

Marihuana, A Signal of Misunderstanding

The Report of the National Commission on Marihuana and Drug Abuse

Chapter V

marihuana and social policy

"The difficulty in life is the choice."

George Moore (1900)

A constant tension exists in our society between individual liberties and the need for reasonable societal restraints. It is easy to go too far in either direction, and this tendency is particularly evident where drugs are concerned.

We have guided our decision-making by the belief that the state is obliged to justify restraints on individual behavior. Too often individual freedoms are submerged in the passions of the moment, and when that happens, the public policy may be determined more by rhetoric than by reason. Our effort has been to minimize the emotional and emphasize the rational in this Report.

Drugs In a Free Society

A free society seeks to provide conditions in which each of its members may develop his or her potentialities to the fullest extent. A premium is placed on individual choice in seeking self-fulfillment. This priority depends upon the capacity of free citizens not to abuse their freedom, and upon their willingness to act responsibly toward others and toward the society as a whole. Responsible behavior, through individual choice, is both the guarantor and the objective of a free society.

DRUGS AND SOCIAL RESPONSIBILITY

The use of drugs is not in itself an irresponsible act. Medical and scientific uses serve important individual and social needs and are often essential to our physical and mental well-being. Further, the use of drugs for pleasure or other non-medical purposes is not inherently irresponsible; alcohol is widely used as an acceptable part of social activities.

We do think the use of drugs is clearly irresponsible when it impedes the individual's integration into the economic and social system. A preference for individual productivity and contribution to social progress in a general sense still undergirds the American value structure, and we emphasize the policy-maker's duty to support this preference in a public policy judgment.

At the same time, in light of the emerging leisure ethic and the search for individual meaning and fulfillment noted in Chapter 1, we cannot divorce social policy from the questions raised by the

recreational use of drugs. Productivity and recreation both have a place in the American ethical system. They are not inconsistent unless the individual's use of leisure time inhibits his productive role in society.

Drugs should be servants, not masters. They become masters when they dominate an individual's existence or impair his faculties. To the extent that any drug, including alcohol, carries with it risks to the well-being of the user and seriously undermines his effectiveness in the society, that drug becomes a matter of concern for public policy.

An essential step in the process of policy-formation is a determination of the circumstances under which use of any given drug' poses such risks. For some drugs, the risks may be so great that all permissible measures should be taken to eliminate use. For other drugs, such risks may be present only under certain specific circumstances, in which case society may defer to responsible individual choice on the matter of recreational use but take appropriate steps to minimize the incidence and consequences of dysfunctional use. In our Report next year, for which studies are already underway, we will consider from this perspective the whole range of drugs now used for non-medical purposes.

A Social Control Policy for Marihuana

In formulating a Marihuana policy, our strongest concern is with irresponsible use, whether it be too often, too much, indiscriminate, or under improper circumstances. The excessive or indiscriminate use of any drug is a serious social concern; and this is particularly true of marihuana since we still know very little about the effects of long term, heavy use. We have little doubt that the substantial majority of users, under any social control policy, including the existing system, do not and would not engage in irresponsible behavior.

In identifying the -appropriate social control policy for marihuana, we have found it helpful to consider the following policy options:

I Approval of Use.

II Elimination of Use.

III Discouragement of Use.

IV Neutrality Toward Use.

APPROVAL OF USE

Society should not approve or encourage the recreational use of any drug, in public or private. Any semblance of encouragement enhances the possibility of abuse and removes, from a psychological standpoint, an effective support of individual restraint.

For example, so long as this society (not only the government, but other institutions and mass advertising as well) in effect approved of the use of tobacco, the growing medical consensus

about the dangers of excessive use did not make a significant impression on individual judgment. With the Surgeon General's Report on Tobacco in 1964, *Smoking and Health*, a very real change has occurred in the way society now thinks about cigarettes.

The institutions of society definitely add their influences to the variety of social pressures which persuade individuals to use any kind of drugs. Rational social policy should seek to minimize such social pressures, whether they come from peers, from the media, from social custom, or from the user's sense of inadequacy. Official approval would inevitably encourage some people to use the drug who would not otherwise do so, and would also increase the incidence of heavy or otherwise irresponsible use and its complications. On this basis we reject policy option number one, approval of use.

ELIMINATION OF USE

For a half-century, official social policy has been not only to discourage use but to eliminate it (option number two). With the principal responsibility for this policy assigned to law enforcement, its implementation reached its zenith in the late 1950's and early 1960's when marihuana-related offenses were punishable by long periods of incarceration. This policy grew out of a distorted and greatly exaggerated concept of the drug's ordinary effects upon the individual and the society. On the basis of information then available, marihuana was not adequately distinguished from other problem drugs and was assumed to be as harmful as the others.

The increased incidence of use, intensive scientific reevaluation, and the spread of use to the middle and upper socioeconomic groups have brought about the informal adoption of a modified social policy. On the basis of our opinion surveys and our empirical studies of law enforcement behavior, we are convinced that officialdom and the public are no longer as punitive toward marihuana use as they once were.

Now there exists a more realistic estimate of the actual social impact of marihuana use. School and university administrators are seldom able to prevent the use of marihuana by their students and personnel and are increasingly reluctant to take disciplinary action against users. Within the criminal justice system, there has been a marked decline in the severity of the response to offenders charged with possession of marihuana.

In our survey of state enforcement activities, only 11% of all marihuana arrests resulted from active investigative activity, and most of those were in sale situations. For the most part, marihuana enforcement is a haphazard process; arrests occur on the street, in a park, in a car, or as a result of a phone call. Among those arrested, approximately 50% of the adults and 70% of the juveniles are not processed through the system; their cases are dismissed by the police, by the prosecutors or by the courts. Ultimately less than 6% of all those apprehended are incarcerated, and very few of these sentences are for possession of small amounts for personal use.

In the law enforcement community, the major concern is no longer marihuana but the tendency of some users to engage in other irresponsible activity, particularly the use of more dangerous drugs. Official sentiment now seems to be a desire to contain use of the drug as well as the drug

subculture, and to minimize its spread to the rest of the youth population. Law enforcement policy, both at the Federal and State levels, implicitly recognizes that elimination is impossible at this time.

The active attempt to suppress all marihuana use has been replaced by an effort to keep it within reasonable bounds. Yet because this policy still reflects a view that marihuana smoking is itself destructive enough to justify punitive action against the user, we believe it is an inappropriate social response.

Marihuana's relative potential for harm to the vast majority of individual users and its actual impact on society does not justify a social policy designed to seek out and firmly punish those who use it. This judgment is based on prevalent, use patterns, on behavior exhibited by the vast majority of users and on our interpretations of existing medical and scientific data. This position also is consistent with the estimate by law enforcement personnel that the elimination of use is unattainable.

In the case of experimental or intermittent use of marihuana, there is room for individual judgment. Some members of our society believe the decision to use marihuana is an immoral decision. However, even during Prohibition, when many people were concerned about the evils associated with excessive use of alcohol, possession for personal use was never outlawed federally and was made illegal in only five States.

Indeed, we suspect that the moral contempt in which some of our citizens hold the marihuana user is related to other behavior or other attitudes assumed to be associated with use of the drug. All of our data suggest that the moral views of the overwhelming majority of marihuana users are in general accord with those of the larger society.

Having previously rejected the approval policy (option number one), we now reject the eliminationist policy (option number two). This policy, if taken seriously, would require a great increase in manpower and resources in order to eliminate the use of a drug which simply does not warrant that kind of attention.

DISCOURAGEMENT OR NEUTRALITY

The unresolved question is whether society should try to dissuade its members from using marihuana or should defer entirely to individual judgment in the matter, remaining benignly neutral. We must choose between policies of discouragement (number three) and neutrality (number four). This choice is a difficult one and forces us to consider the limitations of our knowledge and the dynamics of social change. A number of considerations, none of which is conclusive by itself, point at the present time toward a discouragement policy. We will discuss each one of them separately.

1. User Preference Is Still Ambiguous

Alcohol and tobacco have long been desired by large numbers within our society and their use is deeply ingrained in the American culture. Marihuana, on the other hand, has only recently

achieved a significant foothold in the American experience, and it is still essentially used more by young people. Again, the unknown factor here is whether the sudden attraction to marihuana derives from its psychoactive virtues or from its symbolic status.

Throughout this Commission's deliberations there was a recurring awareness of the possibility that marihuana use may be a fad which, if not institutionalized, will recede substantially in time. Present data suggest that this is the case, and we do not hesitate to say that we would prefer that outcome. To the extent that conditions permit, society is well advised to minimize the number of drugs which may cause significant problems. By focusing our attention on fewer rather than more drugs, we may be better able to foster responsible use and diminish the consequences of irresponsible use.

The more prudent course seems to be to retain a social policy opposed to use, attempting to discourage use while at the same time seeking to deemphasize the issue. Such a policy leaves us with more options available when more definitive knowledge of the consequences of heavy and prolonged marihuana use becomes available.

2. Continuing Scientific Uncertainty Precludes Finality

In 1933 when Prohibition was repealed, society was cognizant of the effects of alcohol as a drug and the adverse consequences of abuse. But, because so many people wished to use the drug, policy-makers chose, to run the risk of individual indiscretion and decided to abandon the abstentionist policy. There are many today who feel that if the social, impact of alcohol use had then been more fully understood, a policy of discouragement rather than neutrality would have been adopted to minimize the negative aspects of alcohol use.

Misunderstanding also played an important part when the national government adopted an eliminationist, marihuana policy in 1937. The policy-makers knew very little about the effects or social impact of the drug; many of their hypotheses were speculative and, in large measure, incorrect.

Nevertheless, the argument that misinformation in 1937 automatically compels complete reversal of the action taken at that time is neither reasonable nor logical. While continuing concern about the effects of heavy, chronic use is not sufficient reason to maintain an overly harsh public policy, it is still a significant argument for choosing official discouragement in preference to official neutrality.

3. Society's Value System Is In a State of Transition

As discussed in Chapter 1, two central influences in contemporary American life are the individual search for meaning within the context of an increasingly depersonalized society, and the collective search for enduring American values. In Chapter IV, we noted that society's present ambivalent response to marihuana use reflects these uncertainties.

For the reasons discussed in the previous Chapters, a sudden abandonment of an official policy of elimination in favor of one of neutrality toward marihuana would have a profound

reverberating impact on social attitudes far beyond the one issue of marihuana use. We believe that society must have time to consider its image of the future. We believe that adoption of a discouragement policy toward marihuana at this time would facilitate such a reappraisal while official neutrality, under present circumstances, would impede it.

4. Public Opinion Presently Opposes Marihuana Use

For whatever reasons, a substantial majority of the American public opposes the use of marihuana, and would prefer that their fellow citizens abstain from using it. In the National Survey, 64% of the adult public agreed with the statement that "using marihuana is morally offensive" (40% felt the same way about alcohol).

Although this majority opinion is not by any means conclusive, it cannot be ignored. We are well aware of the skeptics in with which marihuana user, and those sympathetic to their wishes, view the policy making process; and we are particularly concerned about the indifference to or disrespect for law manifested by many citizens and particularly the youth.

However, we are also apprehensive about the impact of a major change in social policy on that larger segment of our population which supports the implications of the existing social policy. They, too, might lose respect for a policy-making establishment which appeared to bend so easily to the wishes of a "lawless" and highly vocal minority.

This concern for minimizing cultural dislocation must, of course, be weighed against the relative importance of contrary arguments. For example, in the case of desegregation in the South, and now in the North, cult-Lire shock had to be accepted in the light of the fundamental precept at issue. In the case of marihuana, there is no fundamental principle supporting the use of the drug, and society is not compelled to approve or be neutral toward it. The opinion of the majority is entitled to greater weight.

Looking again to the experience with Prohibition, when an abstentionist policy for alcohol was adopted on the national level in 1918, its proponents were not blind to the vociferous opposition of a substantial minority of the people. By the late 1920's and early 1930's, the ambivalence of public opinion toward alcohol use and the unwillingness of large numbers of people to comply with the new social policy compelled reversal of that policy. Even many of its former supporters acknowledged its futility.

With marihuana, however, the prevailing policy of eliminating use had never been opposed to any significant degree until the mid-1960's. Unlike the prohibition of alcohol, which had been the subject of public debate off and on for 60 years before it was adopted, present marihuana policy has not until now engaged the public opinion process, some 50 years after it first began to be used. Majority sentiment does not appear to be as flexible as it was with alcohol.

5. Neutrality Is Not Philosophically Compelled

Much of what was stated above bespeaks an acute awareness by the Commission of the subtleties of the collective consciousness of the American people, as shown in the National

Survey. There is a legitimate concern about what the majority of the non-using population thinks about marihuana use and what the drug represents in the public mind. The question is appropriately asked if we are suggesting that the majority in a free society may impose its will on an unwilling minority even though, as it is claimed, uncertainty, speculation, and a large degree of misinformation form the basis of the predominant opinion. If we have nothing more substantial than this, the argument goes, society should remain neutral.

To deal with this contention, one must distinguish between ends and means. Policy-makers must choose their objectives with a sensitivity toward the entire social fabric and a vision of the good society. In such a decision, the general public attitude is a significant consideration. The preferred outcome in a democratic society cannot be that of the policy-makers alone; it must be that of an informed public. Accordingly, the policy-maker must consider the dynamic relationship between perception and reality in the public mind. Is the public consensus based on a real awareness of the facts? Does the public really understand what is at stake? Given the best evidence available, would the public consensus remain the same?

Assuming that dominant opinion opposes marihuana use, the philosophical issue is raised not by the goal but by how it is implemented. At this point, the interests of the unwilling become important. For example, the family unit and the institution of marriage are preferred means of group-living and child-rearing in our society. As a society, we are not neutral. We officially encourage matrimony by giving married couples favorable tax treatment; but we do not compel people to get married. If it should become public policy to try to reduce the birth rate, it is unlikely that there will be laws to punish those who exceed the preferred family size, although we may again utilize disincentives through the tax system. Similarly, this Commission believes society should continue actively to discourage people from using marihuana, and any philosophical limitation is relevant to the means employed, not to the goal itself.

FOR THESE REASONS, WE RECOMMEND TO THE PUBLIC AND ITS POLICY-MAKERS A SOCIAL CONTROL POLICY SEEKING TO DISCOURAGE MARIHUANA USE, WHILE CONCENTRATING PRIMARILY ON THE PREVENTION OF HEAVY AND VERY HEAVY USE.

We emphasize that this is a policy for today and the immediate future; we do not presume to suggest that this policy embodies eternal truth. Accordingly, we strongly recommend that our successor policy planners, at an appropriate time in the future, review the following factors to determine whether an altered social policy is in order: the state of public opinion, the extent to which members of the society continue to use the drug, the developing scientific knowledge about the effects and social impact of use of the drug, and the evolving social attitude toward the place of recreation and leisure in a work-oriented society. In our second Report next year, we will carefully review our findings to see if our perceptions have changed or if society has changed at that time.

Implementing The Discouragement Policy

Choice of this social control policy does not automatically dictate any particular legal implementation. As we noted in Chapter 1, there is a disturbing tendency among participants in

the marihuana debate to assume that a given statement of the drug's effects, its number of users or its social impact compels a particular statutory scheme.

Law does not operate in a social vacuum, and it is only one of the institutional mechanisms which society can utilize to implement its policies. Consequently, the evaluation of alternative legal approaches demands not only logic but also a delicate assessment of the mutual relationship between the law and other institutions of social control, such as the church, the family and the school.

THE ROLE OF LAW IN EFFECTIVE SOCIAL CONTROL

Social control is most effectively guaranteed by the exercise of individual self-discipline. Elementary social psychology teaches us that restraint generated within is infinitely more effective and tenacious than restraint imposed from without.

One of the participants at our "Central Influences" Seminar observed:

When people grow up into a society, the principal aim is to internalize drives-that is, I assume they come up 'with certain drives which can be satisfied in many ways and you're trying to internalize, ways of satisfying those drives which will be compatible with life in a community and also satisfying to the individual. The external restraints can only complement this, they cannot possibly substitute for it.

The supplemental effect of external restraints, particularly legal restraints, must also be weighed against the nature of the control sought. It was put this way at our Seminar:

Think of the social welfare function as a mountain-the hill of the Lords really. Large parts of it are something of a plateau; that is you can be all sorts of places on it and be safe. You don't have to maximize. This is an economist's fallacy. You can have all sorts of variations, you can be Socialists, Capitalists, Mormons, Adventists and get away with it-even Liberals. But there are cliffs, and you can fall off of them. This is what we are worrying about today. We are nervous about these cliffs.

The "no-no's"-as the kids call them-are the fences on these cliffs. That is, we have set up taboos and say there's a cliff there. Now -one of the problems socially is that we set up "no-no's" where there are no cliffs. There are no cliffs and people jump over these [fences] and they say, "No cliffs! See no cliffs!" [Then, over other fences-and] chop-chop-chop-crash! See, it's just as dangerous to set up fences without any cliffs as not have fences where there are cliffs.

To this functional consideration of external restraint, we must also add the philosophical faith in the responsible exercise of individual judgment which is the essence of a free society. To illustrate, a preference for individual productivity underlies this society's opposition to indiscriminate drug use, the fact that so few of the 24 million Americans who have tried marihuana use it, or have used it, irresponsibly, testifies to the extent to which they have internalized that value.

The hypothesis that widespread irresponsibility would attend freer availability of marihuana suggests not that a restrictive policy is in order but rather that a basic premise of our free society is in doubt. We note that the escalation thesis, used as an argument against marihuana rather than as a tool for understanding individual behavior, is really a manifestation of skepticism about individual vulnerabilities. For example, one-half of the public agreed with the statement that "if marihuana were made legal, it would make drug addicts out of ordinary people."

At the same time, we do feel that the threat of excessive use is most potent with the young. In fact, we think all drug use should continue to be discouraged among the young, because of possible adverse effects on psychological development and because of the lesser ability of this part of the population to discriminate between limited and excessive use.

Social policy implementation in this regard is extraordinarily difficult. For example, although existing social policies toward tobacco, alcohol and marihuana alike oppose their use by the young, those policies are far from being fully effective. For example:

Tobacco

The National Survey (1971) indicates that of young people age 12-to-17,

- 50 % have smoked at one, time or another;
- 15% smoke now; and
- At least 8% smoke at least a half a pack a day.

In a 1970 sample of smoking habits in the 12-to-18 population conducted for the National Clearinghouse for Smoking and Health, it was found that:

- 18.5% of the boys and 11.9% of the girls were regular smokers; and
- About 8% of the boys and 5% of the girls smoked more than a half a pack a day.

Alcohol

The National Survey also ascertained the drinking pattern during the previous month of young people aged 12-to-17, finding that:

- At least 23% had used beer during that month, at least 14% had used wine and at least 12% had used hard liquor; and
- 6% had used beer five or more days during the months 3% had used wine five or more days, and 3% had used hard liquor five or more days.

Marihuana

Of the 12-to-17 population, the Survey found that:

- 15% of this population had tried marihuana;
- At least 6 % still use it; and

- Less than 1% use it once a day or more

The inclination of so many young people to experiment with drugs is a reflection of a so-called successful socialization process on one hand, and of society's ambivalence to the use of drugs on the other. This entire matter will occupy much of our attention in the coming year, but it is essential that we make a few anticipatory comments now.

This nation tries very hard to instill in its children independence, curiosity and a healthy self-assurance. These qualities guarantee a dynamic, progressive society. Where drugs are concerned, however, we have relied generally on authoritarianism and on obedience. Drug education has generally been characterized by overemphasis of scare tactics. Some segments of the population have been reluctant to inform for fear of arousing curiosity in young minds. Where drugs are concerned, young people are simply supposed to nod and obey. -

This society has always been and continues to be ambivalent about the non-medical (in the strict sense) use of drugs. And this ambivalence does not escape our children. If we can come to grips with this issue, we might convince our youth that the curiosity that is encouraged in other aspects of our culture is undesirable where drugs are concerned.

The law is at best a highly imperfect reflection of drug policy. The laws proscribing sale of tobacco to minors are largely ignored. Prohibitions of sale of alcohol to minors are enforced sporadically. As to marihuana, there are areas throughout this nation where possession laws are not enforced at all. In other sections, such proscriptions are strictly enforced, with no apparent decrease in marihuana use.

As a guiding doctrine for parents and children, the law is certainly confusing when it imposes widely varying punishments in different states, and even in different courts of the same state, all for use of the same substance, marihuana. That marihuana use can be treated as a petty offense in one state and a felony in another is illogical and confusing to even the most sincere of parents.

The law is simply too blunt an instrument to manifest the subtle distinctions we draw between the motivations and the circumstances of use. At the same time, legal status carries a certain weight of its own, and other institutions must take account of the law in performing their functions.

In legally implementing our recommended social policy, we seek to maximize the ability of our schools, churches and families to be open and honest in discussing all drugs, including marihuana. The law must assist, not impede. In this respect, we note with concern the counterproductive tendency in our society to seek simple solutions to complex problems. Since the statutory law is a simple tool, the tendency in our society to look to the law for social control is particularly strong.

We have discussed the four basic social policy objectives of elimination, discouragement, neutrality and approval of marihuana use and have selected discouragement of use, with emphasis on prevention of heavy and very heavy use, as our generalized aim. We have considered three legal responses, each with a wide range of alternatives:

1. Total Prohibition.
2. Partial Prohibition.
3. Regulation.

TOTAL PROHIBITION

The distinctive feature of a total prohibition scheme is that all marihuana-related behavior is prohibited by law. Under the total prohibition response now in force in every state and at the federal level, cultivation, importation, sale, gift or other transfer, and possession are all prohibited acts. In 11 states and the District of Columbia, simply being present knowingly in a place where marihuana is present is also prohibited; and many states prohibit the possession of pipes or other smoking paraphernalia. For our purposes, the key feature of the total prohibition approach is that even possession of a small amount in the home for personal use is prohibited by criminal law.

From the very inception of marihuana control legislation, this nation has utilized a policy of a total prohibition, far more comprehensive than the restrictions established during the prohibition of alcohol.

Until recent years, society was operating under an eliminationist policy. The exaggerated beliefs about the drug's effects, social impact, and user population virtually dictated this legal approach. During this entire period, total prohibition was sought through the use of heavier and heavier penalties until even first-time possession was a felony in every jurisdiction, and second possession offenses generally received a mandatory minimum sentence without parole or probation. Yet the last few years have seen society little by little abandoning the eliminationist policy in favor of a containment policy.

Under the total prohibition umbrella, this containment policy has been implemented by a unique patchwork of legislation, informal prosecutorial policy and judicial practice. Possession is now almost everywhere a misdemeanor. Although some term of incarceration remains as a penalty for possessors, it is generally not meted out to young first offenders or to possessors of small - amounts. Instead, most such offenders are dismissed or informally diverted to agencies outside the criminal system by those within the system who are trying to help them avoid the stigma of a criminal record.

Offenders who are processed within the criminal justice system generally receive fines and/or probation. In many jurisdictions, enforcement officials make little or no effort to enforce possession proscriptions, concentrating instead on major trafficking. Possessors are generally arrested only when they are indiscreet or when marihuana is found incident to questioning or apprehension resulting from some other violation. From our surveys, state and federal, we have found that only minimal effort is made to investigate marihuana possession cases.

Such a tendency is a reflection of the adoption of a containment policy. By acting only when marihuana appears above ground, enforcement officials are helping to keep its use underground.

The shift away from the elimination policy has been matched by a similar shift in legal implementation, but the distinctive feature of the total prohibition scheme still remains: all marihuana-related behavior, including possession for personal use within the home, is prohibited by criminal law.

Is such a response an appropriate technique for achieving the social control policy we outlined above? The key question for our purposes is whether total criminal prohibition is the most suitable or effective way to discourage use and whether it facilitates or inhibits a concentration on the reduction and treatment of irresponsible use. We are convinced that total prohibition frustrates both of these objectives for the following reasons.

1. Application of the Criminal Law to Private Possession Is Philosophically Inappropriate

With possession and use of marihuana, we are dealing with a form of behavior which occurs generally in private where a person possesses the drug for his own use. The social impact of this conduct is indirect, arising primarily in cases of heavy or otherwise irresponsible use and from the drugs symbolic aspects. We do not take the absolutist position that society is philosophically forbidden from criminalizing any kind of "private" behavior. The phrase "victimless crimes," like "public, health hazard, has become a rhetorical excuse for avoiding basic social policy issues. We have chosen a discouragement policy on the basis of our evaluation of the actual and potential individual and social impact of marihuana use. Only now that we have done so can we accord appropriate weight to the nation's philosophical preference for individual privacy.

On the basis of this evaluation we believe that the criminal law is too harsh a tool to apply to personal possession even in the effort to discourage use. It implies an overwhelming indictment of the behavior which we believe is not appropriate. The actual and potential harm of use of the drug is not great enough to justify intrusion by the criminal law into private behavior, a step which our society takes only 'with the greatest reluctance.

2. Application of the Criminal Law Is Constitutionally Suspect

The preference for individual privacy reflected in the debate over the philosophical limitations on the criminal law is also manifested in our constitutional jurisprudence. Although no court, to our knowledge, has held that government may not prohibit private possession of marihuana, two overlapping constitutional traditions do have important public policy implications in this area.

The first revolves around the concept that in a free society, the legislature may act only for public purposes. The "police powers" of the states extend only to the "public health, safety and morals." In the period of our history when the people most feared interference with their rights by the government, it was generally accepted that this broad power had an inherent limitation. For example, early prohibitions of alcohol possession were declared unconstitutional on the basis of reasoning such as that employed by the Supreme Court of Kentucky in 1915 in the case of *Commonwealth v. Campbell*:

It is not within the competency of government to invade the privacy of the citizen's life and to regulate his conduct in matters in which alone is concerned, or to prohibit him any liberty the exercise which will not directly injure society.

Noting that the defendant was "not charged with having the liquor in his possession for the purpose of selling it, or even giving it to another," and that "ownership and possession cannot be denied when that ownership and possession is not in itself injurious to the public," the Kentucky court concluded that:

The right to use liquor for one's own comfort, if they use it without injury to the public, is one of the citizen's natural and inalienable rights.... We hold that the police power-vague and wide and undefined as it is-has limits. . . .

Even the perceived dangers of opium were not enough to convince some members of the judiciary that the government could prohibit possession. It is historically instructive to consider these words, penned in 1890, by Judge Scott in *Ah Lim v Territory*:

I make no question but that the habit of smoking opium may be repulsive and degrading. That its effect would be to shatter the nerves and destroy the intellect; and that it may tend to the increase of the pauperism and crime. But there is a vast difference between the commission of a single act, and a confirmed habit. There is a distinction to be recognized between the use and abuse of any article or substance.... If this act must be held valid it is hard to conceive of any legislative action affecting the personal conduct, or privileges of the individual citizen, that must not be upheld.... The prohibited act cannot affect the public in any way except through the primary personal injury to the individual, if it occasions him any injury. It looks like a new and extreme step under our government in the field of legislation, if it really was passed for any of the purposes upon which that character of legislation can be sustained, if at all.

As a matter of constitutional history, a second tradition, the application of specific provisions in the Bill of Rights, has generally replaced the notion of "inherent" limitations. The ultimate effect is virtually the same, however. The Fourth Amendment's proscription of "unreasonable searches and seizures" reflects a constitutional commitment to the value of individual privacy. The importance of the Fourth Amendment to the entire, constitutional scheme was eloquently described by Justice Brandeis in 1928 in the case of *Olmstead v U.S.*:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and his intellect. They knew that only a part of the pain, pleasure and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone-the most comprehensive of rights and the right most valued by civilized men.

Although the Fourth Amendment is itself a procedural protection, the value of privacy which it crystallizes is often read in conjunction with other important values to set substantive limits on legislative power. The Supreme Court, in the case of *Griswold vs. Connecticut*, held in 1965 that Connecticut could not constitutionally prohibit the use of birth control devices by married

persons. Although the Justices did not agree completely on the reasons for their decision, Justice Douglas stated in the opinion of the Court:

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means of having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedom." (citation omitted) Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

Four years later, the Supreme Court, in *Stanley v. Georgia*, held that even though obscenity is not "speech" protected by the First Amendment, a state cannot constitutionally make private possession of obscene material a crime. The Court's reasoning is revealed in the following language:

[The] right to receive information and ideas, regardless of their social worth, (citation omitted), is fundamental to our free society. Moreover, in the context of this case- a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home-that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy ...

While the judiciary is the governmental institution most directly concerned with the protection of individual liberties, all policy-makers have a responsibility to consider our constitutional heritage when framing public policy. Regardless of whether or not the courts would overturn a prohibition of possession of marihuana for personal use in the home, we are necessarily influenced by the high place traditionally occupied by the value of privacy in our constitutional scheme.

Accordingly, we believe that government must show a compelling reason to justify invasion of the home in order to prevent personal use of marihuana. We find little in marihuana's effects or in its social impact to support such a determination. Legislators enacting Prohibition did not find such a compelling reason 40 years ago; and we do not find the situation any more compelling for marihuana today.

3. Total Prohibition Is Functionally Inappropriate

Apart from the philosophical and constitutional constraints outlined above, a total prohibition scheme carries with it significant institutional costs. Yet it contributes very little to the achievement of our social policy. In some ways it actually inhibits the success of that policy.

The primary goals of a prudent marihuana social control policy include preventing irresponsible use of the drug, attending to the consequences of such use, and deemphasizing use in general.

Yet an absolute prohibition of possession and use inhibits the ability of other institutions to contribute actively to these objectives. For example, the possibility of criminal prosecution deters users who are experiencing medical problems from seeking assistance for fear of bring attention to themselves. In addition, the illegality of possession and use creates difficulties in achieving an open, honest educational program, both in the schools and in the home.

In terms of the social policy objective of discouraging use of the drug, the legal system can assist that objective in three ways: first, by deterring people from use; second, by symbolizing social opposition to use; and finally, by cutting off supply of the drug.

The present illegal status of possession has not discouraged an estimated 24 million people from trying marihuana or an estimated eight million from continuing to use it. Our survey of the country's state prosecuting attorneys shows that 53% of them do not believe that the law has more than a minimal deterrent effect in this regard. Moreover, if the present trend toward passive enforcement of the marihuana law continues, the law ultimately will deter only indiscreet use, a result achieved as well by a partial prohibition scheme and with a great deal more honesty and fairness.

A major attraction of the law has been its symbolic value. Yet, society can symbolize its desire to discourage marihuana use in many other, less restrictive ways. The warning labels on cigarette packages serve this purpose, illustrating that even a regulatory scheme could serve a discouragement policy. During Prohibition, the chosen statutory implementation symbolized society's opposition to the use of intoxicating beverages; yet, most jurisdictions did not think it necessary to superimpose a proscription of possession for personal use in the home.

Finally, prohibiting possession for personal use has no substantive relation to interdicting supply. A possession penalty may make enforcement of proscriptions against sale a little easier, but we believe this benefit is of minimal importance in light of its costs.

The law enforcement goal repeatedly stated at both the federal and state levels has been the elimination of supply and the interdiction of trafficking. These avowed aims of law enforcement make sense, since they are the most profitable means of employing its manpower and resources in this area.

Indeed, the time consumed in arresting Possessors is inefficiently used when contrasted with the same amount of time invested in apprehending major dealers. Although a credible effort to eliminate supply requires prohibitions of importation, sale and possession-with intent-to-sell, the enforcement of a proscription of possession for personal use is minimally productive.

As noted, most law enforcement officials, district attorneys and judges recognize the ineffectiveness of the possession penalty. as a deterrent. Its perpetuation results in the making of what is commonly referred to as "cheap" cases that have little or no impact on deterring sale.

The marihuana supply system can be viewed as pyramid with the major bulk of marihuana entering the system at top of the pyramid and then descending to the base which represents the user population. Common sense dictates where law enforcement should devote its efforts. To

remove the profit from the traffic requires arresting sellers, not users. The oft-heard argument that the police need possession penalties to compel users to reveal their sources is not convincing. "Turning informants" at the base of the pyramid is of marginal value and limited utility in reaching upwards toward the apex. Further, the National Survey showed that 60% of the users don't "buy" marijuana but get it from a friend. The volume of traffic in the drug at these levels is at best minimal.

In short, personal possession arrests and even casual sales, which account for more than 95% of the marijuana arrests at the state local level, occur too low in the chain of distribution to diminish supply very effectively.

In addition to the misallocation of enforcement resources, another consequence of prohibition against possession for personal use is the social cost of criminalizing large numbers of users. Our empirical study of enforcement of state and federal marijuana laws indicates that almost all of those arrested are between the ages of 18 and 25, most have jobs or are in school, and most have had no prior contact with the criminal justice system. The high social cost of stigmatizing such persons as criminals is now generally acknowledged by the public at large as well as by those in the criminal justice system.

According to the National Survey, 53% of the public was unwilling to give young users a criminal record and 87% objected to putting them in jail. The nation's judges expressed an overwhelming disinclination to sentence and convict users for marijuana possession. Of these judges only 13% thought it was appropriate to incarcerate an adult for possession and only 4% would jail a juvenile for marijuana possession. This disinclination is reflected in the low percentage of arrested users who are convicted, and the even lower percentage who are jailed.

Even among the nation's prosecutors, a substantial majority favor the present trend toward avoiding incarceration for first offenders. Most jurisdictions have devised informal procedures for disposing of cases in lieu of prosecution. Our empirical study shows that 48% of the adult cases, and 70% of the juvenile cases, were dropped from the system at some point between arrest and conviction. The picture displayed is one of a large expenditure of police manpower to enforce a law most participants further along the line are not anxious to apply.

Other disturbing consequences of laws proscribing possession for personal use are the techniques required to enforce them. Possession of marijuana is generally a private behavior; in order to find it, the police many times must operate on the edge of constitutional limitations. Arrests without probable cause, illegal searches and selective enforcement occur often enough to arouse concern about the integrity of the criminal process.

Yet another consequence of marijuana possession laws is the clogging of judicial calendars. President Nixon has noted that one of the major impediments to our nation's efforts to combat serious crimes is the fact that the judicial machinery moves so slowly. Swift arrests, prosecution, trial and sentence would significantly improve the deterrent effect of law. Yet the judicial system is overloaded with petty cases, with public drunkenness accounting for about 50% of all non-traffic offenses.

In his March 1971 address to the National Conference on the Judiciary, President Nixon said:

What can be done to break the logjam of justice today, to ensure the right to a speedy trial-and to enhance respect for law? We have to find ways to clear the courts of the endless stream of "victimless crimes" that get in the way of serious consideration of serious crimes. There are more important matters for highly skilled judges and prosecutors than minor traffic offenses, loitering and drunkenness.

To this list we would add marihuana possession, which accounts for a rising percentage, of judicial caseloads. In Chicago alone, during the last half of 1970, there were more than 4,000 possession arrests.

A final cost of the possession laws is the disrespect which the laws and their enforcement engender in the young. Our youth cannot understand why society chooses to criminalize behavior with so little visible ill-effect or adverse social impact, particularly when so many members of the law enforcement community also question the same laws. These young people have jumped the fence and found no cliff. And the disrespect for the possession laws fosters a disrespect for all law and the system in general.

On top of all this is the distinct impression among the youth that police may use the marihuana laws to arrest people they don't like for other reasons, whether it be their politics, their hair style or their ethnic background. Whether or not such selectivity actually exists, it is perceived to exist.

For all these reasons, we believe that the possession offense is of little functional benefit to the discouragement policy and carries heavy social costs, not the least of which is disrespect and cynicism among some of the young. Accordingly, even under our policy of discouraging marihuana use, the better method is persuasion rather than prosecution. Additionally, with the sale and use of more hazardous drugs on the increase, and crimes of violence escalating, we do not believe that the criminal justice system can afford the time and the costs of implementing the marihuana possession laws. Since these laws are not mandatory in terms of achieving the discouragement policy, law enforcement should be allowed to do the job it is best able to do: handling supply and distribution.

A criminal fine or similar penalty for possession has been suggested as a means of alleviating some of the more glaring costs of a total prohibitory approach yet still retaining the symbolic disapproval of the criminal law. However, most of the objections raised above would still pertain: the possibilities of invasion of personal privacy and selective enforcement of the law would continue; possessors would still be stigmatized as criminals, incurring the economic and social consequences of involvement with the criminal law; the symbolic status of marihuana smoking as an anti-establishment act would be perpetuated.

On the other hand, a fine most likely would deter use no more than does the present possibility of incarceration. It would continue to impede treatment for heavy and very heavy use and would persist in directing law enforcement away from the policy's essential aim which is to halt illegal traffic in the drug.

For all these reasons, we reject the total prohibition approach and its variations.

REGULATION

Another general technique for implementing the recommended social policy is regulation. The distinguishing feature of this technique is that it institutionalizes the availability of the drug. By establishing a legitimate channel of supply -and distribution, society can theoretically control the quality and potency of the product. The major alternatives within this approach lie in the variety of restraints which can be imposed on consumption of the drug and on the informational requirements to which its distribution can be subject.

We have given serious consideration to this set of alternatives; however, we are unanimously of the opinion that such a scheme, no matter how tightly it might restrict consumption, is presently unacceptable.

1. Adoption of a Regulatory Scheme at this Time Would Inevitably Signify Approval of Use

In rejecting the total prohibition approach, we emphasized the symbolic aspects. In essence, we do not believe prohibition of possession for personal use is necessary to symbolize a social policy disapproving the use. Theoretically, a tightly controlled regulatory schemes with limited distribution outlets, significant restraints on consumption prohibition of advertising and compulsory labeling, could possibly symbolize such disapproval. Our regulatory policy toward tobacco is beginning to slowly to reflect a disapproval policy toward Cigarette smoking. Nonetheless, given the social and historical context of such a major shift in legal policy toward marihuana, we are certain that such a change would instead symbolize approval of use, or at least a position of neutrality.

The Commission is concerned that even neutrality toward use as a matter of policy could invest an otherwise transient phenomenon with the status of an accepted behavior. If marihuana smoking were an already ingrained part of our culture, this objection would be dispelled. However, we do not believe that this is the case,. We are inclined to believe, instead, that the present interest in marihuana is transient and will diminish in time of its own accord once the major symbolic aspects of use are deemphasized, leaving among our population only a relatively small coterie of users. With this possibility in mind, we are hesitant to adopt either a policy of neutrality or a regulatory implementation of our discouragement policy. The law would inevitably lose its discouragement character and would become even more ambiguous in its rationale and its enforcement.

The effect of changing a social policy direction may be seen with tobacco policy. In recent years, society has ostensibly adopted a policy of discouraging cigarette smoking. This new policy has been implemented primarily in the information area through prohibition of some forms of advertising and through compulsory labeling. Yet, the volume, of cigarettes used increased last year. We believe that the failure of the new policy results from the fact that it supplants one that formerly approved use. This set of circumstances argues against any policy which would be regarded as approval of use, including a regulatory scheme. It is always extremely difficult to transform a previously acceptable behavior into a disapproved behavior.

2. Adoption of a Regulatory Scheme Might Generate a Significant Public Health Problem

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.

3. Adoption of a Regulatory Scheme Would Exacerbate Social Conflict and Frustrate a Deemphasis Policy

A significant segment of the public on both sides of the issue views marihuana and its "legalization" in a highly symbolic way. Any attempt to adopt a regulatory approach now would be counterproductive in this respect. The collision of values resulting from such a dramatic shift of policy would maintain the debate at a highly emotional level and would perpetuate the tendency to perceive marihuana use as a symbol of the struggle between two conflicting philosophies.

4. Not Enough Is Known About Regulatory Models In This Area

Advocates of legalization of marihuana are often inclined to propose a licensing scheme or an "alcohol model" without offering a specific program of regulation taking all the variables into account. Responsible policy planning cannot be so cursory. Consequently, we have given serious study to the many issues presented by such a scheme and to the nation's experience with other drug licensing schemes. On the basis of our inquiry, we are convinced that such a step should not be taken unless a realistic assessment of the efficacy of existing schemes and their potential application to marihuana indicates it would be successful. Such an assessment raises a number of disturbing questions.

The regulatory approaches which this nation has used in the cases of alcohol and tobacco have failed to accomplish two of their most important objectives: the minimization of excessive use and the limitation of accessibility to the young. Despite the warning and restraints on distribution and consumption, more than 50 million Americans smoke cigarettes regularly, and more than nine million Americans are "problem" drinkers. We have previously cited data indicating how many of our children begin habits which have been legally forbidden to them. Since the young

user and the chronic user of marihuana are of primary concern to our public health officials, the lack of success with alcohol and tobacco discourages an assumption that the regulation of supply would minimize use by the younger generation.

Another important purpose of a regulatory scheme is to channel the product through a controlled system of supply and distribution. In that way the quality and quantity of the substance can be regulated. The efficacy of such a scheme as applied to marihuana is questionable.

Cannabis can be grown easily almost anywhere in the United States with little or no human assistance. Even if a legitimate source of supply were established, it is likely that many persons would choose to ignore the legitimate source and grow their own, the purity of which would not be in question. If such a practice were illegal, the necessity for a concerted governmental eradication program is raised, which would involve a monumental law enforcement effort. According to the U.S. Department of Agriculture, there are presently an estimated five million acres of wild marihuana growing in this country and an undetermined number of acres under cultivation.

Yet, if such a practice were not forbidden, the revenue-raising, product-control and consumption-restriction features of a regulatory scheme would be threatened. Instructive to note is the fact that intensive regulation of alcoholic beverage production 'has not eliminated illicit production. During 1970, in fact, 5,228 illegal stills were destroyed by the Alcohol, Tobacco and Firearms Division of the U.S. Treasury and 5,279 persons were arrested. In 1971, 3,327 illegal stills were destroyed and 5,512 persons were arrested.

Another disturbing question is raised by the issue of potency regulation. Most advocates of legalization stipulate potency limitations as one feature of their scheme. Presumably they would limit the THC content of the regulated product. This is not an easy undertaking. Especially when cannabis is so easily grown and a black market is so easily created, we are dubious about the success of a regulatory scheme distributing only a product with low THC content. Again, attention must be paid the prospect of increased hashish use under a regulatory scheme; merely stipulating potency control is not sufficient. As we noted in Chapter II, the heavy, long-term use of hashish is a source of major concern to the Commission from both private and public health standpoints.

These are a few of the problems confronting the policy-maker if he seeks to devise an effective regulatory system of distribution for what is, in fact, a universally common plant. Our doubts about the efficacy of existing regulatory schemes, together with an uncertainty about the permanence of social interest in marihuana and the approval inevitably implied by adoption of such a scheme, all impel us to reject the regulatory approach as an appropriate implementation of a discouragement policy at the present time.

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.

PARTIAL PROHIBITION

The total prohibition scheme was rejected primarily because no sufficiently compelling social reason, predicated on existing knowledge, justifies intrusion by the criminal justice system into the private lives of individuals who use marihuana. The Commission is of the unanimous opinion that marihuana use is not such a grave problem that individuals who smoke marihuana, and possess it for that purpose, should be subject to criminal procedures. On the other hand, we have also rejected the regulatory or legalization scheme because it would institutionalize availability of a drug which has uncertain long-term effects and which may be of transient social interest.

Instead we recommend a partial prohibition scheme which we feel has the following benefits:

Symbolizing a continuing societal discouragement of use;

Facilitating the deemphasis of marihuana essential to answering dispassionately so many of the unanswered questions;

Permitting a simultaneous medical, educational, religious, and parental effort to concentrate on reducing irresponsible use and remedying its consequences;

Removing the criminal stigma and the threat of incarceration from a widespread behavior (possession for personal use) which does not warrant such treatment;

Relieving the law enforcement community of the responsibility for enforcing a law of questionable utility, and one which they cannot fully enforce, thereby allowing concentration on drug trafficking and crimes against persons and property;

Relieving the judicial calendar of a large volume of marihuana possession cases which delay the processing of more serious cases; and

Maximizing the flexibility of future public responses as new information comes to light.

No major change is required in existing law to achieve all of these benefits. In general, we recommend only a decriminalization of possession of marihuana for personal use on both the state and federal levels. The major features of the recommended scheme are that: production and distribution of the drug would remain criminal activities as would possession with intent to distribute commercially; marihuana would be contraband subject to confiscation in public places; and criminal sanctions would be withdrawn from private use and possession incident to such use, but, at the state level, fines would be imposed for use in public.*

Specifically, we recommend the following statutory schemes.

RECOMMENDATIONS FOR FEDERAL LAW

Under the Comprehensive Drug Abuse Prevention and Control Act of 1970, Congress provided the following scheme with respect to marihuana, by which was meant only the natural plant and its various parts, not the synthetic tetrahydrocannabinol (THC) :

- Cultivation, importation and exportation, and sale or distribution for profit of marihuana are all felonies punishable by imprisonment for up to five years for a first offense and by up to 10 years for a second offense (the available penalty is doubled for sale to a minor).
- Possession of marihuana with intent to distribute is a felony punishable by imprisonment for up to five years for the first offense and by up to 10 years for a second offense.
- Possession of marihuana for personal use is a misdemeanor punishable by up to one year in jail and a \$1,000 fine for first offense and by up to two years in jail and a \$2,000 fine for second offense (expungement of criminal record is available for first offenders).
- Transfer of a small amount of marihuana for no remuneration is a misdemeanor punishable by up to one year in jail and a \$1,000 fine for first offense and by up to two years in jail and a \$2,000 fine for second offense (Congress singled out marihuana in this way to allow misdemeanor treatment of casual transfers and permitted first offender treatment, as allowed for possession for personal use).

The Commission recommends only the following changes in federal law:

- POSSESSION OF MARIHUANA FOR PERSONAL USE WOULD NO LONGER BE AN OFFENSE, BUT MARIHUANA POSSESSED IN PUBLIC WOULD REMAIN CONTRABAND SUBJECT TO SUMMARY SEIZURE AND FORFEITURE.
- CASUAL DISTRIBUTION OF SMALL AMOUNTS OF MARIHUANA FOR NO REMUNERATION, OR INSIGNIFICANT REMUNERATION NOT INVOLVING PROFIT WOULD NO LONGER BE AN OFFENSE.

The Commission further recommends that federal law be supplemented to provide:

- A PLEA OF MARIHUANA INTOXICATION SHALL NOT BE A DEFENSE TO ANY CRIMINAL ACT COMMITTED UNDER ITS INFLUENCE, NOR SHALL PROOF OF SUCH INTOXICATION CONSTITUTE A NEGATION OF SPECIFIC INTENT.

* Commissioners Rogers, Congressman from Florida, and Carter, Congressman from Kentucky, agree with the Commission's selection of a discouragement policy and also agree that criminalization and incarceration of individuals for possessing marihuana for their own use is neither necessary nor desirable as a means of implementing that policy.

At the same time, both Commissioners feel that the contraband concept is not a sufficiently strong expression of social disapprobation and would recommend in addition a civil fine for possession of any amount of marihuana in private or in public.

Both Commissioners feel that the civil fine clearly symbolizes societal disapproval and is a simple mechanism for law enforcement authorities to carry out. If a person is found by a law enforcement officer to be in possession of marihuana, the officer would issue such person a summons to appear in court on a fixed day. Although a warrant would not issue for Research of a

private residence unless there were probable cause to believe a criminal offense was being committed, a police officer legitimately present for other reasons could issue a civil summons for violation of the "possession" proscription.

Commissioners Rogers and Carter believe that the legal system must be utilized directly to discourage the person from using marihuana rather than being utilized only indirectly as in the case of contraband.

This civil fine would not be reflected in a police record, nor would it be considered a criminal act for purposes of future job consideration, either in the private sector or for government service.

Agreeing with the other Commissioners that the casual transfers of marihuana for no profit should be treated in the same manner as possession for one's own use, Congressmen Rogers and Carter do not agree that it should extend to transfers involving remuneration. They prefer the limiting language of the Comprehensive Drug Abuse Prevention and Control Act of 1970 which does not include the term "or insignificant remuneration not involving a profit."

Apart from the addition of the civil fine to the contraband recommendation in the respects set out above, Congressmen Carter and Rogers are in complete agreement with the statutory recommendations set out in the Report.

Commissioner Ware concurs completely with the statements made by Congressmen Rogers and Carter but wishes to reemphasize that the social policy and legal scheme adopted is applicable only to marihuana and should not be construed to embrace other psychoactive drugs. The policy set forth in this Report, subject to the already noted comments of the two Congressional Commissioners, makes sense for marihuana on the basis of what is known about the drug and in the absence of any conclusive showing which would verify some of the anecdotal law enforcement testimony heard by the Commission regarding criminal behavior exhibited while under the influence of marihuana.

Commissioner Ware feels that some penalty short of criminalizing the user, such as a civil fine or some type of intensive drug education, will act as a positive deterrent toward minimizing the incidence of marihuana use especially among the young. Further, he is opposed to the use of any drug for the express purpose of getting intoxicated, and includes alcohol within this category. The Commissioner feels that what is needed is an internalizing of discipline among our citizenry, with the legal system assisting this process through the use of disincentives.

Commissioners Hughes, Senator from Iowa, and Javits, Senator from New York, feel that the Commission has taken a major, highly laudable step in recommending that the private use of marihuana be taken out of the criminal justice system. They concur in its threshold judgment that overall social policy regarding this drug should seek to discourage use, while concentrating primarily on the prevention of irresponsible use. They disagree, however, with three specific recommendations relating to the implementation of this discouragement policy.

First, they would eliminate entirely the contraband provision from the partial prohibitory model adopted by the Commission. They want it eliminated first because its legal implications are

confusing and the subject of disagreement even among lawyers. Whether or not possession of a given substance is criminal, possession of material designated as contraband makes that possession unlawful. Also, marihuana designated as contraband would be subject to government search and seizure, even though the underlying possession is no longer criminal. The provision- which does not apply to marihuana held for personal use within the home is considered by both Commissioners to be an unnecessary "symbol" of the discouragement policy. It will not foster elimination of the misunderstanding and mistrust which is a hallmark of our current marihuana policy.

Commissioner Hughes and Javits seek to eliminate it also because as a practical matter it serves no useful law enforcement purpose within the overall partial prohibitory model. If marihuana held for personal use within the home is not contraband, why should marihuana held for personal use within one's automobile be contraband? The area of operation of the contraband provision is extremely narrow. If one possesses more than one ounce of marihuana in public, it may be seized without regard to the contraband doctrine since such possession is a criminal violation.

Since the contraband provision does not apply to marihuana possession and use in private, the only effective area covered by the contraband provision is the area of possession in public of less than one ounce. The Commission has chosen to remove the stigma of the criminal sanction in this kind of case. To impose instead a contraband provision, which it is argued is in the nature of a civil "in rem" seizure which does not operate against the person, is to cloud the issue and to weaken the force of the basic decriminalization. A persuasive justification simply has not been made.

Both Commissioners seek to eliminate it also because they believe that the voice of the Commission should be loud and clear that the preservation of the right of privacy is of paramount importance and cannot be casually jeopardized in the pursuit of some vague public or law enforcement interest which has not been defined and justified with clarity and precision.

The second area of disagreement with the Commission's recommendations concerns the casual distribution of marihuana and the not-for-profit sale. As understood:

(1) The totally donative transfer is not subject to criminal penalty, regardless of where it takes place.

(2) The transfer of small amounts for insignificant remuneration not involving a profit is not subject to criminal penalty (except if it is accomplished in public, in which case it is subject to criminal sanction), but (3) The transfer of "large amounts" for "significant" remuneration not involving a profit is subject to criminal penalty.

Footnote 4 on page 158 of the Report, the Commission refers to a Report of The Senate Judiciary Committee on the Comprehensive Drug Abuse Prevention and Control Act of 1970. In substance, it implies that within the meaning of the Act, transfers of -more than one or two marihuana cigarettes in return for 50 cents or one dollar to cover cost are not intended to be covered as casual transfers, but rather are to be treated as unlawful sales.

Commissioners Hughes and Javits feel that the Commission has failed to set forth a clear standard which will adequately inform the public of their obligations under the law. The recommendation and its discussion in the Report are confusing and fail to provide the individual with sufficient guidance to allow him to act without having to dodge in and out of illegality. It also undermines a basic, stated objective of the Commission i.e., to concentrate the weight of the criminal sanction upon significant supply and distribution activities, rather than upon casual consumption.

Moreover, proscribing even the most casual not-for-profit transfers when they occur in public is, in their opinion, wrong. Such transfers are necessarily incident to private possession and use. To hold that they should be subject to criminal sanction is logically inconsistent with the Commission's rationale and recommendation on decriminalization of such private activities.

Instead, both Commissioners recommend that all not-for-profit sales be excluded from the criminal sanction. It is fundamental that there be a clear separation between the serious, commercial, profit-making-seller, or "pusher" as he is known, and the individual who merely splits the cost of a reasonable supply of the drug with his friends or acquaintances.

Thirdly, exception is taken to the retention of the criminal sanction on public possession of more than one ounce. The individual who buys an ounce and a half would be a criminal when he buys on the corner, when he puts it in his pocket, when he gets in his car and drives home, when he is on his doorstep, but not when he crosses the threshold of his home. Commission policy should direct the attention of the law enforcement community to the person who sells the drug for profit, and not to the person who uses the drug privately.

If an individual has more than a few ounces in his possession, and there is probable cause to believe that he intends to sell it for profit, that activity is already covered under the Commission's recommendation that possession with intent to sell is illegal. Therefore, there is no need to further proscribe simple public possession.

All the component parts of the recommended policy of the Commission should be consistent with its objective of non-interference with casual transfers and possession and use which is essentially and fundamentally private and personal.

The contraband device, the not-for-profit sale, and public possession of some reasonable amount which should be presumed to be necessarily incident to private use should all be removed from the ambit of legal sanction. To do so would be to strike down "symbols" of a public policy which had never been adequately justified in the first instance. Such steps would in no way jeopardize the firm determination of the Commission that the use of marijuana ought to be discouraged.

RECOMMENDATIONS FOR STATE LAW

Under existing state marijuana laws, cultivation distribution and possession with intent to distribute are generally felonies and in most states possession for personal use is a misdemeanor. The Commission strongly recommends uniformity of state laws and, in this regard, endorses the basic premise of the Uniform Controlled Substances Act drafted by the National Conference of

Commissioners on Uniform State Laws. The following are our recommendations for a uniform statutory scheme for marihuana, by which we mean, as under existing federal law, only the natural cannabis plant and its various parts, not the synthetic tetrahydrocannabinol (THC)

Existing Law

CULTIVATION, SALE OR DISTRIBUTION FOR PROFIT AND POSSESSION WITH INTENT TO SELL WOULD REMAIN FELONIES (ALTHOUGH WE DO RECOMMEND UNIFORM PENALTIES).

Private Activities

POSSESSION IN PRIVATE OF MARIHUANA FOR PERSONAL USE WOULD NO LONGER BE AN OFFENSE.

DISTRIBUTION IN PRIVATE OF SMALL AMOUNTS OF MARIHUANA FOR NO REMUNERATION OR INSIGNIFICANT REMUNERATION NOT INVOLVING A PROFIT WOULD NO LONGER BE AN OFFENSE.

Public Activities

POSSESSION IN PUBLIC OF ONE OUNCE OR UNDER OF MARIHUANA WOULD NOT BE AN OFFENSE, BUT THE MARIHUANA WOULD BE CONTRABAND SUBJECT TO SUMMARY SEIZURE AND FORFEITURE.

POSSESSION IN PUBLIC OF MORE THAN ONE OUNCE OF MARIHUANA WOULD BE A CRIMINAL OFFENSE PUNISHABLE BY A FINE OF \$100.

DISTRIBUTION IN PUBLIC OF SMALL AMOUNTS OF MARIHUANA FOR NO REMUNERATION OR INSIGNIFICANT REMUNERATION NOT INVOLVING A PROFIT WOULD BE A CRIMINAL OFFENSE PUNISHABLE BY A FINE OF \$100.

PUBLIC USE OF MARIHUANA WOULD BE A CRIMINAL OFFENSE PUNISHABLE BY A FINE OF \$100.

DISORDERLY CONDUCT ASSOCIATED WITH PUBLIC USE OF OR INTOXICATION BY MARIHUANA WOULD BE A MISDEMEANOR PUNISHABLE BY UP TO 60 DAYS IN JAIL, A FINE OF \$100, OR BOTH.

OPERATING A VEHICLE OR DANGEROUS INSTRUMENT WHILE UNDER THE INFLUENCE OF MARIHUANA WOULD BE A MISDEMEANOR PUNISHABLE BY UP TO ONE YEAR IN JAIL, A FINE OF UP TO \$1,000, OR BOTH, AND SUSPENSION OF A PERMIT TO OPERATE SUCH A VEHICLE OR INSTRUMENT FOR UP TO 180 DAYS.

A PLEA OF MARIHUANA INTOXICATION SHALL NOT BE A DEFENSE TO ANY CRIMINAL ACT COMMITTED UNDER ITS INFLUENCE NOR SHALL PROOF OF SUCH INTOXICATION CONSTITUTE A NEGATION OF SPECIFIC INTENT.

A PERSON WOULD BE ABSOLUTELY LIABLE IN CIVIL COURT FOR ANY DAMAGE TO PERSON OR PROPERTY WHICH HE CAUSED WHILE UNDER THE INFLUENCE OF THE DRUG.

DISCUSSION OF FEDERAL RECOMMENDATIONS

The recommended federal approach is really a restatement of existing federal policy. From official testimony and record evaluation, we know that the federal law enforcement authorities, principally the Federal Bureau of Narcotics and Dangerous Drugs and the Bureau of Customs, do not concentrate their efforts on personal possession cases. The avowed purpose of both Bureaus is to eliminate major traffickers and sources of supply. For the most part, the federal agencies have left possession enforcement to the states. Underlying this approach is a need -to maximize the use of enforcement resources for major priorities and allow the states, in exercising their "police powers," to assume the responsibility for local activities, including possession for personal use.

By withdrawing the criminal sanction from possession for personal use we are, in effect, codifying official policy. In addition, such a scheme follows the model chosen for alcohol in the Volstead Act, and also revives the approach taken by Congress in the Drug Abuse Control Amendments (DACA) of 1965. We are in agreement with the original thrust of DACA, when Congress brought previously uncontrolled drugs, LSD, barbiturates and amphetamines, under control but did not assess criminal penalties for possession for personal use.

Instead, Congress placed on the prosecution the burden of proof that the possession was for purposes of sale. Regardless of whether or not Congress was wise in imposing a penalty in 1968 for possession for personal use, a subject we will consider in our next Report, we think the original DACA concept is enlightened where marihuana is concerned.

At the same time, present federal law classifies marihuana as contraband, and this feature should be maintained. The contraband concept serves the discouragement policy in two ways: it assists the removal of supply from the market and it symbolizes a continuing societal opposition to use. Accordingly, if a person is found in possession of marihuana in public and the government is unable to prove any intent to sell, it may nevertheless seize the marihuana and confiscate it as contraband.

The contraband provision would apply only to possession in public and would not extend to possession for personal use in the home. During Prohibition, the Federal Government and most of the states employed a similar statutory limitation. For example, the Volstead Act provided that a private dwelling could not be searched "unless it is being used for the unlawful sale of intoxicating liquor. . . ." The impact of this contraband concept is that marihuana possessed or found in public can be summarily seized by law enforcement officials and forfeited to the state

for subsequent destruction .2 The criminal justice system is not involved in the process. The individual receives no record of any kind; he simply loses the economic value of the marihuana.³

With regard to the casual distribution of small amounts of Marihuana 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 marihuana is generally shared among friends and that not all people who distribute marihuana are "Pushers."^{*}

'§ 39. Unlawful Possession of liquor or property designed for manufacture thereof ; search warrants. It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this chapter or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in [sections 611 to 631 and 633 of Title 181 and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof. if it is found that such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor, and all property designed for the unlawful manufacture of liquor, shall be destroyed, unless the court shall otherwise order. No search warrant shall issue to search any private dwelling occupied as such unless it is being used for unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house. The term "private dwelling" shall be construed to include the room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel or boarding house. The property seized on any such warrant shall not be taken from the officer seizing the same on any writ of replevin or other like process. (Oct. 28, 1919, e. 85, Title 11, § 25, 41 Stat. 315)

The federal and state provisions presently in force regarding the seizure and forfeiture of an automobile transporting marihuana would no longer be applicable. They would still remain in force for other controlled drugs classified as contraband.

³ See the views of Commissioners Rogers, Carter, Ware, Hughes and Javits expressed in the footnote on pages 151-156.

The accuracy of Congress' appraisal is underscored by the National Survey. When people who had used marihuana were asked how they first obtained the drug, 61% of the adults and 76% of the youth responded that it had been given to them. Only 4% of the adults and 8% of the youth said that they had bought it. When asked who their source had been, 67% of the adults and 85% of the youth responded that it had been a friend, acquaintance or family member.

The close association between the concepts of casual transfer and personal possession is also underscored by the fact that 56% of the prosecutors in our survey thought that the present law did not deter casual transfer at all or deterred it only minimally.

With regard to importation and exportation, we recommend no change in existing law and make the following observations. First, the United States must maintain its international standing and,

as a member of the community of nations, this country should do everything in its power to restrict the exportation of marihuana to other countries and to penalize such international traffic.

As to importation of marihuana, the most effective way to discourage use is to cut off supply at the top of the pyramid. Recognizing that most of the marihuana consumed in the United States comes from abroad, we feel that the Bureau of Customs at the borders should have all necessary authority to halt and interdict supplies intended for consumption in this country. There has been a long-standing practice of excepting ports and borders from procedural rules applying within the United States. One example is that Customs officials are allowed to search without the showing of probable cause, even though such a showing is mandatory for searches conducted within the United States. We can see a legitimate reason for continuing this policy.

*In considering this relationship, the Senate, in the Report of the Committee on the Judiciary of the United States Senate regarding S. 3246 (a precursor bill to the new Federal law) stated:

The language "distributes a small amount of marihuana for no remuneration or insignificant remuneration not involving a profit" as contained in section 501 (c) (4) is intended to cover the type of situation where a college student makes a quasi-donative transfer of one or two marihuana cigarettes and receives 50 cents or a dollar in exchange to cover the cost of the marihuana.

Transfers of larger quantities in exchange for larger amounts of money, or transfers for profit, are not intended to be covered by this section, but rather are to be covered by section 501 (c) (2) which deals 'with unlawful distribution. This language sketches a prototype situation which the Committee had in mind; however, the wording of the Federal Act and of our recommendations is not intended to establish inflexible rules. The objective in both provisions is to distinguish between commercial sellers and casual distributors. Ultimately the courts will have the responsibility of drawing this distinction according to the evidence in individual cases. The recommended provision intentionally establishes a loose standard not tied to specific amounts of marihuana or money.

See also the views of Commissioners Rogers, Carter, Ware, Hughes and Javits expressed in the footnote on pages 151-156.

DISCUSSION OF STATE RECOMMENDATIONS

The states have primary responsibility for enforcing the existing proscriptions against possession for personal use. Their present efforts are designed mainly to keep marihuana use contained, and in private. Such an enforcement policy is consistent with our social policy approach, and is an appropriate exercise of the states' obligations to maintain public order. So while we see no need for criminal sanctions against possession for personal use or against casual transfers, we recommend a number of provisions for confining marihuana use to the home.

The first point is that even marihuana possessed for personal use is subject to summary seizure and forfeiture if it is found in public. This concept is now applicable under federal law which we

commend also to the states. In our view, the contraband feature symbolizes the discouragement policy and will exert a, major force in keeping use private.

Another means of symbolizing the discouragement policy which has been suggested is the imposition of a civil fine on those possessing marihuana outside the home for personal use.* Under such an approach, a fine would be levied and processed outside the criminal justice system. Essentially, possession of marihuana would be the equivalent of a traffic offense in those jurisdictions where such an offense is not criminal.

Such a scheme would accomplish little more than that achieved under a partial prohibition scheme. Warrants would presumably not be issued for searches of private residences, and possession offenses would be detected only by accident or if the offender uses the drug in public. The more direct way to confront such behavior is a penalty against public use.

A further problem with the civil fine approach lies in the area, of non-payment of the fine. With traffic tickets, or with civil fines levied against industrial polluters, society can compel compliance by withdrawing its permission to engage in regulated activity. For example, it can revoke the motorists' license to drive or the polluters' license to do business within the state. In short, the state has remedies beyond the criminal law to achieve its policy goal. The same would not be true for the marihuana user and enforceability of the statute would ultimately require court action.

*See the views of Commissioners Rogers, Carter and Ware expressed in the footnote on pages 151-153.

As we have suggested, a central feature, of our statutory approach at the state, level would be a vigorously enforced prohibition of public use. No intoxicant should be used in public, both because it may offend others and because the user is risking irresponsible behavior if he should be under its influence in public. Moreover, where marihuana is concerned, continuing societal disapproval requires that the behavior occur only in private if at all. Public use, under the proposed scheme, would therefore be punishable by a fine of \$100.

We also recognize the need for some prophylactic measure for anticipating distribution, even though there may be no intent to sell for profit. To this end, and in order to deter public use, possession and transfer, we have drawn a line at one ounce of marihuana. Possession in public of more than this amount would be punishable by a fine of \$100.

For these same reasons, we believe the states should prohibit all transfers outside the home, whether or not for remuneration. A transfer for profit would be a felony, as under present law. A casual transfer of a small amount would be punishable by a fine of \$100.

Taken together, the contraband feature, the proscriptions of public use and public possession of more than an ounce (even if for personal use) and the prohibition of public transfers will reflect the discouragement policy underlying the entire, scheme.

The remaining set of recommendations aims at irresponsible behavior under the influence of marijuana. Whatever the precise legal scheme employed, these provisions should be included.

First, the "drunk and disorderly" statutes presently in force in the states are useful tools for maintaining public order. We would suggest similar statutes in the case of marijuana, punishing offenders by up to 60 days in jail, a fine of \$100, or both. Law enforcement authorities must have a means to halt antisocial behavior exhibited incidental to marijuana use.

The second aspect of irresponsible behavior is the operation of automobiles, other vehicles, or any potentially dangerous instrument while under the influence of marijuana. Such behavior is gross negligence in itself, risking harm to others unnecessarily. In addition to penalizing a person who "drives under the influence" as a serious misdemeanor, we would impose absolute civil liability on anyone who harms the person or property of another while under the influence of marijuana.

Finally, no one should be able to limit his criminal accountability by alleging that he was under the influence of marijuana at the time of the crime. Under both federal and state law, the defendant should not be able to negate the mental element of "specific intent," which some offenses carry, by pleading that he was under the influence of marijuana and was therefore unable to have formed such an intent. Unlike many users of heroin, the user of marijuana is not physically dependent on the drug. The use of the drug is usually a matter of choice. Although we believe on the basis of available evidence that there is no causal connection between marijuana use and crime, we would under no circumstances allow a person to escape the consequences of his actions by hiding behind the cloak of marijuana use.

DISCUSSION OF POTENTIAL OBJECTIONS

Having discussed our recommended scheme at the federal and state levels, we think it useful to answer some objections we anticipate will be raised. Possible objections are:

1. Partial prohibition is not a sufficient reflection of the discouragement policy.
2. Partial prohibition is logically inconsistent.
3. A possession penalty is necessary for effective enforcement of sale proscriptions.
4. Partial prohibition won't "work" for marijuana any more than it did for alcohol.
5. A possession offense is essential as a device for detecting problem users.
6. Retention of a possession offense is required by our international obligations.
7. A firm distinction should be drawn between less potent and more potent preparations.

1. The Partial Prohibition Approach Is a Sufficient Reflection of the Discouragement Policy

To those who would argue that a criminal sanction against use is a necessary implementation of an abstentionist policy, we need only respond that this country has not generally operated on that assumption. We would be astounded if any person who lived during the 1920's was not aware of a definite governmental policy opposed to the use of alcohol. Yet, only five states prohibited possession for personal use during Prohibition. The failure of the 18th Amendment, the Volstead Act and 43 state prohibition acts to criminalize private possession certainly did not signify official approval of or neutrality toward alcohol use.

As we pointed out in Chapter 1, our nation has not generally seen fit to criminalize private drug-related behavior; only in the narcotics area was possession made a crime and marihuana was brought within the narcotics framework because of unfounded assumptions about its ill effects. We think it is time to correct that mistaken departure from tradition with respect to marihuana. As during Prohibition, the drug will remain contraband, and its distribution will be prohibited.

Even as late as 1965, an abstentionist drug policy was not thought to require prohibition for personal use. At that time, Congress enacted the Drug Abuse Control Amendments, bringing LSD, amphetamines and barbiturates under federal control. National policy was clearly opposed to use of the hallucinogens and the non-prescription use of amphetamines and barbiturates, yet Congress did not impose a penalty for possession. Whether or not Congress' subsequent decision in 1968, to impose such a penalty was appropriate is an issue we will cover in our next Report after analyzing the individual drugs controlled. The important point now is that such a penalty is not a necessary feature of a discouragement policy for marihuana, regardless of its, propriety for other drugs.

1. The Partial Prohibition Approach Is Not Logically Inconsistent

It will be argued that a law which permits a person to acquire and use marihuana but does not permit anyone to sell it to him for profit is logically unsound. We do not agree. If we had recommended a social policy of approval or neutrality toward use, partial prohibition would indeed have been illogical. However, under a discouragement policy, such a scheme is perfectly consistent.

Under partial prohibition, use is discouraged in three main ways. First, law enforcement authorities will make a concerted effort to reduce the supply of the drug. If a person wishes to use marihuana, he will have to seek out a person to sell it to him; and if his seller is in the business of distributing marihuana for profit, the seller is violating the law.

Second, the user will have to confine his disapproved behavior to the home. If he uses the drug in public, he has committed an offense; if he possesses it in public, it may be summarily seized as contraband.

Third, continuing efforts will be made by educators, public health officials, and official government spokesmen to discourage use. Realizing that educational efforts are not always successful, we would hope for a sound program. In any event, the law should be an ancillary rather than a focal consideration.

There is nothing theoretically inconsistent about a scheme which merely withdraws the criminal sanction from a behavior which is not immoral but which is disapproved. The individual is being allowed to make his own choice. Hopefully, he will choose not to use marijuana. If he chooses to do so, however, he will have to do so discreetly and in private. Apart from its ultimate possession by the user, however, all marijuana-related activity is prohibited. The drug is contraband from its initial growth, through its harvest and distribution. It ceases to be contraband only when possessed and used in the home.

3. Prohibition of All Possession Is Not Essential to Prohibition of Sale

The other side of the "inconsistency" objection is the argument by law enforcement officials that they cannot adequately enforce proscriptions against sale without a possession penalty. We disagree. We have already explained that enforcement of a possession offense to some extent impedes the effort to reduce supply. Possession cases are generally regarded in the law enforcement community and by judges and prosecutors as "cheap" cases. Few seriously contend that prosecution of possessors reduces supply.

Some persons argue in response that the law should remain on the books as a tool not against the possessor but against the seller. They say that a possession offense is helpful in three ways. First, a prosecution can be used as a bargaining tool to encourage the possessor to reveal his source; this is called "turning an informant." Second, the police may know that a person is a seller, but may not be able to prove either sale or intent to sell, so they can at least charge such suspected sellers with simple possession.

Third, a corollary of the second argument is that the possession offense provides a useful tool in the "plea bargaining" process. That is, a seller may plead guilty to the lesser offense of possession, now generally a misdemeanor, instead of running the risk of trial and conviction of the more serious offense of sale, generally a felony. The prosecution may accept such a "bargain" if it is uncertain of the strength of the case, to avoid delay in sentencing, to reduce judicial backlog or in return for information from the defendant.

From an institutional standpoint, we do not find these arguments persuasive. First, if a possession offense is on the books, possession is a criminal activity. We oppose criminalizing conduct when its purpose and intent is directed not toward that conduct but toward another behavior.

In answer to the informant argument, the marijuana user (and this may not be true of other drugs) is simply too low in the distributional chain to help very much. As indicated earlier, the National Survey shows most users receive their marijuana from their friends or acquaintances either as a gift or at cost. Rarely is the time spent on him or on his "source" a fruitful allocation of the law enforcement official's time. Also, it is institutionally improper to hold the criminal sanction over a person to force him to talk, when we otherwise would be unwilling to use that sanction.

As to the "lack of proof" and "plea bargaining" arguments, we believe they challenge a fundamental tenet of our criminal justice system. That is, under our law, a person is not guilty just because the police think he is guilty; his offense must be proven beyond a reasonable doubt

to a judge or jury. If a possession offense were not on the books, the police would have to gather enough evidence to convict the seller of sale or of possession with intent to sell, and the prosecution would have to convince the judge beyond a reasonable doubt. The defendant, suspected seller or not, is entitled to due process of law.

The "lack of proof" argument is nothing more than a plea for an "easy out" when the police do not have enough evidence. This simply represents an admission that law enforcement officials want a possession offense which they can apply selectively, to people whom they think, but cannot prove, are sellers. Such a notion is inconsistent with the basic premise of our system of equal treatment under the law. If "simple" possession is not an offense for some, it is not an offense for all. A "known seller" is entitled to the same rights as anyone else: criminal conduct must be proved beyond a reasonable doubt. We do not favor coddling criminals. We do insist, as did the framers of the Constitution, that suspected criminal behavior be proved.

4. That Partial Prohibition Did Not "Work" For Alcohol Doesn't Mean It Won't For Marihuana

Prohibition failed to achieve its avowed purpose of eliminating the use of intoxicating liquors from American life. Risking an oversimplification, we think two reasons were essentially responsible for this failure: the unwillingness of a substantial minority, and probably a majority, of the American public to discard a habit deeply ingrained in their lives; and the inability of the law enforcement community to eliminate the bootlegging traffic which catered to this continuing demand.

As we have repeatedly noted, one of the reasons for adoption of a partial prohibition approach is uncertainty about the extent to which marihuana use is ingrained in American culture. Indeed, adoption of partial prohibition is the best way to find out for sure. If the social interest turns out to be only transient, this policy will prove particularly appropriate.

Similarly, an increase in marihuana use may be prevented by a concerted effort to eliminate major trafficking, the scope of which is presently only a small fraction of Prohibition bootlegging. We do not pretend that supply of a plant so easily grown can be eliminated. However, an intensive effort to eliminate commercial criminal enterprise should have some impact on the extent of use.

5. The Possession Offense Is Not Required as a Detection Device

In addition to their deterrent and symbolic functions, the drug possession laws serve a third function not shared by most other criminal laws. Like laws against public drunkenness, they facilitate societal detection of drug-dependent persons. Ideally, such persons, although apprehended by law enforcement authorities, may be detained for purposes of treatment and rehabilitation.

Whatever the merits of such an argument for the opiates and alcohol, such an argument does not apply to marihuana. Only a very small percentage of marihuana users are drug-dependent or are in need of treatment. Their dependence is generally upon multiple drug use, not on marihuana. In

any event, the existence of such a small population does not justify retention of the possession offense as a detection device.

6. International Obligations Do Not Require Maintenance of a Possession Penalty

Some have raised the possibility that removal of simple possession criminal penalties would contravene this country's obligations under the Single Convention on Narcotic Drugs (1961), to which it became a signatory in March, 1967. We do not believe the provisions of that Convention compel the criminalization of possession for personal use.

Nowhere in the Convention are its Parties expressly required to impose criminal sanctions on possession for personal use. Article 4 requires Parties to "take such legislative and administrative measures as may be necessary . . . to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs." Penal sanctions are not necessarily included in this formulation.

Article 36, which deals specifically with penal provisions, requires each party to adopt "such measures as will ensure" that the listed activities, including possession, "shall be punishable offenses." Some have argued that this provision requires prohibition of personal use.

However, from a comprehensive study of the history of the Convention, the Commission has concluded that the word "possession" in Article 36 refers not to possession for personal use, but to possession as a link in illicit trafficking. This interpretation is bolstered also by the failure to include "use" in Article 36 even though it has been included in Article 4.

Finally, we must consider Article 33, which provides that "the Parties shall not permit the possession of drugs except under legal authority." This Article also does not require the imposition of any sanctions on possession for personal use. Experts consulted by the Commission have indicated that this Article may, nevertheless, require that the Parties to limit possession and use to medical and scientific purposes. To affirmatively allow drugs to remain in the possession of persons for non-medical use would in this view contravene Articles 4 and 33 to read together. From this perspective our international obligations may require the classification of marijuana, as contraband. For this reason, together with a desire to symbolize our discouragement policy in a clear way, we have included the contraband feature in our legal implementation scheme.

In conclusion, our reading of the Convention is that a Party may legitimately decide to deal with non-medical use and possession of marijuana through an educational program and similar approaches designed to discourage use.

7. No Potency Distinction is Necessary at the Present Time

Following the approach taken in the Comprehensive Drug Abuse Prevention and Control Act of 1970, we have drawn a line between the natural cannabis plant and the synthetic tetrahydrocannabinols. "Marijuana" is defined as any and all parts of the natural plant. That we choose this approach for purposes of statutory implementation does not mean that we are

unaware of the difference between the less potent and more potent preparations of the natural plant.

As noted in Chapters 11 and III, the highest risk of cannabis use to the individual and society arises from the very long-term, very heavy use of potent preparations commonly called hashish. No such pattern of use is known to exist in the United States today.

The predominant pattern of use in the United States is experimental or intermittent use of less potent preparations of the drug. Even when hashish is used, the predominant pattern remains the same. In addition, whatever the potency of the drug used, individuals tend to smoke only the amount necessary to achieve the desired drug effect.

Given the prevailing patterns of use, the Commission does not believe it is essential to distinguish by statute between less potent and more potent forms of the natural plant. Reinforcing this judgment are the procedural and practical problems attending an effort to do so.

If the criminal liability of all individual user is dependent on the THC content of the substance, neither lie nor the arresting officer will know whether he has committed a crime until an accurate scientific determination is made. Even if such accurate determinations were feasible on a large scale, which is not now the case, such after-the-fact liability is foreign to our criminal laws.

Under present circumstances, then, a statutory line based on potency is neither necessary nor feasible. We emphasize also that any legal distinction is an artificial reflection of the Commission's major concern: the heavy use of the drug over a long term. The most emphatic element of official policy should be to discourage such use, especially of the more potent preparations. Unfortunately precise legislative formulations regarding the amount of the drug presumed to be for personal use do not assist this effort at all. Whether it is lawful to possess one ounce of hashish or a proportionate amount based on potency (for example, one-fourth ounce), an individual prone to use the drug heavily will do so. Society's resources should be committed to the task of reducing supply of the drug and persuading our citizens not to use it. Expenditure of police time and financial resources in an attempt to ascertain the THC content of every seized substance would make little, if any, contribution to this effort.

A Final Comment

In this Chapter, we have carefully considered the spectrum of social and legal policy alternatives. On the basis of our findings, discussed in previous Chapters, we have concluded that society should seek to discourage use, while concentrating its attention on the prevention and treatment of heavy and very heavy use. The Commission feels that the criminalization of possession of marijuana for personal is socially self-defeating as a means of achieving this objective. We have attempted to balance individual freedom on one hand and the obligation of the state to consider the wider social good on the other. We believe our recommended scheme will permit society to exercise its control and influence in ways most useful and efficient, meanwhile reserving to the individual American his sense of privacy, his sense of individuality, and, within the context of all interacting and interdependent society, his options to select his own life style, values, goals and opportunities.

The Commission sincerely hopes that the tone of cautious restraint sounded in this Report will be perpetuated in the debate which will follow it. For those who feel we have not proceeded far enough, we are reminded of Thomas Jefferson's advice to George Washington that "Delay is preferable to error." For those who argue we have gone too far, we note Roscoe Pound's statement, "The law must be stable, but it must not stand still."

We have carefully analyzed the interrelationship between marihuana the drug, marihuana use as a behavior, and marihuana as a social problem. Recognizing the extensive degree of misinformation about marihuana as a drug, we have tried to demythologize it. Viewing the use of marihuana in its wider social context, we have tried to desymbolize it.

Considering the range of social concerns in contemporary America, marihuana does not, in our considered judgment, rank very high. We would deemphasize marihuana as a problem.

The existing social and legal policy is out of proportion to the individual and social harm engendered by the use of the drug. To replace it, we have attempted to design a suitable social policy, which we believe is fair, cautious and attuned to the social realities of our time.