 1.05, p. 9 (1954).

[39] E.g., Cal. Penal Code §§ 16, 19(c) (1968 Supp.); Colo. Rev. Stat. §§ 18-1-104, 107 (1973); Del. Code Ann. 11 §§ 4203, 4207 (Rev. 1974); Ill. Ann. Stat. 38 §§ 1005-1-15, 17 (1973); Ohio Rev. Code Ann. § 2901.02(G) (1975 Repl. Vol.).

[40] Tate v. Short, 401 U.S. 395 (1971).

[41] Argersinger v. Hamlin, 407 U.S. 25 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970); Abbit v. Bernier, 387 F. Supp. 57 (D. Conn. 1974) (three-judge court).

[42] Tucker v. City of Montgomery Bd. of Commissioners, 410 F. Supp. 494, 510 (M.D. Ala. 1976) (three-judge court).

[43] Commonwealth ex rel. Parrish v. Cliff, 451 Pa. 427, 304 A.2d 158 (1973); State ex rel. Pedersen v. Blessinger, 56 Wis.2d 286, 201 N.W.2d 778 (1972).

[44] Hendrix v. Lark, 482 S.W.2d 427, 430 (Mo. 1972); see also A.B.A., Standards Relating to Sentencing Alternatives and Procedures, with Commentary, Sec. 6.5(b), pp. 288-289.

[45] State v. DeBonis, 58 N.J. 182, 198-199, 276 A.2d 137, 146-147 (N.J. 1971).

[46] Appointed counsel would not be mandated as a constitutional matter if imprisonment were not authorized. See Argersinger v. Hamlin, 407 U.S. 25 (1972). However, legislators may decide that indigent defendants who are subject to criminal liability in all fairness should have appointed counsel available to them.

[47] In California if the person charged with possession of up to 1 ounce was previously convicted of this offense three times within a 2-year period, he will be diverted to an educational or treatment program in lieu of a fine.

[48] There should be no constitutional obstacle to a state imposing, with respect to use of marijuana, different restrictions on juveniles than on adults. In the obscenity cases, where the fundamental values of the First Amendment are at stake, it has been suggested that the state has a "legitimate interest in preventing exposure of juveniles to obscene material . . ." Paris Adult Theatre I v. Slaton, 413 U.S. 49, 58 n. 7 (1973). A fortiori in the regulation of marijuana, where the First Amendment is not at issue, there should be no objection to imposing different standards for juveniles.

[49]See Paulsen and Whitebread, Juvenile Law and Procedure (1974) at 32.

[50]This was done in Ohio, California, and Minnesota.

[51]New Jersey Stat. Ann. § 2A: 4-14(m) (1952). This statute was held not violative of due process when it was challenged on grounds of vagueness. State v. L. N., 109 N.J. Super. 278, 263 A.2d 150 (1970), aff'd 57 N.J. 165, 270 A.2d 409 (1970), cert. den., 402 U.S. 1009 (1971). Moreover, most statutes of this kind have survived due process attacks. See Paulsen and Whitebread, Juvenile Law and Procedure (1974) at 48-49.

[52]California Welfare and Institutions Code, § 600-602 (Supp. 1976).

[53]By the same token, should the legislature wish to remove noncriminal possession from the jurisdiction of the juvenile courts, this intention should also be made clear on the face of the statute.

[54]Carroll v. United States, 267 U.S. 132 (1925).

[55]27 U.S.C.A. § 39 (West, ed. 1927).

[56]Chimel v. California, 395 U.S. 752 (1969).

[57]United States v. Robinson, 414 U.S. 218 (1973).

[58]LaFave, "'Case-by-Case Adjudication' Versus 'Standardized Procedures': The Robinson Dilemma," 1974 Supreme Court Review 127, 131; A.L.I., Model Code of Pre-Arraignment Procedure 493 (1975).

[59]The Robinson opinion, which gave the police authority to conduct a full personal search whenever they make a "full-custody" arrest, did not define that term, and the case itself involved an arrest plus "booking"; however, as the decision was rationalized as necessary in order to protect policemen, during prolonged contact with a suspect, from attack with any hidden weapon that the suspect might have, it seems clear, at least, that a search incident to any form of detention that requires the policeman to drive the suspect somewhere in his squad car will be upheld as reasonable. United States v. Robinson, 414 U.S. 218, 221-23, n. 2; LaFave, supra, at 148, 152.

[60]The Ninth Circuit has held unconstitutional the arrest of a material witness and the forcible stop of a person wanted for questioning, where they were unnecessary to secure the cooperation of the subjects. Bacon v. United States, 449 F.2d 933 (1971); United States v. Ward,

488 F.2d 162 (1973). On the possibility that unnecessary arrests for traffic violations and the like may violate the Fourth Amendment, see Mr. Justice Stewart's concurring opinion in Gustafson v. Florida, 414 U.S. 260, 266-67 (1973); see also LaFave, supra, at 158-161.

[61]Conn. Stat. Ann. § 6-49 (1972); Minn. Stat. Ann. § 629.34 (1947).

[62]See, e.g., Fuentes v. Shevin, 407 U.S. 67 (1972); Mitchell v. W. T. Grant, 416 U.S. 600 (1974); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975).

[63]407 U.S. 25 (1972).

[64]387 U.S. 1 (1967).

[65]372 U.S. 355 (1963).

[66]Conversely the state must provide counsel to indigents if incarceration is authorized, even if the offense is not a "crime." It must be noted that if the fine authorized is very substantial the Court could well decide that state-paid counsel is required.

[67]Baldwin v. New York 399 U.S. 66 (1970).

[68]Muniz v. Hoffman, 422 U.S. 454 (1975). The Court there specifically reserved the question whether a severe fine might require jury trial. Id. at 477.

[69]See Clark, "Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis," 60 Minn. L. Rev. 379, 398 (1976).

[70]Id. at 382-384, 394-396, 401-403.

[71]But cf. Muniz v. Hoffman, 422 U.S. 454 (1975) ($10,000 fine on union a petty sanction for purposes of Sixth Amendment right to jury trial, absent contrary expression of congressional intent).

[72]Clark, "Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis," 60 Minn. L. Rev. 379, 411 (1976).

[73]See Spevack v. Klein, 385 U.S. 511 (1967) (revocation of professional license); Uniformed Sanitation Men Ass'n v. Commissioner, 392 U.S. 280 (1968) (loss of public employment); Lefkowitz v. Turley, 414 U.S. 70 (1973) (loss of government contract).

[74]Helvering v. Mitchell, 303 U.S. 391, 400 n. 3 (1938) (quoting United States v. Regan, 232 U.S. 37, 50 (1914)).

END