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An Analysis of Marijuana Policy

Committee on Substance Abuse and Habitual Behavior
Commission on Behavioral and Social Sciences and Education
National Research Council

National Academy Press
Washington, D.C. 1982

NOTICE: The project that is the subject of this report was approved by the Governing Board of the National Research Council, whose members are drawn from the councils of the National Academy of Sciences, the National Academy of Engineering, and the Institute of Medicine. The members of the committee responsible for the report were chosen for their special competences and with regard for appropriate balance.

This report has been reviewed by a group other than the authors according to procedures approved by a Report Review Committee consisting of members of the National Academy of Sciences, the National Academy of Engineering, and the Institute of Medicine.

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NATIONAL RESEARCH COUNCIL

2101 CONSTITUTION AVENUE WASHINGTON D C 20418

OFFICE OF THE CHAIRMAN

June 21, 1982

Dr. William Pollin, Director
National Institute on Drug Abuse
Parklawn Building
Room 10-05
5600 Fishers Lane
Rockville, Maryland 20857

Dear Dr. Pollin:

I transmit, herewith, a report of the National Research Council's Committee on Substance Abuse and Habitual Behavior: "An Analysis of Marijuana Policy" prepared at the request of the National Institute on Drug Abuse.

The Committee on Substance Abuse and Habitual Behavior, composed of 18 experts in the several relevant disciplines, has weighed carefully the available data regarding the costs, risks, and benefits of the major policy alternatives regarding the control of marijuana use and supply. The Committee is clear in pointing to the deficiencies of this body of evidence and cautions about the hazards of formulating policy recommendations based solely or in part thereon. In this regard, I call your attention to the following statement by Louis Lasagna and Gardner Lindzey contained in the Preface to the report:

> The Committee wishes to make clear what it regards as the limits of this report for the selection of policy alternatives. Scientific judgment can estimate the prevalence of different kinds of use, risks to health, economic costs, and the like under current policies and try to project such estimates for new policies. It can come to some conclusions based on those estimates. But selection of an alternative is always a value-governed choice, which can ultimately be made only by the political process.

This caveat notwithstanding, the Committee has derived from its examination of the scientific data a conclusion about the major policy choices facing the nation with respect to marijuana: complete prohibition, prohibition of supply only, and regulatory approaches. Specifically, the Committee concurs with the judgment of the National Commission on Marijuana and Drug Abuse, rendered in 1971, that a policy of prohibition of supply only is preferable to a policy of complete prohibition of supply and use.

What must be understood by the public, the media, and all who read the Committee's report is that its decision to endorse a policy change was not fashioned from scientific information--old or new--alone. Rather it was the analysis of a combination of factors which affect policy decisions, including the cost and efficacy of enforcement practices. Values were necessarily involved in balancing these factors and there are those within the membership and governing bodies of the Academies and the National Research Council who might not have come to the same policy conclusions, after reviewing the same data.

My own view is that the data available to the Committee were insufficient to justify on scientific or analytical grounds changes in current policies dealing with the use of marijuana. In this respect I am concerned that the Committee may have gone beyond its charge in stating a judgment so value-laden, that it should have been left to the political process.

I have one further concern that cannot go unaddressed. I fear that this report, coming as it does from a well-known and well-respected scientific organization, will be misunderstood by the media and the public to imply that new scientific data are suddenly available that justify changes in public attitudes on the use of marijuana. This would be unfortunate at a time when daily use trends by high school students are down significantly. As the Committee's discussion of marijuana's behavioral and health-related effects clearly demonstrates, there is no new scientific information exonerating marijuana. In fact, the review by our Institute of Medicine, published a few months ago, reevaluated existing scientific evidence and concluded, as have others, that marijuana is a harmful drug whose use justifies serious national concern.

I wish to remind you that this is a committee report; the only position that can be inferred with respect to the National Research Council on the issue of marijuana policy is that the National Research Council is satisfied that the Committee was competent to examine the issue and diligent in carrying out its task. Despite my personal disagreement, I believe that the Committee has performed a useful service by illuminating many of the complex issues surrounding this highly controversial subject.

Yours sincerely,

Frank Press

Frank Press
Chairman

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PREFACE

In 1978 the Committee on Substance Abuse and Habitual Behavior began a study of marijuana policy at the request and with the support of the National Institute on Drug Abuse. Sharp increases in marijuana use along with suggestions for reform of existing marijuana laws from scientists and policy makers prompted a renewed look at those laws. In addition, the National Commission on Marijuana and Drug Abuse, in its 1973 final report, Drug Use in America: Problem in Perspective, had recommended that a follow-up commission be appointed to review possible changes in the situation four years later. That recommendation was not implemented, so the Committee took as a framework for its task the assessment that the Commission recommended, especially the assessment of new evidence regarding the effects of recent changes in state marijuana policies.

The Committee conducted its study with awareness of the intensity of past controversies about marijuana use in U.S. society. In the four years since the Committee began its work, there has been an increase in visible concern among many parents about marijuana use among youth, its potential risks to the health of children, and the possibility that heavy use by some young people may seriously threaten their education. Parents who have experienced problems with their own children, or observed those of others, have organized to make marijuana policies a major item on current political agendas. In comparison with the situation at the inception of this study, there is today greater rancor in public discussion, press reports, legislative hearings, and policy-oriented technical meetings related to marijuana use.

This is the context in which the Committee completed its review of the evidence and arguments of earlier studies and weighed the significance of subsequent evidence for the major policy alternatives. Every policy has potentially good and potentially bad effects, and policy choices involve difficult comparisons of such effects. It is important to recognize that to allow the inertia developed by existing policies to prevent change is itself a choice.

The Committee is aware that analyzing a topic that is the subject of heated social debate has its hazards. Many of those participating in the marijuana debate have already selected what they take to be the admissible terms of the discussion and look with disfavor on anyone's insistence on a wider set of considerations. For example, some would settle the issue on physiological grounds alone: whether cannabis products, in the dose ranges customarily used by most people, cause tissue damage. Defenders of marijuana use may seize on the ambiguity or absence of evidence for such damage and ignore any other effects on education or safety; those opposed to marijuana use may emphasize the possibility of chronic disease that is suggested by some laboratory findings and ignore the social, political, and economic costs of fighting a well-established custom.

This report does not review and analyze every conceivable policy nuance or option. It addresses the major choices--both because these families of alternative policies subsume many variants and because the choice among these major options must be discussed before specific, perhaps new, policy instruments can be designed.

The Committee wishes to make clear what it regards as the limits of this report for the selection of policy alterative. Scientific judgment can estimate the prevalence of different kinds of use, risks to health, economic costs, and the like under current policies and can try to project such estimates for new policies. It can come to some conclusions based on those estimates. But selection of an alternative is always a value-governed choice, which can ultimately be made only by the political process. The role of scientific evidence in this process is not inconsiderable, even though, at times, the strongest evidence may be pushed aside and the wildest speculation prevail. But the weight of the evidence is only one factor in the process of policy formation; ultimately, that process involves value choices.

In completing its report, the Committee has benefited from many people in formulating, revising, and updating the analyses and data. A very early version of this report was discussed at the Committee's annual conference in 1979, and subsequent versions benefited from comments by staff of the National Institute on Drug Abuse and of the National Research Council. The final draft received close and constructive attention by members of the National Research Council's Commission on Behavioral and Social Sciences and Education, the Institute of Medicine, and the Report Review Committee of the National Academy of Sciences.

We have also maintained a close liaison with the staff and members of the Institute of Medicine's Committee to Study the Health-Related Effects of Cannabis and Its Derivatives, on which three members of our Committee also served, and whose recently published report, Marijuana and Health, significantly contributed to our work.

Two former Committee members, Troy Duster and Michael Agar, assisted in the early preparation of the report. At later stages we were very ably assisted by the staff of the Commission on Behavioral and Social Sciences and Education, in particular David Goslin, executive director, and Eugenia Grohman, associate director for reports. Without their help, it is doubtful that we could have completed this task. Finally, we are indebted to the staff and members of the Committee, for their diligence, patience, and commitment to a difficult assignment.

Louis Lasagna, Chair
Gardner Lindzey, Chair, 1977-1980
Committee on Substance Abuse and
Habitual Behavior

An Analysis of Marijuana Policy

INTRODUCTION

Since the early 1960s the use of marijuana as an intoxicant by a growing proportion of the American population has been an issue of major national concern. Despite repeated warnings of possible adverse health consequences and persistent efforts by law enforcement agencies to restrict the supply and use of marijuana, available data indicate that experimentation with or regular use of the drug is no longer restricted to a small minority of Americans. In 1979, for example, 68 percent of young adults between the ages of 18 and 25 reported having tried marijuana; 35.4 percent reported having used marijuana in the last month. Among adults over age 26, the proportion having ever used marijuana has more than doubled since 1971, from 9.2 percent to 19.6 percent (Fishburne et al., 1980; see Table 1, below).

Although "the marijuana problem" may be viewed as of recent origin, marijuana is not a new drug. The cannabis plant has been cultivated and used both for its intoxicating properties and for its fiber (hemp) throughout the world for more than 10,000 years (Abel, 1980). At various times and places attempts have been made to restrict its use as an intoxicant; at other times and places its virtues have been extolled for medical purposes, and it has played a significant role in religious ritual. Because cannabis is easily grown--indeed, it is one of the hardiest of all plant species--its resin has been used for centuries along with tobacco, fermented distillates of grains and fruits (alcohol), and opium derivatives as one means of relieving stresses associated with daily life.

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

Pouch Y, State Capitol
Juneau, Alaska 99811
(907) 465-3991

Febuary 7, 1986

MEMORANDUM

TO: Representative Andre Marrou

FROM: Mary Jennings MJ
Legislative Ananlyst

RE: Effects of the Decriminalization of Marijuana
Research Request 86-078

You requested information regarding the effects of the decriminalization of marijuana. In particular, you, expressed interest in the following effects: the level of usage; the crime rate; the level of convictions for selling; and law enforcement efforts to interdict the flow.

The information presented in this memorandum was obtained from the Alaska Department of Public Safety, the Alaska State Troopers, Lee Dogoloff of the American Council on Marijuana, and Lieutenant Sterns, the commander of the Anchorage Narcotics Unit.

Conclusions

I could not find statistics on the level of usage of marijuana in Alaska, so I am unable to discuss the effects of marijuana usage on the crime rate. However, the crime rate in Alaska increased between 1975 and 1980 and began to decrease in 1981. The drug sale conviction rate in Alaska is not recorded, but the commander of the Anchorage Narcotics Unit stated that the rate was over 99 percent. First time, major interdiction and eradication efforts were made against marijuana in Alaska in 1984.

Background

In 1975, it became legal under State law for Alaska adults to possess marijuana for their own use in the privacy of their own home. An amendment to the statutes in 1982 defined the amount for home use to be up to four ounces. It is illegal to possess or use marijuana in public, on a school ground, to sell or manufacture marijuana, to possess in a vehicle, and to deliver marijuana to a minor. Federal law makes possession of marijuana illegal without reference to amounts, intended recipient, or location.

Table 1
Alaska Statewide Property Crimes and Marijuana Related Arrests

	Population	Property Crimes	Rate Per 100,000	Marijuana Sale Arrest	Marijuana Sale Rate	Marijuana Possession Arrest	Marijuana Possession Rate
1975	404,000	19,796	4,949	*		*	
1976	417,000	21,402	5,096	153	37	496	119
1977	425,000	23,076	5,367	93	22	543	128
1978	420,000	22,272	5,303	87	21	662	158
1979	416,000	23,406	5,626	73	18	500	120
1980	400,331	23,075	5,769	46	12	388	97
1981	419,593	24,311	5,802	76	18	490	117
1982	460,800	23,886	5,179	119	26	503	109
1983	510,554	25,323	4,960	161	32	659	129
1984	523,000	26,194	5,008	**		**	

* Prior to 1976, drug arrests were not broken down by substance.
**Will not be available until later this month.

Source: Crime in Alaska, Department of Public Safety, 1975-1983. (Crime in Alaska, 1984-1985 will be released later this year.)

* * * *

Convictions. I contacted Lieutenant Sterns, the commandor of the Anchorage Narcotics Unit. Lt. Sterns said that although conviction rates are not kept on record, he believes the conviction rate for drug sale cases is over 99 percent, due to the fact these cases are always substantiated with good evidence. Lt. Sterns added that marijuana is not the major drug of concern: the unit concentrates mainly on cocaine and other narcotics.

Enforcement Efforts

In 1983, drug enforcment agencies in Alaska combined forces. Troopers developed a statewide strategy of drug source interdiction, with the

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

Pouch Y, State Capitol
Juneau, Alaska 99811
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March 4, 1986

MEMORANDUM

TO: Representative Andre Marrou

FROM: Mary Jennings MJ
Legislative Analyst

RE: Effects of the Decriminalization of Marijuana
Research Request 86-078 (Supplemental Information)

You requested additional information regarding usage of marijuana and crime related to marijuana usage before and after its decriminalization in Alaska.

After contacting several agencies in Alaska and nationwide, I found that pertinent data are of poor quality. Ten other states have decriminalized the possession of small amounts of marijuana.[1] Of those states, Oregon, California, and Maine compiled impact reports within one to three years after their decriminalization legislation took effect. The passage of over ten years since Alaska decriminalized marijuana makes obtaining data of the effects difficult, if not impossible.

Use

The University of Alaska-Anchorage, Center for Alcohol and Addiction Studies conducted a school survey on the patterns of drug use in Alaska in 1982. Students from nine high schools in different parts of the state participated in the survey. Of the students responding, 50 percent had tried marijuana. A survey of Anchorage high school students conducted in 1971 (four years before possession of marijuana was decriminalized) found 24 percent of the students had tried marijuana.

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[1]Persons who posses small amounts of marijuana for personal use are not subject to arrest and imprisonment; instead, they are are cited or ticketed for a civil violation punishable by a monetary fine. The average maximum fine is $100.

effects of arrest versus citations (as other states have done) is impossible because no citations have been issued. According to Troopers involved in drug enforcement, issuing citations for possession of small amounts of marijuana is not a priority.

Research in Other States

Ten other states have decriminalized the possession of marijuana. Oregon, Maine and Calfornia prepared impact reports within a few years after their decriminalization legislation took effect. Oregon's report is the findings of three surveys conducted between 1974 and 1976. In the three years following Oregon's elimination of criminal penalties for possession of an ounce or less of marijuana, the number of adults who had used marijuana increased five percent and the number of current marijuana users increased three percent.

Maine compiled a time/cost analysis of the decriminalization of marijuana three years after the law decriminalizing the possession of marijuana took effect (1976). According to the report, the number of citations issued in 1978 was one percent less than the number of arrests made in 1975. The report found that if the possession of marijuana had been a criminal offense in 1978, it would have cost $332,615 to arrest, prosecute, and punish the 1,307 defendents processed that year. Under the system of civil penalities in 1978, marijuana related revenues (fines) were $16,957 greater than the costs of issuing citations

California published an impact report in January of 1977, one and one-half years after the state removed the criminal penalities for possession of marijuana. The state compared the first six months of 1975 (pre-decriminalization) with the same period in 1976. The report found: 1) the total known arrests and citations for marijuana possession decreased 47 percent; and 2) criminal justice system costs related to marijuana decreased 74 percent.

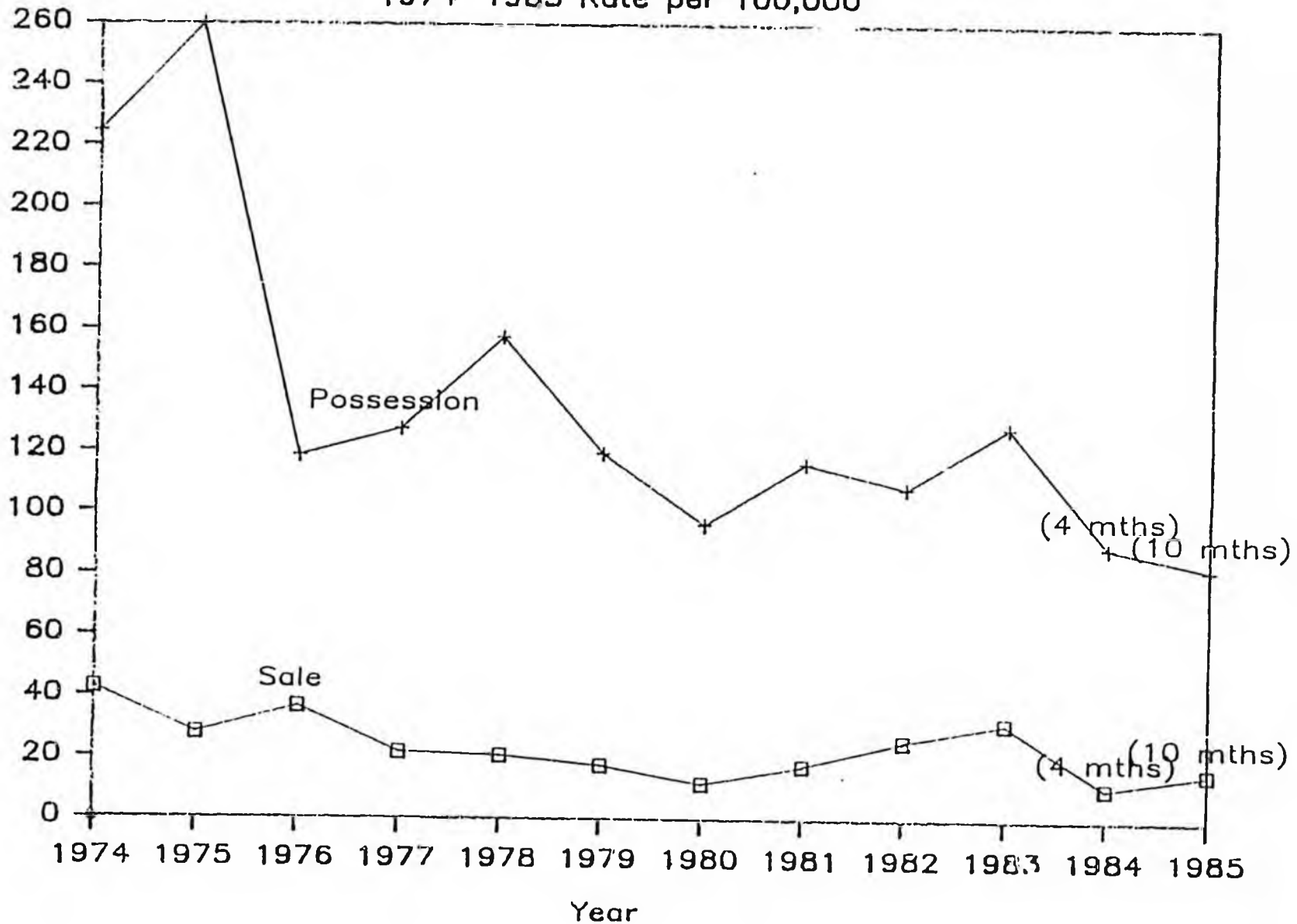
Marijuana and Other Crime

I was unable to find any reports correlating the decriminalization of marijuana with other crime. The following factors make it extremely difficult to draw any conclusions on this topic:

- the poor quality of crime statistics in Alaska;
- the lack of good data on marijuana usage;
- the lapse of ten years since decriminalization;

Alaska Marijuana Related Arrests

1974–1985 Rate per 100,000



virtually to eliminate any potential for abuse. It in no way reduces criminal liability for illegal acts involving the excepted product. Among the items included in this list are buffering agents, reference standards, and diagnostic test kits.

(3) Non-narcotic prescription drugs listed in Schedules II, III, IV, or V may be excepted from some or all control mechanisms of the CSA if contained in a compound, mixture, or preparation which contains one or more active ingredients which are not listed in any schedule and combined in such a way as to vitiate the potential for abuse of the controlled substance. This exception in no way reduces criminal liability for illegal acts involving the excepted product.

III Criteria By Which Drugs Are Scheduled

The Controlled Substances Act sets forth the findings which must be made to put a substance in any of the five schedules. These are as follows (section 202 (b)):

Schedule I

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has no currently accepted medical use in treatment in the United States.

(C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

Schedule II

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions.

(C) Abuse of the drug or other substance may lead to severe psychological or physical dependence.

Schedule III

(A) The drug or other substance has a potential for abuse less than the drugs or other substances in Schedules I and II.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.

Schedule IV

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in Schedule III.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in Schedule III.

Schedule V

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in Schedule IV.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in Schedule IV.

In making these findings, DEA and HHS are directed to consider eight specific factors (section 201 (c)):

(1) Its actual or relative potential for abuse;

(2) Scientific evidence of its pharmacological effect, if known;

(3) The state of current scientific knowledge regarding the drug or other substance;

(4) Its history and current pattern of abuse;

(5) The scope, duration, and significance of abuse;

(6) What, if any, risk there is to the public health;

(7) Its psychic or physiological dependence liability;

(8) Whether the substance is an immediate precursor of a substance already controlled under this title.

Aside from the criterion of actual or relative potential for abuse, subsection (c) of section 201 lists seven other criteria, already referred to above, which must be considered in determining whether a

Federal Trafficking Penalties

CSA Schedule	Drug	First Offense: Trace	5g	100g	500g	1kg	10kg	50kg or More	Second Offense: Trace	5g	100g	500g	1kg	10kg	50kg or More
I & II	LSD	Maximum 15 Years $125,000			Maximum 20 Years $250,000				Maximum 30 Years $250,000			Maximum 40 Years $500,000			
	Narcotics*														
	PCP														
	Cocaine														
	Others**														
	Hash Oil	Maximum 5 Years $50,000							Maximum 10 Years $100,000						
	Hashish														
	Marijuana														
III	All														
IV	All	Maximum 3 Years $25,000							Maximum 6 Years $50,000						
V	All	Maximum 1 Year $10,000							Maximum 2 Years $20,000						

*Except coca leaves and derivatives.
**Others—some stimulants, some depressants and some hallucinogens.

Regulatory Requirements

Schedule	Registration	Recordkeeping	Distribution Restrictions	Dispensing Limits	Manufacturing Security	Manufacturing Quotas	Import/Export: Narcotic	Import/Export: Non-Narcotic	Manufacturer/Distributor Reports to DEA: Narcotic	Manufacturer/Distributor Reports to DEA: Non-Narcotic
I	required	separate	order forms	research use only	vault/ safe	yes	permit	permit	yes	yes
II	required	separate	order forms	Rx: written; no refills	vault/ safe	yes	permit	permit	yes	yes
III	required	readily retrievable	records required	Rx: written or oral; with medical authorization, refills up to 5 in 6 months	secure storage area	NO but some drugs limited by Schedule II	permit	*	yes	**
IV	required	readily retrievable	records required	Rx: written or oral; with medical authorization, refills up to 5 in 6 months	secure storage area	NO but some drugs limited by Schedule II	permit	declaration	Manufacturer only	**
V	required	readily retrievable	records required	OTC (Rx drugs limited to M.D.'s order)	secure storage area	NO but some drugs limited by Schedule II	permit to import; declaration to export	declaration	Manufacturer only	no

* *Permit for some drugs, declaration for others*
** *Manufacturer reports required for specific drugs*

DRUGS AND THEIR RELATION TO CRIME

Rand Studies: 1986

Filcin . PAYAD

. Drug abusers commit more burglaries, thefts, check writing crimes, con-type crimes than non-drug abusers.

. At the time of their offense, 1/3 of all prisoners in the penitentiary were under the influence other than alcohol.

. When alcohol is added in, approximately 73% were under the influence of drugs and alcohol.

A. Burglary
- 54% under influence of alcohol
- 42% under influence of marijuana
- 30% under influence other than heroin or marijuana
- 12% under influence of heroin

B. Larceny
- 38% alcohol
- 32% marijuana
- 24% other than heroin or marijuana
- 15% heroin

C. Auto Theft
- 46% alcohol
- 30% marijuana
- 17% other than heroin or marijuana
- 8% heroin

5. 2 out of 3 inmates reported that they were under the influence of drugs or alcohol when they did majority of their crimes.

6. Of violent crimes:

A. Homicide
- 5% heroin
- 18% other drugs
- 22% marijuana
- 35% alcohol

B. Robbery
- 13% heroin
- 28% other drugs
- 38% marijuana
- 46% alcohol

C. Sexual Assault
- 3% heroin
- 12% other drugs
- 22% marijuana
- 38% alcohol

Fighting Alcohol Abuse in the 1980's: A National Report Card

Areas of Progress

Alcohol-related auto fatalities

1990 Goal: reduction to fewer than 9.5 per 100,000 people.

1977: 11.5 per 100,000

1984-85: 9.5 per 100,000

Deaths from cirrhosis

Goal: reduction to 12 per 100,000 people.

1978: 13.5 per 100,000

1984: 11.6 per 100,000

(Rates for nonwhites much higher than average and unlikely to fall to target.)

Awareness of risks of drinking in pregnancy

Goal: 90% of women of childbearing age aware.

1979: 73% aware

1985: 88% aware

Alcohol consumption

Goal: no increase in average consumption per person 14 years or older.

1978: 2.71 gallons

1985: 2.65 gallons

The Worrisome Trends

Drinking problems of Adolescents

Goal: reduce number with acute drinking problems to below 17%.

1978: 19% of 14 to 17-year-olds reported serious problem.

1985-86: 37% of high school seniors reported drinking five or more drinks at a time at least once in the two weeks before the survey.

Source: Alcohol, Drug Abuse, and Mental Health Administration

DRUGS AND CRIME

State Survey of Prison Inmates 1979

Nearly 2/3 of prison inmates surveyed reported that they were under the influence of drugs and/or alcohol at the time of offense. One-third were under the influence of drugs: mostly marihuana, about 10% heroin, about 5% cocaine, amphetamines, barbiturates. Drug abuse histories of prison inmates taken in 1979 were more extensive than from five years earlier. The proportion under the influence of marihuana at the time of offense doubled from 1974 to 1979, and about the same for other drug categories.

Inciardi Study 1979/Delaware

356 active heroin addicts:

committed 118,314 crimes in one year
95% committed illegal activity in one year
90% relied on criminal activity for income
1 out of every 413 crimes committed resulted in arrest

Temple University School of Medicine 1980/Baltimore

243 heroin addicts committed almost one-half million crimes over 11 years; about one crime every other day for 11 years.

UCR

Arrests for drug violations increased 9% from 1980 to 1981. During the same timeframe, violent crime (murder, forcible rape, aggravated assault) rose 1%. Property crime rate stable.

Update: Reported crime during first 6 months of 1982 compared to first 6 months of 1981 was 5% lower. This is the first 6 month decrease in U.S. since 1978.

Rand Study 1982/California

A state prison population surveyed over 6 years shows:

Inmates who were heroin addicts committed on average per year:

34 robberies 6 burglaries 25 thefts

Inmates who were not heroin addicts committed on average per year:

2 robberies 3 burglaries 8 thefts

Appendix VIII

Suicides Alaska 1983-1984
Drugs Found at Autopsy
N=103

Drug	Count	Percent
Acetaminophen, Chlordiazepoxide, Doxepin, Nordiazepam, Nordoxepin	1	0.97
Acetaminophen, Codeine, Diazepam	1	0.97
Alcohol	50	48.54
Alcohol, Amitriptyline, Nortriptyline	1	0.97
Alcohol, Benzoylecgonine, Cocaine	1	0.97
Alcohol, Cannabinoids	8	7.77
Alcohol, Cannabinoids, Cocaine	1	0.97
Alcohol, Cannabinoids, Propanolol	1	0.97
Alcohol, Carbon monoxide	1	0.97
Alcohol, Cocaine	3	2.91
Alcohol, Cocaine, Methadone	1	0.97
Alcohol, Codeine, Morphine, Salicylate, Tylenol, etc	1	0.97
Alcohol, Diazepam, Nordiazepam	1	0.97
Alcohol, Diphenhydramine	1	0.97
Alcohol, Phenobarbitol	1	0.97
Amoxapine	1	0.97
Amphetamine, Methamphetamine	1	0.97
Barbituate	1	0.97
Benzodiazepine	1	0.97
Benzodiazepine, Cannabinoids	1	0.97
Benzoylecgonine, Cocaine	2	1.94
Cannabinoids	4	3.88
Cannabinoids, Cocaine	1	0.97
Cannabinoids, Cocaine, Ephedrine, Phenylpropanolamine	1	0.97
Carbon monoxide	5	4.85
Carbon monoxide, Phenylpropanolamine	1	0.97
Cocaine	1	0.97
Codiene, Opiates	1	0.97
Desipramine	1	0.97
Diazepam	1	0.97
Dilantin, Phenobarbital	1	0.97
Diphenhydramine	1	0.97
Insulin	1	0.97
Phenothiazine, Salicylate, Thorazine	1	0.97
Phenothiazines	1	0.97
Tegretol (carbamazepine)	1	0.97
unspecified	1	0.97
Total	103	100.00

DR. ROBERT C. GILKESON a nationally known neuropsychiatrist and brain researcher, told a meeting of Hawaii Citizens Against Crime, in Hilo, HI, that adolescents are receiving "myths and misconceptions" rather than truth about crippling effects of marijuana on brain cells.....Founder of the Psychoneurologic Research Center, in Los Angeles, told a citizens forum that studies of youngsters from kindergarten through high school showed that "previously well adjusted and intellectually endowed children were inexplicably falling apart academically and emotionally at 9th, 10th and 11th grade levels with the only new factor - that of 'occasional' marijuana use." In an accompanying news conference, reported by Hawaii Tribune-Herald, Gilkeson said adolescents using marijuana undergo personality changes and show characteristics similar to the learning disabled.

The results are manifested in a variety of ways, Gilkeson told newsmen. Marijuana use leads to an inability to visualize the future, resulting in a lack of recognition of good and bad, and a lack of understanding of self-image. This has resulted in a rise in violent and non-violent juvenile crime, truancy and school dropouts, teenage runaways and vagrancy, teenage prostitution/pregnancy, venereal disease, adolescent depression/suicide, polysubstance abuse and adolescent psychiatric referrals. Because of a decrease in brain wave activities, Gilkeson said, "Marijuana makes great people average and average people dumb." *MCADY's 1987 Conference Information*

NIDA Study Shows: TEEN DRUG USE LIKELY IF OLDER FAMILY MEMBERS USE

If parents and older siblings use any drugs, including cigarettes and alcohol, teens aged 14 to 17 show a strong tendency to experiment with a variety of these substances, according to a study by NIDA statistician Joseph Gfroerer of the 1979 and 1892 National Surveys of Drug Abuse, the last of these periodic surveys to sample more than one family member.

Marijuana use by older family members had an especially strong influence on teen use of the drug, Gfroerer reports in the *American Journal of Drug and Alcohol Abuse, Vol. 13 (1&2).* Teenagers in households where an older family member had used marijuana were twice as likely to use the drug as teenagers who lived with older people who didn't use the substance. When older brothers or sisters aged 18 to 25 were current marijuana users, for example, more than 65 percent of their teenage siblings had also tried the drug. Among mothers who had ever used marijuana, more than three-quarters of their teenage children had also experimented with the drug.

Gfroerer found that even if a teenager smoked and drank, he or she was more likely to have tried marijuana if an older family member had.

"Adult marijuana use may have major implications for teenage behavior, given the increasing proportions of young children whose parents have used the drug," Gfroerer says. In the surveys, parents of children under 12 were three times as likely to be marijuana users than parents who had teenagers. (Among parents of teens, 17 percent of fathers and 14 percent of mothers had used marijuana; among parents of younger children, 54 percent of fathers and 42 percent of mothers had tried the drug.)

As these younger children enter the teen years, they may be likely to try marijuana, given the teenage tendency to experiment with drugs if parents are users, Gfroerer notes. But, he adds, prevention efforts can counter this influence and diminish drug use.

Family use of drugs besides marijuana also influenced teenage behavior, but youths often experimented with substances other than those used by older relatives. More than half the teenagers of cigarette-smoking fathers were current drinkers and nearly 60 percent had tried marijuana, rates that were double those for teenagers of non-smoking fathers.

Similarly, if mothers smoked or drank, teenage cocaine use was more likely. Teens of mothers who smoked were four times more likely to have tried cocaine as teenagers of mothers who didn't smoke; teens of drinking mothers were three times as likely to use the drug.

These findings reflect a "social learning," in which teens practice "general imitation of behavior that adults define as appropriate," according to Gfroerer. If adult actions show acceptance of drugs, teens tend to follow that example, even though they may experiment with different substances.

Gfroerer also finds some evidence for the view that difficult family circumstances may induce teens to try drugs. Teenagers with divorced or separated mothers were more likely than others to use drugs. Again, however, these youths were more likely to try drugs if older family members had. -- NIDA NOTES, Fall Issue

AMSAODD URGES RECOGNITION OF MARIJUANA DANGERS

Calling attention to "the increasing potency of available supplies," the American Medical Society on Alcoholism and Other Drug Dependencies (AMSAODD) is recommending renewed efforts to educate the public and health care professionals on marijuana's mood-altering capabilities and its "adverse effects on various organ systems; on perception, behavior and functioning; and on fetal development."

In a statement adopted by its Board of Directors, AMSAODD (a nationwide organization of more than 2,500 physicians involved in the prevention and treatment of drug dependencies) urged the following steps be taken in education, treatment, and possible medical use.

EDUCATION

- for students, from early elementary school through college—provision of scientifically accurate information on the dangers and harmful effects of marijuana, and on the disease of marijuana dependence.
- for health and human service professionals—required instruction as part of their training curriculum.
- for alcoholics and those dependent on other drugs—warnings on the need for abstinence from marijuana, and on marijuana's role in precipitating relapse.

TREATMENT

- should be offered to persons dependent on marijuana who are convicted of a drug-related offense, including driving under the influence of alcohol and/or other drugs.

MEDICAL USE

- any approved medical use of marijuana or delta-9-tetrahydrocannabinol (its chief active ingredient), for treating glaucoma or emesis (vomiting) associated with chemotherapy should be under direct supervision of a physician licensed to prescribe this drug.

— *AMSAODD News Release*, June 12, 1987.

MARIJUANA DISRUPTS ESSENTIAL HORMONE IN WOMEN

Endocrine studies in experimental animals have consistently shown that the female reproductive system is very sensitive to the effects of marijuana. Now, the first controlled study in women on the acute effects of marijuana on the hormones essential for normal reproductive functioning has shown that smoking a single marijuana cigarette after ovulation decreases the plasma level of luteinizing hormone (LH).

The hormone is essential for maintaining a functional corpus luteum following fertilization; without adequate levels of LH, implantation of conceptus in the uterus can not take place.

NIDA Grantees, Drs. Jack Mendelson and Nancy Mello, and coworkers at the Harvard Medical School—McLean Hospital Alcohol and Drug Abuse Research Center, determined the effect of smoking marijuana on the plasma levels of LH, estradiol, and progesterone during both the follicular (pre-ovulatory) and luteal (post-ovulatory) phases of the menstrual cycle in 16 women (average age 25 years). The hormones were measured during a 3-hour period following smoking.

All the subjects had normal physical examinations, normal physical and mental health histories, and normal menstrual cycles. None had used prescription drugs, including birth control pills, during the year before the study, and none had a history of alcohol and other drug abuse.

Using a double-blind experimental design, each woman served as her own control, smoking either one marijuana cigarette or a marijuana placebo.

The single dose of marijuana during the luteal phase of the menstrual cycle suppressed LH levels by 30%, suggesting the possibility that chronic use of the drug may adversely affect reproductive functioning in women. Smoking marijuana during the follicular phase produced no significant effect on LH. During the short 3-hour experimental period, no effects on estradiol or progesterone were noted in either phase of the menstrual cycle.

The finding of the Harvard researchers was recently published in the *Journal of Pharmacology and Experimental Therapeutics*, "Marijuana Smoking Suppresses Luteinizing Hormone in Women."

—*ADAMHA News*, Vol. XIII, No. 3, March 1987.

MARIJUANA SUPPRESSES IMMUNE SYSTEM

A University of South Florida College of Medicine study verifies earlier research which links marijuana to suppression of the immune system.

Researchers took blood samples from healthy donors who had no history of marijuana use and added tetrahydrocannabinol (THC), the psychoactive ingredient in marijuana.

Examination of the specimens show THC suppresses the natural killer cells which are the first line of

(continued on page 14)

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

P.O. Box Y, State Capitol
Juneau, Alaska 99811-3100
Mail Stop 3100
(907) 465-3991

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December 3, 1986

MEMORANDUM

TO:

ATTN:

FROM: Penelope Weyhrauch
Legislative Analyst

RE: Recriminalization of Marijuana
Research Request 87.047

You requested a discussion of federal and State law criminalizing marijuana, and were interested in which states had amended their constitutions to conform with federal drug law. You also asked for information on recriminalizing marijuana in Alaska by constitutional amendment and/or legislation.

Federal Law

The Comprehensive Drug Abuse Prevention and Treatment (CDAPT) Act of 1970 (also known as the Controlled Substances Act) criminalizes the possession and distribution of marijuana. Under the act, possession of any amount of marijuana is a criminal offense. Both a fine and incarceration can be imposed on a person possessing marijuana, subject to a court's discretion. Any offense other than simple possession (first offense) is a felony. Attachment A contains a copy of applicable sections of the CDAPT Act.

The Anti Drug Abuse Act of 1986 set mandatory sentences for simple possession of marijuana and for possession with intent to distribute. Penalties are specified in Table 1. The act also specified penalties for distributing drugs to juveniles and pregnant women, distributing drugs near schools and appropriated funds for states to improve narcotics control.

Federal drug laws may be enforced in any state by federal agents. State law enforcement officers may also enforce federal drug laws. According to Gretchen Derr, Special Assistant to the Alaska Commissioner of Public Safety, Alaska State Police usually will not pursue a federal offense until the U.S. Attorney's office authorizes such action.

TABLE 1
FEDERAL PENALTIES FOR THE POSSESSION OF MARIJUANA

	First Offense		Second Offense	
	Fine (000)	Incarceration (Years)	Fine (000)	Incarceration (Years)
Simple Possession	$5	1 or probation	$1 to $5*	1*
Possession with Intent to Distribute				
Quantity (kilograms):				
0 to 50				
individual	250	5	500	10
corporation	1,000		2,000	
50 to 99				
individual	1,000	20	2,000	30
corporation	5,000		10,000	
100 to 999				
individual	2,000	5 to 40*	4,000	10 to life*
corporation	5,000		10,000	
1000 and up				
individual	5,000	10 to life*	8,000	20 to life*
corporation	10,000		20,000	
Cultivation:				
< 100 plants & 0-50 kg	250	5	500	10
> 100 plants & 0-99 kilograms	1,000	20	2,000	30

NOTES:

*--Mandatory Sentencing.

Simple possession by quantity is not defined in federal law. A first offender of simple possession will often be put on probation, with the record expunged after the completion of probation. If the offense is repeated, courts then apply either the first or second offense penalties.

Possession with intent to distribute can be inferred by the quantity of marijuana in possession, even if a sale has not occurred. Distribution of a small amount of marijuana for no renumeration is often treated as simple possession.

Cultivation of more than 100 plants with a weight greater than 99 kilograms, carries the same penalties, according to the quantity, as possession with intent to distribute.

"Corporation" includes any organization, asssociation, or group of drug traffickers.

Prepared by the House Research Agency, December 1986.

According to Jim Walsh, Assistant Attorney with the U.S. Department of Justice Controlled Substance Unit, the federal government has no interest in prosecuting for possession of small amounts of marijuana. Federal enforcement agencies are interested in the smuggling and trafficking of large amounts and rarely pursue or prosecute small-scale possessors.

State Law

Although most states have traditionally followed the federal lead regarding drug legislation, a state is not in violation of federal law because its prohibitions on the possession and distribution of marijuana differ from federal law. Adoption of federal provisions in this area is not mandatory, and states may develop their own policies regarding marijuana within their state boundaries. No state has amended its constitution in order to conform with federal drug legislation. The Uniform Controlled Substance Act of 1970--model legislation drafted by the National Conference of Commissioners on Uniform State laws--was designed to make state laws more compatible with federal law. Between 35 and 40 states have adopted the Uniform Act.

State marijuana laws are listed on Table 2. As shown on this table, eleven states--Alaska, California, Colorado, Maine, Minnesota, Mississippi, Nebraska, New York, North Carolina, Ohio, and Oregon--have decriminalized marijuana. Decriminalization means that the possession of marijuana is considered a civil offense or a criminal infraction and is not punishable by incarceration. In states which have decriminalized marijuana, a citation and a small fine are the usual penalties for violations. None of the states that have decriminalized marijuana have recriminalized it.

Twenty-eight states allow for a conditional discharge for first-time, simple possession violators; defendants are released, generally without an adjudication of guilt, on condition that they satisfy certain requirements, such as participation in a drug education program. In Massachusetts, a first offense possessor of any amount of marijuana is subject only to probation.

State laws relating to subsequent violation of simple possession provisions and for cultivation and selling marijuana vary greatly. In a majority of states, cultivation is punished as heavily as the sale of marijuana.

TABLE 2

STATE MARIJUANA LAWS

PREPARED BY THE NATIONAL ORGANIZATION FOR THE REFORM OF MARIJUANA LAWS (NORML)
SPRING 1985

State	Amount[1]	Possession	Cultivation	Sale
Federal Law	any amount	1 yr. & $5,000*	5 yrs. & $15,000	5 yrs. & $15,000
Alabama†	up to 2.2 lbs. for personal use	1 yr. & $1,000	2-15 yrs. & $25,000	2-15 yrs. & $25,000
	up to 2.2 lbs. not for personal use	2-15 yrs. & $25,000	2-15 yrs. & $25,000	2-15 yrs. & $25,000
	[illegible]	[illegible]	[illegible]	[illegible]
	[illegible]	[illegible]	[illegible]	[illegible]
	[illegible]	[illegible]	[illegible]	[illegible]
Alaska	any amount for personal home use	Legal	Legal	N.A.
	any amount "not in a public place" for personal use	$0-$100	$0-$100	N.A.
	[illegible]	[illegible]	[illegible]	[illegible]
	[illegible]	[illegible]	N.A.	[illegible]
Arizona†	any amount not for sale	1-5 yrs. & $0-$1,000	1-5 yrs. & $0-$1,000	N.A.
	[illegible]	[illegible]	[illegible]	[illegible]
Arkansas†	up to 1 oz. for personal use	1 yr. & $1,000	2-10 yrs. & $10,000	2-10 yrs. & $10,000
	[illegible]	[illegible]	[illegible]	[illegible]
	[illegible]	[illegible]	[illegible]	[illegible]
	[illegible]	[illegible]	[illegible]	[illegible]
California†	up to 1 oz.	$0-$100	6 mo., 2 or 3 yrs.	2-4, or 4 yrs.
	over 1 oz.	0-6 mos. $500	16 mo., 2 or 3 yrs.	2-4, or 4 yrs.
Colorado†	0-1 oz. not in public	$0-$100	2-4 yrs.	2-4 yrs.
	1 oz. in public	0-15 days $0-$100	2-4 yrs.	2-4 yrs.
	[illegible]	0-2 yrs. $0-$500	2-4 yrs.	2-4 yrs.
	[illegible]	2 yrs.	2-4 yrs.	2-4 yrs.
[illegible]	[illegible]	[illegible]	0-7 yrs. & $1,000	0-7 yrs. & $1,000
	[illegible]	[illegible]	0-7 yrs. & $1,000	0-7 yrs. & $1,000
	[illegible]	[illegible]	[illegible]	1-20 yrs.
Delaware	[illegible]	2 mos.* & $400	up to 5 yrs. & $10,000	0-10 yrs. & $10,000
	[illegible]	[illegible]	[illegible]	[illegible]
	[illegible]	[illegible]	[illegible]	[illegible]
	[illegible]	[illegible]	[illegible]	[illegible]
Florida†	up to 20 gms.	1 yr.* & $1,000	0-5 yrs. & $5,000	0-5 yrs. & $5,000
	20 gms. to 25 lbs.	0-5 yrs. & $5,000	0-5 yrs. & $5,000	0-30 yrs. & $5,000
	[illegible]	[illegible]	[illegible]	[illegible]
	[illegible]	[illegible]	[illegible]	[illegible]
	[illegible]	[illegible]	[illegible]	[illegible]
Georgia†	[illegible]	[illegible]	[illegible]	[illegible]
	[illegible]	[illegible]	[illegible]	[illegible]
	[illegible]	[illegible]	[illegible]	[illegible]
	[illegible]	[illegible]	[illegible]	[illegible]
Hawaii	[illegible]	[illegible]	[illegible]	[illegible]
	[illegible]	[illegible]	[illegible]	[illegible]
	[illegible]	[illegible]	[illegible]	[illegible]
	[illegible]	[illegible]	[illegible]	[illegible]
Idaho	[illegible]	[illegible]	[illegible]	[illegible]
	[illegible]	[illegible]	[illegible]	[illegible]
	[illegible]	[illegible]	[illegible]	[illegible]
Illinois	[illegible]	[illegible]	[illegible]	[illegible]
	[illegible]	[illegible]	[illegible]	[illegible]
	[illegible]	[illegible]	[illegible]	[illegible]

State	Amount[1]	Possession	Cultivation	Sale
Missouri	[illegible]	1 yr. & $1,000	0-5 yrs. & $1,000	[illegible]
	over 35 gms.	0-5 yrs. & $1,000	0-5 yrs. & $1,000	[illegible]
Montana†	up to 60 gms.	[illegible] & $400	1 yr. life & $50,000	[illegible]
	over 60 gms.	[illegible]	[illegible]	[illegible]
Nebraska	up to 1 oz.	$100 & drug ed.	[illegible]	[illegible]
	[illegible]	[illegible]	[illegible]	[illegible]
	[illegible]	[illegible]	[illegible]	[illegible]
Nevada†	[illegible]	[illegible]	[illegible]	[illegible]
	[illegible]	probation-5 yrs. & $5,000	1-15 yrs. & $5,000	1-15 yrs. & $5,000
	[illegible]	1-20 yrs. & $25,000	1-20 yrs. & $25,000	1-20 yrs. & $25,000
	[illegible]	1-20 yrs. & $50,000	1-20 yrs. & $50,000	1-20 yrs. & $50,000
	over 10 lbs.	15 yrs. life & $200,000	15 yrs. life & $200,000	15 yrs. life & $200,000
New Hampshire†	[illegible]	1 yr. & $1,000	[illegible]	1-15 yrs. & $2,000
	over 1 oz.	0-7 yrs. & $2,000	0-15 yrs. & $2,000	0-15 yrs. & $2,000
New Jersey†	[illegible]	[illegible]* & $500 1 yr. driving suspension	[illegible]	[illegible]
	[illegible]	[illegible]	[illegible]	[illegible]
New Mexico†	[illegible]	[illegible]	[illegible]	[illegible]
	[illegible]	1 yr. & $1,000	[illegible]	[illegible]
	[illegible]	[illegible]	[illegible]	[illegible]
	[illegible]	[illegible]	[illegible]	[illegible]
New York†	up to 25 gms. in private	$0-$100	0-1 yr. & $1,000	0-1 yr. & $1,000
	25 gms.-2 oz.	0-3 mos. & $500	0-1 yr. & $1,000	0-4 yrs.
	[illegible]	0-1 yr. & $1,000	0-1 yr. & $1,000	0-4 yrs.
	1 lb.	0-1 yr. & $1,000	0-1 yr. & $10,000	0-7 yrs.
	8 oz.-1 lb.	0-4 yrs.	0-4 yrs.	0-7 yrs.
	1-10 lbs.	0-7 yrs.	0-7 yrs.	0-15 yrs.
	over 10 lbs.	0-15 yrs.	0-15 yrs.	0-15 yrs.
North Carolina†	up to 1 oz.	$0-$100	[illegible]	[illegible]
	[illegible]	[illegible]	[illegible]	[illegible]
North Dakota	[illegible]	[illegible]* & $500	[illegible]	[illegible]
	[illegible]	1 yr. & $1,000	[illegible]	[illegible]
	[illegible]	[illegible]	[illegible]	[illegible]
Ohio†	up to 100 gms.	$0-$100*	[illegible]	[illegible]
	[illegible]	[illegible]	[illegible]	[illegible]
	[illegible]	[illegible]	[illegible]	[illegible]
	[illegible]	[illegible]	[illegible]	[illegible]
Oklahoma†	[illegible]	[illegible]	[illegible]	[illegible]
Oregon†	up to 1 oz.	$0-$100	[illegible]	[illegible]
	[illegible]	[illegible]	[illegible]	[illegible]
Pennsylvania	[illegible]	[illegible]	[illegible]	[illegible]
	[illegible]	[illegible]	[illegible]	[illegible]
Rhode Island	[illegible]	[illegible]	[illegible]	[illegible]
South Carolina	[illegible]	[illegible]	[illegible]	[illegible]
South Dakota	[illegible]	[illegible]	[illegible]	[illegible]
	[illegible]	[illegible]	[illegible]	[illegible]
	[illegible]	[illegible]	[illegible]	[illegible]
Tennessee†	[illegible]	[illegible]	[illegible]	[illegible]
	[illegible]	[illegible]	[illegible]	[illegible]
	[illegible]	[illegible]	[illegible]	[illegible]

STATE MARIJUANA LAW

	Amount	Possession	Cultivation	Sale
Indiana	[illegible]	0.1 yr * & $5,000	0.1 yr & $5,000	0.1 yr & $5,000
	[illegible]	0.2 yrs & $10,000	0.2 yrs & $10,000	0.2 yrs & $10,000
Iowa*	[illegible]	0 [illegible] * & $2,500	0.5 yrs & $2,500	0.5 yrs & $10,000
Kansas	[illegible]	0.1 yr * & $2,500	0.1 yr & $2,500	1.10 yrs & $10,000
Kentucky	[illegible]	0 (30 days* & $250	0 (30 days & $250	0.1 yr & $500
	[illegible]	0.1 yr & $500	see footnote [illegible]	1.5 yrs & $5,000
	[illegible]	0.1 yr & $500	1.5 yrs & $5,000*	5.10 yrs & $10,000
Louisiana*	up to 100 lbs	0.6 mos * & $500	0.10 yrs & $15,000	0.10 yrs & $15,000
	100.2 000 lbs	5.15 yrs & $50,000	5.15 yrs & $50,000	5.15 yrs & $50,000
	2,000 pounds lbs	15.25 yrs & $200,000	15.25 yrs & $200,000	15.25 yrs & $200,000
	[illegible] 100,000 lbs	25.45 yrs & $500,000	25.45 yrs & $500,000	25.45 yrs & $500,000
Maine*	any amount for personal use	$0-$200	$0-$200	[illegible]
[illegible]	up to 1.5 oz	$0-$500	$0-$200	[illegible]
	[illegible] 2 lbs	0.1 yr & $2,000	0.1 yr & $5,000	[illegible]
	[illegible] lbs	0.5 yrs & $2,500	0.5 yrs & $2,500	[illegible]
	[illegible] 2,000 lbs	0.10 yrs & $20,000	0.10 yrs & $20,000	[illegible]
Maryland	[illegible] amount for personal use	0.1 yr * & $1,000	0.1 yr & $1,000	[illegible]
	[illegible] amount	0.5 yrs & $1,000	[illegible]	[illegible]
	amount over 100 lbs or more	0.25 yrs & $40,000	[illegible]	0.25 yrs & $40,000
Massachusetts	[illegible]	probation*	0.2 yrs & $4,000	0.2 yrs & $5,000
Michigan*	[illegible]	0.1 yr * & $1,000	0.4 yrs & $2,000	[illegible]
	[illegible]	0 (90 days & $100	[illegible]	[illegible]
Minnesota*	up to 1.5 oz	$0-$100*	0.1 yrs & $5,000	[illegible]
	[illegible]	0.1 yrs & $3,000	0.5 yrs & $5,000	[illegible]
Mississippi	up to 1 oz, not in [illegible]	$100-$250	0.1 yrs & $1,000	[illegible]
	[illegible]	0 [illegible] & $1,000	[illegible]	[illegible]
	[illegible]	0.2 yrs & $1,000	0.20 yrs & $40,000	[illegible]
	[illegible]	0.20 [illegible] & $1,000	0.40 yrs & $1,000,000	[illegible]
Missouri*	[illegible]	0.1 yr * & $1,000	0.7 yrs & $5,000	[illegible]
	[illegible]	0 (90 days & $500	[illegible]	[illegible]
Montana*	[illegible]	0.1 yr * & $1,000	0.10 yrs & $20,000	0.20 yrs & $20,000
Nebraska	[illegible]	0.1 yr * & $1,000	0.5 yrs & $5,000	[illegible]
Nevada	[illegible]	0.1 yr * & $2,000	0.5 yrs & $5,000	[illegible]
New Hampshire*	[illegible]	0 (90 days & $500	0.5 yrs & $10,000	0.5 yrs & $10,000
	[illegible]	0.5 yrs & $10,000	0.5 yrs & $10,000	0.5 yrs & $10,000
New Mexico	[illegible]	[illegible]*	0.5 yrs & $15,000	0.5 yrs & $15,000
New York*	[illegible]	[illegible] [illegible] & $500	0.7 yrs & $15,000	0.7 yrs & $15,000
North Carolina*	[illegible]	[illegible] * & $500	0.2 yrs & $5,000	0.2 yrs & $5,000
Wyoming	[illegible]	[illegible] * & $1,000	[illegible] & $5,000	[illegible] & $50,000
Alaska	[illegible]	[illegible] * & $500	0.20 yrs & $20,000	0.20 yrs & $20,000
American Samoa	[illegible]	0.1 yr * & $500	0.20 yrs & $20,000	0.20 yrs & $20,000
District of Columbia	[illegible] amount	0.1 yr * & $1,000	0.1 yr & $5,000	0.1 yr & $5,000
Guam	[illegible]	0 [illegible] * & $500	0.5 yrs & $5,000	0.5 yrs & $5,000
Puerto Rico	[illegible]	0.5 yrs * & $5,000	0.20 yrs & $20,000	0.20 yrs & $20,000
Trust Territory of Micronesia	up to 1 oz	$0-$50	[illegible]	[illegible]
	[illegible] 2.2 lbs	[illegible]	0.5 yrs & $5,000	[illegible]
	[illegible] 2.2 lbs	0.1 yr & $1,000	0.5 yrs & $5,000	0.5 yrs & $5,000
Virgin Islands	[illegible] amount	[illegible]	0.5 yrs & $15,000	0.5 yrs & $15,000

Note: This chart contains the penalties for first offense possession, sale, and cultivation of marijuana. The 11 states which have decriminalized possession are shaded and indicated as follows: Alaska.

Many states have increased penalties for subsequent offenses. A number of states also have separate penalties for offenses not included in this summary chart, including possession with intent to distribute.

The penalties set out above are the maximum authorized by law. When the penalty is a prison term and a fine, both can be imposed unless the chart specifically indicates otherwise. For example, the penalty for possession in Alabama can be up to 1 year in prison and/or a fine of up to $1,000.

* Conditional discharge is authorized for first offense possession. This permits judges to release defendants, generally without an adjudication of guilt, on condition that they satisfy certain requirements, such as participation in a drug education program. If the conditions of the program are satisfied, the criminal case will be dismissed.

* These states have enacted laws allowing for the medical use of marijuana by persons being treated for glaucoma and cancer. Marijuana helps combat the nausea associated with chemotherapy treatment.

* Many states have different penalties for possession or sale of different amounts of marijuana. Some of these statutes distinguish by ounces or pounds, and others by gram or kilograms. For comparative purposes:

1 oz = 28.35 gms 1 lb = 453.6 gms 2.2 lbs = 1 kilogram

* In 1975, the Supreme Court of Alaska held that the constitutional Right of Privacy protects the possession of marijuana for personal use in the home by adults.

* Cultivation of under 25 plants is punishable as possession. Cultivation of 25 or more plants is punishable by 1-5 yrs. and a $5000 fine.

* There is a rebuttable presumption that possession of more than 1.5 ozs. is with intent to distribute, which has the same penalty as sale.

Alaska Law

In Ravin v. State, the Supreme Court of Alaska held that the possession of marijuana for personal use in the home by adults is protected by the right to privacy clause in the Alaska Constitution.[1] Decriminalization of marijuana, however, applies only to the possession of marijuana in the home, as the Ravin case states. Possession outside the home in any amount is a criminal violation.

Under Alaska law, penalties for the possession of marijuana increase as the quantity involved increases. It is a criminal violation to possess up to one ounce of marijuana in a public area (AS 11.71.070). It is a class B misdemeanor to possess one ounce or more in a public area or to possess more than four ounces of marijuana anywhere (AS 11.71.060). According to Gayle Horetski, Assistant Attorney General with the Criminal Division of the Alaska Attorney General's office, AS 11.71.060 could apply to the possession of more than four ounces in a private home. Alaska statutes prohibiting the possession and distribution of marijuana are Attachment B of this memorandum.

Recriminalizing Marijuana

Recriminalization of marijuana in Alaska could occur by amending the Alaska Constitution or by repealing existing legislation and enacting new legislation. If the Alaska Constitution were amended to exempt the possession of marijuana from the right to privacy clause, State statutes would still have to be amended in order to criminalize possession of small amounts of marijuana. If State statutes were amended to criminalize marijuana and the constitution were not amended, the amended statutes would probably be challenged under the Ravin decision.

Amending the Alaska Constitution requires a two-thirds vote of the legislature and a majority vote by the people [Article 13, Section 1 of the constitution (Attachment C)]. Ms. Horetski suggests that langauge to exempt the possession of marijuana from the constitutional right tc privacy might be: "Rights embodied in this section do not extend to the possession of controlled substances (or marijuana)." In 1985, a Senate resolution was proposed to exempt the possession of controlled substances from the constitutional right to privacy (Attachment D).

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[1] The Ravin decision is unique among states. Of the nine states which have right to privacy clauses in their constitutions, California and Hawaii have also addressed the clause in regard to possession of marijuana. In both states, the courts found the claim to be untenable.

Amending State statutes would involve redesigning the structure of the current drug statutes. This would include the repeal of AS 11.71.070, amending statutes which specify penalties for possession of marijuana, and cross referencing statutes to amend all statutes that relate to marijuana. According to Ms. Horetski, if the constitution were not amended to exclude marijuana from the right to privacy clause, statutes criminalizing marijuana could be struck down at the trial court level and the case would probably be appealed to the Supreme Court. According to a fiscal note prepared by the Attorney General's office, convincing the trial court to reverse the Ravin ruling would require that the prosecutor present scientific evidence that the effects of marijuana use are so injurious to a person's mental and physical health as to justify the legislative decision to prohibit the use of marijuana by anyone at any time.

On appeal, the Supreme Court would decide whether the State has proved that there is a "compelling State interest" in prohibiting the use of marijuana which outweighs an individual's right to privacy under the State Constitution. The fiscal note also stated that to prove a compelling State interest, the State must show that the legislature's consideration of the recriminalization of marijuana included extensive public hearings, debate on the merits of recriminalization and discussions of the most recent studies regarding the physical, emotional, and social effects of marijuana usage.

* * * *

I hope this information is helpful to you. Please contact us if you have any questions or if we can be of further assistance.

PW

Attachments

ATTACHMENT A

closure pursuant to subsection (a) of section 552 Code [5 USCS § 552(a)], by reason of subsection § 552(b)(4)] shall be considered confidential and except that such information may be disclosed to the United States concerned with carrying out this relevant in any proceeding for the enforcement of

oses of this section, section 401(d), and section 1(d), 842(a)(9)]

" has the meaning given such term in section 951(a)(1)].

thidine" means 1-(1-phenylcyclohexyl) piperidine, late precursor, homolog, analog, or derivative (or phenylcyclohexyl) piperidine that is included in II of this title.

e" includes its salts and acyl derivatives.

91-513, Title II, Part C, § 310, as added Nov. 10, II, § 202(a), 92 Stat. 3774.)

ITARY LAWS AND DIRECTIVES

In this section, is Title II of Act Oct. 27, 1970, 1242, which appears generally as 21 USCS classification of such Title, consult USCS Tables

In this section, is Title III of Act Oct. 27, 1970, 1285, which appears generally as 21 USCS classification of such Title, consult USCS Tables

dule B", referred to in this section, are contained

ON:

of this section, see Act Nov. 10, 1978, P. L. 95-92 Stat. 3776, which appears as an Other section

Nov. 10, 1978; time to submit piperidine report; Act Nov. 10, 1978, P. L. 95-633, Title II, provided:

uded under paragraph (2), the amendments made ng this section and amending 21 USCS §§ 841-ect on the date of the enactment of this Act 978]

quired to submit a report under section 310(a)(1) Substances Act subsec. (a)(1) of this section ution, sale, or importation of piperidine during

the 90 days after the date of the enactment of this Act [enacted Nov. 10, 1978] may submit such report any time up to 97 days after such date of enactment.

"(3) Until otherwise provided by the Attorney General by regulation, the information required to be reported by a person under section 310(a)(1) of the Controlled Substances Act (as added by section 202(a)(2) of this title) subsec. (a)(1) of this section with respect to the person's distribution, sale, or importation of piperidine shall—

"(A) be the information described in subparagraphs (A) and (B) of such section, and

"(B) except as provided in paragraph (2) of this subsection, be reported not later than seven days after the date of such distribution, sale, or importation.".

Regulations for piperidine reporting. Act Nov. 10, 1978, P. L. 95-633, Title II, § 203(b), 92 Stat. 3777, required the Attorney General to publish proposed interim regulations for piperidine reporting under subsec. (a) of this section not later than 30 days after enactment on Nov. 10, 1978, and final interim regulations not later than 75 days after enactment on Nov. 10, 1978, such final interim regulations to be effective on and after the 91st day after such enactment.

Report to President and Congress on effectiveness of 21 USCS §§ 801 et seq. Act Nov. 10, 1978, P. L. 95-633, Title II, § 203(e), 92 Stat. 3777, required the Attorney General to analyze and evaluate the impact and effectiveness of the amendments made by 21 USCS §§ 801 et seq. and report to the President and Congress not later than Mar. 1, 1980.

Repeal of this section. Act Sept. 26, 1980, P. L. 96-359, § 8(b), 94 Stat. 1194, deleted § 203(d) of Act Nov. 10, 1978, P. L. 95-633, 92 Stat. 3777, which would have repealed this section, effective Jan. 1, 1981.

OFFENSES AND PENALTIES

§ 841. Prohibited acts A

(a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties. Except as otherwise provided in section 405 [21 USCS § 845], any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or

(d)-(f) [Unchanged]

(g) Change of address. Every registrant under this title shall be required to report any change of professional or business address in such manner as the Attorney General shall by regulation require.

(As amended Oct. 12, 1984, P. L. 98-473, Title II, Ch V, Part B, §§ 514, 515, 98 Stat. 2074.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"Schedules II, III, IV, or V", referred to in this section are contained in 21 USCS § 812(c).

Amendments:

1984, Act Oct. 12, 1984, in subsec. (c)(1), substituted subpara. (A) for one which read: "with respect to any narcotic controlled substance in schedule II, III, IV, or V, to the prescribing or administering of such substance by a practitioner in the lawful course of his professional practice unless such substance was prescribed or administered in the course of maintenance treatment or detoxification treatment of an individual; or", and substituted subpara. (B) for one which read: "with respect to nonnarcotic controlled substances in schedule II, III, IV, or V, to any practitioner who dispenses such substances to his patients, unless the practitioner is regularly engaged in charging his patients, either separately or together with charges for other professional services, for substances so dispensed;", and added subsec. (g).

§ 841. Prohibited acts A

(a) [Unchanged]

(b) Penalties. Except as otherwise provided in section 405 or 405A [21 USCS § 845 or 845a], any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a controlled substance in schedule I or II which is a mixture or substance containing a detectable amount of a narcotic drug other than a narcotic drug consisting of—

(I) coca leaves;

(II) a compound, manufacture, salt, derivative, or preparation of coca leaves; or

(III) a substance chemically identical thereto;

(ii) a kilogram or more of any other controlled substance in schedule I or II which is a narcotic drug;

(iii) 500 grams or more of phencyclidine (PCP); or

(iv) 5 grams or more of lysergic acid diethylamide (LSD);

such person shall be sentenced to a term of imprisonment of not more than 20 years, a fine of not more than $250,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 40 years, a fine of not more than $500,000, or both[.]

(B) In the case of a controlled substance in schedule I or II, except as provided in subparagraphs (A) and (C), such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $125,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $250,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

(C) In the case of less than 50 kilograms of marihuana, 50 kilograms of [illegible] one kilogram of hashish oil or in the case of any controlled substance in schedule III, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $[illegible], or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of a State, the United

States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $100,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than $10,000, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this title or title III or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine of not more than $20,000, or both.

(4) Notwithstanding paragraph (1)(C) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in subsections (a) and (b) of section 404 [21 USCS § 844(a), (b)].

(5) Notwithstanding paragraph (1), any person who violates subsection (a) by cultivating a controlled substance on Federal property shall be fined not more than—

(A) $500,000 if such person is an individual; and

(B) $1,000,000 if such person is not an individual.

(6) [Repealed]

(c) Special parole term. A special parole term imposed under this section or section 405[,] 405A [21 USCS §§ 845, 845a] may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 405[,] 405A [21 USCS §§ 845, 845a] shall be in addition to, and not in lieu of, any other parole provided for by law.

(d) [Unchanged]

(As amended Oct. 12, 1984, P. L. 98-473, Title II, Ch. V, Subch. Part A, Subpart, §§ 502, 503(b)(1)(2), 98 Stat. 2068, 2070.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

The bracketed concluding period is inserted in subsec. (b)(1)(A) as the punctuation probably intended by Congress.

The bracketed commas are inserted in subsec. (c) of this section as the probable intent of Congress in the amendment made by Act Oct. 12, 1984, § 503(b)(2), as the 1984 Amendment note to this section.

Amendments:

1984. Act Oct. 12, 1984, in subsec. (b), in the introductory matter, inserted "or 405A", in para. (1), redesignated subparas. (A) and (B) as subparas. (B) and (C), added new subpara. (A), in subpara. (B) as so redesignated, substituted "except as provided in subparagraphs (A) and (C)", for "which is a narcotic drug", substituted "$125,000" for "$25,000", substituted "of a State, the United States, or a foreign country" for "of the United States", and substituted "$250,000" for "$50,000", in subpara. (C) as so redesignated, substituted

USCS § 843 for possession of devices capable of making ordinary drugs appear to be controlled substances. United States v Gesualdi (1981, CA2 NY) 660 F2d 59.

12. Appellate review

Several asserted but unsubstantiated errors in introducing communications obtained pursuant to federal wire interception statute do not require reversal of convictions under 21 USCS §§ 841, 843(b), 952. United States v Falcone (1974, CA3 NJ) 505 F2d 478, cert den 420 US 955, 43 L Ed 2d 432, 95 S Ct 1338, 95 S Ct 1339 and (disagreed with United States v Gigante (CA2 NY) 538 F2d 502 (disagreed with United States v Angelini (CA7 Ill) 565 F2d 469, cert den 435 US 923, 55 L Ed 2d 517, 98 S Ct 1487) and (disagreed with United States v Diana (CA4 SC) 605 F2d 1307, cert den 444 US 1102 62 L Ed 2d 787, 100 S Ct 1067))

Permissible inconsistent verdict rule cannot operate to sustain conviction on charge of using telephone to facilitate conspiracy to possess cocaine with intent to distribute where defendant is acquitted of underlying conspiracy and where indictment charges specific conspiracy in one count and in separate count charges facilitation. United States v Brooks (1983, CA11 Ga) 703 F2d 1273, reh den (CA11 Ga) 712 F2d 1419.

§ 844. Simple possession.

(a) Unlawful acts; penalties. It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this title or title III. Any person who violates this subsection shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than $5,000, or both, except that if he commits such offense after a prior conviction or convictions under this subsection have become final, he shall be sentenced to a term of imprisonment of not more than 2 years, a fine of not more than $10,000, or both.

(b) Conditional discharge and expunging of records for first offense. (1) If any person who has not previously been convicted of violating subsection (a) of this section, any other provision of this title or title III, or any other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, is found guilty of a violation of subsection (a) of this section after trial or upon a plea of guilty, the court may, without entering a judgment of guilty and with the consent of such person, defer further proceedings and place him on probation upon such reasonable conditions as it may require and for such period, not to exceed one year, as the court may prescribe. Upon violation of a condition of the probation, the court may enter an adjudication of guilt and proceed as otherwise provided. The court may, in its discretion, dismiss the proceedings against such person and discharge him from probation before the expiration of the maximum period prescribed for such person's probation. If during the period of his probation such person does not violate any of the conditions of the probation, then upon expiration of such period the court shall discharge such person and dismiss the proceedings against him. Discharge and dismissal under this subsection shall be without court adjudication of guilt, but a nonpublic record thereof shall be retained by the Department of Justice solely for the purpose of use by the courts in determin-

ing whether or not, in subsequent proceedings, such person qualifies under this subsection. Such discharge or dismissal shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime (including the penalties prescribed under this part [21 USCS §§ 841 et seq.] for second or subsequent convictions) or for any other purpose. Discharge and dismissal under this section may occur only once with respect to any person.

(2) Upon the dismissal of such person and discharge of the proceedings against him under paragraph (1) of this subsection, such person, if he was not over twenty-one years of age at the time of the offense, may apply to the court for an order to expunge from all official records (other than the nonpublic records to be retained by the Department of Justice under paragraph (1)) all recordation relating to his arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this section. If the court determines, after hearing, that such person was dismissed and the proceedings against him discharged and that he was not over twenty-one years of age at the time of the offense, it shall enter such order. The effect of such order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest or indictment or information. No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or trial in response to any inquiry made of him for any purpose.

(Oct. 27, 1970, P. L. 91-513, Title II, Part D, § 404, 84 Stat. 1264.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"This title", referred to in this section, is Title II of Act Oct. 27, 1970, P. L. 91-513, 84 Stat. 1242, which appears generally as 21 USCS §§ 801 et seq. For full classification of such Title, consult USCS Tables volumes.

"Title III", referred to in this section, is Title III of Act Oct. 27, 1970, P. L. 91-513, 84 Stat. 1285, which appears generally as 21 USCS §§ 851 et seq. For full classification of such Title, consult USCS Tables volumes.

Effective date of section:

Act Oct. 27, 1970, P. L. 91-513, Title II, Part G, § 704(a), 84 Stat. 1284, which appears as 21 USCS § 801 note, provided that this section is effective on the first day of the seventh calendar month that begins after the day immediately preceding enactment on Oct. 27, 1970.

CROSS REFERENCES

This section is referred to in 21 USCS §§ 841, 885.

RESEARCH GUIDE

Am Jur:

25 Am Jur 2d, Drugs, Narcotics, and Poisons §§ 37, 39, 45.

Forms:

15 Federal Procedural Forms L Ed, Statutes of Limitation, and Other Time Limits § 61:32.

Annotations:

Constitutionality of state legislation imposing criminal penalties for personal possession or use of marijuana. 96 ALR3d 225.

Texts:

Bailey and Rothblatt, Handling Narcotic and Drug Cases.

Law Review Articles:

McLaughlin, Cocaine: The History and Regulation of a Dangerous Drug. 58 Cornell L Rev 537.

INTERPRETIVE NOTES AND DECISIONS

1. Generally

There is no difference in requisite mental capacity ("knowingly or intentionally") for mere possession (21 USCS § 844(a)) or for possession with intent to distribute (21 USCS § 841(a)). United States v Trujillo (1974, CA10 NM) 497 F2d 408.

Key word in 21 USCS § 844(a) is "unless", possession is unlawful unless accused obtained possession of controlled substance pursuant to valid prescription, in order to establish defense set out in "unless" clause, it is not enough for defendant to show that original issuance of drug was pursuant to valid prescription he must also show that his possession was pursuant to prescription. United States v Forbes (1975) 169 App DC 217, 515 F2d 676.

21 USCS § 844(a), insofar as it prohibits possession of marijuana, does not violate individual's constitutional right of privacy. Frazier v State (1977, Alaska) 566 P2d 1023.

2. Applicability

Person who was in status of addict, i. e., unable to resist compulsive urge to take narcotic drugs, would lack requisite mens rea to be responsible criminally for simple non-trafficking possession of narcotic drug for his own use. United States v Lindsey (1971, DC Dist Col) 324 F Supp 55, aff'd in part without op and vacated in part without op on other grounds 159 App DC 57, 486 F2d 1317.

3. Possession, generally

Possession of confederate was possession of defendant. Willsman v United States (1923, CA8 Mo) 286 F 852.

Defendant using tools for cutting morphine was in possession of such morphine as adhered to tools. United States v Adelman (1939, CA2 NY) 107 F2d 497.

Possession for use does not differ, in legal effect, from possession for any other illegitimate purpose, such as for sale or distribution. Pitta v United States (1947, CA9 Cal) 164 F2d 601.

Defendant did not "have possession" of narcotic drugs within meaning of predecessor to 21 USCS § 844 when he had neither personal physical custody nor control over drugs, although he had engaged in common scheme or plan with third person and, in fact, who did have such personal custody or control of narcotic drugs. Hernandez v United States (1962, CA9 Cal) 300 F2d 174.

Cousin facilitator of sale, who knew that given principal possessed and traded in narcotics but who lacked working relationship with that prin-

cipal that enabled assurance of delivery, could not be held to have dominion and control over drug delivered and could not be said to have possession of it. United States v Jones (1962, CA2 NY) 308 F2d 26.

Constructive possession might be established by showing dominance and control over the narcotics, although actual control remained in someone else. United States v Rosario (1964, CA2 NY) 327 F2d 561.

Possession adequate to convict under 21 USCS § 844(a) may be constructive rather than actual, if jury reasonably believes driver knew marijuana was concealed in truck or if driver of car that served to direct truck knew truck contained marijuana, there is constructive possession of drug, but mere presence near truck or in yard of home to which truck was driven does not give rise to constructive profession. United States v Maspero (1974, CA5 Tex) 496 F2d 1354.

Joint purchasers and possessors of controlled substance who intend to share it between themselves as users can not be found guilty of felony possession with intent to distribute within meaning of 21 USCS § 841(a)(1), as distinguished from misdemeanor simple possession in violation of 21 USCS § 844. United States v Swiderski (1977, CA2 NY) 548 F2d 445.

4. —Quantity of drug possessed

"Usable quantity" doctrine is neither applicable nor appropriate for use in connection with prosecutions under 21 USCS § 844(a). United States v Jeffers (1975, CA7 Ind) 524 F2d 253.

Defendant can properly be convicted under 21 USCS § 844 for possession of .289 grams of marijuana despite his contention that statute should not be interpreted to permit convictions based upon so small amount of drug that it could not be used for its common purpose; under federal law, conviction will be upheld where any measureable amount of any controlled substance is found, and § 844 makes no distinction between relative harmfulness of drug involved, but prohibits possession of any controlled substance with no usability test recognized. United States v Harold (1979, CA5 Fla) 588 F2d 1136.

5. Probable cause for search and arrest

In prosecution for violating narcotic laws, remarks by [illegible] that "I don't sell bundles to a thousand [illegible] with agents' observation of two suspects in apartment believed to be addicts, sufficiently establishes probable cause for defendant's arrest. United States v Wilkes (1971, CA2 NY) 451 F2d 949.

Suspicious circumstances involving observation by narcotics agent of surreptitious transfer of package into airplane apparently owned by person suspected of narcotics traffic, failure of defendant pilot to answer truthfully agent's questions about his employment, expiration of medical certificate for aviation, license which does not permit defendant to pilot type of plane he is piloting, and fear of agent that pilot or his companion may be armed, permit detention of airplane at gunpoint by narcotics agent prior to actual discovery of contraband and later arrest of defendant; search is reasonable and made with probable cause such that no constitutional guarantee of Fourth Amendment is violated. United States v Richards (1974, CA9 Cal) 500 F2d 1025, cert den 420 US 924, 43 L Ed 2d 393, 95 S Ct 1118.

Evidence of "detail corroboration" in search warrant application which is limited to affiant's verification that house where informant personally observed marijuana belonged to defendant, without more, lacks probative value. United States v Schmidt (1981, CA8 Minn) 662 F2d 498.

Tip by caller that contained information that defendant is illegal alien but carries "green card", though not entirely correct, is sufficiently correct to support search and subsequent arrest for illegal possession of opium where other information given in tip is corroborated by defendant's acts and surrounding circumstances. United States v Ho Yee Bon (1974, SD NY) 378 F Supp 582.

6. Separate offenses

Possession of several kinds of drugs at same time did not constitute separate and distinct offense as to each kind. Braden v United States (1920, CA8 Minn) 270 F 441.

Offense of selling was separate from that of possession and conviction of both was not double jeopardy. De Bellis v United States (1927, CCA7 Ill) 22 F2d 948, cert den 276 US 634, 72 L Ed 743, 48 S Ct 420.

Purchase, possession and sale of drugs were separate offenses and subject to separate penalties. Walsh v White (1929, CA8 Kan) 32 F2d 240.

Test of whether single transaction violates two separate statutory provisions is whether each provision requires proof of fact that other does not, and so indictment charging in two counts unlawful possession and [illegible] sale of narcotics states two offenses and consecutive sentences imposed on conviction on both counts did not violate Fifth Amendment's prohibition against double jeopardy. [illegible] Amend 5. United States v Johnson (1976, CA7 Ill) 535 F2d 450, cert den 429 US 1066, 51 L Ed 2d 551, 97 S Ct 797.

ATTACHMENT B

Sec. 11.71.030. Misconduct involving a controlled substance in the third degree. (a) Except as authorized in AS 17.30 or AS 17.35, [illegible] the crime of misconduct involving a controlled substance in the third degree if the person

[illegible] delivers any amount of a schedule IIA or IIIA controlled substance; or possesses any amount of a schedule IIA or IIIA controlled substance with intent to manufacture or deliver;

(2) delivers any amount of a schedule IVA, VA, or VIA controlled substance to a person under 19 years of age who is at least three years younger than the person delivering the substance; or

(3) being 18 years of age or older, possesses any amount of a schedule IA or IIA controlled substance within the grounds of or on a parking lot immediately adjacent to a public or private preschool, elementary, junior high, or secondary school.

(b) It is an affirmative defense to a prosecution under (a)(3) of this section that at the time of the possession the school was closed to any school-related activity involving persons under 18 years of age. Nothing in this subsection precludes a prosecution under any other provision of this section or any other section of this chapter.

(c) Misconduct involving a controlled substance in the third degree is a class B felony. (§ 2 ch 45 SLA 1982)

NOTES TO DECISIONS

Editor's notes. — The cases cited in the notes below were decided under former AS 17.10 and 17.12.

Defenses. — Where, on appeal from a conviction of selling cocaine, the defendants argue that this section under which they were charged, prohibits the sale only of natural or L-cocaine, derived from coca leaves, and where the state's chemist testified on cross-examination that his tests did not exclude the possibility that the substance sold by the defendants was D-cocaine, an artificial compound not produced from coca leaves, but where the chemist also testified that to the best of his knowledge D-cocaine had never been synthesized in any quantity, the supreme court construing his testimony most favorably to the state, concluded that reasonable persons could find beyond a reasonable doubt that D-cocaine was not involved in the case and thus rejected the D-cocaine defense. Ledoff v. State, Sup. Ct. Op. No. 2192 (File Nos. 4117, 4136) 618 P.2d 557 (1980).

Fact going to weight of evidence, not admissibility. — Where the informer who purchased bags of drugs from defendant testified and, thus, there was no break in the chain of custody of the bags, and where there was no evidence that the informer tampered with the bags, the fact that the informer was out of sight of the police for short periods of time before turning the bags over to the police went to the weight of the evidence, not its admissibility. Robinson v. State, Sup. Ct. Op. No. 1837 (File No. 3393), 593 P.2d 621 (1979).

Sentence for sale of cocaine. — See Johnson v. State, Sup. Ct. Op. No. 1596 (File No. 3346), 577 P.2d 210 (1978); Elliott v. State, Sup. Ct. Op. No. 1798 (File No. 3379), 590 P.2d 881 (1979); Robinson v. State, Sup. Ct. Op. No. 1837 (File No. 3393), 593 P.2d 621 (1979); Mangold v. State, Sup. Ct. Op. No. 2108 (File No. 4674), 611 P.2d 272 (1980); Hawley v. State, Sup. Ct. Op. No. 2137 (File No. 4200), 614 P.2d 1349 (1980); Ledoff v. State, Sup. Ct. Op. No. 2192 (File Nos. 4117, 4136), 618 P.2d 557 (1980). See also Strachan v. State, Sup. Ct. Op. No. 2151 (File No. 4901), 615 P.2d 611 (1980); Kelly v. State, Sup. Ct. Op. No. 2268 (File Nos. 4097, 4529), 622 P.2d 432 (1981); State v. Dana, Ct. Op. App. No. 03 (File No. 4888), 623 P.2d 348 (1981).

Sentence for sale of amphetamines. — See Bartholf v. State, Sup. Ct. Op. No. 1270 (File No. 2[illegible]), [illegible] (1976).

Sentence for possession of amphetamine tablets with intent to distribute or sell. — See [illegible] Sup. Ct. Op. No. 1221 (File No. [illegible]), [illegible] P.2d 1211 (1976).

Sentence for selling LSD. — See Arevalo v. State, Sup. Ct. Op. No. 1501 (File No. 2880), [illegible] P.2d 1063 (1977).

Sentence for sale of acid, mescaline and amphetamines. — See Mercier v. [illegible], Sup. Ct. Op. No. [illegible] (File No. [illegible]), [illegible] P.2d [illegible] (1977).

Sentence for possession of hallucinogenic drug with intent to sell or distribute. — See Clark v. State, Sup. Ct. Op. No. 1570 (File Nos. 2941, 2946), [illegible] P.2d 1261 (1978).

Sec. 11.71.040. Misconduct involving a controlled substance in the fourth degree. (a) Except as authorized in AS 17.30 or AS 17.35, a person commits the crime of misconduct involving a controlled substance in the fourth degree if the person

(1) manufactures or delivers any amount of a schedule IVA or VA controlled substance or possesses any amount of a schedule IVA or VA controlled substance with intent to manufacture or deliver;

(2) manufactures or delivers, or possesses with the intent to manufacture or deliver, one or more preparations, compounds, mixtures, or substances of an aggregate weight of one ounce or more containing a schedule VIA controlled substance;

(3) possesses

(A) any amount of a schedule IA or IIA controlled substance;

(B) 25 or more tablets, ampules, or syrettes containing a schedule IIIA or IVA controlled substance;

(C) one or more preparations, compounds, mixtures, or substances of an aggregate weight of three grams or more containing a schedule IIIA or IVA controlled substance;

(D) 50 or more tablets, ampules, or syrettes containing a schedule VA controlled substance;

(E) one or more preparations, compounds, mixtures, or substances of an aggregate weight of six grams or more containing a schedule VA controlled substance; or

(F) one or more preparations, compounds, mixtures, or substances of an aggregate weight of one pound or more containing a schedule VIA controlled substance;

(4) being 18 years of age or older, possesses a schedule IIIA, IVA, VA, or VIA controlled substance within the grounds of or on a parking lot immediately adjacent to a public or private preschool, elementary, junior high, or secondary school;

(5) knowingly keeps or maintains any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place which is used for keeping or distributing controlled substances in violation of a felony offense under this chapter or AS 17.30;

(6) makes, delivers, or possesses a punch, die, plate, stone, or other thing which prints, imprints, or reproduces a trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of these upon a drug, drug container, or labeling so as to render the drug a counterfeit substance.

[illegible] the course of the manufacture or distribution [illegible] registration number which is fictitious [illegible] issued to another person

[illegible] false or fraudulent information in any [illegible] application required to be kept or filed under AS 17.30

[illegible] possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge; or

(6) affixes a false or forged label to a package or other container containing any controlled substance.

(d) It is an affirmative defense to a prosecution under (a)(4) of this section that at the time of the possession the school was closed to any educational activity involving persons under 18 years of age. Nothing in this subsection precludes a prosecution under any other provision of this section or any other section of this chapter.

(e) Nothing in (a)(5) or (6) of this section precludes a prosecution or civil proceeding brought under any other provision of this section or any other section of this chapter or under AS 17.

(f) Misconduct involving a controlled substance in the fourth degree is a class C felony. (§ 2 ch 45 SLA 1982)

NOTES TO DECISIONS

Editor's notes. — The cases cited in the notes below were decided under former AS 17.10 and 17.12.

Access to cocaine for personal use. — Right of privacy does not permit reasonable access to cocaine for personal and social use. State v. Erickson, Sup. Ct. Op. No. 1547 (File No. 3250), 574 P.2d 1 (1978).

There is a sufficiently close and substantial relationship between the means chosen to regulate cocaine and the legislative purpose of preventing harm to health and welfare so as to justify the prohibition of use of cocaine even in the home. State v. Erickson, Sup. Ct. Op. No. 1547 (File No. 3250), 574 P.2d 1 (1978).

Possession of even a trace of a prohibited drug may be sufficient to sustain a conviction where other evidence supports the inference of knowledge. Moreau v. State, Sup. Ct. Op. No. 1770 (File No. 2355), 588 P.2d 275 (1978).

Age of purchaser. — Where defendants were charged with selling marijuana to a minor in violation of former AS 17.12, the purchaser's age had no bearing on the question of whether the defendants were guilty of a violation. The purchaser's age was important only in determining the punishment that could be imposed for that offense. Morris v. State, Sup. Ct. Op. No. 2376 (File Nos. 4264, 4318), 630 P.2d 13 (1981).

Knowing possession must be proved for conviction. — To sustain a conviction for possession of narcotics the prosecution must prove a knowing possession by the accused. Davis v. State, Sup. Ct. Op. No. 636 (File No. 1532), 501 P.2d 1026 (1972).

Proving defendant's knowledge of substance's character. — Where the prohibited substance is itself mixed with or contained within an innocuous substance or object, it is necessary that the state prove the defendant's knowledge of the narcotic character of the substance. Moreau v. State, Sup. Ct. Op. No. 1770 (File No. 2355), 588 P.2d 275 (1978).

Knowledge can be shown by inferences. — A defendant's knowledge of the narcotic character of a substance can be shown by inferences that can be reasonably drawn from facts in evidence. Moreau v. State, Sup. Ct. Op. No. 1770 (File No. 2355), 588 P.2d 275 (1978).

Evidence of previous possession of contraband admissible. — In the prosecution of possessive offenses, where it is essential to prove the defendant's knowledge, evidence of previous possession of the contraband material is admissible. Wright v. United States, 13 Alaska 301, 102 F.2d 695 (9th Cir. 1951).

Sufficiency of evidence. — Evidence was sufficient to warrant conviction for possession of heroin. See Rose v. State, Sup. Ct. Op. No. 1750 (File No. 4250), 636 P.2d 616 (1981).

Sufficient evidence existed to support a conviction for possession of heroin where immediately after he was alerted to the approach of the police, defendant was found with a napkin containing heroin in his mouth, where one police officer stated that when he asked defendant what was in his mouth, defendant said it was dentures, and where both officers testified that defendant was asked a number of times to spit out what was in his mouth and give it to the officers. Moreau v. State, Sup. Ct. Op. No. 1770 (File No. 2355), 588 P.2d 275 (1978).

Evidence insufficient to warrant conviction. — Momentary possession of a trace of heroin on a napkin and a possible movement towards the bathroom was not sufficient for a conviction for possession of heroin where the evidence revealed another defendant had prior possession. Moreau v. State, Sup. Ct. Op. No. 1770 (File No. 2355), 588 P.2d 275 (1978).

Where a case resulting in a conviction of unlawfully possessing a narcotic drug, numorphan, was tried on the theory that numorphan was a drug having "similar physiological effects" to the drugs named in the definition of "narcotic drugs" but there was an absence of testimony as to the physiological effects of the drugs specifically named therein, the supreme court reversed the conviction since there was no basis for the jury to find that numorphan had "similar physiological effects" to any of those drugs. Casey v. State, Sup. Ct. Op. No. 880 (File No. 1701), 509 P.2d 285 (1973).

Jury could find defendant guilty of the attempt to commit the crime of possessing narcotic drugs under this section. Simpson v. United States, 13 Alaska 615, 102 F.2d 721 (9th Cir. 1952).

Sentence for possession of narcotics. — See James v. State, Sup. Ct. Op. No. 892 (File No. 3686), 510 P.2d 1050 (1973); Whitton v. State, Sup. Ct. Op. No. 1135 (File No. 2256), 541 P.2d 266 (1975); State v. Trunnel, Sup. Ct. Op. No. 1261 (File No. 2637), 549 P.2d 550 (1976); Ruman v. State, Sup. Ct. Op. No. 1521 (File No. 2856), 570 P.2d 1235 (1977); Welton v. State, Sup. Ct. Op. No. 1566 (File No. 2932), 574 P.2d 816 (1978); Daniels v. State, Sup. Ct. Op. No. 1730 (File No. 3568), 584 P.2d 47 (1978); Moreau v. State, Sup. Ct. Op. No. 1770 (File No. 2355), 588 P.2d 275 (1978); Wharton v. State, Sup. Ct. Op. No. 1797 (File No. 3380), 590 P.2d 427 (1979); State v. Walls, Sup. Ct. Op. No. 1957 (File No. 4127), 601 P.2d 1050 (1979); Elson v. State, Ct. App. Op. No. 40 (File No. 4967), 633 P.2d 292 (1981); Rose v. State, Ct. App. Op. No. 45 (File No. 5334), 633 P.2d 1027 (1981). See also Davis v. State, Sup. Ct. Op. No. 1599 (File No. 3540), 577 P.2d 690 (1978); Strachan v. State, Sup. Ct. Op. No. 2151 (File No. 4901), 615 P.2d 611 (1980); Kelly v. State, Sup. Ct. Op. No. 2268 (File Nos. 4097, 4529), 622 P.2d 432 (1981).

Sentence for uttering forged prescription. — See Stonefield v. State, Ct. App. Op. No. 84 (File No. 5507), 635 P.2d 494 (1981); Walker v. State, Ct. App. Op. No. 234 (File No. 6304), 662 P.2d 948 (1983).

Cited in Poggas v. State, Ct. App. Op. No. 224 (File Nos. 6762, 7101), 658 P.2d 796 (1983).

Sec. 11.71.050. Misconduct involving a controlled substance in the fifth degree. (a) Except as authorized in AS 17.30 or AS 17.35, a person commits the crime of misconduct involving a controlled substance in the fifth degree if the person

(1) manufactures or delivers, or possesses with the intent to manufacture or deliver, one or more preparations, compounds, mixtures, or substances of an aggregate weight of one-half ounce or more containing a schedule VIA controlled substance;

(2) manufactures or delivers, or possesses with the intent to manufacture or deliver, one or more preparations, compounds, mixtures, or substances of an aggregate weight of less than one-half ounce containing a schedule VIA controlled substance, for remuneration;

(3) possesses one or more preparations, compounds, mixtures, or substances of an aggregate weight of one-half pound or more containing a schedule IVA controlled substance;

(4) possesses one or more preparations, compounds, mixtures, or substances of an aggregate weight of one ounce or more containing a schedule IVA controlled substance;

(5) delivers to a minor ampules or cassettes containing a schedule IVA controlled substance;

(6) possesses one or more preparations, compounds, mixtures, or substances of an aggregate weight of less than six grams containing a schedule VA controlled substance; or

(7) delivers to a minor ampules or cassettes containing a schedule VA controlled substance.

(b) Misconduct involving a controlled substance in the fifth degree is a class A misdemeanor. (§ 2 ch 45 SLA 1982)

NOTES TO DECISIONS

Editor's notes. — The cases cited in the notes below were decided under former AS 17.12.

Neither the federal or Alaska constitution affords protection for the buying or selling of marijuana. Ravin v. State, Sup. Ct. Op. No. 1156 (File No. 2135), 537 P.2d 494 (1975).

Constitutionality of punishment for possession of marijuana. — Imposition of criminal punishment for possession of marijuana did not violate the constitutional prohibition of cruel and unusual punishment. Belgarde v. State, Sup. Ct. Op. No. 1296 (File No. 2447), 543 P.2d 240 (1975).

[illegible] in connection with the sale [illegible] drug even though his conviction was for possessing the drug rather than for [illegible] to sell. The state must prove all the [illegible] defendant's possession. Belgarde v. State, Sup. Ct. Op. No. 1296 (File No. 2447), 543 P.2d 240 (1975).

Possession at home with intent to sell. — Possession at home of amounts of marijuana indicative of intent to sell rather than possession for personal use is unprotected by the Alaska Constitution. Ravin v. State, Sup. Ct. Op. No. 1156 (File No. 2135), 537 P.2d 494 (1975).

Possession at home for personal use. — Possession of marijuana by adults at home for personal use is constitutionally protected. Ravin v. State, Sup. Ct. Op. No. 1156 (File No. 2135), 537 P.2d 494 (1975).

Citizens of the State of Alaska have a basic right to privacy in their homes under Alaska's constitution. This right to privacy would encompass the possession and ingestion of substances such as marijuana in a purely personal, noncommercial context in the home unless the state can meet its substantial burden and show that proscription of possession of marijuana in the home is supportable by achievement of a legitimate state interest. Ravin v. State, Sup. Ct. Op. No. 1156 (File No. 2135), 537 P.2d 494 (1975).

No adequate justification for the state's intrusion into the citizen's right to privacy by its prohibition of possession of marijuana by an adult for personal consumption in the home has been shown. Ravin v. State, Sup. Ct. Op. No. 1156 (File No. 2135), 537 P.2d 494 (1975).

Age of purchaser. — Where defendants were charged with selling marijuana to a minor in violation of former AS 17.12, the purchaser's age had no bearing on the question of whether the defendants were guilty of a violation. The purchaser's age was important only in determining the punishment that could be imposed for that offense. Morris v. State, Sup. Ct. Op. No. 2126 (File Nos. 4764, 4815), 650 P.2d 1141 (1982).

The state must demonstrate knowing possession. Bell v. State, Sup. Ct. Op. No. [illegible] (File No. [illegible]), 519 P.2d 804 (1974).

Evidence sufficient to prove knowing possession. — Evidence was sufficient to establish that defendant was aware that he possessed an illicit drug. Bell v. State, Sup. Ct. Op. No. 1005 (File No. 1717), 519 P.2d 804 (1974).

Sentence for possession of marijuana with intent to sell. — See Rader v. State, Sup. Ct. Op. No. 1499 (File No. 1123), 568 P.2d 408 (1977); Snyder v. State, Sup. Ct. Op. No. 1444 (File No. 1124), 565 P.2d 229 (1978); Anderson v. State, Sup. Ct. Op. No. 2261 (File No. [illegible]), 621 P.2d 1143 (1981).

Sentence for sale of marijuana. — See Salazar v. State, Sup. Ct. Op. No. 1441 (File No. 2367), 562 P.2d 694 (1977); Sanders v. State, Sup. Ct. Op. No. 1978 (File No. 4190), 602 P.2d 1252 (1979); Druck v. State, Sup. Ct. Op. No. 2159 (File No. 4572), 616 P.2d 15 (1980); Kelly v. State, Sup. Ct. Op. No. 2268 (File Nos. 4097, 4529), 622 P.2d 432 (1981).

Sentence for sale and distribution of marijuana. — See Wolfe v. State, Sup. Ct. Op. No. 1301 (File No. 2766), 553 P.2d 472 (1976).

Sec. 11.71.060. Misconduct involving a controlled substance in the sixth degree. (a) Except as authorized in AS 17.30 or AS 17.35, a person commits the crime of misconduct involving a controlled substance in the sixth degree if the person

(1) uses or displays any amount of a schedule VIA controlled substance or possesses one or more preparations, compounds, mixtures, or substances of an aggregate weight of one ounce or more containing a schedule VIA controlled substance on a public street or sidewalk or on the premises of a public carrier or business establishment or in any other public place;

(2) knowingly possesses any amount of a schedule VIA controlled substance within the immediate control of that person while operating a propelled vehicle;

(3) being under 19 years of age, possesses one or more preparations, compounds, mixtures, or substances of an aggregate weight of less than four ounces containing a schedule VIA controlled substance;

(4) possesses one or more preparations, compounds, mixtures, or substances of an aggregate weight of four ounces or more containing a schedule VIA controlled substance; or

(5) refuses entry into a premises for an inspection authorized under AS 17.30.

(b) Misconduct involving a controlled substance in the sixth degree is a class B misdemeanor. (§ 2 ch 45 SLA 1982)

NOTES TO DECISIONS

Editor's notes. — The cases cited in the notes below were decided under former AS 17.12.

Possession or ingestion of marijuana not itself a fundamental right. — The right to privacy amendment to the Alaska Constitution cannot be read so as to make the possession or ingestion of marijuana itself a fundamental right. Ravin v. State, Sup. Ct. Op. No. 1156 (File No. 2135), 537 P.2d 494 (1975).

No absolute protection for use or possession of marijuana in public. — See Ravin v. State, Sup. Ct. Op. No. 1156 (File No. 2135), 537 P.2d 494 (1975).

Possession of marijuana in public place in connection with sale. — Where [illegible] the state could [illegible] (1975).

Possession or ingestion of marijuana while driving. — See Brown v. State, Sup. Ct. Op. No. 1444 (File No. 2522), 565 P.2d 179 (1977).

[illegible] the evidence of the effect of marijuana on driving, an individual's right to possess or ingest marijuana while driving would be subject to the prohibition provided for in this section. Ravin v. State, Sup. Ct. Op. No. 1156 (File No. 21351), 537 P.2d 494 (1975).

The need for control of drivers under the influence of marijuana and the existing doubts as to the safety of marijuana demonstrate a sufficient justification for the [illegible] of the state's police power for the [illegible] welfare. Ravin v. State, Sup. Ct. Op. No. [illegible] P.2d 494 (1975).

Possession at home for personal use. — See notes to AS 11.71.060 under same catchline.

Marijuana found on person and in automobile at time of arrest. — See Price v. State, Sup. Ct. Op. No. 1794 (File No. 3524), 590 P.2d 419 (1979).

Proof of knowing control. — Mere presence at the scene, alone, was insufficient to prove knowing control of the prohibited substance. Egner v. State, Sup. Ct. Op. No. 784 (File No. 1443), 495 P.2d 1272 (1972). Also, see Bell v. State, Sup. Ct. Op. No. 1005 (File No. 1717), 519 P.2d 804 (1974), on requirement of knowing possession.

Sec. 11.71.070. Misconduct involving a controlled substance in the seventh degree. (a) Except as authorized in AS 17.30 or AS 17.35, a person commits the offense of misconduct involving a controlled substance in the seventh degree if the person

(1) manufactures or delivers, or possesses with the intent to manufacture or deliver, one or more preparations, compounds, mixtures, or substances of an aggregate weight of less than one-half ounce of a schedule VIA controlled substance; or

(2) possesses one or more preparations, compounds, mixtures, or substances of an aggregate weight of less than one ounce containing a schedule VIA controlled substance on a public street or sidewalk or on the premises of a public carrier or business establishment or in any other public place.

(b) Misconduct involving a controlled substance in the seventh degree is a violation and is punishable as authorized in AS 12.55, except that if a fine is imposed it shall not be more than $100. (§ 2 ch 45 SLA 1982)

NOTES TO DECISIONS

Gifts of small amounts of marijuana. — The letter of intent of the Free Conference Committee which put forth the committee's understanding of a law enacted by a former legislature was not legislative history which removed gifts of small amounts of marijuana from the plain language of former AS 17.12.010. Wright v. State, Ct. App. Op. No. 133 (File No. 5739), 651 P.2d 846 (1982) (defendant shared marijuana cigarettes with 16-year-old).

Applied in Wright v. State, Ct. App. Op. No. 133 (File No. 5739), 651 P.2d 846 (1982).

Sec. 11.71.080. Aggregate weight of live marijuana plants. For purposes of calculating the aggregate weight of a live marijuana plant, the aggregate weight shall be the weight of the marijuana when reduced to its commonly used form. (§ 2 ch 45 SLA 1982)

Article 2. Standards and Schedules.

Sec. 11.71.100. Controlled substances advisory committee. (a) The Controlled Substances Advisory Committee is established in the Department of Law. The committee consists of

(1) the attorney general or the attorney general's designee;

(2) the commissioner of health and social services or the commissioner's designee;

(3) the commissioner of public safety or the commissioner's designee;

(4) the president of the Board of Pharmacy or the designee of the president who shall also be a member of the Board of Pharmacy;

(5) a peace officer appointed by the governor after consultation with the Alaska Association of Chiefs of Police;

(6) a physician appointed by the governor;

(7) a psychiatrist appointed by the governor; and

(8) two individuals appointed by the governor.

(b) Members of the committee appointed under (a)(5) — (8) of this section serve terms of four years. A member of the committee receives no salary but is entitled to per diem and travel expenses authorized by law for boards and commissions under AS 39.20.180.

(c) The attorney general is the chairman of the committee.

(d) The committee meets at the call of the attorney general.

(e) The committee may not meet less than twice a year.

(f) Five members of the committee constitute a quorum, except that a smaller number may adjourn a meeting in the absence of a quorum. A quorum being present, a majority vote of the total membership is required to take official action. (§ 2 ch 45 SLA 1982)

Cross references. — For terms of initial members, see sec. 25, ch. 45, SLA 1982 in the Temporary and Special Acts.

Sec. 11.71.110. Duties of committee. The committee shall

(1) advise the governor of the need to add, delete or reschedule substances in the schedules in AS 11.71.140 — 11.71.190;

ATTACHMENT C

ALASKA STATE CONSTITUTION

ARTICLE XI
INITIATIVE, REFERENDUM, AND RECALL

ARTICLE XII
GENERAL PROVISIONS

ARTICLE XIII
AMENDMENT AND REVISION

SECTION 1. Amendments to this constitution may be proposed by a two-thirds vote of each house of the legislature. The lieutenant governor shall prepare a ballot title and proposition summarizing each proposed amendment, and shall place them on the ballot for the next general election. If a majority of the votes cast on the proposition favor the amendment, it shall be adopted. Unless otherwise provided in the amendment, it becomes effective thirty days after the certification of the election returns by the lieutenant governor. (The above Constitutional Amendment was approved by the voters of the State August 25, 1970. The words secretary of state were changed to lieutenant governor.)

SECTION 2. The legislature may call constitutional conventions at any time.

SECTION 3. If during any ten-year period a constitutional convention has not been held, the lieutenant governor shall place on the ballot for the next general election the question "Shall there be a Constitutional Convention?" If a majority of the votes cast on the question are in the negative the question need not be placed on the ballot until the end of the next ten-year period. If a majority of the votes cast on the question are in the affirmative delegates to the convention shall be chosen at the next regular statewide election, unless the legislature provides for the election of the delegates at a special election. The lieutenant governor shall issue the call for the convention. Unless other provisions have been made by law, the call shall conform as nearly as possible to the act calling the Alaska Constitutional Convention of 1955, including but not limited to, number of members, districts, election and certification of delegates, and submission and ratification of revisions and ordinances. The appropriation provisions of the call shall be self-executing and shall constitute a first claim on the state treasury. (The above Constitutional Amendment was approved by the voters of the State August 25, 1970. The words secretary of state were changed to lieutenant governor.)

SECTION 4. Constitutional Conventions shall have plenary power to amend or revise the constitution, subject only to ratification by the people. No call for a constitutional convention shall limit these powers of the convention.

(Editor's note: Following is the reapportionment schedule that became effective on July 11, 1982. Previous reapportionment schedules are available in earlier *Blue Books*.)

ARTICLE XIV
APPORTIONMENT SCHEDULE

SECTION 1. Members of the house of representatives shall, according to the reapportionment schedule of the governor, dated July 29, 1981, be elected from the election districts and in the numbers shown below:

House District	Name of District	Number of Representatives
1	Ketchikan-Wrangell-Petersburg	2 (A, B)
2	Inside Passage-Cordova	1
3	Bayou-Chichagof	1
4	Juneau	2 (A, B)
5	Kenai-Cook Inlet	2 (A, B)
6	South Kenai-South Coast	1
7	South Anchorage	1
8	Hotsale	2 (A, B)
9	Salt Lake	2 (A, B)
10	Mid-Town	2 (A, B)
11	West Side	2 (A, B)
12	Downtown	2 (A, B)
13	Mt. Iditarod-New University	2 (A, B)
14	Skwentna	2 (A, B)
15	Chugiak-Eagle River-Bases	2 (A, B)
16	Matanuska-Susitna	2 (A, B)
17	Interior Highways	1
18	Southeast-South Star Borough	1
19	Outer Fairbanks	1
20	Fairbanks City	2 (A, B)
21	Near Fairbanks	1
22	North Slope-Kotzebue	1
23	Norton Sound	1
24	Interior Rivers	1
25	Lower Kuskokwim	1
26	Bristol Bay-Aleutian Islands	1
27	Kodiak-East Alaska Peninsula	1

In all two-member house districts candidates will run for designated seats indicated by Seat A and Seat B.

ATTACHMENT D

Introduced: 2/19/85
Referred: Health, Education & Social Services
and Judiciary

IN THE SENATE

BY P.FISCHER, FERGUSON AND FAIKS

SENATE JOINT RESOLUTION NO. 16

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

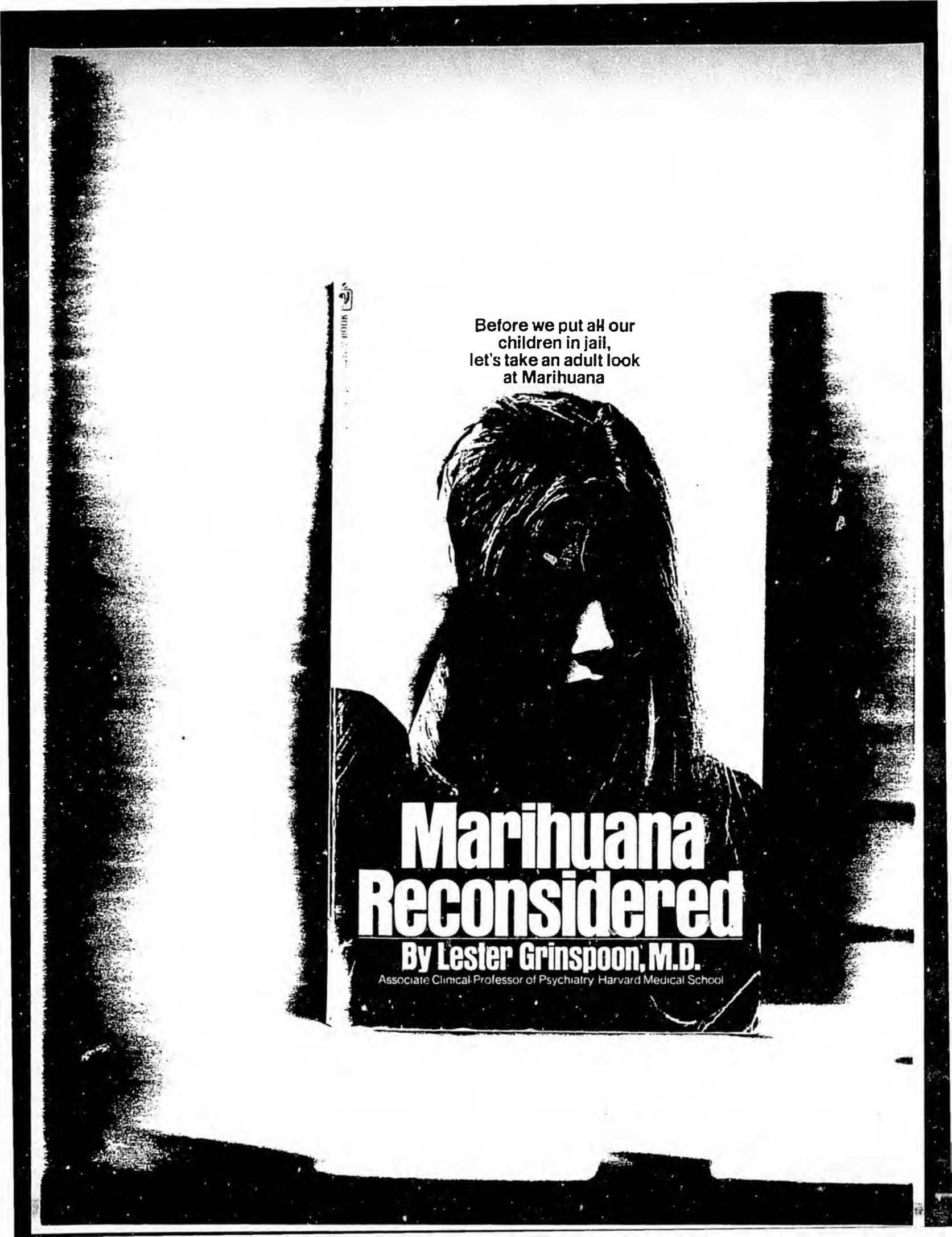
Proposing an amendment to the Constitution of the State of Alaska providing that an individual's right of privacy does not extend to the unlawful possession or use of cocaine, heroin, marijuana, or other controlled substances.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. Article I, sec. 22, Constitution of the State of Alaska, is amended to read:

SECTION 22. RIGHT OF PRIVACY. The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section. The right of privacy does not extend to the unlawful possession or use of cocaine, heroin, marijuana, or other controlled substances as defined in the criminal law of the state.

* Sec. 2. The amendment proposed by this resolution shall be placed before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.


Before we put all our
children in jail,
let's take an adult look
at Marihuana
Marihuana
Reconsidered
By Lester Grinspoon, M.D.
Associate Clinical Professor of Psychiatry Harvard Medical School

Kopoucek

"THE BEST DOPE ON POT SO FAR."
—The New York Times

"I would urge anyone who is interested in the question to read Dr. Grinspoon's book carefully. **MARIHUANA RECONSIDERED** is a most valuable document in the field of drug use and abuse."
—Dr. William Abruzzi, Saturday Review

"There's finally a book about dope that you can unreservedly recommend to your parents. For that matter, **MARIHUANA RECONSIDERED** should be read by legislators, health officials, PTAs—and anyone else whose views on marihuana are based on misinformation and institutionalized myths."
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Children
are the greatest
high
of all

ALASKA'S RIGHT TO PRIVACY TEN YEARS AFTER *RAVIN V. STATE:* DEVELOPING A JURISPRUDENCE OF PRIVACY

I. INTRODUCTION

> The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.
>
> Alaska Constitution, article I, section 22.[1]

With these words, Alaska became one of the first states in the United States to explicitly recognize the right to privacy in its constitution.[2] Previously, the existence of the right as a constitutional principle had to be inferred from the "penumbras" of the United States Constitution[3] and the Alaska Constitution.[4] The explicit recognition of this right in the Alaska Constitution enables the judiciary and the legislature to protect Alaskans from intrusion into their private lives. The ability of the Alaska courts and legislature to respond to threats to privacy is especially significant today because of the increased information-gathering capacity of both government and business.[5]

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1. Approved Aug. 22, 1972.

2. For similar constitutional provisions see ARIZ. CONST. art. II, § 8; CAL. CONST. art. I, § 1; FLA. CONST. art. I, § 23; HAWAII CONST. art. I, § 5; ILL. CONST. art. I, § 6; LA. CONST. art. I, § 5; MONT. CONST. art. II, § 10; S.C. CONST. art. I, § 10; WASH. CONST. art. I, § 7.

3. The penumbra theory was first announced in Griswold v. Conn., 381 U.S. 479 (1965). Justice Douglas, writing for the Court in *Griswold*, held that the right to marital privacy protected married couples who use contraceptives and doctors who advise couples on their use. *Id.* at 485-86. The right of marital privacy was found in the "penumbras" of the first, third, fourth, fifth, and ninth amendments. *Id.* at 484. Justice Goldberg, in concurrence, preferred to base the right to marital privacy solely on the ninth amendment. *Id.* at 486 (Goldberg, J., concurring).

4. In Alaska, the right to privacy was initially implied from the term "liberty" in article I, section 1 of the Alaska Constitution, which provides a list of inherent rights enjoyed by all persons. Breese v. Smith, 501 P.2d 159, 168 (Alaska 1972). For a discussion of the *Breese* case, see *infra* text accompanying notes 48-53.

5. The term "Information Age" has been used to describe the current post-industrial era in the United States and other technologically advanced nations. McGuire, *The Information Age: An Introduction to Transborder Data Flow*, 2 JURIMETRICS J. 1 (1979-80) (quoting Senator George McGovern, then Chairman of the Subcomm. on International Operations of the Senate Comm. on Foreign Relations).

The increase in the information-gathering capacity of government and business due to technological advances in the field of computers and electronics which make it easier to gather and store large amounts of information. Concern about the effect

In the first major Alaska Supreme Court case interpreting the privacy amendment, *Ravin v. State*,[6] the court struck down a statute that criminalized possession of marijuana in the home for personal use.[7] The court held that, given the fundamental nature of the right to privacy in the home[8] and the limited potential for societal harm posed by using small amounts of marijuana in the home, the state failed to demonstrate a sufficient justification for criminalizing such possession.[9]

Several decisions interpreting the right to privacy amendment have been issued by the Alaska Supreme Court since *Ravin* was decided. These decisions represent the Alaska Supreme Court's first attempt to develop a jurisprudence of privacy. No fully independent jurisprudence of the privacy amendment has developed, however, because the courts have proceeded largely on a case-by-case basis, linking the right to privacy with other constitutional interests and borrowing standards from other constitutional guarantees. The court's failure to develop an independent analytical approach to the privacy issue has resulted in inconsistent treatment of the right in the variety of contexts in which the amendment has been invoked.

The justification for the adoption of a separate privacy amendment is undermined by the lack of an independent privacy jurisprudence.[10] At times, the privacy amendment has been used as a justification for a broad reading of other constitutional provisions. Although those applications of the privacy amendment are correct ap-

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the Information Age has been evidenced by Congress in its findings in support of the Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (1974) (codified at 5 U.S.C. § 552a (1982)). Congress found, among other things, that

> (2) the increasing use of computers and sophisticated information technology, while essential to the efficient operations of the Government, has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use, or dissemination of personal information.

Id.

In the Privacy Act of 1974, Congress attempted to safeguard the privacy of information gathered by government agencies by restricting access to such personal data and by providing for inspection of files by the subject of those files. *See* 5 U.S.C. § 552a(b) (1982). The Act has failed to achieve its aims. *See Privacy in the U.S. Is an Illusion: Report*, 63 A.B.A. J. 1363 (1977) (article on the report of the Privacy Protection Study Commission). For other descriptions of these threats, see WESTIN, PRIVACY AND FREEDOM (1967); *Privacy in Peril: Technology and Government Erode Protections*, 69 A.B.A. J. 565 (1983); Note, *The Interest in Limiting the Disclosure of Personal Information: A Constitutional Analysis*, 36 VAND. L. REV. 139 (1983); and material cited therein.

6. 537 P.2d 494 (Alaska 1975).

7. ALASKA STAT. § 17.12.010 (1975) (repealed 1982).

8. *Ravin*, 537 P.2d at 504.

9. *Id.* at 511. The court held that the state must show that an actual threat to public health or welfare would exist without the challenged governmental control.

10. *See* State v. Glass, 583 P.2d 872, 879 (Alaska 1978).

plications, they should not be the sole effect of the amendment's adoption. If the sole purpose of the privacy amendment is to justify a broad reading of other constitutional provisions, then the amendment is superfluous,[11] for such broad readings could be achieved under pre-privacy-amendment precedent.[12] If, on the other hand, the privacy amendment is to have an independent status, then the development of a distinct jurisprudence of privacy is necessary.

Although this process has begun, in some areas in which the court could have employed a separate privacy analysis, the court has preferred instead to use the privacy amendment to influence the conventional analysis. Foremost among these areas is search and seizure.[13] This note attempts to identify the themes running through the Alaska privacy decisions and suggests that a unifying analysis employing a sliding scale test[14] be adopted for use in all cases raising constitutional privacy issues.

The sliding scale test is essentially a balancing test. The test weighs the individual's interest in privacy against the state's justification for the infringement of that right. The state interest which can overcome the individual privacy interest varies with the strength of the individual interest.[15] Thus, as the privacy interest grows stronger, the burden on the government to justify its intrusion on the right becomes greater.[16]

The note first discusses the background of the right to privacy in both the federal and state courts. Then, specific Alaska decisions are examined in order to isolate the tests which the Alaska courts have applied in interpreting the privacy amendment and to establish the basis for a unifying test. This discussion will focus on developments in the following areas: general personal and place privacy, information privacy, and search and seizure.[17] Finally, the note compares the tes

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11. *Id.*

12. For a discussion of how the same results could be achieved under pre-privacy amendment precedent as under the privacy amendment, see *infra* note 128.

13. The need for and consequences of recognizing the independent significance of the privacy amendment in the search and seizure context are discussed *infra* notes 127-41 and accompanying text.

14. The sliding scale test was advocated by Justice Boochever. *See* Wood v. Rohde, Inc. v. State Dep't. of Labor, 565 P.2d 138, 153-54 (Alaska 1977) (Boochever, J., concurring); *Ravin*, 537 P.2d at 515-16 (Boochever, J., concurring).

15. *Ravin*, 537 P.2d at 515 (Boochever, J., concurring).

16. *Id.*

17. The right to privacy has a potential impact on almost every area of the law and a thorough treatment of all the implications of the privacy amendment would well beyond the scope of this note. Accordingly, three litigated areas are examined in the note. The first category, general personal and place privacy, is meant as an embracing category for cases concerned with the meaning of the "fundamental right of privacy." *See Ravin*, 537 P.2d at 504. The principles derived from the cases

which have been used and advocates the adoption of the sliding scale test to provide a consistent privacy analysis in all cases in which the privacy amendment is involved.

II. Origins of the Right to Privacy

A. Federal Law: Inferring the Right to Privacy

Throughout most of the history of federal constitutional law, the right to privacy was not even implicitly recognized. The most famous opinion dealing with the right to privacy in the first century and a half of United States Supreme Court history was Justice Brandeis's dissent in *Olmstead v. United States* in 1928.[18] Justice Brandeis argued that the protection provided by the fourth amendment against unreasonable searches and seizures was intended to reach not only physical tampering with property by the government, but also invasions of personal privacy, such as wiretapping, which did not involve physical penetration of protected space. Justice Brandeis described this fundamental right as "the right to be let alone."[19] The other Justices, however, continued to support the belief that the fourth amendment protected individuals only against unreasonable searches and seizures that physically intrude into protected space.[20]

After *Olmstead*, the right to privacy was not explicitly addressed until 1965 in *Griswold v. Connecticut*.[21] Several decisions based on other rights, however, recognized elements of the right to privacy.[22] These decisions included cases protecting "associational privacy,"[23] the right to privacy in one's home,[24] and the right to decide how one's children are to be educated.[25] The privacy interest acknowledged in

these areas are intended to be applicable in other areas of the law touching upon the privacy issue.

18. 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting).

19. *Id.* at 478. This phrase was made famous by Warren and Brandeis in an 1890 article on the right to privacy. Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). In their article, the writers advocated the recognition of a common law cause of action for the invasion of privacy.

20. 277 U.S. at 465.

21. 381 U.S. 479 (1965).

22. *See* Comment, *A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision*, 64 Cal. L. Rev. 1447 (1976). *Cf.* Haiman, *Speech v. Privacy: Is There a Right Not To Be Spoken To?*, 67 Nw. U.L. Rev. 153 (1972) (discussing the clash between speech and free press rights and an individual right to privacy).

23. NAACP v. Alabama, 357 U.S. 449 (1958) (statute requiring a civil rights organization to provide membership lists held unconstitutional because of potential harassment and resulting chill to free speech and assembly interest).

24. Breard v. Alexandria, 341 U.S. 622 (1951) (right to privacy in the home provides government justification for prohibiting a form of commercial speech, door-to-door sales).

25. Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (statute requiring attendance at public schools held unconstitutional as an unreasonable interference with the "ri of parents to raise their children as they please).

each of these cases was not recognized as an independent interest, bu was held to be necessary to the exercise of an explicit right.

The United States Supreme Court finally recognized the existen of a constitutionally protected right to privacy in *Griswold*.[26] Th "fundamental" privacy right involved in *Griswold* was the right marital privacy.[27] The Court did not find this right in any specif amendment, but in the "penumbras" of a number of amendments. Marital privacy is one component of the "liberty" protected from sta encroachment by the fourteenth amendment.[29]

Since *Griswold*, the Supreme Court has struggled to define t scope of this federal right to privacy. Of the many privacy decisio handed down by the Supreme Court in the last two decades, thr have been of particular significance for Alaska constitutional law These three cases have formed the basis for many of Alaska's priva decisions.[31]

Katz v. United States[32] was the search and seizure case which troduced a privacy component into fourth amendment analysis. T case involved a challenge to the admissibility of evidence gai through a warrantless wiretapping of a public telephone booth. T majority held that, even though the government had not physic invaded the zone of privacy in the booth, the wiretap itself was unc stitutional without a warrant[33] because of the expectation of priv one has when the door to the telephone booth is closed. Even m significant than the majority opinion, however, was Justice Harl concurrence. Justice Harlan laid out a test to determine when an pectation of privacy will be protected under the fourth amendmen The Alaska Supreme Court later adopted this test as its own for c interpreting the Alaska counterpart to the fourth amendment.[35]

The test asks two questions. First, did the subject of the se exhibit an actual (subjective) expectation of privacy? Second, is subjective expectation one which society is willing to recognize as sonable? If the subjective expectation of privacy is reasonable, th

26. 381 U.S. at 484.

27. *Id.* at 486.

28. *Id.*; *see also supra* note 3.

29. 381 U.S. at 481-82.

30. Roe v. Wade, 410 U.S. 113 (1973); Stanley v. Georgia, 394 U.S. 557 (Katz v. United States, 389 U.S. 347 (1967).

31. *See, e.g.*, Ravin v. State, 537 P.2d 494, 498-500 (Alaska 1975)

32. 389 U.S. 347 (1967).

33. *Id.* at 358-59. In so holding, the Court overturned its decision in Olms United States. *Id.* at 353.

34. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

35. State v. Glass, 583 P.2d 872, 875 (Alaska 1978).

governmental encroachment upon this privacy interest without a search warrant is presumed to be unreasonable and must be justified by exigent circumstances.[36]

The second Supreme Court case with particular significance for Alaska privacy law is *Stanley v. Georgia.*[37] In *Stanley,* the Supreme Court struck down an ordinance which criminalized in-home possession of pornographic materials for personal use. In reaching its decision, the Court emphasized the privacy of the home.[38] The decision was based on the first amendment "right to receive information and ideas,"[39] but the Court recognized that the privacy interest means the first amendment right "takes on an added dimension."[40] The acknowledgement by the *Stanley* Court of the privacy of the home provided the basis for the Alaska Supreme Court's decision in *Ravin v. State.*[41]

The third federal privacy case which has had significant impact on the development of Alaska law is *Roe v. Wade,*[42] in which the Supreme Court held that the states could not constitutionally prohibit abortions except in the third trimester of pregnancy. The decision was based on a woman's right to privacy in her decision concerning whether or not to have children.[43] This privacy right is related to the marital right to decide whether or not to use contraceptives which was involved in *Griswold.* Both rights emerge from the privacy interest in the family and in procreation. The Alaska Supreme Court has characterized these privacy rights as part of an even more general right of "personal autonomy in relation to choices affecting an individual's personal life."[44]

36. *Katz,* 389 U.S. at 361. The United States Supreme Court has drastically cut back on previous privacy decisions in the search and seizure area. For example, the Court has approved of warrantless recording of conversations between a suspect and a consenting informant, United States v. White, 401 U.S. 745 (1971), and the warrantless use of an electronic tracking device placed in a car trunk, United States v. Knotts, 460 U.S. 276 (1983). Decisions such as these have led to an increasing willingness on the part of the state high courts to liberally interpret their own constitutions in order to compensate for the federal retreat from the protection of the privacy of individuals. *See* Galie, *The Other Supreme Courts: Judicial Activism among State Supreme Courts,* 33 SYRACUSE L. REV. 731 (1982); *see also* Brennan, *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489 (1977). With a separate privacy amendment in place, Alaska is particularly able to respond to the increasing need to protect individuals' privacy. *See Glass,* 583 P.2d at 875.

37. 394 U.S. 557 (1969).

38. *See id.* at 564.

39. *Id.*

40. *Id.*

41. 537 P.2d 494 (Alaska 1975).

42. 410 U.S. 113 (1973).

43. *Id.* at 153.

44. *Ravin,* 537 P.2d at 500.

The three cases just discussed are important, not only becau they have been cited as persuasive authority by the Alaska Supre Court in defining the right to privacy, but also because they illustr different types of privacy analysis. The *Katz* approach finds a right privacy implicit in the text of a constitutional amendment and e ploys a test of societal reasonableness in defining the parameters that right. *Stanley* also finds an implicit right to privacy but ties t right to a fundamental right and therefore allows encroachment up these rights only upon a showing of a compelling state interest. nally, *Roe* recognizes a right to privacy which is itself fundamen Invasions of this fundamental right to privacy must be judged by compelling state interest standard.

The diversity of approaches to privacy questions in the fede courts is mirrored in Alaska case law. Such a variety of analy seems unnecessary in a state where an explicit textual basis for right to privacy exists. Alaska courts continue, however, to apply least two different analytical approaches: one for search and seiz cases[45] and a second for other privacy cases.[46]

B. State Law Origins: Incorporating the Federal Precedent

Prior to the adoption of the privacy amendment in 197[illegible], Ala courts rarely considered the right to privacy. Since so litt[illegible] Ala precedent exists, it is difficult to determine the status of the righ privacy before the adoption of the amendment. The only conclus that can safely be drawn is that the Alaska pre-amendment righ privacy was at least as broad as the federal right.[47]

The only major pre-amendment privacy case decided by Alaska Supreme Court is *Breese v. Smith,*[48] which involved a c lenge by a student to a school hair length limitation. A federal pen bral privacy argument was presented, but the court did not decide case on those grounds. The court explained that there was disag ment over the federal issue among various state and federal courts

45. The search and seizure cases employ the *Katz* societal reasonableness tes but the privacy amendment is used, as in *Stanley,* to justify a broader reading test. The effects of the test employed by the Alaska Supreme Court in the searc seizure area are discussed *infra* text accompanying notes 116-23.

46. The *Roe* type of analysis has been used in general privacy cases like General privacy cases are discussed *infra* text accompanying notes 66-134.

47. This result is mandated by the supremacy clause of the federal Consti U.S. CONST., art. VI, cl.1. Any state decision granting less protection than the Constitution would in effect invalidate the federal protections and thus contra the supremacy clause. An interesting question is whether, if a decision like *Wade,* 410 U.S. at 113, were overturned, the privacy amendment would requ Alaska courts to follow the overturned precedent.

48. 501 P.2d 159 (Alaska 1972).

that the United States Supreme Court had refused to decide the issue.[49] The Alaska court then proceeded to strike down the hair length limitation on state law grounds. The court based its decision on the right to liberty guaranteed in article I, section 1 of the Alaska Constitution and on the right to a public education guaranteed by article VII, section 1.[50] The court articulated its liberty rationale in privacy terms. It stated that personal appearance was constitutionally protected as a fundamental right. This right was described as being part of a broader concept — the notion of personal immunity from governmental control or the right "to be let alone."[51] The right to be let alone is at the core of the concept of liberty.[52] The court then applied a compelling state interest test to the hair length restriction. Since the court was unable to find a compelling state interest, the school regulation was struck down.[53]

Two statements made by the *Breese* court have had significant influence on the development of the right to privacy in Alaska. First, the court noted that the state courts were not limited by federal precedent when construing similarly-worded Alaska constitutional provisions. States have a duty to "move forward" and interpret state provisions more broadly than their federal counterparts.[54] Moreover, the court recognized a judicial duty to develop *additional* rights not recognized under the federal Constitution.[55] These two statements continue to provide a significant foundation for an extension of the Alaska constitutional right to privacy beyond the limits set by federal precedent.

The 1975 decision in *Ravin* was the first major decision to construe the privacy amendment, which was adopted in 1972. In the decade following *Ravin*, developments in two specific areas of the law show that a jurisprudence of privacy is beginning to take shape in Alaska, although as yet it is without a unifying theme.

49. *Id.* at 167. The United States Supreme Court, however, subsequently decided the issue in favor of the validity of hair length restrictions, at least with regard to public servants. Kelley v. Johnson, 425 U.S. 238 (1976) (police officer).

50. *Breese*, 501 P.2d at 166-67.

51. *Id.* (quoting COOLEY ON TORTS, *cited in* Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891). This is the origin of the phrase used by Warren and Brandeis. *See supra* note 19.).

52. *Breese*, 501 P.2d at 168.

53. *Id.* at 174.

54. *Id.* at 167 n.30 (citing Baker v. City of Fairbanks, 471 P.2d 386, 401 (Alaska 1970)).

55. *Breese*, 501 P.2d at 169 n.43 (citing *Baker*, 471 P.2d at 402).

III. MAJOR DEVELOPMENTS IN SELECTED AREAS: 1975-1984

A. Introduction

To understand the developments in privacy jurisprudence, one must recognize the distinction between two types of privacy rights — personal privacy rights and place privacy rights.[56] Place privacy rights protect a privacy interest in a place itself.[57] Personal privacy rights, on the other hand, protect some inherent "personal autonomy" right[58] or a relational interest like the marital privacy mentioned in *Griswold*.[59] These rights exist regardless of where they are exercised. Future issues are more likely to arise in the personal privacy arena because the boundaries of place privacy are well defined while the boundaries of personal privacy are indefinite.[60]

The home is the only place in which a fundamental right to pri-

56. The distinction between place and personal privacy analyses was made by Chief Justice Burger in his opinion for the Court in Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973). He contrasted the "protection afforded by Stanley v. Georgia, 394 U.S. 557 (1969), [which] is restricted to a place, the home," 413 U.S. at 66 n.13, with the "constitutionally protected privacy of family, marriage, motherhood, procreation and child rearing, [which involve] a protected intimate relationship." *Id.* This distinction was utilized in a right to privacy article on *Ravin*. Note, *Ravin v. State: A Case for Privacy and Possession of Pot*, 5 U.C.L.A.-ALASKA L. REV. 178, 201-04, 218-19 (1975). For another attempt to break privacy into component parts see Comment *supra* note 22.

57. This right is the primary privacy conception which has been used in search and seizure analysis. *See infra* note 138 and accompanying text.

58. *Ravin*, 537 P.2d at 500 and Breese v. Smith, 501 P.2d 159 (Alaska 1972) (right in one's own hairstyle), are examples of cases involving personal privacy rights.

59. 381 U.S. 479 (1965).

60. In both federal and state courts, place privacy has largely become synonomous with the privacy of the home. For instance, the holding in *Stanley* was sharply limited to the home by a series of later Supreme Court decisions. In United States v. Reidel, 402 U.S. 351 (1971), the Court upheld a federal statute prohibiting the mailing of obscene material, even when the material was mailed only to consenting adults; and in United States v. Thirty-Seven (37) Photographs, 402 U.S. 363 (1971) the Court upheld a statute criminalizing the importation of obscene material for both commercial distribution and personal use. Chief Justice Burger later characterized *Stanley* as "hardly more than a reaffirmation that 'a man's home is his castle.'" Paris Adult Theatre I v. Slaton, 413 U.S. at 66.

In Alaska, the protection *Ravin* afforded marijuana users was strictly confined to the home. *See infra* notes 61-63 and accompanying text; *see also* ALASKA STAT. §§ 11.71.060(1) & (2) (1983) (possession of one ounce of marijuana in public or any amount in a motor vehicle criminalized). The range of activity that is protected in the home is also sharply limited. Marijuana remains the only controlled substance which can legally be possessed in the home without a prescription. *See* State v. Erickson, 574 P.2d 1 (Alaska 1978) (possession of cocaine in the home for personal use not protected by privacy amendment). The court has also refused to extend *Ravin* to cover sexual conduct of children in the home. Anderson v. State, 562 P.2d 351 (Alaska 1977). The court in *Anderson* avoided a decision on whether the right to privacy protects certain acts between consenting adults within the privacy of the home. *Id.* at 353.

vacy is recognized.[61] This fundamental right was the basis for the *Ravin* holding.[62] Thus, the protection provided by *Ravin* is largely ineffectual outside the home. In *Belgarde v. State*, the court refused to extend the *Ravin* holding to decriminalize the possession in a public place of small amounts of marijuana intended for personal use.[63]

The two areas of significant development after the right to privacy amendment was adopted are general privacy[64] and privacy within the search and seizure context.[65] General privacy cases involve both personal and place privacy concepts, while search and seizure cases have focused primarily on place privacy concepts. Judicial developments in each of these areas center around the refinement of basic principles unique to that particular area. As a result, a bifurcated analysis of the right to privacy is emerging, with one test for search and seizure cases and another test for general privacy cases. This bifurcation is unnecessary. A unified test that would encompass the entire spectrum of privacy cases could be employed by the Alaska courts.

B. General Right to Privacy

1. *Developing the tests.* Since the adoption of the privacy amendment, the Alaska Supreme Court has used three different methods of analyzing general privacy claims. In *Gray v. State*,[66] the court adopted the "compelling state interest" test. Under this test, any time a fundamental right is infringed by the state, the state must justify the infringement by a single standard — the infringement must be necessary to further a compelling state interest. *Gray* involved a challenge to the marijuana statute which was later held unconstitutional as applied in *Ravin*.[67] The *Gray* court held that the right to privacy encompassed the right to ingest "food, beverage, or other substances."[68] The court remanded the case, however, for a determination of whether the state's

61. *Ravin*, 537 P.2d at 504.
62. *Id.*
63. 543 P.2d 206 (Alaska 1975). Thus, a person can legally possess marijuana but cannot legally obtain that marijuana for personal use in the home. This situation is analogous to the result reached in *Stanley* and *Thirty-Seven (37) Photographs* by the United States Supreme Court in the pornography area. A person can legally possess obscene materials but cannot legally purchase them for personal use in the home. *Thirty-Seven (37) Photographs*, 402 U.S. at 381 (Black, J., dissenting).
64. The right of informational privacy is a subset of general privacy. Because of the importance of the informational privacy cases, both as examples of the application of the test evolving in personal privacy cases and as examples of issues likely to confront the courts in the future, these cases are treated separately.
65. *See supra* note 17.
66. 525 P.2d 524 (Alaska 1974).
67. *Id.*
68. *Id.* at 528.

interest was compelling where marijuana is concerned. Before th *Gray* dispute returned to the supreme court, the court held in *Rav* that the state's interest in preventing possession of marijuana in t home for personal use was not compelling.[69]

The method of analysis used by the Alaska Supreme Court *Ravin* was the "important governmental interest" test. This test w adopted by the court as a less rigid alternative to the compelling sta interest test.[70] Under this test, if the government interferes with individual's right to privacy, then the government must show that t interference furthered an important governmental interest and that means chosen to carry out the governmental interest bore a close substantial relationship to that interest. The court undertook an tensive review of scientific and sociological data concerning the effe of marijuana use. It concluded that the potential harm to the pub from marijuana use was not great enough to present a close and s stantial relationship between public welfare and control of mariju possession and use in the home.[71]

In *State v. Erickson*,[72] the Alaska Supreme Court used the "s ing scale" test to analyze the asserted privacy right to ingest cocain the home.[73] The sliding scale test compares the infringing gov rnm conduct with the privacy interest in question. The more fund me the privacy right, the greater the burden that is put on the stat show "the relationship of the intrusion to a legitimate gove nme interest."[74] In *Erickson*, the privacy interest was the same as in *R* — the right to use controlled substances in the home. Nev rthe the state intrusion in *Erickson* was upheld. The distinction mad the court was based on the nature of the relative effects of co aine marijuana on users of the drugs. Employing extensive scie tific sociological data, the court concluded that use of cocaine, eve small amounts in the home, presented a greater danger o harm society than marijuana use.[75] The court noted that a fundam ntal sonal right "must yield when it interferes in a serious manne with health, safety, rights and privileges of others or with the p blic fare."[76] Therefore, the court found that the right to ingest cocai

69. 537 P.2d at 511.
70. *Id.* at 498.
71. *Id.* at 511.
72. 574 P.2d 1 (Alaska 1978).
73. The sliding scale test was advocated by Justice Boochever in *Ravin*, 5 at 515 (Boochever, J., concurring), and in Woods & Rohde, Inc. v. State Labor, 565 P.2d 138, 153 (Alaska 1977) (Boochever, J., concurring).
74. *Ravin*, 537 P.2d at 515 (Boochever, J., concurring).
75. 574 P.2d at 21-22 & n.144.
76. *Id.* at 21 (quoting *Ravin*, 537 P.2d at 504).

one's home must yield to the state interest in protecting the public welfare.[77]

The Alaska Supreme Court's use of three different tests for deciding the privacy issue underscores the lack of consistency and predictability existing at present in Alaska's jurisprudence of privacy. The court does appear, however, to be moving toward acceptance of the sliding scale test used by the majority in *Erickson*. This movement has occurred primarily in cases involving personal privacy concepts rather than place privacy rights,[78] especially in the cases which consider the right of informational privacy.[79]

2. *Informational privacy: the emerging sliding scale test.* Several types of personal privacy rights have been explored by the courts, including the right to keep personal information private.[80] In analyzing informational privacy cases, the Alaska Supreme Court seems to apply

77. In his concurrence, Justice Matthews expressed concern about the majority's use of the sliding scale test. Justice Matthews believed that the sliding scale test failed to define the precise privacy right at stake, and that a definition of the specific right was necessary to give the privacy amendment "the life it deserves." 574 P.2d at 23. He argued that the majority's approach assumed the existence of a protected privacy interest, and then "balance[d] it away" when "confronted with a reasonable statute." *Id.* at 21-22. The approach advocated by Justice Matthews emphasizes the definition of the privacy interest at stake. The *Ravin* court had characterized the privacy interest as "the general proposition that the authority of the state to exert control over the individual extends only to activities of the individual which affect others or the public at large as it relates to matters of public health or safety, or to provide for the general welfare." *Id.* at 21 (quoting *Ravin*, 537 P.2d at 509). According to Justice Matthews, if the activity at issue falls within the sphere of the state's authority because it relates to matters of public health, safety, or the general welfare, then the activity is not protected by the right to privacy. The individual's activity in *Erickson*, cocaine use, did not fall within the right to privacy because the anti-social behavior that may accompany it falls within the sphere of the state's authority. Thus, the privacy amendment offered no protection to Erickson for his cocaine use under Justice Matthews's test, even when this activity was confined to the home.

78. The distinction between personal privacy and place privacy is discussed *supra* notes 56-60 and accompanying text.

79. *See, e.g.*, Falcon v. Alaska Pub. Offices Comm'n, 570 P.2d 469 (Alaska 1977).

80. Another personal privacy area in which there has been a good deal of activity has been in the definition of children's fundamental privacy rights. Generally, less protection has been given to children's privacy rights than to those of adults because the state has a greater interest in regulating the conduct of children than of adults. Anderson v. State, 562 P.2d 351, 358 (Alaska 1977). This is especially true with respect to the sexual conduct of children. *Id.*; *see also* L.A.M. v. State, 547 P.2d 827 (Alaska 1976) (The court identified distinct government interests with reference to children in upholding Alaska's Children in Need of Aid statute, ALASKA STAT. § 47.10.010 (1977).) Children have also received less protection in the search and seizure area, whether place privacy or personal privacy is involved. The court has held valid against a privacy challenge a search of the person of a student where the search is conducted by a school official pursuant to properly enacted regulations within the common law privilege to discipline. D.R.C. v. State, 646 P.2d 252 (Alaska Ct. App. 1982).

a sliding scale test, although the court often describes its approach in words that suggest the application of the compelling state interest t

A decision which clearly illustrates the application of the slid scale analysis is *Falcon v. Alaska Public Offices Commission.*[81] In *Falcon*, a physician member of a school board challenged a requirement under the Alaska Conflict of Interest Law[82] that he furnish a list of patients with whom he had done more than $100 worth of busir during the previous year. The court held that Falcon did not hav personal privacy interest in the disclosure but he was allowed to as his patients' right to privacy, even though the doctor-patien privil did not protect the information.[83]

The court's analysis in *Falcon* began with a determinat on of nature of the privacy interest involved.[84] The privacy inter st, wl arose in the context of the doctor-patient relationship, was the inte in not having one's identity revealed where such a revelatio. disc personal information. Next, the court applied a level of sc utiny propriate to that interest. To justify interference with tl e doc patient relationship, the state had to show " 'a fair and substantia lation' between the statutory means and a legitimate governme purpose."[85] The court then balanced the "nature and the extent of privacy invasion and the strength of the state interest requiring di sure"[86] in order to determine the validity of the state's action. In forming the balancing, the court examined the interest of the stat promoting fair and honest government and weighed that inte against the patients' interest in concealing their identity as patien this doctor.[87] Because the state regulation provided a potential revealing sensitive information without a procedure for screening patients who would be harmed by such disclosure, the operation o disclosure law was suspended until procedural safeguards introduced.

An example of an informational privacy case in which the Al Supreme Court described its approach as an application of the con

81. 570 P.2d 469 (Alaska 1977).

82. ALASKA STAT. §§ 39.50.010 -.200 (1983).

83. *Falcon*, 570 P.2d at 475.

84. "Under the Alaska Constitution, the required level of justification tu the precise nature of the privacy interest involved." *Id.* at 476

85. *Id.* (citing Isakson v. Rickey, 550 P.2d 359, 363 (Alaska 1976)).

86. *Falcon*, 570 P.2d at 476.

87. *Id.* at 480. The court noted that, in the usual case, revealing that s had seen a doctor would not be regarded as a revelation of very sensitive mate certain cases, however, the mere fact that the patient had been seeing a doc *particular* doctor could amount to revelation of a sensitive matter. This would case where the doctor specializes in contraceptive matters or performs mas tions, or in the case where one spouse sees a doctor without the other's knowled at 479-80.

ling state interest test but which more closely resembles a sliding scale analysis is *Messerli v. State.*[88] This case involved a challenge to a campaign disclosure law which required anyone advertising in a political campaign to file a disclosure statement with the State Election Commission. The court applied a compelling interest test[89] but the opinion is not inconsistent with the sliding scale analysis used in *Falcon.* The state intrusion in *Messerli* infringed not only on privacy rights but also on free speech and free press rights. In combination, these rights unquestionably require a compelling state interest to justify an intrusion upon them.[90] Nevertheless, in support of the proposition that the right to privacy is not absolute, the *Messerli* court cited the *Falcon* court's statement that the level of justification depends on the nature of the privacy interest involved.[91] Thus, *Messerli* can be read as simply focusing on that segment of the sliding scale that requires a compelling state interest.

Another case which illustrates the Alaska Supreme Court's use of a compelling interest test which is in substance one end of the sliding scale test is *State v. Oliver.*[92] *Oliver* was the first Alaska case raising the right to privacy as a defense for failure to file a tax return. The taxpayer argued that the right to privacy prevented the state from requiring him to submit his federal W-2 forms and other employer-generated records to the state for computation of his state income tax. The *Oliver* court rejected the privacy claim.[93]

The court noted, and the state conceded, that the personal financial information to be disclosed was within the zone of privacy protected by the privacy amendment.[94] Then the court applied a compelling interest test to the furnishing of information required by the tax statute. The court held that the implementation of a tax system was a compelling interest.[95] The court noted that at best a tenuous connection existed between the information contained in W-2 forms and "a person's more intimate concerns,"[96] and that the disclosed information was to be kept confidential.[97] Therefore, the state's

88. 626 P.2d 81 (Alaska 1980).
89. *Id.* at 86.
90. *See supra* cases cited notes 23-25.
91. 626 P.2d at 86 (citing *Falcon,* 570 P.2d at 476).
92. 636 P.2d 1156 (Alaska 1981).
93. *Id.* at 1167. The taxpayer's self-incrimination argument was also rejected. *Id.* at 1160. Federal courts have rejected similar claims based on the federal right to privacy. *See, e.g.,* United States v. Silkman, 543 F.2d 1218, 1220 (8th Cir. 1976), *cert. denied,* 431 U.S. 919 (1977).
94. *Oliver,* 636 P.2d at 1166 (citing *State v. Glass,* 583 P.2d 872, 878-79 (Alaska 1978)).
95. *Oliver,* 636 P.2d at 1166.
96. *Id.* at 1167.
97. *Id.*; ALASKA STAT. § 43.05.230 (1983).

interest outweighed the intrusion on the taxpayer's privacy. The court then held that self-disclosure of such information was the least intrusive means for the state to secure the information.[98]

Despite the court's explicit use of a compelling state interest standard in *Oliver,* a careful reading of the case reveals that the court actually applied a sliding scale analysis. The application of the sliding scale test is evident in several statements in the *Oliver* opinion. One indication that the court was applying the sliding scale analysis is the court's use of the *Falcon* language regarding the need for a balancing of interests.[99] Such a balancing is inconsistent with traditional compelling state interest analysis. Traditional compelling state interest analysis is an all-or-nothing type of analysis. There is no weighing of interests.[100] If the right is fundamental, the state must show a compelling state interest to justify infringement of that right. This is a very high standard for the government to meet. In fact, very few laws will pass such a test.[101] If the right is not fundamental, any infringing law which has a rational basis in fact is valid. Under this standard, almost no law will fall. In practice, therefore, the determination of whether or not a right is fundamental is the end of the inquiry. In *Oliver,* however, the determination that a fundamental right was involved did not end the analysis. The state's interest in the implementation of an income tax was found to be compelling and *then* it was weighed against the privacy interest in non-disclosure.[102] A further indication of the court's balancing approach appears in the court's expression of "grave doubts" about the permissibility of requiring production of "purely private" papers, even if necessary to the state's compelling interest in collecting revenue.[103] Such statements represent a more precise

98. *Oliver,* 636 P.2d at 1167.
99. *Id.* at 1166.
100. *See, e.g.,* Gray v. State, 525 P.2d 524 (Alaska 1974).
101. The United States Supreme Court has found a compelling interest sufficient to justify government intrusion into fundamental rights in only one case, Korematsu v. United States, 323 U.S. 214 (1944), and this result can be explained as the Court giving in to wartime pressures in upholding the Japanese internment scheme undertaken in World War II. *Korematsu* was the case in which the compelling interest test was first announced. *Id.* at 216. The Alaska Supreme Court has had only a few occasions to apply this test and has found a compelling state interest to be present in *Oliver,* 636 P.2d at 1167, and in Schultz v. State, 593 P.2d 640, 642 (Alaska 1979), which involved the search of a burning house by a fire inspector. See also Pharr v. Fairbanks-North Star Borough, 638 P.2d 666, 670 (Alaska 1981), which followed *Oliver.*
102. *Oliver,* 636 P.2d at 1167.
103. *Id.* These statements seem to indicate a pro-taxpayer viewpoint. In the only reported tax case citing *Oliver,* however, the privacy argument again lost to the revenue interests of local government. *Pharr,* 638 P.2d 666. Nevertheless, this case is not a cutback on the court's rationale in *Oliver.* It involved sales tax records of

with a sliding scale analysis than with the less flexible compelling state interest analysis.

The argument for the non-disclosure of "purely private information" is applicable to state regulations outside the tax area. The language in *Oliver* does not limit the holding to the State Department of Revenue. Given the form of the sliding scale test applied in *Oliver*, there is no reason why other governmental agencies should not have to satisfy the same compelling interest standard for gaining access to personal financial information that the Department of Revenue must satisfy.[104]

C. Search and Seizure: Nonrecognition of the Independence of the Privacy Amendment

Although the bulk of the case law interpreting the privacy amendment has been in the area of searches and seizures, the court has not even begun to provide an independent privacy analysis for the search and seizure cases. An examination of the case law demonstrates that the privacy amendment *can* be given independent significance in this area, as in other areas.

The preeminent Alaska privacy case in the area of search and seizure is *State v. Glass*.[105] In *Glass*, the Alaska Supreme Court invoked the privacy amendment and suppressed evidence gained by means of warrantless monitoring of a conversation between the accused and an informant wearing a wireless transmitter. Although the United States Supreme Court found no constitutional bar to such activity[106] and the Alaska Supreme Court indicated in a prior case that the testimony of an informant or undercover police officer actually participating in a conversation with a suspect was admissible despite the absence of a warrant,[107] the court in *Glass* held that the right to privacy protected a suspect from warrantless *recording* of his conversations.[108]

The *Glass* court reached this result by applying the two-pronged test laid out by Justice Harlan in *Katz v. United States*.[109] No issue

in the possession of another government agency. This operated, according to the court, to lower the privacy interest because others had already seen the records.

104. There may also be a private right of action implied here in favor of individuals against credit reference organizations that make use of such personal information. This action would be in the nature of a tort action, and exploration of this possibility is beyond the scope of this note.

105. 583 P.2d 872 (Alaska 1978).

106. United States v. White, 401 U.S. 745 (1971).

107. Pascu v. State, 577 P.2d 1064 (Alaska 1978).

108. *Glass*, 583 P.2d at 880.

109. 389 U.S. at 61 (Harlan, J., concurring). The two-part Harlan test had previously been adopted by the Alaska court for use in search and seizure cases in Smith v.

was raised about the treatment of the first prong of the test. The co assumed that Glass had exhibited an actual expectation that he c versation would not be recorded. The discussion in *Glass* focused the "reasonableness" of such an expectation. The court first not that the United States Supreme Court decision supporting such eav dropping did not produce a majority opinion,[110] and that the Alas court was not bound by the Supreme Court's holding.[111] The co then distinguished the situation where a "false friend" actually testif concerning a conversation that he had with the accused[112] from t introduction of recordings of that conversation surreptitiously ma with the cooperation of the "false friend." The court noted that t expectation that one's confidential conversations would not be peated by a friend is qualitatively different from the expecta ion th the same conversation would not be recorded.[113]

Finally, the court stated that the Alaska privacy amendment " fords broader protection than the penumbral right inferred from oth [federal and state] constitutional provisions. Were that not he c there would have been no need to amend the constitution."[114] Ba on these principles, the *Glass* court held that the expectation t hat co conversations would not be recorded is reasonable within the mean of the Harlan test.[115]

The search and seizure cases following *Glass* have primarily b concerned with the question of which expectations society is willing recognize as reasonable. In only a few cases has the court found t the expectations of the persons involved were "reasonable" as defi

State, 510 P.2d 793, 797 (Alaska), *cert. denied*, 414 U.S. 1086 (1973). The two p of the test are laid out *supra* text accompanying note 36.

110. *White*, 401 U.S. at 745.

111. *Glass*, 583 P.2d at 876. The court reminded those reading the opinion th could construe the Alaska Constitution as providing rights additional to th provided by the federal constitution. *Id.* n.12 (citing, among others, Zehrung v. S 569 P.2d 189 (Alaska 1977), *opinion on rehearing*, 573 P.2d 858 (Alaska 1978), W & Rohde, Inc. v. State Dep't. of Labor, 565 P.2d 138 (Alaska 1977), and Blue v. S 558 P.2d 636 (Alaska 1977)).

112. *Glass*, 583 P.2d at 880. An example of such a case is Pascu v. State, 577 at 1064.

113. *Glass*, 583 P.2d at 876-78. The court quoted extensively from Judge stedler's dissent in Holmes v. Burr, 486 F.2d 55, 72 (9th Cir.), *cert. denied*, 414 1116 (1973). Judge Hufstedler stated that uninhibited discussion is an essential ponent of a democratic society. While the risk of one's confidential conversa being repeated can be just as inhibiting as the risk that the conversation is bein corded, the risk of recording is not one that society is willing to accept. Therefore expectation that confidential conversations are not being recorded is reasonable F.2d at 72.

114. *Glass*, 583 P.2d at 879.

115. *Id.* at 880.

in *Glass*, and the facts in these cases are all very similar to *Glass*.[116] Moreover, the court has held *Glass* inapplicable to any recordings of conversations between citizens and uniformed officers when the conversation took place in the course of the officer's duty, either before[117] or after[118] an arrest. The protection against unreasonable searches and seizures was interpreted by the court to cover searches by all governmental officials, including agency employees.[119] The term "government officials," however, was held not to apply to school authorities conducting searches of students.[120] In addition, fishermen were held not to have a reasonable expectation of privacy in catches being stored in their holds sufficient to protect them from searches by agency officials.[121]

Glass, then, seems to have been the high-water mark for the privacy amendment's impact on the search and seizure area. In later cases, the holding in *Glass* was limited to undercover operations and the use of informants to record conversations.[122] Moreover, the *Glass* decision is applicable to administrative searches, but the expectation of privacy in these administrative cases involving commercial activity is considered to be lower than that involved in criminal cases concerning one's private conversations or activities in the home.[123]

IV. A Unified Privacy Analysis Through The Sliding Scale Test

The emergence of the sliding scale test in the general privacy area leaves search and seizure the only privacy area in which the Alaska Supreme Court has not begun to give the privacy amendment independent significance. By adopting the sliding scale test in the search and seizure area, the court would provide greater protection for privacy rights than is currently available under the search and seizure test. Adoption of the test also would give the privacy amendment the

116. *See, e.g.*, Coffey v. State, 585 P.2d 514 (Alaska 1978).

117. City of Juneau v. Quinto, 684 P.2d 127 (Alaska 1984) (expectation that officer conducting lawful stop or arrest would not record conversation not reasonable).

118. Palmer v. State, 604 P.2d 1106 (Alaska 1979).

119. Schultz v. State, 593 P.2d 640, 642 (Alaska 1979) (fire inspector); *see also Woods & Rohde, Inc.*, 565 P.2d at 150 (OSHA inspector). In *Schultz*, the court held that there was "a compelling need for official action, and no time to secure a warrant." Thus, the invasion of privacy by the fire inspector was justified. 593 P.2d at 642.

120. D.R.C. v. State, 646 P.2d 252 (Alaska Ct. App. 1982).

121. Dye v. State, 650 P.2d 418 (Alaska Ct. App. 1982). In this case, the court indicated its lack of reliance on the privacy amendment when it stated that the *Katz* test, which it applied, was nothing more than a new definition of "search." *Id.* at 421. This underscores the lack of any independent significance for the privacy amendment in the search and seizure context.

122. *See supra* notes 116-21 and accompanying text.

123. *Woods & Rohde, Inc.*, 565 P.2d at 150-51.

independent significance which other privacy areas have given it.[124] The sliding scale test also has the virtue of unifying the privacy amendment analysis found in search and seizure cases with the analysis emerging in general privacy areas. Moreover, use of the sliding scale test would allow the court to remain consistent with current precedent and the realities of law enforcement.

A. Greater Protection for Privacy Rights

In *Glass*, the court used the two-pronged Harlan test to determine both the privacy and the search and seizure issues presented.[125] The test does not provide lasting protection to the right to privacy from government encroachment because of its emphasis on reasonableness as determined by society. Privacy is by definition a personal right which involves the right to *exclude* an activity from society's view. Using society's expectations to define whether a given expectation of privacy is protected at all is fundamentally inconsistent with the personal nature of the right. The balance that must be struck in privacy cases is a balance between an individual's rights and society's rights. If society's expectations are used to define what the individual's rights are, the balance is bound to tilt in favor of society's interests.

Society's expectations do have a role to play in deciding to what degree a given expectation of privacy will be protected under the sliding scale test. They should not be used, however, to decide whether a privacy interest should be recognized at all. If societal expectations are used in determining which interests will be protected, privacy interests will remain in a very precarious position. Only very strongly commonly held notions of privacy — like the privacy of the home or the marital bedroom — will be accorded any lasting protection under a societal reasonableness test. On the other hand, unpopular interests — like the privacy of consenting homosexual adults — will receive no protection if they are not generally recognized as "reasonable" by soci-

124. Privacy should be defined with respect to the fundamental "right to be alone" which all citizens enjoy. How much a citizen's exercise of that right conflicts with similar rights of other citizens or the community at large should set the level of justification required to overcome that right. This is the essence of the sliding scale test. Where the interest at issue represents the core of the right to be let alone, as was the privacy of the home involved in *Ravin*, the state should be required to show a compelling interest to overcome that right. On the other hand, where the right to be let alone is slight, the justification need only be a rational basis. Through the use of consistent language, courts can assure that the privacy amendment will function as an independent protection of rights for Alaskans, rather than merely an excuse for liberal interpretation of other constitutional guarantees.

125. The Harlan test was first adopted by the Alaska Supreme Court in a case decided less than one year after the passage of the privacy amendment. Smith v. State, 510 P.2d 793, 797 (Alaska), *cert. denied*, 414 U.S. 1086 (1973).

ety. Changes in society's ideas of reasonable expectations might even cause a protected personal right to privacy to vanish.[126]

It is more difficult to define privacy rights out of the privacy amendment when a sliding scale test rather than a societal expectations test is employed by the court. Under the societal expectations test the court may summarily deny any protection to a right. The court simply states that society has not accepted the given expectation of privacy as reasonable. Either a right is "reasonable" and protected against infringement absent an important governmental interest or it is "unreasonable" and totally unprotected. A sliding scale test, on the other hand, proceeds from the assumption that *all* privacy rights are protected to some degree. The sliding scale test avoids the either/or analysis of the societal expectations test in favor of an analysis which recognizes the existence of a middle ground between these poles of reasonableness. It does not *define* privacy through societal standards of reasonableness, but *balances* a challenged personal expectation against society's expectations and other governmental interests. Of course, the sliding scale test itself can be manipulated to give unpopular interests minimal protection, but the sliding scale has an advantage over a reasonable expectations test in this regard. Even if judges decide to provide only minimal protection to a privacy right, the right would still be protected against arbitrary attacks. In contrast, a privacy right that the court labels as an unreasonable expectation receives no protection from the privacy amendment at all.

126. The fragility of privacy rights under a reasonable expectations test is illustrated by the case in which the Harlan test was advanced, Katz v. United States, 389 U.S. 347 (1967). *Katz* held that physical intrusion into protected space was not necessary in order to make out a fourth amendment violation. *Id.* at 352-53. In so doing, the court overruled Olmstead v. United States, 277 U.S. 438 (1928). Nevertheless, if the two cases are analyzed under the Harlan test, the results are entirely consistent. (This comparison was made in Comment, *supra* note 22, at 1457-61.) When *Olmstead* was decided in 1928, society was not yet ready to recognize an expectation of privacy in telephone use as reasonable. Very few people had telephones and societal expectations as to their use had not yet developed. By 1967, when *Katz* was decided, the telephone had become part of daily life in America, and definite expectations of privacy could be said to have developed. Whereas in *Katz* the societal expectation had developed in such a way as to provide increased protection for privacy, expectations can also change in a way that provides less protection for privacy. An example of the latter phenomenon is occurring in the area of electronic eavesdropping and information gathering. As technology develops, it will become easier and easier for the government to eavesdrop; consequently, fewer and fewer places will be characterized as places in which society would reasonably expect privacy. Other changes in society may also reduce the number of places in which one would reasonably expect privacy. An example of such a change is the replacement of the enclosed telephone booth. It is an open question whether society would decide that the expectation of privacy in an open booth, as opposed to the enclosed booth so important in *Katz*, is reasonable.

B. Independent Significance and Uniformity across Areas

The sliding scale test seems to be emerging as the preferred for of analysis in privacy jurisprudence.[127] Search and seizure remains t main area in which the court has not adopted a separate privac / anal sis. The adoption of the sliding scale test in search and seizure ca would, therefore, make search and seizure part of a uniform and i dependent privacy analysis. An independent privacy analysis focu squarely on the privacy issues involved and forces recognition of t independent validity of the privacy amendment. The recognition of independent analysis requires the recognition of a separate exclusio ary rule specifically applicable to the privacy amendment.[128]

A separate exclusionary rule would not only provid an dependent analysis in the search and seizure area, it would provi

127. The emergence of the sliding scale test is discussed *supra* notes 99-104 accompanying text.

128. Prospects for an independently significant privacy amendment depend u convincing the supreme court to explicitly recognize an exclusionary rule based u the privacy amendment. Although *Glass* was decided based upon the right to priv it did not explicitly hold that article I, section 22 provides a basis for excluding dence independent of the search and seizure provision. In fact, earlier in the s year in which *Glass* was decided, the court had refused to recognize tha any a tional protection was provided by the privacy amendment in a search and s izure c Weltin v. State, 574 P.2d 816, 821 n.15 (Alaska 1978). That refusal was confine the facts of the case. The effect of the *Glass* decision on this language was not state *Glass* itself. Subsequent to *Glass*, however, at least one Alaska appeals court has h that there is no such independent exclusionary rule under the privacy a nendm Wortham v. State, 641 P.2d 223, 224 n.2 (Alaska Ct. App. 1982), *aff'd after remo* 657 P.2d 856 (Alaska Ct. App. 1983). The supreme court affirmed the decision, did not reach the privacy issue. Wortham v. State, 666 P.2d 1042 (Alaska 1983).

A strong argument can be made from the language in *Glass* itself that the Ala Supreme Court in fact recognized an independent exclusionary rule based on the vacy amendment in *Glass*. The court deviated from federal precedent in partici monitoring of conversation because it believed the privacy amendment provided tection in addition to that provided by the fourth amendment and its Alaska coun part. *Glass*, 583 P.2d at 879. If the privacy amendment did not provide addit protection, the court reasoned, there would have been no reason to amend the con tution. *Id. See also* Palmer v. State, 604 P.2d 1106, 1108 (Alaska 1979) (where court said that in *Glass*, "we held that the privacy amendment, Alaska Const., a § 22, prohibited the electronic recording of a narcotics transaction.").

The *Glass* court, however, could have achieved the same result under pre-pri amendment precedent. The Alaska court had previously held that state rights provide greater protection than their federal counterparts. Zehrung v. State, 569 189, 199 (Alaska 1977). In fact, it is the duty of state courts to develop additi rights. Baker v. City of Fairbanks, 471 P.2d 386, 402 (Alaska 1970). If the pri amendment did not provide additional protection but merely served as an alterna ground for accomplishing the same result attainable without the amendment, th dependent significance of the privacy amendment is lost. The only way for the pri amendment to provide additional protection is by a separate exclusionary rule w would focus the court's attention on privacy issues.

more certain and adequate protection to privacy interests than Justice Harlan's societal expectations test.[129] The passage of the privacy amendment meant that Alaska's courts would no longer have to rely on penumbral privacy arguments. Use of the sliding scale test in search and seizure cases, as well as in other contexts, makes the passage of the amendment meaningful and enables the courts to truly give the privacy amendment "the life it deserves."[130] More importantly, the use of the sliding scale test will ensure that the right to privacy will have equal meaning in all contexts, including the search and seizure area.

C. Implications of the Sliding Scale Test

Once the operation of the sliding scale test is understood, one can see that the test need not be applied in an ad hoc manner. Furthermore, the test will not require abandonment of whole areas of precedent. If an aspect of the right to privacy is found to be fundamental, then an important governmental interest is necessary to overcome the right to privacy. In addition, the means of regulation or intrusion chosen by the state would have to bear a "close and substantial relationship" to the important governmental purpose.[131] Whether or not a right to privacy is fundamental would depend upon various factors, such as the historic importance of the privacy interest, its relationship to other fundamental rights,[132] and the impact of the exercise of the right on other people and the public at large.[133] If the right being exercised is not fundamental, a lesser governmental justification for regulation or intrusion would be required to validate the state action, even though the same factors could be examined in balancing the interests involved.

The actual operation of the sliding scale test in the search and seizure context would require a two-tiered analysis.[134] First, the court would apply the search and seizure test of reasonable expectations. If the search were illegal under this traditional search and seizure test,

129. *See supra* note 126, concerning the fragility of privacy interests under the societal expectations text.

130. State v. Erickson, 574 P.2d 1, 23 (Alaska 1978) (Matthews, J., concurring).

131. *See Ravin*, 537 P.2d at 498.

132. For example, "associational privacy" is necessary for the exercise of first amendment rights in certain circumstances. *See supra* note 23.

133. The factors listed admittedly do not constitute a bright line. Nevertheless, determining whether a right is a "fundamental" or lesser protected component of the right of privacy is no more difficult than deciding whether or not a particular subjective expectation of privacy is recognized as "reasonable" by society at large.

134. A similar two-tiered analysis is advocated in Walinski & Tucker, *Expectations of Privacy: Fourth Amendment Legitimacy through State Law*, 16 HARV. C.R.-C.L. L. REV. 1 (1981).

there would be no need for a privacy inquiry. If the search passed reasonable expectations test, a further privacy inquiry under the sliding scale test would be necessary. Should the privacy interest rather minor one, such as the right to use cocaine in a public p then the burden on the government to justify its intrusion would be minor. Thus, a legitimate interest in protecting the public preventing crime would almost always justify a warrantless search concealed cocaine if it were being used in a public place.[135] Under sliding scale test, however, as the privacy interest became stronger burden on the government would increase.

Applying the sliding scale test to the search and seizure would not necessarily cause a wholesale reversal of precedent or problems for the policeman on the street. Since public safety, or safety, and the capture of criminals are legitimate state interests, searches by government officials would satisfy a requirement of a creased state interest.[136]

The privacy analysis would have the greatest potential in where a "fundamental" right to privacy was found to be infringe an aspect of privacy were deemed "fundamental," then any searc fringing on this right would be presumed unconstitutional, therefore quiring justification by a showing of an important governm interest and the least intrusive means chosen to further that int The important governmental interest would be balanced against fundamental privacy interests involved. The traditional exceptio the warrant requirement would generally satisfy this test, sin these cases the governmental interest is heightened by the need to tect officers or to keep evidence from being destroyed.

If the results would be substantially the same under either sliding scale analysis or the traditional search and seizure test, employ a separate privacy test as a second tier of analysis at all? reason for employing the test is that the recognition of a distin between the aspects of privacy protected by the Harlan test and ing scale test suggests that the results would not be the same both tests in all cases.[137] The Harlan test is primarily suited for

135. This ignores questions concerning the *scope* of the search.

136. There may also be cases, however, under the intermediate standard the requirement that the police obtain a search warrant would impose so slight den that warrantless searches would be invalid. An example of such a situation be a case involving warrantless wiretapping of a massage parlor, a place patrons and employees have been held to have no reasonable expectation of Hilbers v. Municipality of Anchorage, 611 P.2d 31 (Alaska 1980). In such some privacy interests were found to be infringed, a search could be invalid facts showed that there would have been no burden on the police in obtaining warrant.

137. *See supra* notes 56-60 and accompanying text.

involving privacy of *places*.[138] A sliding scale test, on the other hand, is used generally to provide a *personal* right to privacy.[139] Such personal rights stay with an individual no matter where that person goes. Of course, personal privacy is often hard to define without reference to a place,[140] but where a right *is* defined without reference to a place, as in *Glass*, the right can be protected from interference even in a place where society is not willing to recognize an expectation of privacy as "reasonable."[141]

V. CONCLUSION

It has been thirteen years since the people of Alaska adopted article 1, section 22 guaranteeing the right to privacy, and ten years since the Alaska Supreme Court's first major decision in the area.[142] In that time, the courts have had ample opportunity to develop a unifying rationale for the explicitly recognized right. The process is under way, but it has proceeded slowly. The judicial development, relying on a case-by-case analysis, lacks consistency. As a consequence, the contours of the right, including exactly what is meant by the term "privacy," have not yet been fully defined. The courts have not used the privacy amendment to extend additional protection to individuals

138. Justice Harlan himself recognized the difference between applying his test to place privacy interests and applying it to personal privacy rights. While the majority noted that "the Fourth Amendment protects people, not places," *Katz*, 389 U.S. at 351, Harlan based his concurrence on the fact that a phone booth is a constitutionally protected *area*, not the fact that there was any reasonable expectation of privacy in the conversation itself. *Id.* at 360.

139. This distinction provides a basis for recharacterizing the holding in *Glass*. *Glass* was decided without reference to place, but with a recognition of the fundamental right to privacy in intimate conversations which is necessary for full and free discussion in a democratic society. This is indicated by the *Glass* court's extensive quote from Judge Hufstedler's dissent in Holmes v. Burr, 486 F.2d 55 (9th Cir.), *cert. denied*, 414 U.S. 1116 (1973). *Glass*, 583 P.2d at 876-78. *See supra* note 113.

140. The difficulty of defining personal privacy without reference to a place is illustrated by *Ravin*, 537 P.2d 494. The court based the holding on the place privacy of the home. The personal privacy right to ingest substances was not sufficient by itself to overcome the state's interests. *Id.* at 511.

141. A good example of the difference that recognition of fundamental privacy rights would make is People v. Crowson, 33 Cal. 3d 623, 660 P.2d 389, 165 Cal. Rptr. 65 (1983). In that case, two suspects were left alone in the back seat of a police car. While they were alone they talked to each other, making some incriminating statements. Their conversation was surreptitiously recorded, and the remarks introduced into evidence against them. The introduction of the remarks was upheld because there was no reasonable expectation of privacy in conversations held in a police car, even with no police officer present.

If *Glass* were recharacterized as suggested above, *supra* note 139, the fundamental right of intimate conversation would protect such conversations, even though the expectation of privacy in that *place* was not reasonable.

142. *Ravin*, 537 P.2d at 494.

against the increasing threats to privacy posed by the demands of the Information Age in which Alaskans now live.[143] What is needed is judicial commitment to the independent significance of a separate privacy guarantee. This could be achieved by judicial inquiry into the full textual implications of the privacy amendment. Cases like *Ravin v. State* and *State v. Glass* indicate such a willingness on the part of the Alaska Supreme Court. Recognition of a truly independent privacy amendment, however, also requires consistent analysis in order for comprehensive form of protection to be developed. The sliding scale test provides the vehicle for the attainment of comprehensiveness and consistency in the construction of the privacy amendment. Moreover, the test allows for flexibility in confronting any threats to privacy which may emerge in the future.

John F. Grossbauer

143. *See supra* note 5.

HEALTH CONSEQUENCES OF MARIHUANA USE

HEARINGS

BEFORE THE

SUBCOMMITTEE ON CRIMINAL JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-SIXTH CONGRESS

SECOND SESSION

ON

MARIHUANA USAGE

JANUARY 16 AND 17, 1980

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STATEMENT

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ADDITIONAL SUBMISSIONS FOR THE RECORD

ADDITIONAL PREPARED STATEMENTS

STUDIES AND REPORTS

The Greatest Addiction of All

by Jon Gettman, NORML Director

NORML—IZER

Power is the most addictive habit in the world. The moral influence that shaped the American Revolution and inspired our democracy demands that individual citizens challenge the abuse of power by our leaders. Modern politics is founded on the belief that the government's natural tendency to increase its power requires restraint. Conservatives are inspired by the belief that governmental power needs to be kept minimal in order to preserve individual liberty. Liberals are inspired by the belief that individual rights require protection from authoritarians throughout society.

The War on Drugs is really a war between two opposing ideologies about the management of our society. It is a struggle between authoritarians driven by their craving for ever-increasing power and patriots driven by the love of their democratic heritage.

Marijuana reform will eventually prevail because it is true to the principles that give our society its greatest strength. It will gain support from a diverse coalition of Americans because they abhor abuse of power in their name. When they understand how the War on Drugs has been the excuse for a steady increase in the power of the government to invade their privacy, whether they use drugs or not, they will demand an end to the war.

In the last few years marijuana and other drug use has been exploited by governmental agencies to not only increase their budgets but their authority. And they lie to and mislead the public in order to justify the exceptional steps they wish to take, steps which repudiate the principles upon which our country was founded.

The American Revolution was inspired by a long simmering, deeply felt distrust by the colonists of the men running the English government. They proudly asserted their liberty to exercise their natural rights, which, wrote John Dickinson in a pre-war pamphlet, "are created in us by the decrees of Providence, which establish the laws of our nature. They are born with us; exist with us; and cannot be taken from us by any human power without taking our lives. In short, they are founded on the immutable maxims of reason and justice."

One of these rights was and is held to be a right to privacy. It is this right that is protected by the Fourth Amendment of the United States Constitution which restrains the government from unreasonable search and seizures. However, the anti-drug crusade seeks to have police excused from this restraint as long as they act in "good faith." And the Fourth Amendment would have been quietly circumvented amidst the anti-drug hysteria of September, 1986 had it not been for a few brave conservatives in the Senate, like Robert Packwood, who seek to block the abuse of governmental power, no matter what the excuse.

But this is not the only assault on the Fourth Amendment. The anti-drug movement has secured court rulings which allow the government to hover over your back yard and spy on you. They have secured widespread support for forced urine testing. How would George Mason, the father of the Bill of Rights, react to a surprise urine test? "Mr. Mason, take off that wig, we don't want any contaminants in your pee. Now just fill this little bottle and you can go back to writing the Bill of Rights, just as long as you haven't been smoking any of those hemp plants in your garden."

The assertion of a right to be protected from governmental scrutiny precedes the American Revolution. Its advocates were inspired by the tradition of liberty established by the Magna Carta and nurtured by the English Constitution. In an immortal declaration, William Pitt, a man the King's men found to be too reasonable to run the government, said in 1763: "The poorest man in his cottage may bid defiance to all the force of the Crown. It may be frail; its roof may shake; the rain may enter—but the King of England cannot enter, all his forces dare not cross the threshold of the ruined tenement!"

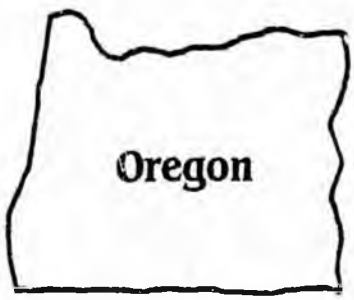
Nearly 200 years later, in 1960, Barry Goldwater wrote **The Conscience of the Conservative**, which "is pricked by anyone who would debase the dignity of the individual human being." Our dignity is debased, by a government that not only seeks to barge into our living rooms and instruct our behavior, but also has dedicated itself to spreading lies about marijuana users and promoting their widespread persecution. Our dignity is debased when Carlton Turner, the President's drug advisor, encourages employers to discriminate against marijuana users by stating the are unfit for work. Our dignity is debased when the National Institute on Drug Abuse releases a story to the press that marijuana causes premature senility without mentioning that it would take the equivalent of 135 joints a day for 40 years to accomplish it, and that 50 joints a day has no effect on the brain.

Conservatism, Goldwater wrote, is guided by "the ancient and tested truths that guided our Republic through its early days (and they) will do equally well for us." Power corrupts, and "the natural tendency of men who possess some power to take unto themselves more power leads eventually to the acquisition of all power."

The 200th birthday of the Constitution is about to be celebrated. We must remember that we, the people, must assert our natural rights so that our society may prosper as our ancestors envisioned.

We believe, as those who brought about the American Revolution, that when faced with tyranny, "submission is a crime." We're not involved in a struggle over whether or not you have a right to smoke marijuana. It's a struggle over how much power we are willing to let the state accumulate at the expense of liberty. The time has come to remind our leaders of this, and begin anew our quest for liberty. ●

Since 1969, enough Americans have been arrested for possession of marijuana to empty the states of:



(pop. 2,633,149)

(pop. 944,038)

(pop. 800,493)

And the cities of:

Fresno, CA (pop. 218,202)
Amarillo, TX (pop. 149,230)
Santa Fe, NM (pop. 48,899)
Spokane, WA (pop. 171,300)
Pueblo, CO (pop. 101,686)
Redding, CA (pop. 41,995)
Salt Lake City, UT (pop. 163,033)
Casper, WY (pop. 51,106)
Flagstaff, AZ (pop. 34,641)

And the towns of:

Piercy, Reynolds, Leggett, Rockport, Cummings, Covelo, Ukiah, Dos Rios, Laytonville, Branscomb, Westport, Longvale, Inglenook, Cleone, Ft. Bragg, Novo, Willits, Casper, Mendocino, Littleriver, Potter Valley, Redwood Valley, Comptche, Albion, Calpella, Navarro, Talmage, Elk, Philo, Manchester, Boonville, Point Arena, Yorkville, Anchor Bay and Gualala, California (pop. 66,783)

In fact, almost 6,000,000 people have been arrested for possession of marijuana. In 1984 alone, over 419,000 marijuana arrests were reported, *one every minute and a half.* The government has pledged to continue. If you think enough is enough, get involved.

Join NORML today by sending $25 membership dues, or write or call for free information:

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Washington DC, 20009

ACTIVIST NEWS

drug arrest, and if that citizen refused, he was subjected to a possible $1,000 fine.

The House Bill allowed illegally seized evi- [illegible] federal cases, not just [illegible] remember John Adams [illegible] allowed Brit- [illegible] dwelling?) Over the [illegible] Secretary of Defense Casper [illegible] called for the military to [illegible] within thirty days of en- [illegible] of the bill. And let us not forget the president's call for more than one million federal workers to submit themselves to a urine [illegible] without any prior individual basis for sus- [illegible]

In the end, only sixteen Representatives had the courage to just say no to such inherently unsound legislation. They include Rep. William Clay (Mo), Rep. John Conyers (MI), Rep. Barney Frank (MA), Rep. Ron Dellums (CA), Rep. Don Edwards (CA), Rep. Henry Gonzalez (TX), Rep. Michael Lowry (WA), Rep. [illegible] Mitchell (MD), Rep. Edward Roybal (CA), Rep. Martin Olavsabo (MN), Rep. Gus Savage (IL), Rep. Louis Stokes (OH), Rep. James Weaver (OR), Rep. Ted Weiss (NY), and one Republican, Rep. Philip Crane (IL). If your Congressman is not on this list, why don't you let him know your displeasure with his [illegible]

Meanwhile, on the other side of the Capitol, Senate Majority Leader Bob Dole introduced a bill which would have allowed the arbitrary withholding of alcohol, and mental health block grants to any state that had decriminalized. This was a deliberate, but clumsy attempt to force states to recriminalize.

The moment we heard about this amendment, **NORML** sent out word to the activists in the decrim states. They contacted their friends and local drug treatment centers and urged them to contact their Senators and Governors. **NORML** sent out a press release and also called Senators' offices to make them aware of the amendment.

All these people had one question for their elected representative: "Are you in favor of cutting off our state's drug, alcohol, and mental health grants? Neither am I. I suggest that you do something about it."

It takes about ten phone calls from constituents about a specific bill before a Representative's aide really takes notice. Only ten. Not too many of the Senators were in favor of this proposal, and they let Sen. Dole know it. The amendment was dropped the next day.

IN THE EYE OF THE STORM

Activist News by Burt Neal, NORML Projects Coordinator

At the end of September and the beginning of October of the past year, a storm of hurricane strength overcame Washington D.C. This hurricane became known as "Hurricane Hysteria" and she was a tough one to weather. Hysteria's appearance came to no one's surprise; after all, it was a mid-term election year, and the media rarely gives reform supporters a fair shake. In other words, it is always hurricane season. But the fierceness of Hysteria was the shocker. Who would have thought that crack and cocaine, the killers of 700 people last year, (tobacco—350,000 dead), would have been proclaimed by every publication as the number one security threat facing the nation? And let us not forget the opportunistic politicians trampling of the very constitutional rights that our forefathers fought for.

Needless to say, it was a busy time for **NORML** and its activitists. Everyone was on the anti-drug gravy train, and they were all out to expand their powers, increase their funding, and spread their lies while they could. The anti-marijuana forces in the White House and in the National Institute of Drug Abuse quickly began to increase their exaggerations to an eagerly awaiting and amazingly gullible media.

Here's one example of the embellished stories by the government in late September. United Press International published a story that claimed that excessive marijuana smoking could cause brain damage similar to aging. One government official described it as "a ticking time bomb." When a reporter contacted NIDA about the story, he was told these new findings should have a grave impact on the voters of Oregon who were considering a proposal on November's ballot to legalize possession and cultivation of cannabis: the Oregon Marijuana Initiative.

What reporters weren't told was that one group of rats was given the human equivalent of **136 joints a day for 30 to 40 years**, the other the equivalent of 54 joints a day for 30-40 years. The 136 "J's" a day group suffered the ill effects, the 54 a day group **showed no problems.**

Typical. **NORML** wrote the papers that ran the story and sent out a press advisory to the media warning about this and other examples of government exaggerations about marijuana. We know that we did have some impact on the media, but the truly important point is that an organization was out there to point out the falsity of this story.

The press frenzy, which began to deteriorate somewhat in October, came in a distant second to what we witnessed in Congress. [illegible]

As I am writing, the storm is slowly subsiding. A fair amount of the media is beginning to admit that they exaggerated the drug crisis. And there are even voices of wisdom coming from certain politicians, especially Pat Schroder (D-CO) and Gary Ackerman (D-NY). Perhaps the bravest was Sen. Evans (R-WA), who was absolutely correct when he said that the Senate Bill "belonged in Orwell's 1984, not America in 1986."

America's civil liberties took a beating this hurricane season. Perhaps it's greatest victim was **O.M.I.** They'll be back next election. But we were able to in some ways deflect some of Hysteria, and thus alter the course of the debate. **NORML** activists and members were able to make a difference to the temporary situation.

If you think that the work of **NORML** as described above is important, please help us to help you. Join **NORML** or make a contribution today. If you want to alter history, become an activist for justice in America. Contact **NORML** today. Hysteria was a rough storm, but remember, it is always hurricane season during prohibition.

Here is a listing of some of the **NORML** college chapters around the country:

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CASE IN POINT

BOOZE AND GRASS IN ALASKA

● Possession's still legal, eleven years later. ●

A monthly report on drugs and the law. Written in consultation with Kevin Zeese, NORML Chief Counsel.

BY BOB LABRASCA

The case that gives rise to this column is that of *Hugh Harrison v. State of Alaska*—a case that's not very important in itself.

Harrison, an Alaska state trooper who apparently enjoyed an occasional nip, was transferred in late 1981 to duty in St. Mary's, a "dry" village on the Yukon River. In April '82, he flew a plane in from Nome to St. Mary's carrying a load of beer and vodka. Two days later police searched his home and found 62 liters of beer and 1.75 liters of vodka. He was convicted under the local ordinance of importing alcohol and then appealed, arguing in part that the local law violated his right to privacy under the state constitution.

In August '84, the Alaskan court of appeals affirmed his conviction. In so doing they had to draw some sharp distinctions between Harrison's case and one from 1975 involving a chap named Irwin Ravin. It was the Ravin case that effectively legalized "the possession of marijuana by an adult for personal consumption" in the state of Alaska.

You see, the Alaska Constitution specifically protects the "Right of Privacy." The state proudly guards that right: "Our territory and now state," the Alaska Supreme Court wrote in the Ravin decision, "has traditionally been the home of people who prize their individuality and who have chosen to settle or to continue living here in order to achieve a measure of control over their own lifestyles which is now virtually unattainable in many of our sister states."

In concluding that the state had no right to go rooting through people's domiciles and belongings in search of their personal pot stashes, they stated unequivocally, "We believe this tenet to be basic to a free society. The state cannot impose its own notions of morality, propriety, or fashion on individuals when the public has no legitimate interest in the affairs of these individuals."

So, in response to Harrison's appeal, the appeals judges had to explain why his case was different from Ravin's—and they had no trouble doing that. The Ravin decision, they pointed out, had not affirmed a "fundamental right" to possess or ingest marijuana. It was the privacy of the home, and implicitly the person, that was at issue, and that privacy wasn't absolute. If marijuana were the cause of a significant public health problem, then that right might have to give way to the public interest. But, "given the evidence of the relative harmlessness of the drug," they told Harrison, "an individual's right of privacy in the home outweighed the government's interest in regulating personal use of marijuana in the home."

Despite the defeat of the Oregon Marijuana Initiative at the polls last fall, some states continue to exercise a more enlightened attitude toward pot.

Alcohol, on the other hand, was far from harmless, they explained, citing these facts among others: "Alaska's alcoholism mortality rate in 1975 was 418 percent higher than the national average . . . one out of every ten Alaskans is an alcoholic . . . (In rural areas of the state) 77.0 percent of violent crimes and 55.6 percent of property crimes were committed under the influence of alcohol." With a drug problem of *that* severity ravaging the Alaskan population, the town of St. Mary's had a perfect right to outlaw the importing of booze, regardless of trooper Harrison's lifestyle. (This decision, by the way, did not address Harrison's right to drink in his own home, but only his right to import or sell alcohol. Smuggling and dealing pot are still illegal in Alaska.)

What I find interesting about this is that it's been well over eleven years since *Ravin*, and it's still a matter of law in Alaska that marijuana is relatively harmless. Nobody gets busted there for head stash. If "legal" pot had the potential to provoke a major health problem, it would have done so by now, and the "parents power" antimarijuana lobby would have made its case before the legislature and the courts, and personal possession of grass would be illegal again. In the intervening decade, hundreds of millions of tax dollars (your money and mine) have been spent to try to discover some intolerably deleterious effect of marijuana, and "experts"—who in that much time could have proven clear, arctic air poisonous—are still coming up dry.

I talked with Anchorage attorney Robert Wagstaff, who handled the Ravin case, before putting this column together and heard for the first time the story of how the Alaskan courts became enlightened on this issue. It seems that he and Irwin Ravin, also a lawyer, actually conspired to change the law.

According to a prearranged plan, Ravin got himself busted with some pot in his pocket way back in December 1972. They moved to dismiss the case, and almost three weeks of hearings ensued in which the entire issue of marijuana and health was examined. Nationally-recognized scientists and zealots, from Dr. Lester Grinspoon to Dr. Gabriel Nahas, took the stand, and the current scientific literature on cannabis was entered in the record. A thorough study of that evidence formed the basis of the Supreme Court's *unanimous* decision in Ravin's favor, delivered in May '75.

Despite the passage of time, it's still quite probably the most thorough and rational discussion on marijuana prohibition yet dispensed by a body of judges. (Courts in the lower 48 have universally rejected the pot-privacy argument.) Anyone with an interest in this issue and access to a law library should give it a read-through. It just might make your day.

You'll find it under *Ravin v. State*, 537 P. 2d 494 (Alaska 1975). ●

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AMERICAN SURVEY

The long, losing battle against drugs

WASHINGTON DC

AN OCCASION for congratulation, the administration had rather hoped. It did not turn out like that. The White House conference on a drug-free America, held this week in Washington, has given critics the chance to draw attention to the failures of the tough drug policy that President Reagan has tried to make a theme of his administration.

America's drug plague is growing worse. The National Institute on Drug Abuse counts the cases where drugs are mentioned by the coroner as a contributing cause of death; it also follows hospital emergency-room admissions involving drugs. Both indicators show rapid growth in recent years, above all for cocaine. A sample of coroners' reports in major metropolitan areas shows deaths from cocaine increasing from 53 in 1976 to 615 in 1985. A similar sample of emergency-room admissions for cocaine shows an increase from 1,000 in 1976 to 9,400 in 1985. And the stuff is getting easier and cheaper to buy. In 1981 a pure gram of cocaine sold for about $600; by 1986 the price had dropped to $200 and is now even lower.

The president's men try to cheer themselves up with the news about those in their last year at high school who are taking less marijuana than they once did. In 1978 11% of them reported that they had taken marijuana daily in the previous month; by 1986 this figure had dropped to 4%. But cocaine rates have not shown the same trend. In 1981 5.8% reported taking the drug at some time in the previous month; by 1986, after some fluctuations, the figure was 6.2%.

The heroin epidemic of the early 1970s has long burnt itself out. Most current heroin users have been on the drug for at least ten years; the average age of those having treatment is about 35. Many heroin addicts are black. Concern about dirty needles and AIDS has refocused interest on a lost generation of inner-city blacks (see box on next page).

Other drugs are taking over, and not just in the inner city. A recent Rand Corporation study of drug-taking in and around Washington showed that PCP, a peculiarly noxious chemical drug originally developed as an animal anaesthetic, is widely taken in Washington's well-heeled suburbs as well as in the blighted parts of its centre.

Federal spending on fighting drug suppliers has risen steeply. In 1981 $861m was spent; by 1987 the president was asking for $3 billion. There is quite a bit to show for it. Seizures of cocaine by the federal government rose from 2 tons in 1981 to 27 tons in 1986, with state and local agencies seizing almost as much. Arrests on drug charges have increased sharply and sentences are harsher: Colombian sailors on marijuana boats now get average sentences of more than five years. The number of federal prisoners is expected to grow enormously over the next ten years, and most of the growth will be attributable to drugs.

But the critics, some of them retired drug warriors, accuse the administration of lacking a battle plan. There is much confusion. A former head of the Miami Coast Guard wrote late last year that the fragmentation of responsibility between the Coast Guard and the Customs Service, with its better political connections, had led to bothersome duplication. And a lack of co-ordination is felt in other ways: the Coast Guard's commander recently complained that his expanded drug-interception fleet was confined to port because of a lack of money caused by a budget dispute between the administration and Congress.

Efforts to involve the armed services in a more central way have not come to much. Though the Defence Department is required to provide specialised equipment, the services seem content to play a secondary role: half of the 16 frigates that the navy plans to decommission as part of its cuts are heavily involved in drug interception.

In an effort to stem the flow of cocaine at its source, the administration says it will make drugs a central theme in its dealings with supplier countries. But government agencies have differing priorities. The CIA may have tolerated the alleged involvement with drugs of Panama's General Manuel Noriega (he has been indicted by a federal grand jury in Miami) in return for the information he provided on Cuba and Nicaragua. State Department diplomats have little time for their department's Narcotics Bureau, often ignoring the bureau's recommendations against "certifying" that a supplier country has tried hard enough to stem the traffic. (Congress insists on this certification if a country is to get aid.)

But the saddest failures in American drug policy are to do with prevention and treatment; by comparison, programmes for drug-fighting and interception are well financed. Though there is endless talk by almost everybody about the importance of prevention, little is done. The budget for prevention and treatment remained almost static, at less than $400m, between 1981 and 1986. Congress, which passed the Drug Control Act in 1986, increased the appro-

More drug busts, but still the plague spreads

The battle for clean needles

WASHINGTON, DC

MORE than half the intravenous-drug addicts in New York are infected with the AIDS virus. More than half the heterosexuals with AIDS in America are intravenous-drug addicts. For those two reasons alone, the epidemic of needle-transmitted AIDS in America's eastern cities requires action. But, as the chairman of President Reagan's commission on AIDS, Admiral James Watkins, made clear in his first recommendations this week, there is another reason why intravenous-drug AIDS is the most dangerous part of America's AIDS epidemic.

The reason is that AIDS is expanding at an accelerating rate only among drug addicts. Among homosexuals who are not addicts, the rate of new infections is now falling—though the number of new cases of the disease itself will continue to rise for years because of the long lag between infection and symptoms. Infection by blood transfusion has been all but stopped and infection through heterosexual sex is still increasing only slowly. Yet shared needles constitute the main route by which the AIDS virus is invading the heterosexual population. AIDS spreads more easily to the sexual partners of addicts than to the sexual partners of people who have had transfusions. Three out of four babies born with the virus are born to drug addicts or their sexual partners. And AIDS is 20 times as common among black drug addicts as among white addicts.

America is still paralysed by indecision about how to tackle the needle-sharing epidemic. Educating addicts to the dangers has had surprisingly little effect. More than 90% of the addicts in a study in Sacramento believed they would eventually catch AIDS; yet 75% of them continued to share their needles. Distributing clean needles has just begun in New York, and other cities are considering it. Distributing bleach with which addicts can clean their own needles is easier for most politicians to contemplate, and has had some success in San Francisco. Admiral Watkins's commission favours strengthening drug-treatment centres to get them to stamp out the epidemic and the addiction at the same time. He recommended this week that the federal government should spend an extra $1.5 billion to fight AIDS among America's 1.2m drug addicts, increasing by 32,000 the number of workers in drug-treatment centres and increasing the number of such centres by 3,300.

priation to $960m. The administration tried to cut it back again.

Cities do not have the resources to treat drug addicts. In Washington, for instance, facilities were expanded to treat twice as many addicts in 1986 as in 1978, but, with more people being arrested on drug charges and requiring treatment, the waiting-lists grow ever longer. Heroin takers are being squeezed out of their expensive methadone programmes. Cocaine treatment, which is not yet well developed, has been overwhelmed as new and more addictive forms of the drug become available.

And, despite Mrs Nancy Reagan's "Just say no" campaign, prevention remains the neglected stepchild of drug policy. New school-based programmes, copying some rather successful anti-smoking campaigns, are being tentatively tried out. In a forceful opening speech to the White House conference, Mrs Reagan argued that once public concern is truly aroused, victory must surely come. It still looks a long way off.

The campaign

Countdown to Super Tuesday

On Super Tuesday, March 8th, 20 states hold caucuses or primaries to choose their favourites for president. Of the Democratic candidates, four expect to do well; none has an obvious lead. This article summarises what each says he stands for. It is followed by reports from some of the larger states that make their choices on Tuesday

A manager rather than a visionary, **Governor Michael Dukakis** has not distilled his message into a slogan. Rather, he draws heavily on his experience in Massachusetts. He stresses that he has run a government, put together ten budgets and presided over unprecedented prosperity. He wants America to "invest" in "good jobs at good wages", by which he means that he would repeat on a national scale his state practice of setting up programmes to divert public investment into certain industries and regions in the hope of drawing in private money too. Like most candidates, he is more specific when criticising others' policies than when describing his own: he finds fault with star wars, the contras, the deficit, the defence build-up, the lack of an energy policy (though he vigorously opposes an oil-import tax), trade protectionism, the political-action committees whose cash he rejects.

Mr Dukakis believes in heavier social spending. He would guarantee basic health insurance for those who cannot afford it. He would use "workfare" and retraining programmes to get people off welfare. And he would pay for it all by better tax collection and by cutting military spending.

On foreign affairs he is still trying to redress a reputation for inexperience and naivety. His main contribution is to talk less about East-West issues and more about North-South ones. He has an unfashionable affection for bodies like the Organisation of American States and proclaims a deep respect for international law. Mr Reagan's policy in Central America, he says, is "not only a failed policy, but an illegal one."

Mr Dukakis has more money than his rivals, which enables him to buy more television time than they can. Regardless of how he does in the South, he expects to win a clutch of northern states on Super Tuesday (Massachusetts, Rhode Island, Washington and Idaho). He appeals to middle-class liberals, old people and Hispanics (partly because he speaks Spanish). Support for him seems especially strong among the liberals of At-

COMMENTARY

We've Won Some Battles, But We're Still Losing the War on Drugs

Despite massive efforts, the problem won't go away

By David McClintick

BY WRIGHT FOR THE MIAMI NEWS

When John C. Lawn, head of the Drug Enforcement Administration, wants to get a sure laugh inside his agency, he says, "We've turned the corner."

"What can I tell you, we've turned the corner," Lawn quips, as an aide recites record-setting arrest statistics at a recent meeting in Washington of the two dozen top officials of the DEA. They all laugh.

"We've turned the corner again," he says in Ft. Lauderdale in remarks to 58 supervisory agents from the DEA's huge Miami division. They all laugh. He says it at a conference in Toronto of the special-agents-in-charge of the 20 DEA field offices in the United States and Canada, and again in Vienna at a gathering of senior DEA agents from Europe and the Middle East. More laughter.

The "corner" in the drug war hasn't been turned, of course, and claims to the contrary have been a quiet gallows joke in federal law-enforcement circles since at least 1973, when President Nixon, in all seriousness, proclaimed publicly, "We have turned the corner on drug addiction in America," a statement that proved to be incorrect in the extreme. "We've turned the corner" remains the DEA's internal laugh line today because it expresses—in a stab of bitter, dark humor—the frustration the DEA feels as the lead law-enforcement agency in America's frustrating war on illegal narcotics.

Measured by the usual standards of law-enforcement effectiveness—arrests and convictions of significant criminals—the DEA is a phenomenal success. But when judged by the more fundamental question of whether the nation is winning the war on drugs, the agency must be rated a failure. The failure is so pervasive and urgent, in fact, that the DEA is launching a new strategy—a dangerous, highly classified, when-all-else-fails effort to stop drugs overseas, at the source.

In a dichotomy perhaps unprecedented in the annals of American law enforcement, most current statistics of both success and failure in the drug war are records. Nearly two decades into America's second and worst narcotics epidemic (the first lasted roughly from 1885 to 1920), drugs have spawned perhaps the most virulent crime wave in U.S. history. In the fiscal year that ended last September, 12,395 people arrested by the DEA were convicted of drug crimes, up from 5,580 in 1981. Drug criminals constitute more than a third of the federal prison population, a growing percentage and by far the largest single category (robbery, at 15 percent, is second). Drugs are behind a recent murder wave in Washington, D.C., and spawn robberies and killings in cities across the country.

The harder the DEA pushes, the more drugs seem to enter the United States. Last year, DEA agents seized nearly 40 tons of illegally imported cocaine in the United States, up from two tons in 1981. They also seized 682 illicit drug-processing laboratories, almost four times the number of labs seized six years earlier. They confiscated just over $500 million in cash and other assets belonging to drug traffickers, more than the DEA's entire budget for 1987, as well as 4,964 firearms, including 249 automatic weapons. On their face, these statistics reflect an exceptional achievement—a deft melding of new laws, bigger budgets and the skill of thousands of people. Yet they are a profile of defeat.

Despite one of the largest mobilizations of law-enforcement power in history, America's drug problem is worse than ever in many respects, and worse overall than in any other nation in the industrialized world. One in six working Americans uses drugs regularly, and the problem is even more acute among the unemployed, the poor and the young, especially school dropouts. More drug-addicted babies are being born than ever before. Cocaine is more readily available in the United States, and at a lower cost, than in several years. The 40 tons that the DEA seized last year are believed to represent only a small portion of the total smuggled into the nation. Meanwhile, the narcotics mafia of Colombia, the source of most cocaine, continues to function freely and appears to be stepping up a campaign of terror against Colombian government officials who try to combat it. On Jan. 25 the drug mafia kidnaped and assassinated Colombia's attorney general, the latest in a series of extraordinarily brazen acts of violence.

The DEA's efforts to combat the drug epidemic have been hampered by two factors. First, drugs aren't simply a crime problem, like bank robbery or income-tax evasion. Drugs also are a public-health and medical problem, and, in a larger sense, a social dilemma that seems to invite a variety of possible approaches such as education and therapy having little to do with law enforcement. Until the demand for illegal drugs eases, the DEA's efforts to reduce the supply may be doomed.

Second, the drug war also has been a bureaucratic turf war. Partly because of the lack of consensus on how best to attack the problem, the government bureaucracies responsible for fighting drugs haven't received the kind of stable political support the FBI and IRS get in waging their more conventional and less controversial wars.

Federal narcotics agents in the United States have carried a total of 30 different badges in the nearly three-quarters of a century since the federal government outlawed drugs in 1914. After decades of intermittent scandal, malfeasance and mismanagement, the DEA emerged in 1973 when the Nixon administration, responding to a narcotics epidemic already well under way, created a new "superagency" from several contending agencies. The result was paralysis at the top of the narcotics bureaucracy. Internecine warfare raged. The new agency had three heads in its first three years. It took most of a decade, and the new, younger blood that came with attrition, before the old animosities began to heal and the DEA began to function with any degree of institutional stability and effectiveness. In 1981, the FBI, which had shunned drug responsibilities under J. Edgar Hoover for fear that they would corrupt the bureau, agreed to accept "concurrent" jurisdiction over drug enforcement.

During the Reagan years, the drug bureaucracies at large have continued to expand. In addition to the DEA and the FBI, 11 Cabinet departments and about three dozen agencies are involved in the drug war at the federal level—including the State and Defense departments, the CIA, the National Security Agency, the Department of Health and Human Services, the Department of Agriculture, the Customs Service, the Immigration and Naturalization Service and the Coast Guard. And, of course, state and local governments and a myriad of private groups are in the fight as well.

The DEA, as the primary agency for both investigations and intelligence and as a leader in drug education, is at the center of the fight, and its recent growth has been explosive. From 1979 through 1987, the DEA's budget rose an average of 32 percent annually, to about half a billion dollars, the only major agency outside the Defense Department to get such increases. But since the dramatic increases in arrests, convictions and confiscations of drugs, money and property in this country have failed to reduce drug abuse—and since severe overcrowding in prisons poses the distinct possibility that there will be no place to put newly convicted drug offenders—the DEA is beginning some new efforts to stop drugs at their overseas origins.

In concert with the State Department and other agencies, the DEA is launching a major, highly sensitive initiative in South and Central America to try to disrupt the manufacture, processing and shipment of cocaine before it leaves the so-called source countries such as Colombia, Bolivia and Peru.

The DEA is in the early stages of training between 150 and 200 of its own special agents for duty with antinarcotics teams assembled from the police and armed forces of about a dozen Latin nations. In Bolivia and Peru, the first wave of DEA agents is already participating with the teams in raiding clandestine jungle cocaine laboratories, disrupting shipments to and from the labs by air, river and other means, and collecting and coordinating intelligence on the cocaine traffic in the region.

In recent months, U.S. sources say, the joint teams (and in some cases all-Latin teams acting partly on DEA intelligence) have seized several tons of fully processed cocaine and destroyed labs, processing facilities, chemicals

and ingredients capable of producing considerably more cocaine than was seized in the United States during all of last year. The authorities believe that the techniques used may be reducing more effectively the amounts of cocaine reaching the United States.

The new venture, which is scheduled to last indefinitely, builds on the DEA's experience with a number of previous operations that were somewhat similar but much smaller, including one in Bolivia in 1986 that was terminated after four months. U.S. agents so far have suffered no casualties in the current effort, though there have been some close calls. Recently three DEA agents and a Bolivian police unit that was in the midst of arresting a drug pilot and seizing his wares were attacked by a large mob of angry, rock-throwing coca farmers. A few shots were fired, but the joint team was rescued before anyone was seriously injured.

In foreign enterprises, such as the new Latin initiative, the DEA is making greater use of its little-known but potent network of foreign agents, intelligence analysts and informants—and its 93-plane air wing. Apart from the new contingent in Latin America, the DEA deploys 211 special agents in 65 foreign cities, more than twice as many agents as all other civilian U.S. law-enforcement agencies combined stationed abroad. For example, there are 18 DEA agents in Bogota, 10 in Mexico City, 18 in Bangkok, four in Paris, three in Istanbul.

"As an intelligence network on international drug trafficking, the DEA [is] unparalleled," writes Ethan A. Nadelmann, an assistant professor at Princeton University's Woodrow Wilson School of Public and International Affairs, in a soon-to-be-published book on international law enforcement. "In a few countries, most notably in Latin America but also in those countries where governments are not on good terms with the United States, the DEA agent's access may exceed that of both the [U.S.] ambassador and the CIA."

Panama has tarred unjustifiably the DEA's generally good record abroad. When Gen. Manuel Antonio Noriega, the Panamanian dictator, was indicted by federal grand juries in Florida on drug charges, he defended himself in part by displaying letters from DEA chief Lawn and other U.S. officials commending his supposed antidrug efforts.

The Noriega affair illustrates the seamy world in which the DEA must operate—and critics' naivete about the murky, constantly shifting reality of the international drug war. The DEA finds it necessary to deal routinely with many unsavory characters in its worldwide effort to inhibit narcotics traffic. Noriega turned out to be one of those characters, and the DEA long has been aware of his likely involvement in illegal activities. Because Noriega was demonstrably helpful in particular DEA operations, the agency thanked him—in letters known within the DEA as "attaboys" that essentially were formalities. But when hard evidence of his criminality—usable in U.S. courts—mounted relatively recently, it was the DEA's own lengthy investigation that underlay a large part of his indictment.

The DEA also has aggressively investigated official misconduct in Mexico, where, as in Panama, the United States has a sensitive, multifaceted relationship comprising far more than narcotics policy. Even more than Panama, Mexico has allowed itself to become a major source and conduit of illegal narcotics and associated violence that has demanded urgent U.S. attention.

The 1985 torture-murder of Enrique Camarena Salazar, a U.S. drug agent stationed in Guadalajara, has obsessed the DEA, which has conducted an intensive investigation of the killing and related events. Early in January, a federal grand jury in Los Angeles indicted nine people, including two reputed Mexican drug lords and three Mexican police officials, for complicity in the murder. Despite Mexico's inaction, obstruction and outright corruption, the DEA's investigation provided the evidence to support the Los Angeles indictments.

In Panama, Mexico and elsewhere, the DEA's choice—which must be exercised daily and pragmatically in hundreds of ambiguous, difficult situations—is between working in, around and through an environment of pervasive corruption to accomplish something positive or withdrawing and accomplishing nothing. The DEA has consistently chosen the former course.

The agency's reputation spans ideological boundaries. Although they once portrayed narcotics as a symptom of capitalist decadence, the governments of the Soviet Union, the People's Republic of China and other communist nations over the past year or two have quietly asked the DEA's help in combating their own drug traffickers. Some training in drug-enforcement skills already has been completed, and the Soviet, Chinese and several Warsaw Pact governments have begun to share intelligence with the United States and other western nations that has resulted in the seizure of illegal drugs and the arrest of traffickers.

For years the DEA has tried to live down a somewhat reckless "cowboy" reputation, stemming from the early 1970s when federal drug agents perhaps were best known for their occasional "knockless searches" of what turned out to be the wrong residences. They're not cowboys, but fictional portrayals of their work usually understate just how difficult it is. DEA agents work undercover most of the time, making many arrests during the commission of the crime. As a result, drug law enforcement is considerably more dangerous than most other types, and DEA agents are much more likely to be involved in a violent episode than are officers of any other federal law-enforcement agency. Two DEA agents were killed in a gun battle with alleged heroin dealers in Los Angeles on Feb. 5. Two agents died in the line of duty in 1987, and a number of others have been wounded or injured while making arrests or seizing booby-trapped drug labs.

As the drug war on U.S. streets and in South American jungles grows more violent and preoccupying, we risk losing sight of the DEA's less visible but equally urgent mission—education, which most experts consider an essential long-term key to reducing drug abuse. The DEA's Sports Drug Awareness Program provides guidance and training in drug education to the nation's 48,000 school athletic coaches, who in turn are in direct touch with more than 5 million youths, many of them role models in their schools. This and similar federal programs, though vastly underfunded by the Reagan administration, may be contributing to the reported recent decline in cocaine use among high school seniors.

Although Americans broke a devastating drug habit in the 1920s, it's more difficult this time. The drugs are more numerous and varied, the criminals far better organized and financed. Only with the strongest commitment to curbing both supply and demand—through dogged, discriminating worldwide law enforcement and pungent, well-focused drug education—do we stand a chance of turning the corner. ■

David McClintick, the author of "Indecent Exposure: A True Story of Hollywood and Wall Street," is writing a book about federal law enforcement to be published by William Morrow and Co.

If Higgins Were a Soviet, Would He Be Free Now?

Our response to hostage-takers is restrained by scruples

By Terrell E. Arnold

The recent kidnaping of Lt. Col. William Higgins brought to a boil once more the frustrations many Americans feel about dealing with the crime of hostage-taking.

We genuinely want to do something to get our hostages out and deter future kidnapings. But what are our real options? One way to begin to answer this question is to look at how other countries respond to hostage-taking and then to ask whether those methods would be sensible—or legal—for the United States.

Because hostage-taking commands so much media attention, it looks like a bigger problem than it really is. In fact, in 1986, kidnapings and hostage-takings accounted for just 6 percent of all international terrorist incidents. Bombing, shooting and arson were the real threats. But knowing that bostage-taking is a minor statistical risk doesn't make it any easier to swallow the latest kidnaping or the plight of the eight other kidnaped Americans.

The Higgins kidnaping doesn't pose any new issues. It merely sums up the old ones. Should we retaliate in kind against the terrorists or their sponsors? Is assassination a proper weapon? If not, what other choices do we have? As the following survey makes clear, different nations have tried various answers to these questions. Their sometimes hard-nosed tactics raise obvious moral and legal problems; the evidence also suggests that these tactics often don't work.

ASSOCIATED PRESS

William Higgins

■ *The Soviet approach.* Four Soviet embassy officials were taken hostage in Beirut in September 1985. There was no discernible publicity in the Soviet Union. One hostage was killed, but a month later three hostages were released. The question is: How?

The story on the street in Beirut is that in the period between the taking of the hostages and their release, Soviet KGB agents identified the hostage-taking group as the Sunni Moslem Islamic Liberation Organization. The KGB supposedly then captured a member of that group, cut off his testicles and sent the body back to his friends as a warning of what would happen if they didn't release the hostages.

This gruesome story may simply be a bit of KGB propaganda, as some U.S. experts suspect. It is more likely that the Soviets turned up the heat on their Syrian clients and told them to get the Russian hostages out—quick! Any dirty work that may have been done was probably the work of the Syrians, not the Soviets.

Whatever the case, the Soviets haven't been bothered by hostage-takers since then and have continued to operate relatively freely in West Beirut—despite an ever-present terrorist threat that has driven most other diplomats into Christian East Beirut.

A tough Soviet response to the Beirut hostage incident would be in line with other known Soviet reactions to terrorism. When a Soviet airliner was hijacked in the Soviet republic of Georgia several years ago, they stormed the aircraft on the ground—killing passengers and hostage-takers alike until the incident was resolved.

Their political system, so different from ours, allows responses that would be unthinkable for the United States. In dealing with terrorist incidents, Soviet officials behave with no apparent need to consider the morality or legality of their tactics or the reactions of their own people and critics abroad.

■ *The Lebanese approach.* In Beirut, the traditional response to hostage-taking has been tit-for-tat. If someone kidnaps a member of your family or religious group, you abduct a member of his—and then try to arrange a trade. This hard-nosed approach sometimes works in the short run, but it generates a continuing chain of grievances. During the Lebanese civil war in 1975-76, this approach reached absurd dimensions, as opposing factions erected barricades throughout the city and took hostages by the hundreds.

When the hostage-trade approach fails, many Lebanese factions turn to rougher and less discriminate methods. They park a Mercedes Benz outside the house of their enemy, loaded with 100 pounds or so of plastic explosive, and wait for the dust to settle.

Some Lebanese privately suggest that the United States and Europe should adopt similar tactics: That is, go into Shiite Moslem areas of West Beirut, abduct members of hostage-taking families and negotiate a trade. This approach is hardly a model for successful anti-terrorism policy. Most observers contend that such cut-throat tactics are part of Lebanon's problem—not part of the solution.

■ *The French approach.* Their response is rooted in a centuries-old Gallic tolerance for dissenters. France has been a second home for political outcasts and exiles—from Ho Chi Minh to the Ayatollah Khomeini. Most of the time, this French openness has been cost-free and a matter of pride to the French. But beginning with the Algerian revolution, when revolutionaries concluded that they could influence French policy by bombing Paris cafes, the French have had a terrorism problem.

During the 1980s, the French have used a range of unconventional approaches to terrorism. One method is to provide safe haven for terrorists—even to such established villains as "Carlos the Jackal" and Syria's Rifaat Assad—on the understanding that they will refrain from acts of violence inside French territory.

TABLE 1

Total Marijuana and Drug Arrests Since 1965

Year	Total Drug Arrests	Total Marijuana	Percent Marijuana
1965	60,500	18,815	31.1
1966	75,900	31,119	41.0
1967	121,500	61,563	50.9
1968	198,900	94,572	48.2
1969	258,600	119,903	41.2
1970	415,000	188,682	45.4
1971	492,000	225,828	45.9
1972	527,400	292,179	55.4
1973	628,900	430,700	66.9
1974	642,080	443,900	69.3
1975	661,300	416,179	63.2
1976	679,700	441,100	72.3
1977	642,700	457,600	71.2
1978	628,700	445,800	70.9
1979	565,600	391,600	72.1
1980	580,900	405,600	69.8
1981	559,900	400,300	71.5
1982	676,000	455,600	67.4
1965-82	8,309,180	5,312,639	63.9

Source: FBI Uniform Crime Reports 1965-1983

TABLE 2

How do people rank the severity of crime?

severity score	offense
72.1	Planting a bomb in public, killing 20 people
52.8	Forcible rape resulting in death
43.2	Robbing a victim at gunpoint and shooting victim to death
35.6	Intentionally injuring victim resulting in death
25.9	Focible rape
24.9	Arson causing $100,000 damage
19.5	Smuggling heroin into country
10.5	Stealing property worth $10,000 from outside a building
9.6	Breaking into a home and stealing $1000
7.2	Signing someone else's name to a check and cashing it
6.9	Stealing property worth $1000 from outside a building
4.6	Carrying a gun illegally
1.4	Smoking marijuana
0.3	Vagrancy
0.2	Playing hooky

Source: Excerpts from Report to the Nation on Crime and Justice, U.S. Department of Justice 1983, citing The National Survey of Crime Severity, 1977.

TABLE 3

Marijuana Arrests Compared With Other Crimes - 1982

Crime	Number of Arrests
Larceny - Theft	1,368,100
Burglary	527,100
Marijuana	455,600
Aggravated Assault	313,150
Vandalism	245,700
Weapons Offenses	193,500
Robbery	157,630
Motor Vehicle Theft	129,100
Forgery and Counterfeiting	97,300
Rape	33,600
Murder	21,810
Arson	20,500
Embezzelment	9,000

Source: Compiled from FBI Uniform Crime Report, 1983

TABLE 4

Estimated Number of People Arrested for Marijuana - 1982

Year	455,600
Each month	37,967
Each week	8,762
Each day	1,248
Each hour	52

Source: FBI Uniform Crime Report, 1983

TABLE 5

Marijuana Arrests - Possession and Sale

Total Marijuana Arrests	Total Possession	Total Sale/Cultivation
455,600	68,340 (15%)	387,260 (85%)

Source: FBI Uniform Crime Report, 1983

LIFETIME PREVALENCE TRENDS IN MARIJUANA USE, 1962 - 1982

YEAR	'62*	'67*	'71	'72	'74	'76	'77	'79	'82
AGE:									
12 - 17			14%	14%	23%	23%	28%	31%	27%
18 - 25	4%	13%	39%	48%	53%	53%	60%	68%	64%
26 - 34	2%	3%	19%	20%	30%	36%	44%	48%	56%
Adults 18+	2%	5%	15%	16%	19%	21%	25%	30%	32%

Source: Based on National Household Surveys on Drug Abuse, 1971-1982, National Institute on Drug Abuse.

*Based on reconstructed data collected in 1977 from Cisin, I., et al., highlights from the National Survey on Drug Abuse: 1978. National Institute on Drug Abuse, 1978.

LIFETIME PREVALENCE TRENDS IN MARIJUANA USE, 1977-1982

Number of Adult Users, 18+

1977 - 36,215,655

1979 - 47,500,000

1982 - 52,543,000

Number of Users, Youth - Ages 12 - 17

1977 - 7,032,506

1979 - 7,300,000

1982 - 6,132,240

Number of Users, Total Population - Age 12+

1977 - 43,248,171

1979 - 54,800,000

1982 - 58,675,240

Source: Based on National Household Surveys on Drug Abuse, 1977 - 1982, National Institute on Drug Abuse.

90% of all persons who have used marijuana are adults.

The above surveys do not include members of the armed forces, people living in college dormitories, group quarters, and institutional populations.

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Compiled by: U.S. Dept. of Justice
Executive Office for US. Attorneys
Washington D.C. 20530
11/85

STATE MARIJUANA LAWS

STATE (Territory)	PERSONAL USE POSSESSION		POSSESSION		SALE, DISTRIBUTION, DELIVERY	
	Max. Imprisonment	Max. Fine	Max. Imprisonment	Max. Fine	Max Imprisonment	Max. Fine
ALABAMA	1 yr (for personal use)	$1,000	min. 2-15 yrs	$25,000	Min. 2-15 yrs	$25,000
ALASKA	Legal to possess up to 4 oz. in public	if not	90 days (4 oz to 1/2 lb) (1 oz or more in public)	$1,000	5 yrs (more than 1 oz.	$50,000
	(less than 1 oz in public)	$100	1 yr (more than 1/2 lb)	$5,000		
ARIZONA	1 1/2 yrs	$150,000	1 1/2 yrs	$150,000	7 yrs	$150,000
ARKANSAS	1 yr	$1,000	1 yr	$1,000	min. 4-10 yrs (less than 10 lbs)	$25,000
					5-20 yrs (10 lbs - 100 lbs)	$50,000
					6-30 yrs (over 100 lbs)	$100,000
CALIFORNIA	(less than 28.5 grams)	$100	6 mos.	$500	4 yrs	$10,000
COLORADO	(less than 1 oz.)	$100	6 mos. - 2 yrs. (1-8 ozs.)	$5,000	2-4 yrs	
			1-2 yrs (over 8 ozs.)			
CONNECTICUT	1 yr	$1,000	1 yr	$1,000	7 yrs	$1,000

STATE (Territory)	PERSONAL USE POSSESSION		POSSESSION		SALE, DISTRIBUTION, DELIVERY	
	Max. Imprisonment	Max. Fine	Max. Imprisonment	Max. Fine	Max Imprisonment	Max. Fine
ILLINOIS	30 days (2.5 grams or less)	$500	6 mos (2.5-10 grams)	$500	6 mos (2.5 grams or less)	$500
			1 yr (10-30 grams)	$1,000	1 yr (2.5-10 grams)	$1,000
			1-3 yrs (30-500 grams)	$10,000	1-3 yrs (10-30 grams)	$10,000
			2-5 yrs (over 500 grams)	$10,000	2-5 yrs (30-500 grams)	$10,000
					3-7 yrs (over 500 grams)	$10,000
INDIANA	1 yr (up to 30 grams)	$5,000	2 yrs (over 30 grams)	$10,000	1 yr (up to 30 grams)	$5,000
					2 yrs (30 grams - 10 lbs)	$10,000
					5 yrs (10 lbs or more)	$10,000
IOWA	6 mos	$1,000	6 mos	$1,000	5 yrs	$1,000
KANSAS	1 yr	$2,500	1 yr	$2,500	3-20 yrs (sale)	$15,000

STATE (Territory)	PERSONAL USE POSSESSION		POSSESSION		SALE, DISTRIBUTION, DELIVERY	
	Max. Imprisonment	Max. Fine	Max. Imprisonment	Max. Fine	Max Imprisonment	Max. Fine
MASSACHUSETTS	6 mos	$500	6 mos	$500	2 yrs	$5,000
					2 1/2 - 15 yrs (50-100 lbs)	$10,000
					3-15 yrs (100-2,000 lbs)	$25,000
MICHIGAN	1 yr	$1,000	1 yr	$1,000	4 yrs	$2,000
MINNESOTA	(small amount)	$100 and drug education	3 yrs	$5,000	5 yrs	$30,000
MISSISSIPPI	(1 oz or less)	min $100 max $250	3 yrs (1 oz to 1 kilo)	$3,000	3 yrs (1 oz or less)	$3,000
			20 yrs (1 kilo or more)	$1,000,000	20 yrs (1 oz to 1 kilo)	$30,000
					30 yrs (over 1 kilo)	$1,000,000
MISSOURI	1 yr (35 grams or less)	$1,000	5 yrs (over 35 grams)	$1,000	5 yrs to Life	

STATE (Territory)	PERSONAL USE POSSESSION		POSSESSION		SALE, DISTRIBUTION, DELIVERY	
	Max. Imprisonment	Max. Fine	Max. Imprisonment	Max. Fine	Max Imprisonment	Max. Fine
NEW YORK	(less than 25 grams)	$100	3 mos (25 grams - 2 ozs)	$500	1 yr (25 grams or less)	$1,000*
			1 yr (2-8 ozs)	$1,000	4 yrs (25 grams - 4 ozs)	$5,000*
			4 yrs (8-16 ozs)	$5,000	7 yrs (4-16 ozs)	$5,000*
			7 yrs (16 ozs - 10 lbs)	$5,000	15 yrs (over 16 ozs)	$5,000*
			15 yrs (over 10 lbs)	$5,000	* Fine can be double the pecuniary gain from crime.	
NORTH CAROLINA	(1 oz or less)	$100	5 yrs (1 oz - 50 lbs)	discretion of Judge	5 yrs	set by Judge
			min 5 yrs (50-100 lbs)	$5,000 min. Max up to Judge		
			min 7 yrs (100-2,000 lbs)	$25,000 minimum		
			min 14 yrs (2,000-10,000 lbs)	$50,000 minimum		

STATE (Territory)	PERSONAL USE POSSESSION		POSSESSION		SALE, DISTRIBUTION, DELIVERY	
	Max. Imprisonment	Max. Fine	Max. Imprisonment	Max. Fine	Max Imprisonment	Max. Fine
SOUTH CAROLINA	30 days (oz or less)	$100 min $200 max	6 mos	$1,000	5 yrs	$5,000
			10 yrs (10-100 lbs)	$10,000		
			mandatory 25 yrs (100-2,000 lbs)	$25,000		
			mandatory 25 yrs (2,000-10,000 lbs)	$50,000		
SOUTH DAKOTA	30 days (1 oz or less)	$100	1 yr (1 oz - 1/2 lb)	$1,000	min 15 days to 1 year (sale 1 oz or less)	$1,000
			2 yrs (1/2 - 1 lb)	$2,000	2 yrs (1 oz - 1/2 lb)	$2,000
			5 yrs (1-10 lbs)	$5,000	5 yrs (1/2 - 1 lb)	$5,000
			10 yrs (over 10 lbs)	$10,000	10 yrs (over 1 lb)	$10,000
TENNESSEE	11 mos 29 days	$1,000	11 mos 29 days	$1,000	min 1-5 yrs (1/2 oz - 10 lbs	$3,000
					min 4-10 yrs (10-70 lbs)	$10,000
					min 10 yrs to Life (over 70 lbs)	$200,000

STATE (Territory)	PERSONAL USE POSSESSION		POSSESSION		SALE, DISTRIBUTION, DELIVERY	
	Max. Imprisonment	Max. Fine	Max. Imprisonment	Max. Fine	Max Imprisonment	Max. Fine
VIRGIN ISLANDS	1 yr	$5,000	1 yr	$5,000	5 yrs	$15,000
					mandatory 3 yrs (50-100 lbs)	$25,000
					mandatory 5 yrs (200-1,000 lbs)	$50,000
					mandatory 15 yrs (over 1,000 lbs)	$200,000
VIRGINIA	30 days	$500	30 days	$500	1 yr (1/2 oz or less)	$1,000
					1-10 yrs (1/2 oz - 5 lbs)	$1,000
					min 5-30 yrs (over 5 lbs)	
WASHINGTON	90 days (40 grams or less)	$1,000	5 yrs	$10,000	5 yrs	$10,000
WEST VIRGINIA	min 90 days max 6 mos	$1,000	min 90 days max 6 mos	$1,000	min 1 yr max 5 yrs	$15,000
WISCONSIN	5 yrs	$15,000	5 yrs	$15,000	5 yrs	$15,000
WYOMING	6 mos	$1,000	6 mos	$1,000	10 yrs	$10,000

STATEWIDE ACTIVITIES

January 1, 1986
thru
June 30, 1987

DRUG SEIZURES

Type of Drug	Quantity	Street Value
Cocaine	87.2 pounds	$8,573,326
Marijuana	626 pounds	2,527,950
Marijuana plants	3,649	866,190
Hashish	520 grams	9,912
Amphetamines	622 tablets	9,394
Mushrooms	137 grams	1,470
Heroin	90 grams	50,642
Dilaudid	697 tablets	54,180
Look-a-likes	807 dosage units	1,986
LSD	4,595 dosage units	26,580
Other Drugs		63,530
TOTAL		$12,185,160

$3,404,052

NON-DRUG SEIZURES

Cash	$393,076
Vehicles (13)	101,845
Property	496,720
TOTAL	$991,641

SOURCE: State of Alaska Department of Public Safety/Scientific Crime Detection Laboratory. George M. Taft, Jr., Laboratory Director. 5500 East Tudor Road, Anchorage, Alaska, 99507; (907) 269-5740.

ANNUAL REPORT OF OFFENSES REPORTED AND ARRESTS

Juneau Police Department Year Ending: December 1986

CLASS I OFFENSES:	Offenses Reported		Unfound Reports		Actual Offenses		Adult Arrests		Juvenile Arrests	
	1985	1986	1985	1986	1985	1986	1985	1986	1985	1986
1. Criminal homicide	2				2		2			
2. Forcible rape	3	2			3	2	1	1		
3. Robbery	3	3	1		2	3				
4. Aggravated assault	11	6			11	6	9	6		1
5. Burglary	67	118	3	5	64	113	8	6	5	15
6. Larceny	492	660	8	15	484	645	27	46	29	31
7. Motor vehicle theft	38	45	3	6	35	39	1			6
8. Arson	1				1					
TOTAL CLASS I OFFENSES:	617	834	15	26	602	808	48	59	34	53

CLASS II OFFENSES:										
9. Other assaults--simple	155	161	5	4	150	157	52	61	6	5
10. Forgery	5	24			5	24				
11. Fraud	63	50	3	2	60	48	6	1		1
12. Embezzlement	1	3			1	3				
13. Receiving/concealing stolen property		4				4				
14. Vandalism	188	312	2	3	186	309		16	3	1
15. Weapons violation	20	29	2	3	18	26	7	11		
16. Prostitution	1				1					
17. Sex offenses (except 2 & 16)	38	6	3	3	35	43	3	2	1	
18. Drug laws Marijuana	70	71	4	6	66	65	15	14	31	77
19. Gambling Cocaine, etc.	2				2					
20. Family and children	35	60	1	5	34	55				
21. Driving under influence	250	266	14	14	236	252	193	193	3	1
22. Liquor laws Alcohol	245	301	4	15	241	286	109	118	110	148
23. Disorderly conduct	418	721	9	8	409	713	64	87		3
24. Vagrancy										
25. All other	537	814	2	6	535	808	233	313	16	21
TOTAL CLASS II OFFENSES	2028	2862	49	69	1979	2792	682	816	172	197
TOTAL CLASS I & II OFFENSES	2645	3696	64	95	2581	3601	730	875	206	250

Rev. 1/85

ALASKA CONTROLLED SUBSTANCES

DRUG	PROHIBITED ACT	CLASS OF OFFENSE
		Felony
III Depressants Narcotics Codeine Hashish	Delivery of any amount to anyone under 19 and 3 years younger	Unclassified-1° 11.71.010(a)(2)
	Manufacture or delivery or possession with intent to manufacture or deliver any amount	B-3° 11.71.030(a)(1)
	Possession of 3 grams or more	C-4° 11.71.040(a)(3)(B), (C)
	Defendant 18 or older, possession on school grounds, etc.	C-4° 11.71.040(a)(4)
		Misdemeanor
	Possession of less than 3 grams	A-5° 11.71.050(a)(3)(A), (B)

FEDERAL CONTROLLED SUBSTANCES ACT

Marijuana		
Schedule I	Defendant - 18, distribution to person under 21	First Offense 0-30/$50,000 Second Offense 0-45/$75,000
	Distribution	First Offense 0-15/$25,000 Second Offense 0-30/$50,000 If distribution is for small amount with no renumeration, see penalty below
	Possession	First Offense 0-1/$5,000 Second Offense 0-2/$10,000

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APP

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APR 27 1993

DDP # 3 —

Lead Editorial in the Economist - Not usually thought of as a liberal mag.

Jim - File

PHG

Getting gangsters out of drugs

YOUNG men in the gh[illegible]es and millionaires' daughters up [illegible] Oxford die horribly of it. Wherever it spreads, crime rates soar. Policemen are murdered for it, politicians suborned for it. Central Americans buy whole governments through it. Lebanese and Afghans nourish their feuds with it. The traffic in illegal drugs—partly in mildish marijuana and worse cocaine, but most dreadful in heroin— has become a main tragedy of this age. The trade was created in its present worst-possible form because democratic politicians fell into a well-meant confusion of policy 20 years ago.

Governments decided then to threaten long terms of imprisonment against the suppliers and pushers who were making your daughter a junkie, but to treat her possession of a little marijuana and cocaine as much less of an offence. Supply was made highly illegal, some demand was not—exactly as during America's prohibition of alcohol in the 1920s, and thus with the same results. Gangsters market the stuff to people who feel no guilt about buying from them. The expert criminal organisations that were so enriched by the attempts of earlier American governments to prohibit alcohol and gambling (another addictive practice) are applying Capone's old murderous skills to the international narcotics business.

Subsistence peasants in wretched places are glad to take cash for poppies and coca leaves which, after simple processing, are marked up by 5,000 times for sale to final consumers. This distributors' margin—turning $1m of raw material into $5 billion of revenue—makes drug smuggling the world's most profitable business. Drugs are very-high-price and light goods, easily transported in hand-baggage or even inside people. The most prudent smugglers get big organisations to launder the money and make unrefusable offers to politicians and policemen and rival salesmen in the way. A small group of criminals now probably launders tax-free sums of over $100 billion a year, more than the GNPs of 150 of the 170 nations of the world. If these huge mark-ups went to governments in tax, as a big slice of profits from drugs like alcohol and tobacco does, they would use it for better purposes, including reducing addiction. Is that the right way?

There have been escapes from tragedies as great as today's narcotics trade, significantly almost all along this same road. America's effective answer to Capone's bootleg gangs was not gang-busting but the legalised, taxed and regulated sale of quality-controlled liquor. The best enemy of the numbers racket is the state lottery and the off-course, licensed, taxed betting shop. The British coped similarly with the main drug scourge of the first industrial revolution. Gin Lane sold cheap rot-gut to the not-quite-destitute, who drank themselves out of misery into inefficiency. So the government brought the sale of spirits under local licensing courts, forced the distillers to sell only liquor of approved quality and strength, and raised prices by excise duties as high as the market would bear without driving drinkers to poisonous cheap intoxicants like methylated spirits. People got less drunk less damagingly, initially on untaxed beer (the brewers were delighted). The distillers, forced to sell better hooch, grew rich and respectable on exports of Scotch whisky and London and Plymouth gin.

Drugs are not a "disease of affluence", or any such glib slogan. Some big British companies founded their fortunes on the officially sponsored sale of Indian dope to the poorest people the world has ever known, the Victorian Chinese. Bhang and hashish and coca and kola-nuts and qat are the opiums of their respective poor peoples. None is good for them, but nor is alcohol for rich countries.

Legalise, control, discourage

Today there are four big recreational drugs on the market in most of the world's big cities. Two of them (alcohol and tobacco) are legal, two (marijuana and cocaine) illegal. People have been attacking their brains with the first of these poisonous chemicals since Noah had vines (Genesis ch 9, 20). Christianity uses alcohol in its central rite, as does most of mankind (outside the strict Muslim nations) in its social relations. Yet in countries like Britain lawful alcohol directly kills some 10,000 people a year, and is instrumental in about half of the country's violent crime. Cigarettes in Britain kill 100,000 a year. Marijuana, one of the illegals, has hardly killed anybody yet; but the toll from it will rise because it is a poison with the defects of both the legal drugs. Tobacco and marijuana give you lung cancer; alcohol and marijuana make you run over pedestrians in your car.

In the United States marijuana is now virtually tolerated, because tens of millions of Americans have smoked it or eaten it in cookies. They think it about as befuddling per dollar as alcohol, as bad for their health as cigarettes, and less habit-forming than either. The great extra worry about marijuana is that, while the addict gets his tobacco and whisky from a law-abiding and taxpaying publican, he gets his joint from a sinner who sometimes sells adulterated poison, pays no tax and—this is important—is often keen to lead his customers on to much more harmful drugs.

A sensible public policy might be to treat all three—alcohol, tobacco, marijuana— the same, with licensing, taxes and

quality control. Since all are bad for you, it may be right to plaster them with larger health warnings than those that are at last helping to cut smoking. Wary governments might stop the pub culture spreading to the communal joint culture by restricting marijuana sales to boringly uncongenial premises, like the glum state liquor-stores of Sweden or New Hampshire; or give monopolies to state shops like the post office, which has perfected the art of driving customers away. But a main weapon should be tax: high enough to deter consumption, and varied enough to move people from the worst drugs. Today's worst are possibly cocaine and certainly heroin.

Cocaine came back into high fashion only recently. It is more stimulating than alcohol, less addictive than tobacco. It may be worse for you than either, including being eventually more likely to poison you. What is certain is that it is causing more murders than any commodity ever before. Because it is newish and illegal, its supply is in the hands of the worst illegals. About 80% of American supply is channelled through one group of Colombian gangsters (see page 62) who kill the law-enforcers whom they cannot suborn. Cocaine most needs to be brought under the aegis of controlled and thus legal suppliers, either by treating it like alcohol, tobacco and marijuana (see above) or like heroin (see below), depending on how statistically awful it proves to be.

How present law hooks people on heroin

Heroin is different. It is more addictive than tobacco, and damages the health far more rapidly. It can enslave the mind, so addicts want more to satisfy a craving that obsesses them so that they cannot work. Without work, they have two ways of affording more: stealing or, more easily, dealing. Encouraged by their supplier, they buy a little more than they want, and sell it on at a profit by recruiting new users, whose supplier they become. The furtive illegality of this trade increases its danger, since by the time an addict realises that he needs help he is likely to have started supplying others, so that he cannot seek outside help without risking big trouble with the law. Illegality locks people into addiction.

Legislation pretends that heroin is not significantly more dangerous than marijuana or cocaine. Since dealing in all three is a crime, the same criminal gangs handle them all. Customers for the milder drugs are therefore exposed to salesmen of the really dangerous one. So marijuana (but not alcohol) gets blamed for leading its users on to hard stuff.

Recent developments in the market for heroin give clues to how its use might eventually be curbed. Increased demand in the early 1980s led to increased production (in, among other places, lawless Burma and Afghanistan), just as the publicity about AIDS began to deter new users from experiments with sticking filthy needles into themselves. Demand and prices are falling. The evidence, scant as it is in this mysterious world, is that most long-term heroin users want to break their addiction, although probably then to destroy themselves with some other drug, usually alcohol. Since alcoholics do not recruit fresh heroin users, this is sadly to be encouraged.

So the best policy towards existing heroin users might be to bring them within the law, allowing them to register for the right to buy strictly limited doses. Taxes should be high enough to help deter consumption, but low enough to put illicit dealers out of business. To get addicted to heroin you have to be crazy, or weak-willed, or young and foolish. It is a problem of mental health, treated as one of crime and therefore made worse. If some extra stick is wanted, then in America registered heroin and cocaine users could be disqualified from driving cars. They might then have an incentive to get listed as cured.

Even if the present narcotics trade could be beaten, self-destroyers will seek other ways to bend their minds. Calming pills from respected multinational companies produce doped-up addicts when doctors prescribe them for non-medical ills such as poverty or unhappiness. Backroom chemists find and market new drugs. The LSD of the "psychedelic" 1960s was followed in the violent early 1980s by PCP, or angel-dust. There will be more nasty successors. But these drugs, cheaply produced close to their markets, do not spawn the sort of international racketeering that today's narcotics do. They go through brief cycles of fashion, newspaper scares and oblivion. They are destructive teenage fashions, rather than social menaces, which might also be reduced by discriminatory tax.

If there were a lasting answer to drug abuse, it would lie beyond all this, in the chemists' dream of the good drug, the soma, driving out bad poisons by its controllable merits. It may lie close in the future, if research for it can be brought into the open. That is another reason why the worst policy is the present one of making the supply of noxious drugs illegal, so that only dreadful illegals engage in their supply.

Jackson power

Jesse Jackson's success mainly reflects the narrowing base of the Democratic party

ANDREW JACKSON occupied the White House from 1829 to 1837, and conventional wisdom says he is the only man Americans will refer to as President Jackson for a long time to come. The Rev Jesse Jackson does not believe in conventional wisdom. Nor do the blacks who have been voting for him in large numbers in Democratic primary elections and caucuses across America this year, most recently in Michigan on March 26th. They think he can be president. Few whites do, but some have been voting for him because they like what he says, and the way he says it. As a result, with more than half the delegates to the Democratic convention now selected, Mr Jackson has about as many as Mr Michael Dukakis, hitherto the front-runner. Mr Dukakis has yet to win in a large industrial state. And the Democratic party faces the choice of either giving Mr Jackson his due, and thus losing the presidential election in November, or denying him his due

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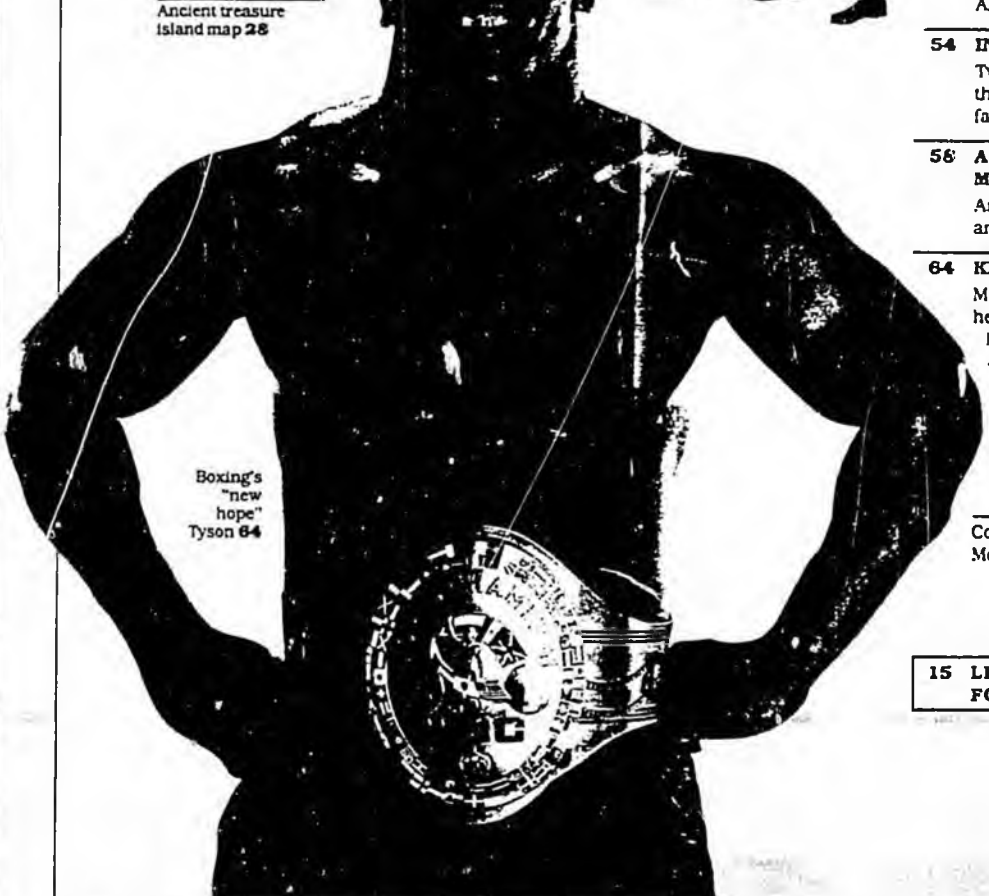


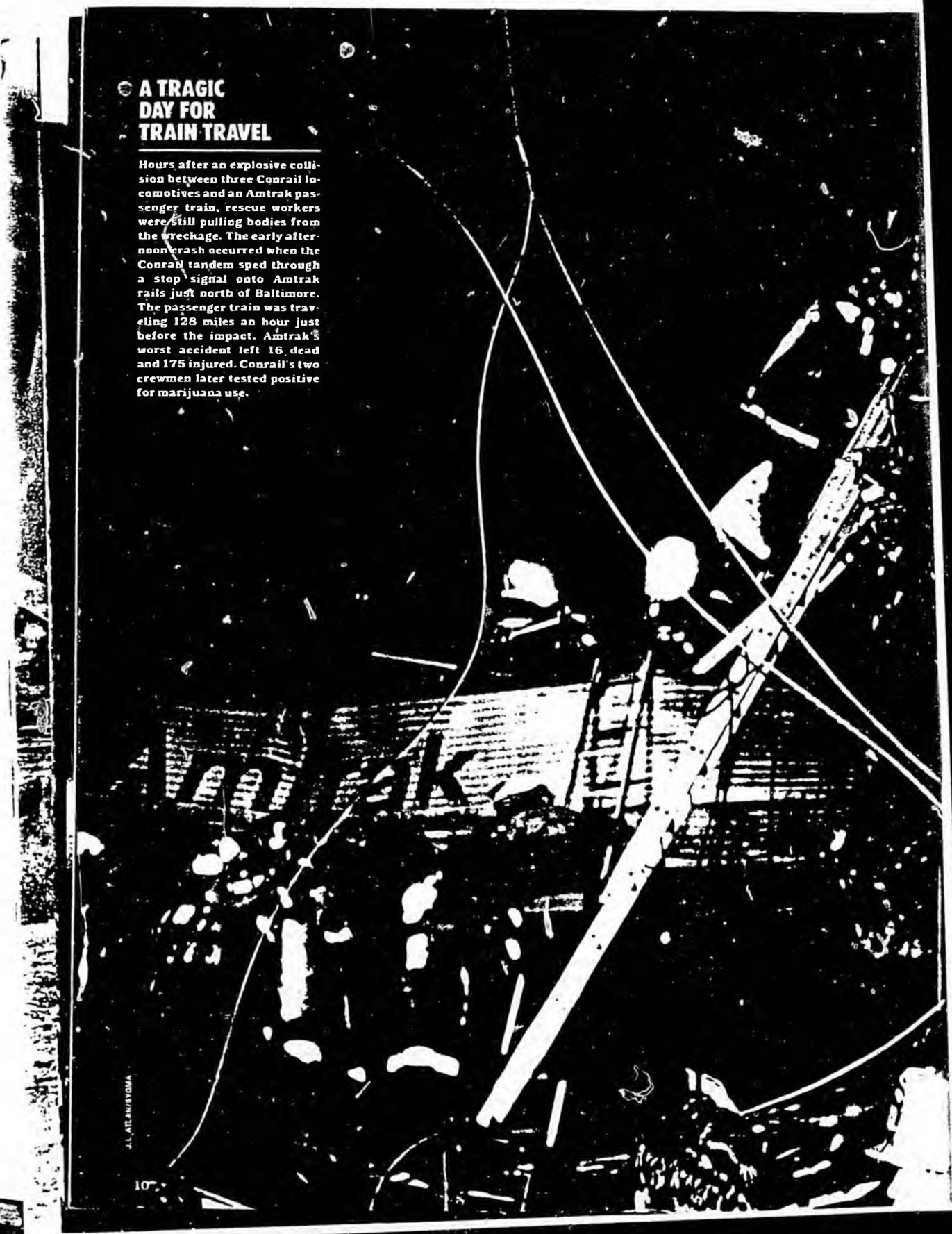
Boxing's "new hope" Tyson **64**

Cover photograph by Michael Melford/Wheeler Pictures

Picture sources are listed by page. 3: Dolly—Enrico Ferorelli/DOT, soldiers—Harry Benson; Tyson—Walt Hart; map—National Maritime Museum, Greenwich ("Waggoner of the South Sea," by William Hack, 1680). 24: illustration—copied by Jon Blumb. 31: top right—ctsy. Lee Spence. 34-35: lower left—copied by Guanciano Costa, ctsy. Bibliotena Trivulziana, Milan; lower right—*Treasure Island*, ctsy. of Charles Scribner's Sons. 36: top left—ctsy. Franklin D. Roosevelt Library; bottom—photo # 86319-122, Maritime Resource Management Service-Amherst, Nova Scotia. 38: four travels—ctsy. The Dons, Arizona. 77: top right—from *Virginia Woolf: A Biography* by Quentin Bell. © 1972 by Quentin Bell. By permission of Harcourt Brace Jovanovich, Inc. LIFE (ISSN 0024-3019) is published monthly except for two (2) issues in August at the subscription price of $32.50 per year by Time Inc. Time Inc. Principal Office: Time & Life Building, Rockefeller Center, New York, NY 10020-1393 U.S.A. Nicholas J. Nicholas Jr., President; Glenn A. Britt, Treasurer; William M. Guzman, Secretary. Second-class postage paid at New York, NY, and additional mailing offices. Authorized as second-class mail by the Canada Post Corp., Ottawa, Canada, and for payment of postage in cash. Vol. 10 No. 3 © 1987 Time Inc. All rights reserved. Reproduction in whole or in part without permission is prohibited. "LIFE" is a registered trademark of Time Inc. POSTMASTER: Send address changes to LIFE, Time Inc., 541 N. Fairbanks Court, Chicago, IL 60611-3333

A TRAGIC DAY FOR TRAIN TRAVEL

Hours after an explosive collision between three Conrail locomotives and an Amtrak passenger train, rescue workers were still pulling bodies from the wreckage. The early afternoon crash occurred when the Conrail tandem sped through a stop signal onto Amtrak rails just north of Baltimore. The passenger train was traveling 128 miles an hour just before the impact. Amtrak's worst accident left 16 dead and 175 injured. Conrail's two crewmen later tested positive for marijuana use.




BEGINNER'S GUIDE TO GROW ROOMS
HIGH TIMES
POT STING IN HAWAII
THE 10 WORST THINGS THAT HAPPENED TO POP MUSIC
BY JAMES MARSHALL
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COVER PHOTOGRAPHY:
ELISABETSKY
MODEL:
SHARON M.
LIGHTS:
CAPTAIN WHIZZO

ON THE COVER: Sharon M. is the lead singer of *Black Light Chameleons*, a New York-based psychband (**pictured left**). Captain Whizzo's light show is visible to the naked eye at NYC's *Mind's Eye* Events (**see feature**).

FIGHT FOR LEGAL WEED LIVES!

NORML Bigwigs Meet

by Steven Hager

COURTESY NORML

● Jon Gettman—National Director of NORML

OMI didn't pass, but 270,000 Oregon voters agreed to let residents grow ALL the pot they wanted.

The legendary Keith Stroup, founder of the National Organization for the Repeal of Marijuana Laws (NORML), made a rare appearance at the organization's annual convention on May 8th and 9th in Washington, D.C. Although the conference was sparsely attended, morale was high.

It's no secret that NORML has weathered a decade of apathy and financial difficulty. However, thanks in large part to the indoor gardening revolution, NORML seems to be entering a more stable and productive period in its lobbying effort to legalize marijuana.

In his first appearance as National Director, Jon Gettman released figures for NORML's annual crop report for 1986. Apparently, even NORML has been underestimating the number of marijuana smokers in America. "Since it is believed 30 million pounds of marijuana are consumed annually in this country, the number of pot-smokers must be over 50 million," said Gettman. "The government wants it both ways: They want more money for eradication budgets based on consumption, but at the same time, they pretend the 'problem' isn't so widespread they can't control it."

Gettman also spoke on the effort in Alaska to criminalize marijuana use. (Growing in Alaska for personal use has been legal since 1975. See "Normlizer," p. 25.) "Only the facts can combat hysteria and ignorance in the war on drugs," said Gettman. "The most ridiculous claim is that marijuana has become stronger, so all the studies done in the '70s that said it was harmless are no longer valid." Gettman asserted that THC content has always varied. "Potent varieties have always been available," he said, "but the drug itself is unchanged."

Another important address was delivered by John Sajo, director of the Oregon Marijuana Initiative (OMI). After collecting 85,000 signatures, OMI managed to place a referendum on the ballot legalizing "private" use of marijuana. Run by a tiny group of dedicated volunteers, OMI suddenly found itself pitted against all the resources the Reagan administration could muster, including a personal visit by Vice President George Bush, who campaigned against the initiative.

Sajo admitted the initiative (which was supported by only 23% of the voters) suf-

continued on page 30

SEXIST, RACIST ART SCUM

NEW YORK ART MUSEUMS—non-profit, tax-exempt organizations that receive government funds—have been charged with racial and sexual discrimination by a subversive, underground protest group. At a recent informational show called **The Guerilla Girls Review the Whitney** at the **Clocktower Gallery** in downtown New York, the Girls offered statistics showing that, from 1973 to 1987, 71% of the artists selected for the prestigious **Biennial** shows sponsored by the **Whitney Museum of American Art** were white males. While 24% of the artists were white females, only a shocking 4% were non-white males, and an infinitesimal .30% were non-white females. The **Biennial** exhibited **no works** by any Hispanic, black, or Indian women.

In addition to exhibitions like the Clocktower show, the **Guerilla Girls** have been attacking the sexist and racist policies of all major New York museums and galleries with incriminating street posters. "We feel that what the Guerilla Girls have to say is important," Tom Finklepearl, the Clocktower director, told the **New York Daily News**.

That's obvious. And the Guerilla Girls' efforts should be applauded. But it would be nice if somebody would also mention that museums and galleries should stop discriminating against artists who produce small paintings, drawings, cartoons, pottery, or anything else the art establishment doesn't understand. Art is not just big paintings on canvas.

NORML—IZER

THE BIG CHILL:
Alaska's Proposed Pot Law

By JON GETTMAN, NORML Director

(The following testimony was given to the Senate Judiciary Committee on May 1, 1987 during a public hearing on Senate Bill #32, which if passed would recriminalize marijuana use in the state of Alaska.)

Mr. Chairman, members of the committee, citizens of **Alaska:** My name is Jon Gettman and I am the National Director of **NORML**, the National Organization for the Reform of Marijuana Laws. Founded in 1970, **NORML** is an educational organization dedicated to the review and study of marijuana use, marijuana laws, and their effect on our society.

The **Marijuana Tax Act of 1937** marked the beginning of federal attempts to deter marijuana use by making it illegal. And here we are, **50 years later**, living proof of prohibition's ineffectiveness, still discussing whether criminal penalties are appropriate for marijuana use.

Alaska has the respect and admiration of people around the world for its integrity on the matter of marijuana use. They are impressed by your dedication to the principle of privacy, which Justice Brandeis once remarked is the cornerstone of all our freedoms. We are impressed by Alaska because we know that your dedication to privacy is founded on a deep conviction to the ethic of personal responsibility.

Others, though, respect your laws because they are practical. They envy you in that respect, wishing the political climate in which they work would allow them to devote their time to more serious matters than debating adult marijuana use at home.

There have been repeated challenges to the policy of arresting marijuana users over the last 25 years that have discredited many of the old excuses justifying prohibition. The emotional voices calling for the imprisonment of marijuana users come up with some new excuse every few years. The latest is that because marijuana is, on average, more potent today than ten years ago, it is somehow more dangerous; more subtle is the implication that this increase in its potency renders previous research irrelevant.

The claim is that the more potent marijuana of the '80s is a new, different drug than the one many adults tried in the '60s and early 70s. First of all, as with alcohol, marijuana smokers compensate for a higher potency by simply using less. Secondly, high potency marijuana has been on the market, so to speak, for thousands of years under the name hashish. Though hashish is manufactured from the resins of oils of marijuana, pharmacuetically it has a high level of THC .This claim is part of a long historical trend of believing that despite the discrediting of previous scare stories about marijuana, new evidence emerging from research will finally prove that marijuana really is as bad as **"they"** said it was. It is this historical context that causes me to treat these claims with more than a bit of skepticism.

The National Academy of Sciences conducted a review of all the literature about marijuana. The study was chaired by Arnold S. Relman, editor of the **New England Journal of Medicine**. Their report, **Marijuana & Health**, was published in 1982. There have been no new developments since that time to contradict their findings. Just as in a court of law, there are rules of evidence by which to evaluate research claims. Without exception, the "dangers" of marijuana fail to satisfy those rules of evidence to the satisfaction of the National Academy of Sciences.

Let me address this bill pointedly. It is based on several "findings" that are without foundation. First of all, THC, the drug's active ingredient, does not, I repeat, **does not** lodge in the fatty tissues of the body for 30 days, as Finding Number One reports. Findings Number One and Number Two (which claims that this buildup cause "loss of sleep," "moociness," and "restlessness") are simply wrong. THC is broken down by the body in a few hours, when the high associated with it wears off. It is the by-products of this chemical breakdown that lodge in the fatty tissues for several weeks. **These have no effect on the body whatsoever and there is not a single study that proves otherwise.** So there is no "buildup" of THC.

Finding Number Three, which claims "it is possible for a human being to overdose from marijuana," is also factually incorrect. Marijuana is one of the least toxic drugs known. You can not overdose from smoking marijuana. Furthermore, marijuana does not interact with alcohol, as other drugs do, and increase its potency. Any toxicologist familiar with marijuana will confirm this fact.

To the extent that marijuana and alcohol are both intoxicants, their use in conjunction, and to excess, would be irresponsible, and in some circumstances, dangerous.

Finding Number Four concerns the accusation that marijuana is more dangerous today because it is more potent. The "finding" also claims that marijuana averages a THC potency of 10 percent; actually, the average potency of marijuana these days is closer to 3.5

continued on page 28

NORML-IZER

continued from page 25

percent. A slight digression will further underscore its irrelevance.

Experts are now realizing that the key to understanding drug related problems is to focus on addictive personalities rather than arguing about the relative addictiveness of different drugs. Present theory holds that, for a variety of reasons, some people are prone to abuse drugs, any drugs, legal or not. The potency of the drug is irrelevant for these people. An alcoholic is no less off the wagon for drinking beer than he or she would be for drinking vodka. The increased potency of marijuana makes it no less and no more dangerous than it was ten years ago, which is, relatively speaking, not dangerous at all.

Marijuana does not cause schizophrenia, illusions, or hallucinations (as Finding Number Five claims) and the only pain it can dull is that of headaches, muscle soreness, or cramps—which by the way is why urinalysis tests confuse the metabolites of marijuana with those of ibuprofen, the active ingredient in Advil. The possibility that marijuana makes the body unresponsive to severe pain, as the finding claims, is just not so.

There is no doubt that long-term marijuana smoking will increase someone's likelihood of lung disease or lung cancer, as in the case of smoking tobacco. Our lungs, it seems, are not made for smoke.

The claim that one marijuana cigarette a day for three years will cause cancer is preposterous. Millions of people have smoked far more marijuana than this for far longer, including, I admit, myself, and there are not millions of cases of lung cancer to prove this claim. As with the rest of the findings this bill is based on, this claim is contradicted by the Relman report.

Furthermore, examinations commissioned by the British government in 1894, by Mayor LaGuardia in New York in 1944, by President Nixon in 1972, by the LeDain Commission in Canada in 1974, by the Australian Royal Commission in 1977, by the National Academy of Sciences in 1982, and also by a British Advisory Council Report to the Home Secretary in 1982 have all concluded that these claims about the "dangers" of marijuana use are without foundation. Marijuana has been around for thousands of years, and it has not essentially changed during the last ten.

The simple fact is that marijuana users have found it to be relatively harmless. It is also clear that many other people just don't like this fact. Rather than leave this matter of choice to the individual as an issue of personal responsibility, some would rather have the state make that decision and intervene in the private lives of its citizens. This is what the invasion of privacy is all about, and if that is the intent of your law then you should be honest and change your findings to this simple statement: We find that many Alaskans don't like marijuana use by their fellow citizens because they are afraid of it.

And before I continue, let me share with you what my organization tells the public about marijuana use. It's bad for the lungs, and a waterpipe should be used to filter out some of the tars. It raises the blood pressure in some people, and should be avoided for that reason by people with cardivascular problems. The use of marijuana during pregnancy may contribute to a slightly smaller birth weight for the fetus, similar to alcohol or tobacco use during pregnancy; NORML advises women to cease marijuana use during pregnancy, as well as alcohol and tobacco. Marijuana causes short-term impairment and should not be used in conjunction with work, driving, and/or the use of heavy machinery, or under any circumstances by adolescents. And yes, gentlemen, it is true that marijuana slightly suppresses sperm production. However, this has no effect on fertility or chromosomes, as the Relman report confirms, and as do the several married couples of my acquaintance.

Arresting pot smokers is ineffective —and it costs too much money.

Ladies and gentlemen, we don't need to examine the works of experts to decide if marijuana causes this massive complex of adverse effects cited by its opponents. Marijuana has been used by over 75 million people, yet there is no prevalance of case histories (epidemiological or longitudinal studies) that prove a single one of these findings. There are no deformed babies on account of marijuana use, no overdoses, no lung cancer patients, and no brain-damaged patients either. The burden of proof, then, is with the accuser. I, for one, would like to know about the individuals whose cases would prove these findings, for I don't believe they exist. If it really caused genetic defects, surely out of the millions and millions of people who have used marijuana in the last 25 years, there would be some clear proof of deformed babies? Yet there is not. And there is almost certainly no indication that millions of young men are walking around with protruding breasts. This, I neglected to mention earlier, was one of the scare stories circulated during the '70s, that marijuana, by way of affecting hormonal production, caused breast development in young males.

And how about Alaska's fellow pioneer, The Netherlands, which has long had a tolerant attitude toward marijuana? Officials there, reported an April 18th article in the New York *Times*, have concluded that their noncriminal approach to marijuana is working, that marijuana use did not lead to harder drugs, and that the number of marijuana users has remained steady (at 36 percent) during the last ten years. Several years ago Spain decriminalized marijuana. Last fall a committee of members of the European parliament recommended that marijuana smokers caught with cannabis for their own use should be cautioned, not prosecuted.

Of even greater interest are domestic developments. In the last few years Columbia, Missouri, almost passed a decriminalization bill by referendum, a bill cleared the Milwaukee City Council, and another cleared the New Hampshire House by consent. Though neither measure became law, the town of Hickory Hills, Illinois, has enacted a decriminalization bill. And, one recently passed the House in Iowa by a wide vote, and awaits action in their Senate.

The alternative to arresting marijuana smokers is to drop criminal penalties, or, as in Alaska, to respect personal use and cultivation of marijuana as a matter of individual privacy. This approach is being studied by others, not so much because of a noble respect for privacy, or, I'm sorry to say, justice and credibility, but for two other very understandable reasons.

1) Arresting marijuana smokers in ineffective. And 2) it costs too much money. Many experts share the opinion, voiced for example by Dr. William J. Kinnard Jr., Dean of the School of Pharmacy at the University of Maryland at Baltimore, that "legal control of marijuana is almost impossible and our limited resources should be directed to the control of the more toxic illicit substances," that is, cocaine and heroin.

Finally, if the legislature adopts these findings they will be challenged. Certainly the issue will end up in court, but that is not the arena that threatens the well-being of your communities the most. No, these findings will be challenged by the inquiring minds of your children. If these fears and distortions are adopted as fact, they will constitute a lie, and a lie easily contradicted by common sense, history, and scientific review. It is in the arena of credibility that this bill will damage the state of Alaska. If you want to send a message to your kids, tell them what we tell them: When you are old enough to accept responsibility for yourself you are old enough to make your own decisions. Alcohol, marijuana, and tobacco can all be harmful, though many people seem to enjoy using them in moderation. Some people have a tendency to abuse drugs, and unfortunately, we don't always know in advance who they are. Furthermore, young people lack the maturity to use and not abuse these drugs (as do many adults). These principles, a good, credible education, and a keen interest in development will keep your children from having drug problems.

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

P.O. Box Y, State Capitol
Juneau, Alaska 99811-3100
Mail Stop 3100
(907) 465-3991

February 9, 1988

MEMORANDUM

TO: Representative Randy Phillips

ATTN: Bill Stoltze

FROM: Karla Hart
Legislative Analyst

RE: Marijuana and Controlled Substances Tax
Research Request 88.162

You requested information on the taxation of marijuana and controlled substances. As noted in the Anchorage Times article that you forwarded to us, Illinois and Minnesota have imposed taxes on marijuana and controlled substances (Attachment A). Copies of the Illinois "Cannabis and Controlled Substances Tax Act" (Public Act 85-663) and the Minnesota "Marijuana and Controlled Substances Taxation" law (Chapter 297D) are Attachment B. Additional information has been requested from both states and will be forwarded to your office as soon as possible.

Allan Sorley, Special Taxes Division, Minnesota Department of Revenue, said that the tax law has been upheld in four district courts. He said that he expects the law will also be upheld in a case scheduled to go before the Minnesota Supreme Court.

I hope this information is helpful. If you have questions, please call.

Attachments

ATTACHMENT A
Illinois and Minnesota Taxes

ATTACHMENT A

Illinois adopts 'grass tax' against dealers

SPRINGFIELD, Ill. (AP) — The state has imposed a tax on marijuana, cocaine and other illegal drugs, but expects that most of the revenue from the new law will come from stamp collectors.

The law requires drug dealers to purchase tax stamps, featuring either a marijuana leaf with a slash through it or a skull and crossbones, and affix them to drug packages.

The stamps cost $5 per gram for marijuana, $250 per gram for other drugs and $2,000 for each dose of drugs not sold by weight.

However, no drug dealers bought stamps when they went on sale Monday, said Helen Adorjan of the state Department of Revenue. She thinks stamp collectors will be the most frequent buyers, although they would have to pay the same price as a drug dealer.

Other states have also levied taxes on illegal drugs — not to raise money, but to provide another legal weapon against dealers.

Major drug dealers without the stamps would be hit the hardest. A violator would be subject to four times the amount of the tax, a $10,000 fine and three years in prison.

"An immediate reaction is, 'Why tax something illegal?' But as you look at it more closely, it makes more sense," said Sen. David Barkhausen, R-Lake Bluff.

Barkhausen, the law's chief sponsor, modeled the "grass tax" after a similar law in Minnesota, which has sold about 150 stamps so far and collected $13 million in fines since its inception about 18 months ago.

The law provides that dealers cannot incriminate themselves by buying the stamps, Adorjan said. Employees will not even ask for names, she said.

Only those who order stamps by mail will be required to give their names and addresses for return mail, she said.

Illinois State Police spokesman Bob Fletcher said the department is stronlgy in favor of the new law.

"People can say the taxes and the law are ridiculous, but they should think back a little bit and remember how Al Capone was convicted," he said.

Capone was convicted of tax evasion.

ATTACHMENT B
Illinois "Cannabis and Controlled Substances Tax Act"
(Public Act 85-663) and Minnesota "Marijuana and Controlled
Substances Taxation" law (Chapter 297D)

such purpose, be deposited in escrow with a banking corporation, or national banking association, located in and doing business in the State of Illinois, with power to accept and execute trusts, or any successor thereto, which is also a member of the Federal Deposit Insurance Corporation and of the Federal Reserve System to be held in an irrevocable trust solely for and until the payment and redemption of the bonds so to be refunded, and any balance remaining in such escrow after the payment and retirement of the bonds shall be returned to the Commission to be used and held for use as revenues pledged for the payment of such refunding bonds; or

(v) for any combination thereof.

(d) The bonds shall be authorized by resolution of the Commission and may be issued in one or more series, may bear such date or dates, may be in such denomination or denominations, may mature at such time or times not exceeding 20 years from the respective dates thereof, may mature in such amount or amounts, may bear interest at such rate or rates not exceeding 8% per annum payable semi-annually, may be in such form either coupon or registered as to principal only or as to both principal and interest, may carry such registration privileges (including the conversion of a fully registered bond to a coupon bond or bonds and the conversion of a coupon bond to a fully registered bond), may be executed in such manner, may be made payable in such medium of payment, at such place or places within or without the State, and may be subject to such terms of redemption prior to their expressed maturity, with or without premium as such resolution or other resolutions may provide. Proceeds from the sale of the bonds may be invested as such resolution or resolutions and as the Commission from time to time may provide. All bonds issued under this Act, except refunding bonds as provided for in this Section, shall be sold in such manner as the Commission may deem to be in the best interest of the public, but such bonds shall be sold at such price that the interest cost of the proceeds therefrom will not exceed 8% per annum computed to maturity according to standard tables of bond values. Such resolution may provide that the bonds be executed with one manual signature and that other signatures may be printed, lithographed or engraved thereon.

The Commission shall not be authorized to create and the bonds shall not in any event constitute State debt of the State of Illinois within the meaning of the Constitution or statutes of the State of Illinois and the same shall be so stated upon the face of each bond. The source of payment for the bonds shall be stated on the face of each bond.

Section 2. This Act takes effect upon its becoming a law.

[S.H.A. ch. 122, ¶ 30-15.18 note]

APPROVED: September 20, 1987 EFFECTIVE: September 20, 1987

ILLINOIS

CANNABIS AND CONTROLLED SUBSTANCES TAX ACT

PUBLIC ACT 85–663

SENATE BILL 1154

AN ACT to impose a tax on cannabis and controlled substances.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

[S.H.A. ch. 120, ¶ 2151]

Section 1. This Act shall be known and may be cited as the "Cannabis and Controlled Substances Tax Act".

Section 2. As used in this Act:

[S.H.A. ch. 120, ¶ 2152]

"Cannabis" has the same meaning specified in Section 3 of the Cannabis Control Act.[1]

"Controlled Substance" means a drug, substance, or immediate precursor specified in Article II of the Illinois Controlled Substances Act[2] and includes counterfeit substance as defined in Section 102 of the Illinois Controlled Substances Act.[3]

"Person" means any individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, or any other entity.

"Department" means the Department of Revenue.

"Director" means the Director of the Department of Revenue.

"Dealer" means a person who in violation of the Illinois Controlled Substances Act[4] or the Cannabis Control Act[5] manufactures, produces, ships, transports, imports, sells or transfers or possesses with intent to deliver to another person more than 30 grams of cannabis or more than 5 grams of any controlled substance or 5 or more dosage units of a controlled substance.

[1] Chapter 56½, ¶ 703.
[2] Chapter 56½, ¶ 1201 et seq.
[3] Chapter 56½, ¶ 1102.
[4] Chapter 56½, ¶ 1100 et seq.
[5] Chapter 56½, ¶ 701 et seq.

[S.H.A. ch. 120, ¶ 2153]

Section 3. The Director shall administer this Act. Payment of taxes and penalties required by this Act must be made in the form and manner required by the Department. The Department shall collect all taxes and penalties imposed by this Act.

[S.H.A. ch. 120, ¶ 2154]

Section 4. The Department shall promulgate rules necessary to enforce this Act. The Department shall adopt a uniform system of providing, affixing, and displaying official stamps, official labels, or other official indicia for cannabis and controlled substances on which the tax is imposed pursuant to this Act.

[S.H.A. ch. 120, ¶ 2155]

Section 5. No dealer may possess any cannabis or controlled substance upon which a tax is imposed by this Act

ATTACHMENT B

riority, all liens established at the hearing as being bona fide and existing without the enor having any notice or knowledge at the time the lien was created that the vehicle conveyance was being used or was intended to be used in connection with any olation as specified in the order of the court, and shall pay the balance of the proceeds to the state treasury. A sale under the provisions of this section frees the vehicle or nveyance sold from all liens, and appeal from order of the district court lies to the preme court as in other civil actions. At any time after seizure and before the hearing e vehicle or conveyance must be returned to the owner or person having a legal right its possession on execution by that person of a valid bond to the state of Minnesota, ith corporate surety, in the sum of not less than $100 and not more than double the alue of the vehicle or conveyance seized, to be approved by the court in which the case triable, or a judge thereof, conditioned on obeying any order and the judgment of the ourt, and to pay the full value of the vehicle or conveyance at the time of seizure.

History: *1985 c 305 art 2 s 12; 1Sp1986 c 3 art 1 s 82*

297C.13 VIOLATIONS.

Subdivision 1. Felonies. It is a felony for a holder of an alcoholic beverage license o:

(1) evade or attempt to evade the excise tax on intoxicating liquor and nonintoxicating malt liquor;

(2) fraudulently neglect or fail to keep complete accounts in book or books of ccount, or to make true and exact entries in them as required by the rules of the ommissioner of public safety and the commissioner of revenue, or by law;

(3) conspire to violate a provision of this chapter;

(4) fail to do or cause to be done anything required by law;

(5) refill or cause to be refilled a bottle or other container of intoxicating liquor in rder to evade tax; or

(6) sell intoxicating liquor or nonintoxicating malt liquor on which the excise tax as not been paid and thereby evade the tax.

Subd. 2. Gross misdemeanors. Any other violation of this chapter is a gross isdemeanor except where a different penalty is specified.

History: *1985 c 305 art 2 s 13*

MINNESOTA

ENACTED 1986
AMENDED 1987

CHAPTER 297D

MARIJUANA AND CONTROLLED SUBSTANCE TAXATION

297D.01 DEFINITIONS.

Subdivision 1. "Marijuana" means any marijuana, whether real or counterfeit, as defined in section 152.01, subdivision 9, that is held, possessed, transported, transferred, sold, or offered to be sold in violation of Minnesota laws.

Subd. 2. "Controlled substance" means any drug or substance, whether real or counterfeit, as defined in section 152.01, subdivision 4, that is held, possessed, transported, transferred, sold, or offered to be sold in violation of Minnesota laws. "Controlled substance" does not include marijuana.

Subd. 3. "Dealer" means a person who in violation of Minnesota law manufactures, produces, ships, transports, or imports into Minnesota or in any manner acquires or possesses more than 42-1/2 grams of marijuana, or seven or more grams of any controlled substance, or ten or more dosage units of any controlled substance which is not sold by weight. amended

Subd. 4. "Commissioner" means the commissioner of revenue.

History: *1986 c 470 s 4*

297D.02 ADMINISTRATION.

The commissioner of revenue shall administer this chapter. Payments required by this chapter must be made to the commissioner on the form provided by the commissioner. The commissioner shall collect all taxes under this chapter.

History: *1986 c 470 s 5*

297D.03 RULES.

The commissioner may adopt rules necessary to enforce this chapter. The commissioner shall adopt a uniform system of providing, affixing, and displaying official stamps, official labels, or other official indicia for marijuana and controlled substances on which a tax is imposed.

History: *1986 c 470 s 6*

297D.04 TAX PAYMENT REQUIRED FOR POSSESSION.

No dealer may possess any marijuana or controlled substance upon which a tax is imposed by section 297D.08 unless the tax has been paid on the marijuana or other controlled substance as evidenced by a stamp or other official indicia.

History: *1986 c 470 s 7*

297D.05 NO IMMUNITY.

Nothing in this chapter may in any manner provide immunity for a dealer from criminal prosecution pursuant to Minnesota law.

History: *1986 c 470 s 8*

1987 AMENDMENTS

CHAPTER 297D

MARIJUANA AND CONTROLLED SUBSTANCE TAXATION

297D.01 DEFINITIONS.

[For text of subds 1 and 2, see M.S.1986]

Subd. 3. "Dealer" means a person who in violation of Minnesota law manufactures, produces, ships, transports, or imports into Minnesota or in any manner acquires or possesses more than 42-1/2 grams of marijuana, or seven or more grams of any controlled substance, or ten or more dosage units of any controlled substance which is not sold by weight. A quantity of marijuana or other controlled substance is measured by the weight of the substance whether pure or impure or dilute, or by dosage units when the substance is not sold by weight, in the dealer's possession. A quantity of a controlled substance is dilute if it consists of a detectable quantity of pure controlled substance and any excipients or fillers.

[For text of subd 4, see M.S.1986]

History: *1987 c 330 s 2*

297D.02 ADMINISTRATION.

The commissioner of revenue shall administer this chapter. Payments required by this chapter must be made to the commissioner on the form provided by the commissioner. Dealers are not required to give their name, address, social security number, or other identifying information on the form. The commissioner shall collect all taxes under this chapter.

History: *1987 c 268 art 17 s 35*

297D.07 MEASUREMENT.

For the purpose of calculating the tax under section 297D.08, a quantity of marijuana or other controlled substance is measured by the weight of the substance whether pure or impure or dilute, or by dosage units when the substance is not sold by weight, in the dealer's possession. A quantity of a controlled substance is dilute if it consists of a detectable quantity of pure controlled substance and any excipients or fillers.

History: *1987 c 268 art 17 s 36; 1987 c 330 s 3; 1987 c 384 art 3 s 48*

297D.09 PENALTIES; CRIMINAL PROVISIONS.

Subdivision 1. **Penalties.** Any dealer violating this chapter is subject to a penalty of 100 percent of the tax in addition to the tax imposed by section 297D.08. The penalty will be collected as part of the tax.

Subd. 1a. **Criminal penalty; sale without affixed stamps.** In addition to the tax penalty imposed, a dealer distributing or possessing marijuana or controlled substances without affixing the appropriate stamps, labels, or other indicia is guilty of a crime and, upon conviction, may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both.

Subd. 2. **Statute of limitations.** Notwithstanding section 628.26, or any other provision of the criminal laws of this state, an indictment may be found and filed, or a complaint filed, upon any criminal offense specified in this section, in the proper court within six years after the commission of this offense.

History: *1987 c 268 art 17 s 37*

297D.10 STAMP PRICE.

Official stamps, labels, or other indicia to be affixed to all marijuana or controlled substances shall be purchased from the commissioner. The purchaser shall pay 100 percent of face value for each stamp, label, or other indicia at the time of the purchase.

History: *1987 c 268 art 17 s 38*

297D.12 ALL ASSESSMENTS ARE JEOPARDY.

Subdivision 1. **Assessment procedure.** An assessment for a dealer not possessing valid stamps or other official indicia showing that the tax has been paid shall be considered a jeopardy assessment or collection, as provided in section 270.70. The commissioner shall assess a tax and applicable penalties based on personal knowledge or information available to the commissioner; mail the taxpayer at the taxpayer's last known address or serve in person, a written notice of the amount of tax and penalty; demand its immediate payment; and, if payment is not immediately made, collect the tax and penalty by any method prescribed in chapter 270, except that the commissioner need not await the expiration of the times specified in chapter 270.

[For text of subds 2 and 3, see M.S.1986]

History: *1987 c 268 art 17 s 39*

297D.13 CONFIDENTIAL NATURE OF INFORMATION.

Subdivision 1. **Disclosure prohibited.** Notwithstanding any law to the contrary, neither the commissioner nor a public employee may reveal facts contained in a report or return required by this chapter or any information obtained from a dealer; nor can any information contained in such a report or return or obtained from a dealer be used against the dealer in any criminal proceeding, unless independently obtained, except in connection with a proceeding involving taxes due under this chapter from the dealer making the return.

Subd. 2. **Penalty for disclosure.** Any person violating this section is guilty of a gross misdemeanor.

Subd. 3. **Statistics.** This section does not prohibit the commissioner from publishing statistics that do not disclose the identity of dealers or the contents of particular returns or reports.

History: *1987 c 268 art 17 s 40*

100TH CONGRESS
2D SESSION

S. 2205

To enact the Omnibus Antidrug Abuse Act of 1988, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 23 (legislative day, MARCH 21), 1988

Mr. DECONCINI (for himself, Mr. D'AMATO, Mr. DIXON, Mr. MOYNIHAN, Mr. GRAHAM, Mr. DOMENICI, Mr. DOLE, Mr. WILSON, Ms. MIKULSKI, Mr. KERRY, Mr. SPECTER, Mr. MURKOWSKI, Mr. ROCKEFELLER, Mr. BENTSEN, Mr. HATFIELD, Mr. PRESSLER, Mr. HEINZ, Mr. COCHRAN, Mr. REID, Mr. HEFLIN, Mr. WEICKER, Mr. GRASSLEY, Mr. RUDMAN, Mr. STEVENS, Mr. INOUYE, Mr. TRIBLE, Mr. BINGAMAN, Mr. BREAUX, Mr. SARBANES, Mr. DANFORTH, Mr. STENNIS, Mr. MCCONNELL, Mr. HELMS, Mr. PELL, Mr. THURMOND, Mr. KARNES, Mr. NICKLES, Mr. DURENBERGER, Mr. HECHT, and Mr. CRANSTON) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To enact the Omnibus Antidrug Abuse Act of 1988, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Omnibus Antidrug Abuse Act of 1988".

SEC. 2. ORGANIZATION OF THE ACT.

This Act is organized as follows:

TITLE I—DRUG ENFORCEMENT AND PERSONNEL ENHANCEMENT

Subtitle A—Asset Forfeiture Fund Amendments Act of 1988

SEC. 101. SHORT TITLE.

This subtitle may be cited as the "Department of Justice and Department of Treasury Assets Forfeiture Fund

IN THE SUPREME COURT FOR THE STATE OF ALASKA

IRWIN RAVIN,

Petitioner,

vs.

STATE OF ALASKA,

Respondent.

Supreme Court No. 2135

ON PETITION FOR REVIEW FROM THE DISTRICT AND SUPERIOR COURTS OF THE THIRD JUDICIAL DISTRICT

BRIEF OF THE PETITIONER

R. Collin Middleton
Robert H. Wagstaff
Attorneys for Petitioner and
The American Civil Liberties
Union

Filed this 11th day of June, 1974 in the Supreme Court of the State of Alaska

J. M. McPHETRES, Clerk

By: Betty H. Barker
Deputy Clerk

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

CONSTITUTIONAL AND STATUTORY PROVISIONS RELIED ON

United States Constitution

First Amendment guarantees freedom of religion, association, speech and the press.

Third Amendment guarantees that "No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law"

Fourth Amendment guarantees freedom from unreasonable searches and seizures

Eighth Amendment is a guarantee against cruel and unusual punishments

The Fourteenth Amendment makes applicable to the states many of the first ten Amendments

Alaska Constitution

Article I, Section 1 is fully set forth on page 16 and is a basic guarantee to Alaskans of liberty, life and the pursuit of happiness

Article I, Section 12 is a guarantee for Alaskans against cruel and unusual punishments

Article I, Section 22 states

> The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

Alaska Statutes Relied Upon

AS 11.55.050 prohibits flourishing, pointing or discharging a firearm in a public place and provides a punishment

AS 11.55.060 prohibits shooting at buildings and provides a punishment

AS 11.55.070 prohibits possession of a firearm while under the influence of liquor and provides a punishment

AS 11.15.230 prohibits assault and battery and provides a punishment

AS 11.20.140 prohibits larceny of money and provides a punishment

AS 11.40.480 prohibits cruelty to animals and provides a punishment

AS 17.12.010 is set forth on page 9 of this brief and prohibits the private possession of any stimulant depressent or hallucinogenic drug. Petitioner was charged under this statute.

AS 17.12.150 defines marihuana (Cannabis Sativa L) as one of the drugs prohibited above and is set forth on page 9 of this brief.

AS 28.35.030 prohibits driving under the influence of intoxicating liquor and provides a punishment.

JURISDICTIONAL STATEMENT

Petitioner was arrested for possession of marihuana on December 11, 1972. He moved to dismiss his complaint for the unconstitutionality of the statute under which he was arrested in February of 1973 and a bifurcated hearing was held commencing on May 2, 1973, running for five days of testimony and again on June 20, 1973 for an additional five days. Judge Tyner denied petitioner's motion on November 16, 1973. Review was granted by the Superior Court and Judge Tyner's decision affirmed on December 19, 1973. This Court granted review of Judge Tyner's decision on April 8, 1974, directing petitioner to file this supplemental brief. Jurisdiction was found by the order of April 8, 1974 where this petition for review was granted.

ISSUES PRESENTED FOR REVIEW

I. Is the prohibition against possession of marihuana for personal use an unconstitutional invasion of the privacy and liberty of petitioner?

A. Is the possession of marihuana for personal use a "fundamental" right protected by the Constitutions of the State of Alaska and the United States as a right to privacy and liberty?

B. Was a compelling state interest shown to contravene petitioner's fundamental rights to privacy and liberty?

II. Is the prohibition against possession of marihuana for personal use an unconstitutional unequal application of the laws?

A. Is the prohibition against possession of marihuana for personal use when alcohol and tobacco are not prohibited the unequal application of the laws?

B. Is marihuana misclassified as a dangerous drug denying persons possessing it the due process of law and the equal protection of law?

III. Is the prohibition against possession of marihuana for personal use and resulting penalties for arrest a cruel and unusual punishment?

STATEMENT OF THE CASE

Irwin Ravin is an Alaskan who was arrested for having in his pocket, for his own personal use a small amount of marihuana. He moved to dismiss the criminal complaint on the grounds that it was unconstitutional to arrest him for possessing marihuana. This case is before this Court on a Petitioner for Review (see jurisdictional statement) from the denial of his motion by the District Court.

Irwin Ravin is not the only person in Alaska who has possessed marihuana for personal private use. Much of the hearing on the motion to dismiss was related to marihuana in Alaska and the non danger it was for the public health of Alaskans.[1] Doctor Carolyn Brown, a board certified physician in preventive medicine (Brown Tr. p. 13) has been an epidemiologist (. . ." a qualified person whose major concern deals with the cause and distribution of perameters relating to a certain problem" (id. at 21)) for three years at the Alaska Native Health Service. She has participated in a study of marihuana use by

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1/ As goes Alaska so go the United States. Our experience is not different from that of the rest of the country or the world as was demonstrated by the outside experts who testified. Assembled before the District Court werethe experts of the country as well as all the scientific and anecdotal information on marihuana. That information is parsed in Argument II of the brief. In State v. Kantner, 493 P.2d 306 (Hawaii 1972), cert. denied 409 U.S. 948 (1972) few-witnesses testified; however, the court divided two for affirming conviction, one for affirming on procedural groudns and two dissenting essentially on the strength of books by Kaplan and Grinspoon, neither of whom testified. In Commonwealth v. Leis, 243 N.E. 2d 898 (Mass. 1969) no where near the documentation was available for the harm-

school children in the Greater Anchorage Area Borough (exhibit J.), a use study by lawyers in the Third Judicial District (id. at 41), and doctors statewide (id. at 40). She has been a physician at the Open Door Clinic (id. at 58). Additionally she has spoken with may physicians in Alaska and many Alaskans.

Q. As an epidemiologist have you an opinion as to the amount of usage of marihuana in the state of Alaska?

A. Yes. I do.

Q. And what is that opinion?

A. An awful lot of people are smoking marihuana.

Brown Tr., pps 27, 28. In fact of 15,634 borough school children in grades six through twelve, 24% had used marihuana at least once. id. at 35. Of grades twelve and eleven 46% had used marihuana. ibid. The study was (exhibit J.) published, "Drug Use in Anchorage, Alaska," 223 J. Amer. Med. Ass. 657 (1971) (exhibit N.). Significant numbers of the lawyers and doctors polled, but fewer of the League of Women Voters, used marihuana. (Exhibits C and 5). However,

Q. Doctor, do you have an opinion as to whether or

1/ (cont'd) lessness of marihuana as is before this Court. Admitted into evidence by their authors in favor of petitioner's position are Fort, The Pleasure Seekers (1969), Grinspoon, Marihuana Reconsidered (1971), and the two reports of the National Commission on Marihuana and Drug Abuse, Marihuana: A Signal of Misunderstanding and Drug Use in America: Problem in Perspective as well as the two volume appendix.

not marihuana use, as you have described it, for the last hour and a half, in Anchorage, poses a public health problem?

A. Marihuana, as it is currently used in Anchorage, is a relatively tremendously insignificant problem in terms of public health and public interest, relative to other problems which exist in this town.

Q. You said "relatively tremendously" and I don't know if it's a relative problem or a tremendously small problem.

A. It's a very small insignificant problem.

Q. O.K. What do you mean by insignificant problem?

A. The number of people who have bad things happen to them, either economically, morbidity; mortality, sociologically, from the use of marihuana as it's currently used in Anchorage, is insignificant, when one compares the bad things that happen to people, given those parameters, when one uses Seconal, Darvon, librium, alcohol.

Q. All those are used in Anchorage?

A. Tremendously. They kill people every day.

id., pps 46-47.

Of 380 some odd cases coming to the attention of the Poison Control Center each year since 1965 none was caused by marihuana. Of ten admissions per day to the ANS energency room since 1965 only one was for "acute anxiety" and "it was alleged that he may have come in contact with marihuana. No marihuana was found on him." (Dr. Brown, Tr. p. 47). Of 40,000 outpatients seen at ANS per year since 1965 only the case reported above was ever admitted with a primary, secondary or tertiary diagnosis of marihuana. (id., p. 57). Of 1,593 ou.patient consultations at the Open Door Clinic two persons had conjunct vitis and ten to twenty had bronchitis possibly secondary to either marihu:ne use or cigarette smoking. id., p. 58. Of 180 admissions for drug usage in a six month period at Community Hospital one was admitted for marihuana (Heesch transcript, p. 87) although even that admission was suspect. (exhibit Z, testimony of Keller, p. 4).

Doctor J. Ray Langdon, whose psychiatric clinic has seen 13,000 - 15,000 persons for mental health help has never seen a person suffering from an organic brain syndrome or damage due to marihuana ingestion (Langdon transcript, p. 17) (although he has seen such conditions resulting from alcohol and bromo-seltzer (id. at 18)), nor has he ever treated anyone suffering from any mental problem caused by the ingestion of marihuana. (id. at 19-20).

Q. Based on the persons whom you have seen (including court referral forensic cases) and based on the other

material which you know is the, as the, as being on the staff and consultant to three hospitals, now, do you have an opinion as to whether or not marihuana is a public mental health problem?

A. I, it's my opinion that the use of marihuana, per se, is not a public mental health problem. . . .

id. at 20-21. Similarly Doctor Aron Wolf as Chief of Psychiatric Services at the Elmendorf Mental Health Clinic saw no one with a mental health problem caused by the ingestion of marihuana.

A. To my knowledge, no one came to that clinic specifically because of marihuana as a medical problem. There were several cases in which someone was being court martialed for the use of marihuana. It was no problem to the person other than he had gotten caught by the Air Force authorities. . . .

Wolf transcript (May 2) p. 98.

Q. (by Mr. Weight) You've never seen a case where marihuana contributed in some respects, more than marginally to a mental disease or defect?

A. No, I have not.

Wolf transcript (May 2 -- should be May 3) p. 25. Marihuana has not caused impediments to the maturation of adolescents sent to McLaughlin (id. at 38), does not lead to heroin (id. at 14), and of three hundred psychiatric emergencies at Providence Hospital over a six month period only one was related to marihuana where a person with a chronic mental condition was admitted suffering anxiety after drinking wine and smoking marihuana. id. at 10.

Of the witnesses testifying about Alaska not one found any potential or present danger to the health of the large numbers of persons from all strata of Alaskan society who used marihuana. (Dr. Wolf id. at 8; Dr. Langdon, supra, Dr. Brown, supra, Mr. Heesch, supra at 105). Indeed the Alaska State Medical Society voted that marihuana is of so little danger to health it be legalized for personal possession (exhibit A) and the Alaska Bar Association voted it be fully legalized both for possession and sale (exhibit BBB). There is, however, one major danger which is present from the private possession of marihuana, a danger manifestly harmful and of potentially tragic consequences. That danger is arrest. 156 persons of which petitioner is one were arrested for simple possession of marihuana in 1972 (exhibit BB) up from 81 in 1971 ibid.; see Tr. 15 (May 5).

Simply put there is no mental, medical or moral harm from the private use of marihuana in Alaska. The only harm is its illegality, and it is that harm to which this brief is addressed.

ARGUMENT

I. INTRODUCTION

Petitioner asks that this Court declare as unconstitutional AS 17.12.010[2] as that statute is defined by AS 17.12.150.[3] Petitioner seeks from this Court a determination that the possession and use of marihuana by an adult is not a crime, cannot be made a crime by the legislature, and that the legislature in enacting the above statutes as they relate to the possession and use of marihuana exceeded the power granted it by the Constitutions of the United States and the State of Alaska. Seeking judicial redress of unconstitutional legislation is not novel; indeed, it is the purpose of this introduction to show that such redress is the vital function of judiciary within our system of government. That the judiciary may declare unconstitutional an act of the legislature was aptly defined as a constitutional duty upon the judiciary by Chief Justice John Marshall when he wrote:

> It is emphatically the province and duty of the judicial department to say what the law is.

Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60 (1803). The rationale was within

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2/ AS 17.12.010 provides in pertinent part:

> ". . .it is unlawful for a person to . . . possess (or) have under his control . . . in any manner, a depressant, hallucinogenic or stimulant drug."

3/ AS 17.12.150 provides in pertinent part:

> "Definitions. In this chapter. . . .
> (3) 'depressant, hallucinogenic or stimulant drug' means:

the system of checks and balances which is the American and Alaskan form of government.

> . . .The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between the government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested that the Constitution controls any legislative act repugnant to it; or, that the legislature may alter the Constitution by an ordinary act.

Marbury v. Madison, supra, at 177.

The power of this court to set right that which is wrong is clear. This court must be vigilant against James Madison's observation that "the most rational government will not find it a superfluous advantage, to have the prejudices of the community on its side." The Federalist, #49 at 349 (Wright Ed. 1969). Madison's words touch all branches of government, but it applies most tellingly to the legislative branch, where public decisions of elected lawmakers are necessarily colored by the passions and prejudices of those who elect them. The judicial branch of government and the power of the judiciary as affirmatively recognized by Chief

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3/ (cont'd) (A) cannabis. . .

(4) 'cannabis' includes all parts of the plant, Cannabis Sativa L., whether growing or not; the seeds of this plant; the resin

Justice Marshall are above and divorced from community passion.

The United States Supreme Court has indicated continual acceptance of Marshall's words and declared that courts have the power and the duty to inquire into the facts behind a stat . In Mugler v. Kansas, 123 U.S. 623, 661 (1887) the court stated:

> The Courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty -- indeed, under a solemn duty -- to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute proporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of the rights secured by the fundamental law, it is the duty of the Courts to so adjudge, and thereby give effect to the Constitution.

This principle was restated in Abie State Bank v. Bryan, 282 U.S. 765, 772 (1931), as follows:

> (E)ven though a police power enactment may have been or may have seemed to be valid when made, later events or later-discovered facts may show it to be arbitrary and confiscatory.

See also United States v. Carolene Products Co., 314 U.S. 144, 153-54 (1938):

3/ (cont'd)

> extracted from any part of this plant; and every compound, manufacture, salt, derivative, mixture, or preparation of this plant, its seeds or resin. . . ."

> (W)e recognize that the constitutionality of a statute valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason because the article, although within the prohibited class, is so different from others of the class as to be without the reason for the prohibition.

Such determinations have been recently applied to statutory proscriptions against marihuana. As Justice Levinson of the Supreme Court of Hawaii recently stated in State v. Kantner, 493 P.2d 306, cert. denied, 409 U.S. 948 (1972):

> Any criticism which attempts to deter courts from inquiring into the constitutionality of laws must distinguish between legislation which seeks to regulate economic and social relationships and that which intrudes into the purely private sphere of human life. In the former instance courts rightfully grant the legislature wide latitude for experimentation in the promotion of the general good. But, where the State endeavors to intrude into the individual's private life and regulate conduct having no public significance, it is the duty of the courts to offer a haven of refuge where the individual may secure vindication of his right to be let alone.

State v. Kantner, supra, (493 P.2d at 317-18.)

In the same case, Justice Kobayashi indicated, 493 P.2d at 320:

> Until legitimate research indicates otherwise, the harm created by placing a criminal sanction on the activity of a significant percentage of our population who would otherwise be law abiding citizens far outweighs any present benefit to be derived from the effects of classifying marijuana as a narcotic. There is no logical or otherwise rational reason for our society, on the basis of a law that has little or no merit in its application, to continue to make criminals out of and consequently alienate the youth of today.

> The use of marijuana does not cause the social ills that the legislature has attempted to guard against. It is the present status of the law classifying marijuana as a narcotic and proscribing its use as a narcotic that is responsible for the social harm created.

Nowhere has the judicial duty to investigate legislation for its conformance to constitutional mandates, been more clearly stated than in Alaska. In Breese v. Smith, 501 P.2d 159, 174 (Alaska 1972) this Court stated in declaring invalid a school regulation regarding student hair length:

> Even if such a regulation were arrived at and promulgated by a more democratic process, a student's claim to liberty would remain undiminished for this court is held to a standard of vigilance in the matter of the protection of an individual's constitutional liberties. Protection of personal liberty cannot be left to depend upon the will of the majority for those are antithetical concepts.

In Baker v. City of Fairbanks, 471 P.2d 386, 402 (Alaska 1970), this Court found the right to jury trial in misdemeanor cases a basic constitutional right under the Alaska Constitution.

> . . . (W)e are under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage.

Baker v. Fairbanks, supra, 471 P. 2d at 402.

Indeed this Court has frequently found constitutional obligations for the protection of Alaskans that the United States Supreme Court has not found

mandated under the United States Constitution. Specifically in Roberts v. State, 458 P.2d 340, 342-343 (Alaska 1969), this court said:

> (W)e are not limited by decisions of the United States Supreme Court or the United States Con- s n when we expound our state constitution; th iska Constitution may have broader safe- guar than the minimum federal standards.

And again in Baker, supra, 471 P.2d at 401 this Court stated:

> (W)e have recognized that we are at liberty to make constitutional progress in Alaska by our own interpretations, as long as we measure up to the national standards which are required by the United States Supreme Court. It is our duty to move forward in those areas of constitutional progress which we view as necessary to the development of a civilized way of life in Alaska.

See also, State v. Browder, 486 P.2d 925, 936 (Alaska 1971); R.L.R. v. State, 487 P.2d 27 (Alaska 1971).

It is against this firm judicial backdrop that petitioner presents his arguments that the statutes under which he was charged are unconstitutional. It is with this firm constitutional and judicial committment that the legislation questioned in in the light of scientific knowledge must be viewed, and it is because of this commitment by this Court that petitioner requests in the following arguments reversal of the decisions by the courts below, and that the legislation be struck down.

II. THERE IS NO COMPELLING STATE INTEREST IN THE PROHIBITION OF MARIJUANA

A. THE RIGHT OF LIBERTY AND PRIVACY

This Court has stated that

> Once a fundamental right under the constitution of Alaska has been shown to be involved and it has further shown that this constitutionally protected right has been imparied by governmental action, then the government must come forward and meet its substantial burden of establishing that the abridgment in question was justified by a compelling governmental interest.

Breese v. Smith, supra, 501 P.2d at 171. [4]

The first question to be determined, then, is whether a fundamental constitutional right is involved in this case. The District Court so found,

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Griswold v. Connecticut, 381 U.S. 479 (1965) was the first case in which the United States Supreme Court established the right of privacy as an independent constitutional right, and based its decision squarely upon that right. Griswold set forth a number of principles for privacy cases which have been followed and reaffirmed by the most recent Supreme Court decisions involving the right of privacy. Foremost among these principles is the rule that if the challenged statute invades rights or liberties which are considered "fundamental", then the government must justify the statute by demonstrating an overriding and compelling state interest. As the Court stated in Griswold, 381 U.S. at 497:

> In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a sub-

opinion page 4.

Article I, Section 1 of the Constitution of Alaska provides:

> This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

Article I, Section 22 of the Alaska Constitution provides: "the right of the people to privacy is recognized and shall not be infringed". That privacy and liberty are fundamental and their abridgment is possible only by a compelling state interest is explicit in Alaska. Petitioner advances that the possession of marijuana for private use is fundamental is implicit in the above, based upon this record.

4/ (cont'd) ordinating interest which is compelling,' Bates v. Little Rock, 361 U.S. 516, 524, 4 L.Ed.2d 480, 486, 80 S. Ct. 412. The law must be shown 'necessary, and not merely rationally related, to the accomplishment of a permissible state policy.' McLaughlin v. Florida, 379 U.S. 184, 196, 13 L.E.d 2d 222, 231, 85 S. Ct. 283.

See also Stanley v. Georgia, 394 U.S. 557 (1969) (right to private possession of obscene materials); Roe v. Wade, 410 U.S. 113 (1973) (right to abortion).

A second, but related principle established in Griswold was that legislation in areas of legitimate state interests cannot sweep unnecessarily broadly and stifle fundamental freedoms: "(A) governmental purpose to control or prevent

The two most important zones of privacy and liberty involved are the sanctity of areas of expectation of privacy and the right to be let alone by government to develop and use one's faculties as one sees fit.

The issue of whether the private possession and use of marijuana involves fundamental liberties has, surprisingly, received little detailed attention in the cases decided to date. As one recent law review article has indicated: "Only one court has come close to giving the issue thoughtful treatment." Comment, "On Privacy: Constitutional Protection For Personal Liberty",: 48 N.Y.U. L. Rev. 670, 756 (1973). The case referred to is State v. Kantner, 493 P.2d 306 (Hawaii 1972), cert. denied, 409 U.S. 948 (1972). In Kantner, the five justices of the Hawaii Supreme Court issued four separate opinions on the constitutionality of the marijuana prohibition. Two justices voted to affirm the convictions, two dissented, holding possession of marijuana was protected by the right of privacy, and the fifth justice voted to affirm because he did not believe that the issue had properly been raised.

There are at least two aspects of the private possession and use of marihuana which involve "fundamental" interests. The first aspect is that the activity engaged in is the privacy of the home or other areas of expectation of privacy. In Stanley v. Georgia, 392 U.S. 557 (1969), the Supreme Court held that the pos-

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4/ (cont'd) activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." 381 U.S. at 485.

session of obscene materials in a person's home involved fundamental values. The Court's opinion appears to rely upon two bases for its decision -- the First Amendment right to receive information, and the privacy of the home. The Court states, 392 U. S. at 564:

> It is now well established that the Constitution protects the right to receive information and ideas. . . . This right to receive information and ideas, regardless of their social worth. . . 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.

In cases subsequent to Stanley, however, the Supreme Court has emphasized that Stanley did not involve the First Amendment so much as it did the privacy of the home. See, e.g., United States v. 12 200-FT.Reels of Super 8MM Film, 413 U.S. 123, 126 (1973). In the recent case of Paris Adult Theatre I v. Slaton, ____U.S. ____, 41 U.S.L.W. 4935 (1973) Chief Justice Burger, speaking for the Court, indicated that "the privacy right encompasses and protects the personal intimacies of the home," and indicated that Stanley was decided upon this ground "which was hardly more than a reaffirmation that 'a man's home is his castle.'" Id., at 4940.

Stanley and these subsequent cases should therefore be interpreted as holding that the privacy of the home, in and of itself, is a "fundamental" value, and that the state must show an overriding and compelling interest to

justify criminalizing any activity in the privacy of the home or other Fourt Amendment areas in which one has an expectation of privacy.

In a number of different contexts, the United States Supreme Court has indicated that the privacy of the home, in and of itself, is a fundamental value. In Wolf v. Colorado, 338 U.S. 25 (1949), one issue was whether the Fourth Amendment was "basic to a free society" and "implicit in the concept of ordered liberty" so that it was applicable to the states through the Due Process Clause of the Fourteenth Amendment. The Court stated, 232 U.S. at 27-28:

> The security of one's privacy against arbitrary intrusion by the police -- which is at the core of the Fourth Amendment -- is basic to a free society. It is therefore implicit in "the concept of ordered liberty" and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.

Even though the Court held that the Fourth Amendment was applicable to the states, the court also held that the exclusionary rule was not binding on state courts. This portion of the Court's decision was overruled in Mapp v. Ohio, 367 U.S. 643 (1961). Mapp held that illegally siezed evidence was not admissible in state courts, and, of course, Mapp reaffirmed the holding in Wolf that the privacy of the home is "basic to a free society," and was "no less important

than any other right carefully and particularly reserved to the people." 367 U.S. at 656. See also Boyd v. United States, 116 U.S. 616, 630 (1886):

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers; but it is the invasions of his indefeasible right of personal security, personal liberty and private property. . . .

See also, Weeks v. United States, 232 U.S. 383, 390-91 (1914).

In Moreno v. U.S. Dept. of Agriculture, 345 F. Supp. 310 (D.D.C. 1972), aff'd., 93 S.Ct. 2821 (1973), a three-judge court in the District of Columbia Circuit granted a declaratory judgment invalidating a statute which denied eligibility in the food stamp program to households composed of unrelated individuals (the so-called "hippie communes"). The Court stated:

> Recent Supreme Court decisions make it clear that even the states, which possess a general police power not granted to Congress, cannot, in the name of morality infringe the rights of privacy and freedom of association in the home. 345 F. Supp. at 314 (emphasis in original).

See also, Powel v. Texas, 392 U.S. 514 (1968), where the Court, in holding that the states may make public intoxication a criminal offense, intimated that the state could not prohibit such activity in the privacy of the home. 392 U.S. at 532.

The privacy of a person's home is also an area about which people entertain legitimate expectations of privacy. As Justice Powell indicated in his concurring opinion in United States v. Robinson, ___ U.S. ___, 42 U.S.L.W. 4055, 4070 (1973):

> The Fourth Amendment safeguards the right of 'the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures. . .' These are areas of an individual's life about which he entertains legitimate expectations of privacy.

The privacy of the home is also "so rooted in the collective conscience of the people" as to be ranked as "fundamental." Few values in America are so widely shared as the belief that "a man's home is his castle." The privacy of the home, is related to, and emanates from, a number of specific guarantees in the Bill of Rights, including the Third Amendment ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner. . . ."); the Fourth Amendment ("The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated. . . ."); and the concept of Liberty embodied in the Fourteenth Amendment.

For all the above reasons, the privacy of the home, in and of itself, is a "fundamental" right.

The Supreme Court has also indicated, in a number of different contexts, that the right to be let alone by government (liberty) is a "fundamental" right.

In Union Pacific Railway Co. v. Botsford, 141 U.S. 250, 251 (1891), the Court stated:

> No . . . t is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, "'the right to one's person may be said to be a right of complete immunity: to be let alone'".

In Stanley v. Georgia, supra, the Court quoted with approval the now famous dissent of Mr. Justice Brandeis in the Olmstead case, 394 U.S. at 564.

> 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 of 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. (emphasis added)

See also, Meyer v. Nebraska, 262 U.S. 390, 392 (1922):

> (W)e should not overlook the fact that the spirit of America is liberty and toleration - the disposition to allow each person to live his own life in his own way, unhampered by unreasonable and arbitrary restrictions.

See also Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972); Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897) ("right of the citizen to be free in the enjoyment of all his faculties"); Bishop v. Colon, 450 F.2d 1069, 1077 (8th Cir. 1971)

("toleration of individual differences is basic to our democracy, whether those differences be in religion, politics, or life-style"). In the more recent case of Roe v. Wade, 410 U.S. 113 (1973), the Supreme Court held that a woman's right to decide for herself whether she should have an abortion cannot be infringed upon by a state requirement that bears no rational relationship to the state's compelling interest to protect the health of pregnant women. The majority of the court held, in a lead opinion by Mr. Justice Blackmun, that the right of a woman to control her own pregnancy is included within the general right of privacy which is itself part of the liberty protected by the Fourteenth Amendment's Due Process Clause and in the penumbra of the Ninth Amendment.

The right to be let alone by government also emanates from a number of specific guarantees in the Bill of Rights, including the First Amendment freedom of expression, and the Ninth and Tenth Amendments.

A number of the Western Philosophers have discussed this right to be let alone. John Stuart Mill, in Principles of Political Economics, Vol. II, pp. 560-61 (1848), stated:

> There is a circle around every individual human being, which no government, be it that of one, of a few, or of the many, ought to be permitted to overstep; there is a part of the life of every person who has come to years of discretion, within which the individuality of that person ought to reign uncontrolled either by any other individual or by the public collectively. That there is, or ought to be, some space in human existence thus entrenched around and sacred

> from authoritative intrusion, no one who professes the smallest regard to human freedom or dignity will call in question.

The Archbishop of Canterbury, quoted in Chesser, Live and Let Live 58 (1958), stated:

> (T)here is a sacred realm of privacy for every man, where he makes his choice and decisions, fashions his character and directs his desires; a realm of his own essential rights and liberties, including, in the providence of God, liberty to go to the devil, into which the law, generally speaking, must not intrude.

See also, R. Clark, "The Erosion of Civil Liberty," in The Center Magazine, Vol. 3, No. 4 at p. 56 (July, 1970):

> I don't think we have ever really examined what privacy is. I think that privacy is the foundation of individual character. I think it is the way you come to know who you are and what you are and how you make value judgments as to what is right and what is wrong. If that kind of personal, private judgment goes, then everything will become instinctive or group reaction. I think one's character develops over a long period of time through private reflection, by being by oneself and thinking about oneself, so that when we tamper with privacy we tamper with the foundations of individual integrity.

B. COMPELLING STATE INTEREST.

District Court Judge Tyner found that while possession of marijuana for private personal use involved a fundamental right to privacy, there nevertheless was a compelling state interest. Opinion, p. 12.

Judge Tyner applied the correct test, in essence identified the correct

facts, but inexplicably arrived at the wrong conclusion. The facts that were misstated in her opinion are:

1. Meaningful research about marihuana was not conducted until the late 1960's (page 2).

2. The synthesis of THC was relevant to effective research. (page 5)

3. A. Hashish is now entering the United States.

   B. Some literature states tolerance develops and lung impairment has been noted with marihuana.

   C. Polarmetabolites of THC are stored for weeks or months in the brain.

   D. The immune system may be affected.

   E. Chromosomal breakage has been noted (page 7).

Judge Tyner stated that the above "results are far from conclusive and defense witnesses tended to rebut" and then, erroneously, stated that because these might be potential harms and were not fully explored by the National Commission on Marijuana and Drug Abuse that a compelling state interest existed. The burden of proof is upon the state to show a compelling state interest - a "potential" of "unexplored" harm cannot be enough. In fact, the "potentials" noted by Judge Tyner do not even rise to that status. Most were in fact considered by the National Commission and rejected. See infra.

> Black's Law Dictionary (4th ed.) defines "compell" as "to force. . . to oblige". A com-

> pelling state interest therefore must be one which the state is forced or obliged to protect.

Coleman v. Coleman, 291 N.E. 2d 533 (Ohio 1972) (upholding residence requirement for divorce).

> The "compelling state interest" standard, or the standard of "active review" calls upon the state to show more than a link of reasonableness. The state must demonstrate the pressing importance of the classification in the context of some necessary governmental objective.

Dunham v. Pulsifer, 312 F. Supp. 411, 417 (D.C. VT. 1970) (finding unconstitutional a school clothing regulation).

It could be contended that the states and Federal government have a right to prohibit any activity which may, in some way, have an adverse effect on the public welfare. It could be argued that a police power enactment is valid if it protects the public from harm, no matter how rare or remote. For example, Congress or the states could pass statutes requiring every person to be in bed by 10:00 p.m. or brush their teeth three times a day, in order to promote the public health. Similarly, statutes could be passed to prohibit persons from listening to Beethoven or playing bridge because these activities may cause certain persons to become agitated or even violent. These statutes would have a rational relationship to the public health and safety, in the narrowest sense of that term. However, can there be any doubt that these laws would be invalid? Government in the United States was never given such broad powers over the lives of its citizens.

As the Court stated in People v. Carmichael, ____N.Y.____, 53 Misc. 2d 584, 588-89 (1967):

> If a statute required every person to refrain from smoking there could be no serious argument that many persons would be spared crippling illness that cause premature disability and death. If a statute required every person to retire to bed by 10:00 p.m. every evening it would probably benefit the general health of many citizens.
>
> The police power traditionally has not included the power to make a citizen protect his own physical wellbeing. To hold that a citizen may be required to protect his health alone would be an enlargement of the police power beyond traditional limits; it would introduce a novel basis for government power, a new principal upon which to authorize the regulation of the lives of the citizen in a manner and to an extent hither to unknown.

There are numerous cases in which statutes similar to the marihuana prohibitions have been struck down for violation of the right of privacy, liberty, or other fundamental constitutional guarantees.

In People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964), the Supreme Court of California held that the use of peyote by an Indian religious organization, the Native American Church, was Constitutionally protected. The Court found that the use of peyote was an integral part of the Church's activities, and that the state of California had not shown any compelling and overriding interest to justify infringing the church members' rights. The Court stated, 394 P.2d at 817:

> In a mass society, which presses at every point toward conformity, the protection of self-expression, however unique, of the individual and the group becomes ever more important. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty.

There have been a number of recent Circuit Court decisions in which school dress and groomirg codes have been invalidated because they violated the rights of privacy or liberty. See, e.g., Bishop v. Colon, 450 F. 2d 1069 (8th Cir. 1971); Arnold v. Carpenter, 459 F. 2d 939 (7th Cir. 1972); Anderson v. Laird, 437 F. 2d 912 (7th Cir. 1971), cert. denied, 404 U.S. 865 (1971). Contra: Stull v. School Bd., 439 F. 2d 339 (3rd Cir. 1972).

There are two interesting cases from the early years of this century dealing with the right to smoke cigarettes. In 1911, the Supreme Court of Kentucky considered the validity of an ordinance prohibiting the smoking of cigarettes within the corporate limits of the city. Hershberg v. City of Barbourville, 142 Ky. 60, 133 S.W. 985 (1911). The Court held the ordinance to be an unreasonable interference with personal liberty, stating, 142 Kt. at 61, 133 S.W. at 986:

> The ordinance is so broad as to prohibit one from smoking a cigarette in his own home or on any private premises in the City. To prohibit the smoking of cigarettes in the citizen's own home or on other private premises in an invasion of his right to control his own personal indulgencies. . . .(Government) may not unreasonably interfere with the right of the citizen to determine for himself such personal matters.

The Illinois case involved an ordinance which prohibited smoking "in any street, alley, avenue, park, . . . or (other) public place." City of Zion v. Behrens, 262 Ill. 510, 104 N.E. 836 (1914). In striking down the statute, the Court stated, 262 Ill. at 513, 104 N.E. at 837-38:

> In the broad language in which the ordinance is enacted it is apparently an attempt on the part of the municipality to regulate and control the habits and practices of the citizens without any reasonable basis for so doing. The ordinance is an unreasonable interference with the private rights of the citizen. . . .

Cases dealing with the Constitutional right to possess alcoholic beverages are also relevant to the instant case. As pointed out by Bonnie and Whitebread in their law review article, supra., 56 U.Va.L.Rev. at 999:

> Until 1915 the weight of authority was that it was beyond the police power to prohibit mere possession of alcoholic beverages unless the quantity justified an inference that they were held for sale. A few cases so held; many courts so stated in dictum, while holding the laws either in conflict with particular constitutional provisions regarding the "sale" of liquor or in excess of the power of municipal corporations; and many contemporary commentators so stated. (Footnotes omitted)

The U.S. Supreme Court in 1917 ruled that the states could prohibit the private possession of alcoholic beverages. Crane v. Campbell, 245 U.S. 304 (1917). The Court based its decision, in part, on the harmfulness of alcohol:

> It must now be regarded as settled that on account of their well known noxious qualities and the extraordinary evils shown by experience commonly to be

> consequent upon their use, a State has the power absolutely to prohibit manufacture, gift, purchase, sale or transportation of intoxicating liquors within its borders without violating the guarantees of the Fourteenth Amendment.

Crane v. Cambell, 245 U.S. at 307.

A few comments are necessary on Crane v. Campbell. First, the right of privacy has evolved enormously in recent years, and it is not unforseeable that the Crane decision in 1917 would prove to be an anachronism in the law if the issue were litigated today. Second, the Court in Crane reasoned that the right to possess alcohol would necessarily imply the right to procure it, and the Court noted that it had previously rejected Constitutional arguments dealing with the right to procure and transport alcohol.

This reasoning was explicitly rejected by the Supreme Court in Stanley v. Georgia, where the Court enunciated a right to private possession of obscene materials, see 394 U.S. at 567-68, and in Paris Adult Theatre I v. Slaton, 41 U.S.L.W. 4935 (June 21, 1973), where the Court reaffirmed Stanley but refused to extend this right to the transportation or procurement of obscene materials.[5]

5/ This is not to suggest that an argument could not be made for the right to receive marihuana, especially small amounts distributed not-for-profit. These cases are cited above to indicated only that the right to possess does not necessarily imply the right to receive. Cf. Baird v. Eisenstadt, 405 U.S. 438, 445-46 (1972).

Finally, the Court in Crane held that possession of alcoholic beverages could be made illegal because of the "well known noxious qualities and the extraordinary evils" associated with its use. It is obvious from the transcripts and exhibits in this case that marijuana use does not have these harmful effects. Whatever the continuing validity of Crane v. Cambell with respect to possession of alcohol, surely it would not foreclose consideration of the right to possess marihuana if marihuana is shown to involve no substantial danger to the public health, safety, or welfare.

C. NO COMPELLING STATE INTEREST WAS SHOWN AT PETITIONER'S HEARING FOR A PROHIBITION AGAINST PRIVATE PERSONAL USE AND POSSESSION BY ADULTS OF MARIHUANA

Defendant assembled for the District Court, and now for this Court's consideration, what is unquestionably the most comprehensive presentation ever made to a court concerning the issue of whether or not a state has a legitimate interest in criminally proscribing the use and possession of marihuana for adults. There are no known facts concerning marihuana that were not presented to the court and which are not contained in the transcript and record. The issue presented to this Court is a technical and a scientific one. The brief synopsis of testimony and exhibits to follow cannot approach a full understanding of the testimony and what marihuana is and what marihuana is not. The transcript itself is inadequate; it has many misspellings, phonetic interpretations, and outright mistakes. Fortunately a complete video transcript was made and it undoubtedly will be

necessary for this Court to view it especially for the cross-examination of Gabriel Nahas and the testimony of Sanford Feinglass who used three-dimensional molecular models, drawings and physical evidence in portions of his testimony.

The Testimony

Dr. Joel Fort

The first witness of international repute called by petitioner was Dr. Joel Fort of San Francisco whose qualifications to speak on marihuana are well known.

Joel Fort described marihuana as a unique drug which has been used for over four thousand years and which is presently being enjoyed by 300,000,000 persons in the world. 26,000,000 persons in the United States have tried marihuana and 13,000,000 are enjoying its use on a continuing basis. (Tr. Fort p. 21-22). Dr. Fort described the history of the adoption of the marihuana Tax Stamp Act in the 1930's at the insistence of Harry Anslingler, a person who reappears again and again throughout testimony of the witnesses and the documentary evidence. Prior to that time the possession and use of marihuana was not a crime. Anslinger's testimony before the Congressional Committee was unrebutted for reasons later amplified in the testimony of Dr. Lester Grinspoon. (Tr. Fort p. 22-28). Even prior to that hearing an excellent study on the subject by the Indian Hemp Commission had been relegated to obscurity. Since the work of Anslinger there have been several studies of the subject, the LaGuardia Report the Canadian Commission (LeDain Report) and the most recent definitive report of the National Commission

on Marihuana and Drug Abuse of 1972. (Tr. Fort p. 31-34). Dr. Fort testified that there were no negative physical effects from the use of marihuana (Tr. Fort p. 35). He found barbituates and amphetamines to be much more harmful and dangerous. (Tr. Fort p. 36). He stated that the user of marihuana does not develop a tolerance to the drug. (Tr. Fort p. 40). He found that marihuana was not addicting nor was the concept of "psychological dependence" meaningful. (Tr. Fort p. 43). He noted that in fact a reverse tolerance has been associated with marihuana and a user tends to take less and less to achieve the desired effect. Morever, due to the phenomenon of auto-titration, (a user is able to control by himself the intake of the drug to achieve the desired effect) the relative strength of the marihuana being used does not make much difference to the user. (T . Fort p. 41, p. 47). Dr. Fort stated that it was unreasonable to classify marihuana with other dangerous drugs as defined and proscribed by AS 17.12.150(3). Dr. Fort stated that alcohol is a much, much more dangerous drug and in fact the most dangerous in terms of problems to individual and society. (Tr. Fort pp 42-43). Dr. Fort stated there was no known fatality resulting from the use of marihuana. (Tr. Fort p. 50), no genetic damage (Tr. Fort p. 51), no psychosis (Tr. p. 52), and that marihuana did not lead to the use of other drugs (p. 55) nor did it lead to any amotivational syndrome.

Dr. Fort cirticized the Kolansky and Moore studies (exhibit KK) relied upon by the State. Neither Mr. Kolansky nor Mr. Moore testified. Dr. Fort be-

lieves that the criminal prohibition against the possession and use of marihuana by adults will result only in the criminalization of society. He noted that between two and three hundred thousand persons are arrested in the United States each year for possession of marihuana (Tr. Fort p. 65-67).

On cross-examination Dr. Fort refuted the Campbell Cerebral Atrophy Studies (exhibit II) discussed periodically throughout the trial. He also answered and effectively dealt with many of the questions raised by the Hollister Temporal Disintegration Studies (exhibit JJ) (Tr. Fort p. 45-46). He discussed the chief architects of the State's case, Hardin Jones (Tr. Fort p. 38) and refuted the "second" Kolansky and Moore study (Tr. Fort p. 39). Doctor Campbell and Doctor Hollister also did not testify and surprisingly, although present, Hardin Jones did not testify.

Dr. Lester Grinspoon

Petitioner's second eminent Outside expert was Dr. Lester Grinspoon author of, at the time of its publication in 1971, the single most comprehensive work on the subject, Marihuana Reconsidered (exhibit S). Much of his work was incorporated within the National Commission report "Marihuana: A Signal of Misunderstanding. (exhibit DDD). Dr. Grinspoon, after first being qualified, also related the history of marihuana and marihuana legislation (Tr. Grinspoon p. 8) noting modification in the Bureau of Narcotics' rhetoric and rationale for prohibition throughout the years as the facts change. Dr. Grinspoon's testimony

also included the very interesting history of the American Medical Association's activities with respect to marihuana (Tr. Grinspoon p. 16). Dr. Grinspoon also, as did Dr. Fort, noted the significance of the Indian Hemp Commission's report of last century and cited the recent important reports concerning marihuana. (Tr. Grinspoon p. 24). Dr. Grinspoon believes that true scientific interest in marihuana in the United States only occured after marihuana, initially a drug associated with undesirable black communities, appeared in the white neighborhoods. (Tr. Grinspoon p. 28).

Dr. Grinspoon noted the effects of marihuana use were minimal on the user with no organic damage. (Tr. Grinspoon p. 30). Dr. Grinspoon also examined in some detail the Campbell Cerebral Atrophy studies (exhibit II), once used by "anti marihuana crusaders" and which is also the subject of a New England Journal of Medicine review by Dr. Grinspoon (Tr. Grinspoon p. 31). Dr. Grinspoon compared marihuana to tobacco, noting that there was no nicotine present (Tr. Grinspoon p. 32); and he noted that there were no significant adverse mental effects from the use of marihuana (Tr. Grinspoon p. 34). He also testified that the study of temporal disintegration by Hollister (exhibit JJ) only concerned short term memory during the period of the marihuana high and actually was one of the pleasurable aspects of the high (Tr. Grinspoon p. 36). He discounted the amotivational syndrome (Tr. Grinspoon p. 38) and noted that seventy percent of all Harvard students used marihuana with no known adverse effect (Tr. Grinspoon p. 40) also

citing the studies of Halprin and the Jamaican studies of the National Commission which rejected the concept of amotivational syndrome. Dr. Grinspoon noted that toxic psychosis in marihuana was rare (Tr. Grinspoon p. 41) as was induced paranoia. (Tr. Grinspoon p. 48). He noted the setting of marihuana use was important. (Tr. Grinspoon p. 49) and that the reverse tolerance phenomenon, when noted, was probably due to psychological conditioning (Tr. Grinspoon p. 43).

Dr. Grinspoon then defined the relationship and distinctions between addiction, tolerance and physical dependence (Tr. Grinspoon p. 54) and noted that most people in his opinion simply smoke marihuana because it's fun (Tr. Grinspoon p. 58). Dr. Grinspoon noted that alcohol was much more dangerous than marihuana by any perameters of measure (Tr. Grinspoon p. 59). Dr. Grinspoon compared marihuana to other dangerous drugs, as defined by the Alaska statutory scheme, finding that those cited are much more dangerous in terms of addiction, tolerance, risk of lethal dose, tissue damage, and induced psychoses. (Tr. Grinspoon p. 61). Dr. Grinspoon stated that marihuana was not a true hallucinogenic drug. He stated that autotitration is the ability that users have to regulate the dose to achieve the desired effect. He also noted that there is a part of the ego that always seems to remain outside of the high of the marihuana intoxication and that is able to override further ingestion when necessary (Tr. Grinspoon p. 67). Dr. Grinspoon noted that not only does marihuana not induce anti-social acts but there is a strong indication that it inhibits them due to its tranquilizing effect (Tr. Grinspoon p. 68). Dr. Grinspoon noted the medical possibilities and uses for mari-

huana, (Tr. Grinspoon p. 71) discounted any theories of genetic damage, discounted the stepping stone theory that marihuana leads to harder drugs, discounted the Kolansky and Moore studies (exhibit KK) and stated that the real problem with marihuana was its illegality. Dr. Grinspoon stated there was no known lethal dose (Tr. Grinspoon p. 84), that it was not an aphrodisiac (Tr. Grinspoon p. 85). He saw no significance in terms of adverse effects of the fact that carbon tagged polymers of THC remain in fatty tissues. Dr. Grinspoon noted that marihuana had been used much longer than alcohol (Tr. Grinspoon p. 110) and discussed the Chopra India studies in detail, frequently mentioned at trial.

Dr. Sanford Feinglass I

The defense called Dr. Sanford Feinglass, as psychopharmacologist and consultant to the National Commission. Dr. Sanford Feinglass' testimony during defendants's case in chief was helpful in understanding the nature of marihuana. He also testified as to the inappropriateness of marihuana being classified with other dangerous drugs (Tr. p. 31) and in what ways marihuana was different (Tr. p. 41). He also compared the molecular structures of various drugs to that of marihuana demonstrating the differences in that spectrum (Tr. Feinglass p. 47). He testified that the therapeutic index of marihuana (the relation of desired dose to lethal dose) was almost impossible to determine since no deaths have occured.

Dr. Feinglass also testified there were greater dangers in thirty-four various drugs found on the shelves of a local drug store (Tr. Feinglass, et seq.)

including Sleepeze, Nite-all, Alka Seltzer and Lydia Pinkim's Solution (see video tape).

In comparing marihuana to alcohol Dr. Feinglass testified about pharmacological reinforcement, the opposite of auto titration. In pharmacological reinforcement the user keeps wanting to take more and more; alcohol is the worst offender. Dr. Feinglass further compared the differences between marihuana and other drugs and narcotics (Tr. p. 77). Dr. Feinglass described his Commission work (Tr. p. 77) and stated that he had only heard of one adverse reaction to marihuana and this was probably caused by excessive pepperoni pizza (Tr. Feinglass p. 103). Dr. Feinglass stated no genetic defects were caused by marihuana use; for the four thousand years marihuana has been used no deformed offspring have been born because of marihuana use by their parents (Tr. Feinglass p. 12--121).

Dr. Gabriel Nahas

The person upon whom the State most relies and upon whom the District Court most relied, in finding a compelling State interest for making criminals out of marihuana users was the testimony of Gabriel Nahas. Through his testimony, and his book, Marihuana Deceptive Weed (exhibit 9), Gabriel Nahas, in the words of Doctor Ungerleider of the National Commission, and the Journal of the American Medical Association (Underleider transcript pp 256-261) is revealed as a "fanatic" and "scientific prostitute" who is not only not above distortion, deletions and misquotations, but rather uses these techniques as the basis for all of his opinions. Petitioner contends he is a man without integrity who is not worthy of belief and a

person upon whose judg ment we cannot rely in determining whether or not we are going to make a large segment of our population criminals. It is urged that this Court read carefully his book, and his recent "discoveries" relating to the effects of marihuana on the immune system and the criticism of both his book and his recent study (appendix to this Brief).

Compelling state interests cannot be made from the unfounded statements of unbelievable witnesses anymore than they can be made from the thin air of precatory legislative language and unfounded legislative findings. Since it is Nahas who alone keeps burning the fires of compelling state interest in the proscription of marihuana through the courts to date, his testimony deserves considerable attention, more especially since no reputable scientist agrees with him.

Nahas is an anthesiologist (Tr. Nahas p. 4) interested primarily in the historical and social aspects of marihuana (Tr. Nahas p. 8). Contrary to all findings in the field Dr. Nahas believes that the marihuana user develops tolerance to the drug and must increase the dosage in order to obtain the desired high (Tr. Nahas p. 11). He classifies marihuana as a stupifying drug, the same as an opiate, (Tr. Nahas p. 14) and believes that it disintegrates mental function. Dr. Nahas states that his opinion is based on the "fact" that marihuana is harmful to the body (Tr. Nahas p. 16) and describes his own studies that "have shown that the immune system is impaired". (Tr. Nahas p. 19) Dr. Nahas made this revelation in Anchorage, Alaska for the first time and his "studies" became the subject of a highly controversial Science Magazine article in January of 1974. The article has been examined

and condemned by all scientists reviewing it. (Nahas Tr. p. 21 and see appendix to this brief). This was the first time that anyone had ever been permitted to ask him any questions about his work and the first time Dr. Nahas ever testified in court. (See Tr. Nahas p. 21).

Throughout his discussion of his studies Dr. Nahas attempted to infer that if the immune system is impaired then cancer may result (Tr. Nahas p. 23) a rather unscientific appeal to passion and prejudice. Dr. Nahas, also contrary to most scientific study, stated that there are marked chromosome breaks in the users of marihuana (Tr. Nahas p. 25). Dr. Nahas engaged in a deliberate and blatant distortion of the Egyptian Nasser studies of cannabis users to suit his own end. Apparently no one had ever brought this to his attention before. Citing the Nasser studies, Nahas stated that the findings of a man named Soueif demonstrated that these studies conclusively show that marihuana causes social harm (Tr. Nahas p. 35), marihuana causes inefficiency of production, and marihuana users can't quit once they start. (Tr. Nahas p. 35). When the article in question is examined, (exhibits CC and 8) it is evident that Soueif does not in fact make these statements and that in fact the Egyptian study dealt with marihuana users in a prison population and concluded that there was basically little danger in its use. Soueif did not note that the marihuana user oscillates between anxiety and gratification as Nahas claims he did (Tr. Nahas p. 39). He cites the study of Tennant, (Exhibits NN and OO) stating that Tennant found anatomical proof of cellular damage

from the smoking of marihuana and the presence of pre-cancerous lesions in the lungs. As can be seen from this study the lesions referred to were due to extremely heavy smoking and not attributed to the presence of THC. This apparent distortion by Nahas was pointed out by Dr. Ungerleider in his testimony (See infra).

Nahas cites the Boston Free Access Study conducted by the National Commission as an example of how marihuana users will tend to smoke more and more in order to achieve the desired effect. However, that was not the finding of the Boston Free Access Study. The Boston Free Access Study was in fact set up to encourage the use of marihuana in order to observe its effects. The conclusion was that there was no evidence that a tolerance developed. Compare Marihuana: A Signal of Misunderstanding 52 with Tr. Nahas p. 45. Nahas then quotes the Commission as saying that if hashish becomes available in the United States there will be a major health problem here. (He is unable to find this passage when asked to do so (Tr. Nahas p. 170, 171)).

The cross-examination of Nahas commenced with an examination of his book. It was demonstrated that Nahas' approach was hardly objective and in reality was a social treatise directed to the decaying Western values and loss of the Puritan Ethic in the face of the rise of permissiveness (see appendix 2 to this brief). Nahas notes our eroding religious values (Tr. Nahas p. 60). He states that society regresses from the use of marihuana (Tr. Nahas p. 62) but he claims that his views

are based only on objective information. He sees the real danger of marihuana use upon the lower classes who are doing all of the work (Tr. Nahas p. 64) and a general erosion of our society (Tr. Nahas p. 68) and Puritanical beliefs of hard work. Nahas also claims that the "summary" of the Commission report contained in the publication Marihuana A Signal of Misunderstanding are not the actual findings of the National Commission, but rather the views and interpretations of one man (Tr. Nahas p. 75-77). Doctor Underleider characterizes this as another example of the misstatement by Nahas that can only be politely categorized as a distortion of the truth (See testimony of Thomas Ungerleider). Nahas again returned to the Soueif studies which have also formed the basis for many of his political statements (See exhibit QQ). He states that this study shows a positive association between marihuana users and opiate users (Tr. Nahas p.88). Nahas cited a particular graph which appears on page 282 of his book as establishing this relationship. Nahas in fact changed this graph from that which appeared in Soueif's study, changing the word "habitue" (defined by Soueif as a person who uses hashish at least once a day) to the word "user", meaning user of marihuana. (Tr. Nahas p. 85-93 and p. 115 and see page 21 of exhibit 8 for Soueif's original). As a matter of fact Soueif's study only noted that heavy users of hashish in prison also tended to use opiates - a far cry from the causal relationship of marihuana leading to heroin. Nahas criticizes the cerebral atrophy study as not having been duplicated yet apparently he believes that his studies are not subject to the same standards (Tr. Nahas p. 107) nor are those of Stencheever (Tr. Nahas p. 197)

whose "studies" of chromosome breakage made ephemeral headlines but were never published. Nahas criticizes Wiel and Zinberg (exhibit MM) stating that they used subthreshold amounts of marihuana even though he admits that he does not know what a normal dose is.

Nahas admits that the polar metabolites of THC, which are retained in fatty tissues in the body, are not the psychoactive substances of THC but does not and cannot explain exactly why they would then cause a reverse tolerance effect. (Tr. Nahas p. 117-120). Nahas claims that tolerance is a fact. Significantly, Nahas did admit that contrary to his statements, there is no causal relationship between marihuana and other drugs (Tr. Nahas p. 127) although he does make that statement that 30% of all marihuana users out of a random sample of 100 will be using stronger drugs within a few years again misrelying upon the Soueif study. Such propaganda can only exist because it is what some people wish to hear; once again, an examination of Soueif's papers will show no basis whatsoever for this statement.

The actual "study" shown for the first time in Anchorage, Alaska and proudly asserted as the compelling state interest is the subject of critical comment in the appendix 1. Dr. Nahas gathered around him persons who claimed they smoked marihuana and claimed that they were in good health before they smoked marihuana and compared blood samples of these persons with a "control group", who did not smoke marihuana. Nahas then said that he noted some changes in their lymphocytes which are associated with the immune system. That was the study.

This is what is claimed to be the compelling state interest. Nahas admitted that he had already concluded that marihuana was harmful even before making the study. (Tr. Nahas p. 137) and that several persons had diseases prior to the beginning of the test (Tr. Nahas p. 133). He admitted that he relied only on self-diagnosis of the subject (Tr. Nahas p. 139). He had no idea what people were taking and how much, taking only their word (Tr. Nahas p. 140). Dr. Nahas admitted that this was not proof marihuana caused disease although that is what he constantly states (Tr. Nahas p. 141). He admitted that the test group also used alcohol and tobacco both known to affect health. Dr. Nahas stated he did not know which, in the case of cancer, came first, the cancer or a change of lymphocytes. Dr. Nahas admitted that he did not even know what the average dose of the user of marihuana was in his test or normally (Tr. Nahas p. 151).

Dr. Nahas stated that he agreed with the Kolansky and Moore studies, which, as Dr. Ungerleider points out in his testimony, have generally been rejected by the scientific community. On page 161 of the transcript Dr. Nahas states that he believes (erroneously) the Axelrod study (exhibit 22) showed that the psychoactive properties of marihuana remain behind. (Tr. Nahas p. 163). On page 163 he discusses the Tennant studies (exhibits NN and OO). However, comparing this testimony with the studies themselves shows Dr. Nahas to be incorrect.

Dr. Nahas stated that marihuana users developed the same tolerance to marihuana as does a barbituate user (Tr. Nahas p. 176) all contrary to scientific

fact. Dr. Nahas claims that marihuana causes actual tissue damage, also contrary to scientific fact. Finally Dr. Nahas claims that the National Commission report intentionally tries to confuse the issue.

Dr. Harvey Powelson

The other State's witness to testify in support of a compelling State interest for the criminalization of marihuana was Harvey Powelson. Harvey Powelson is a psychiatrist from Berkeley, California who is presently an employee of Hardin Jones (Tr. Powelson p. 14, 33), a person discussed elsewhere in the record who accused the National Commission of being stoned. Powelson apparently was at one time the head of Student Psychiatric Health Services at the University of California at Berkeley until members of the staff, according to him, conspired with the students to get him to resign (Tr. Powelson p. 14). Dr. Powelson maintains that even small amounts of marihuana affect thinking for as long as 48 hours and impairs memory, judgment and accentuates pathological thinking causing irreversible changes in the brain. Dr. Powelson testified that his opinion about marihuana was the result of his experience with one patient, "S" who used alcohol, LSD and marihuana (Tr. Powelson pps 25 and 18-19). From this anecdotal information, Dr. Powelson asserted that marihuana induces paranoia, affects memory and judgment claiming to be able to identify marihuana users by their "fixed face" and claiming also that it induces delirium (Tr. Powelson p. 31-36). Dr. Powelson endorses the views of Dr. Nahas, Ko-

lansky and Moore, and the Soueif Egyptian Study as misquoted by Nahas. Interestingly, Powelson asserts that Dr. Ungerleider agrees with his views (Tr. Powelson p. 43). Dr. Powelson admitted that marihuana was not addicting (Tr. Powelson p. 50) and that acute panic reactions were rare (Tr. Powelson p. 44). Dr. Powelson believes that atrophy of the brain has been demonstrated, apparently accepting the now universally discredited cerebral atrophy studies of Campbell (exhibit II) (Tr. Powelson p. 52) and also misstates the temporal disorganization (sic) studies of Hollister (exhibit JJ) (Tr. Powelson p. 54). Dr. Powelson states that there is no question but that marihuana will change one's basic personality (Tr. Powelson p. 55) and that it is a stepping stone to harder drugs (Tr. Powelson p.57), both assertions of which are contrary to the most universally accepted fact. (See National Commission report Marihuana: A Signal of Misunderstanding pp. 57 and 87). Dr. Powelson also believes that he personally can tell from observation when someone is on both LSD and marihuana (Tr. Powelson p. 59) and subscribes to the dirty hippie syndrome. (Tr. Powelson p. 62), and use of marihuana causes "mushy thinking" (Tr. Powelson p. 7). Dr. Powelson also states that Dr. Grinspoon's theories are "observably untrue" (Tr. Powelson p. 67). All of Dr. Powelson's observations are from his clinic and none can be repeated.

On cross examination Doctor Powelson denied that "S" was a person named Michael Entin. (See testimony of Kulik for a direct contradiction). Dr. Powelson

claims that marihuana is the first step toward changing one's mind (Tr. Powelson p. 20) and that he was able to observe in multiple drug users marihuana as a common denominator (Tr. Powelson p. 22) and his "observations" are that marihuana affects thinking (Tr. Powelson p. 24) and effects lasting damages (Tr. Powelson p. 27). He cites the studies of Kolansky and Moore (Tr. Powelson p. 28) and endorses their discredited methodology (Tr. Powelson p. 28), and also misrelies upon the studies of Hollister, et al. (exhibit JJ) in support of his views when asked the basis for them. He admits he can't name any other studies (Tr. Powelson p. 29) and claims that the literature supports that there are chronic changes in the brain (Tr. Powelson p. 30) caused by marihuana.

Of course, Dr. Powelson believes that the best summary of the literature is Gabriel Nahas' book Marihuana Deceptive Weed (Tr. Powelson p. el) which lends his tacit endorsement to biased, distorted and changed facts. Dr. Powelson admits that his "observations" are of multiple drug users (Tr. Powelson p. 32). Dr. Powelson who continually talks about marihuana buildup in the brain admits that he does not even know what polar metabolites are (Tr. Powelson p. 39) maintaining also that there is actual structural damage caused to the brain by marihuana (Tr. Powelson p. 44). He speaks of a colleague who took marihuana who "could not stop running in circles" (Tr. Powelson p. 54) and describes a marihuana panic reaction as someone climbing walls (Tr. Powelson p. 55) and that a marihuana user can't give up the drug after six months (Tr. Powelson p. 82) and once again

endorses cerebral atrophy studies (Tr. Powelson p. 63) claiming that marihuana is the common denominator. All of the foregoing misstatements of fact and reliance upon totally discredited studies form the basis for Dr. Powelson's belief in addition to his own unreplicable personal clinical observations. Predictably, Dr. Powelson also endorses the Kolansky and Moore theory that marihuana changes the personality (Tr. Powelson p. 65).

Dr. Powelson was asked how he could reconcile his theory of tolerance as being based upon marihuana "buildup" with his co-existing stepping stone theory that the user wants more and more and moves on to harder drugs. (Tr. Powelson p. 66). Dr. Powelson explains that there is a sort of "dynamic equilibrium" that explains the phenomena. Dr. Powelson claims, also contrary to all belief, that marihuana may lead to criminal behavior (Tr. Powelson p. 70). Dr. Powelson also claims that the marihuana user develops the same tolerance to marihuana as an amphetamine user does to speed. A hint of rationality crept into Dr. Powelson's testimony when he admitted that other dangerous drugs proscribed in Alaska's statutory scheme are much more lethal than marihuana.

Dr. Thomas Ungerleider

In rebuttal, defendants were able to produce an actual member of the National Commission on Marihuana and Drug Abuse, Dr. Thomas Ungerleider. Dr. Ungerleider initially explained what the Commission did (Tr. Ungerleider p. 211-213) and stated simply that Dr. Nahas' statement that "Marihuana. A Signal of Misunderstanding" was authored by one man was entirely untrue, and that it was the work and the actual report of the entire Commission (Tr. Ungerleider p. 214). Dr. Ungerleider interestingly noted that contrary to what the law enforcement agencies say, 93% of marihuana arrests are for the user (Tr. Ungerleider p. 215). The Commission visited some 35 countries (Tr. Ungerleider p. 217) and simply did not find the marihuana problems that are popularly attributed to them. In this context the Commission actually met with Dr. Chopra in India and Dr. Miras in Greece (Tr. Ungerleider p. 223) and could not find any evidence of "moral deterioration" found in their studies. Drs. Hardin Jones, Harvey Powelson and Kolansky and Moore testified before the Commission (Tr. Ungerleider p. 225) and as can be seen from a reading of the report their positions were totally and unequivocably rejected. Dr. Ungerleider noted the hysteria and fear associated with the subject (Tr. Ungerleider p. 225). He noted that the Commission's

national survey revealed that there were 24 million persons who had tried marihuana (Tr. Ungerleider p. 228) and that in a year this number had increased to 26 million (Tr. Ungerleider p. 228). Dr. Ungerleider noted that alcohol is the greatest problem (Tr. Ungerleider p. 229) and that all types of persons use marihuana (Tr. Ungerleider p. 229). He cited as very interesting the Anchorage School Children Study which appeared in the Journal of the American Medical Association (page 230 Exhibit N) which showed that the same situation nationally is in effect here. He summarized the results of the Commission's findings to the effect that there was no phyiscal damage or significant psychological effects from the use of marihuana. (Tr. Ungerleider p. 231), and no chromosome breaks (Tr. Ungerleider p. 232), in fact the chromosome break studies could never be duplicated by anyone else (Tr. Ungerleider p. 233). There was no withdrawl from marihuana (Tr. Ungerleider p. 235), no psychological dependence (Tr. Ungerleider p. 256), no amotivational syndrome (Tr. Ungerleider p. 258), no personality changes (Tr. Ungerleider p. 237), marihuana did not lead to other drugs (Tr. Ungerleider p. 238), that there was no tolerance developed by the user (Tr. Ungerleider p. 240), that the reverse tolerance syndrome was not considered significant, and that the effects on long time users was minimal (Tr. Ungerleider p. 232). He noted that there was some body storage of the polar metabolites of THC (Tr. Ungerleider p. 241) but did not see this in any was related to reverse tolerance which phenomenon is attributed in Dr. Ungerleider's judgment to psychological conditioning

factors. Dr. Ungerleider distinguished marihuana from other dangerous stimulants, hallucinogenic and depressant drugs. He noted the self titration phenomenon of marihuana which eliminated any danger from strong hashish to the user (Tr. Ungerleider p. 245) and stated that the Commission just couldn't find the disasters of marihuana use that were popularly held ideas. Any induced psychosis was very rare and only in predisposed individuals (Tr. Ungerleider p. 246). He stated that marihuana did not induce violence and in fact has sedative effects (Tr. Ungerleider p. 246). He stated that alcohol was the greatest drug problem in the United States. (Tr. Ungerleider p. 246).

Dr. Ungerleider explained that the Commission went through a very subtle process in arriving at its recommendation of decriminalization through the process of education. (Tr. Ungerleider p. 250) and that it believed that continued criminalization was harmful (Tr. Ungerleider p. 251). He discounted Nahas' book as a moral treatise reading from the American Medical Association review of the work (TR. Ungerleider p. 255). He particularly criticized page 40 of the book (Tr. Ungerleider p. 255) where Nahas called the Commission "liberal" when as a matter of fact it was operated in conjunction with the Bureau of Narcotics and Dangerous Drugs. Dr. Ungerleider stated that Tennant, Teague, Chopra, West and Brill, relied upon by Nahas, were themselves in favor of decriminalization. (Tr. Ungerleider p. 258). He also criticized the Kolansky and Moore studies as they involved multiple drug users who used LSD

the most powerful drug known to man (Tr. Ungerleider p. 260). He notes that any new study must be conducted by non-moralists and must be replicated (Tr. Ungerleider p. 261) before it can have any significance. He states why the works of Miras in Greece were rejected (Tr. Ungerleider p. 261).

The State called three witnesses to Alaska to testify, Hardin Jones, his employee, Harvey Powelson and Gabriel Nahas. Jones was present as the State's in-house expert throughout the testimony but left the night before he was to testify. Hardin Jones and Harvey Powelson both testified before the National Commission (Tr. Ungerleider p. 2650266); when the Commission apparently was not subscribing to Hardin Jones' views he accused the Commission of being stoned on marihuana. (Tr. Ungerleider p. 269). Dr. Jones' testimony related primarily to sexual behavior and marihuana and seemed to the Commission to be quite irrational (Tr. Ungerleider p. 270). Dr Ungerleider stated that one of the Commission members, Maurice Seevers, a pharmacologist, examined the significance of polar metabolites' retention in body fat and found as did the Commission there was no significance. Dr. Ungerleider also described the Boston Free Access Study upon which Nahas misplaced great reliance (Tr. Ungerleider p. 282) to support his stepping stone and tolerance theories. Dr. Ungerleider notes that Dr. Seevers and many of the other Commission members changed their initial opinion about marihuana as the facts became known to them (Tr. Ungerleider p. 286). Dr. Ungerleider recalled the testimony of Harvey Powelson before the Commission as based essentially

upon his experience with one patient (Tr. Ungerleider p. 287) the same as his testimony given before the District Court. He also noted that one of the Commission members, Dana Farnsworth, was the head of the Harvard Student Health Services and had come to opposite conclusions from Dr. Powelson (Tr. Ungerleider p. 295). Dr. Ungerleider notes that alcohol is much more harmful than marihuana (Tr. Ungerleider p. 355) and distinguishes marihuana from other dangerous drugs (Tr. Ungerleider p. 353). Dr. Ungerleider also notes that 200 deaths occur from ingestion of aspirin in the United States per year (Tr. Ungerleider p. 355). He stated that the use of LSD by any person in any study of marihuana invalidates the study because LSD is the most powerful drug known to man (Tr. Ungerleider p. 257).

Dr. Sanford Feinglass II

Sanford Feinglass was also called back by the defense to testify in rebuttal. Dr. Feinglass explained that the non-psychoactive polar metabolites of THC were stored in fatty tissues in the liver, lungs, and brain and this could have no significant effect (Tr. Feinglass p. 18-22). Dr. Feinglass also described in detail the Patton studies (exhibit 22) in mice relied upon by Dr. Nahas in his immunology theory (Tr. Feinglass p. 22-25) and demonstrated how far Nahas was reaching for the conclusions that he sought.

Dr. Feinglass had great difficulty in following Nahas' statement that polar metaboloid buildup explains reverse tolerance as this conclusion is not

warranted by the facts (Tr. Feinglass p. 26). Dr. Feinglass explained that the only significant question is what amount of the psychoactive properties of a drug effect the receptor in the brain (Tr. Feinglass p. 28) and the polarmetabaloids were not psychoactive.

Dr. Feinglass severely criticized Dr. Powelson's testimony in which Dr. Powelson stated that marihuana accumulated in a particular part of the brain for which there is no evidence and he criticized him for stating that marihuana stays in the brain longer than any other drug, a meaningless statement since LSD stays in the brain an extremely short time (Tr. Feinglass p. 28). Dr. Feinglass also severely criticized Dr. Nahas, particularly on page 93 of his book where he deliberately distorted a molecular diagram in an effort to show that marihuana was similar in structure to LSD and mescaline (Tr. Feinglass p. 37) and he criticized Dr. Nahas for the distortion and alterations of other diagrams (Tr. Feinglass p. 54 and see video tape).

Dr. Feinglass explained how ample research could have been done and was in fact done prior to the synthesization of THC in 1967 by use of marihuana extract (Tr. Feinglass p. 45).

From the evidence presented at petitioner's hearing on his motion to dismiss it is obvious that the overwhelming weight of scientific knowledge, and indeed the weight of general knowledge based on four thousand years of man's use of marihuana is that it is as close to a harmless drug as exists. Against

the testimony of Alaskan witnesses, of Doctor Brown and her studies, of Doctors Langdon and Wolf and Jack Heesch no evidence was submitted. Against the testimony of Doctor Fort of Doctors Grinspoon and Feinglass and of Doctor Ungerleider who introduced into evidence the findings, publications and studies of the National Commission on Marihuana and Drug Abuse all the state could produce after a six week delay of searching was Doctor Powelson with anecdotal information and Doctor Nahas whose book is far more deceptive then the "weed" he describes. This is not the stuff of compelling state interests; this is not the material to force a state to interfere with the liberty and privacy of individuals like petitioner to possess and use a pleasurable plant which grows wild all over the world. The years when Harry Anslinger could state that marihuana causes murder, violence and psychosis are long gone. Even the days when those opposed to pleasure could point to amotivational syndromes or long term effects are ended by the plethora of studies compiled in the National Commission reports and appendices which are evidence in this case. All that could be brought forth by the State of Alaska to show why it was forced, compelled to outlaw marihuana was a psychiatrist with an unhappy patient, "S", and an anasthesiologist who felt there might, possibly be some effect on the immune systems of the body. But possibilities are not enough and hysterical pronouncements based on deceptive data cannot meet the constitutional tests legislation must meet. Petitioner asks that this Court in viewing all the evidence in looking for "hard facts" (Breese v. Smith,

supra, 501 P. 2d at 172) reverse the decisions below because no compelling state interest was shown. Petitioner asks that this Court find reefer madness is no longer a viable concept upon which to predicate laws and declare those under which he was arrested invalid.

III. THE PROHIBITION AGAINST MARIJUANA VIOLATES THE EQUAL PROTECTION AND DUE PROCESS OF THE LAWS

A. EQUAL PROTECTION

It is evident that the legislature has made the possession of one recreational drug, marijuana, a crimina. offense while at the same time, the possession of other recreational drugs such as alcohol or tobacco, which clearly from all the testimony at trial pose a greater danger, are not prohibited. On a scale of one to ten ". . . I would say nothing is a zero. Caffeine, which is the safest of all mind altering drugs would be about one, marihuana at about 3 and then at the hardest end of that spectrum. . . would be alcohol and tobacco." (Fort Tr., p. 42). At present the average yearly consumption for each adult over 18 years in Alaska is: distilled spirits - 6 gallons per year; wine - 30 gallons; beer - 34 gallons. 14 Alaska Medicine 35 (1972).

It is clear that the equal protection guarantee is a constantly evolving right. As the Supreme Court state in Harper v. Virginia State Board of Elections, 383 U.S. 663, 669 (1966):

> (T)he Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are constitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights . . . Notions of what constitutes equal treatmant for purposes of the Equal Protection Clause do change.

The Supreme Court initially set out the test for the validity of statutes under the Equal Protection Clause in Skinner v. Oklahoma, 316 U.S. 535, 539 (1942), as follows:

> When the law lays an unequal hand on those who committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment. (Citations omitted.) Sterilization of those who have thrice committed grand larceny, with immunity for those who are embezzlers, is a clear, pointed, unmistakable discrimination.

In recent years, the Supreme Court has added an additional dimension to the Equal Protection guarantee: where the statute effects a fundamental right, the classification must be supported by a compelling governmental interest, and must be narrowly drawn. See Shapiro v. Thompson, 394 U.S. 618, 634 (1969); McLaughlin v. Florida, 379 U.S. 184 (1964); Harper v. Virginia State Board of Elections, 383 U.S. 663 (1963). In Harper, the Court stated, 383 U.S. at 670:

> We have long been mindful that where fundamental rights and liberties are assured under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.

Petitioner has argued above, in connection with the right of privacy, that private possession of marihuana does involve "fundamental" rights. That argument is applicable to the equal protection argument made in this portion of

the brief, and it will not be repeated here. For the same reasons as discussed above, the private possesssion of marihuana involved "fundamental" rights and liberties in terms of the Equal Protection Clause.

Whether this Court uses the test set out in Skinner, supra., or uses the more recent test, it is clear that there can be no legitimate reason for treating marijuana differently from alcohol and the other durgs which were introduced and discussed at trial.

There exists unanimity in the record that alcohol is the most dangerous drug in our society as defined by perameters of tolerance, addiction, toxicity, tissue damage, induced criminality and psychosis. See testimony of Fort p. 42-43; Grinspoon p. 49; Ungerleider p. 229, 355; Langdon p. 18; Feinglass p. 77 and see the Second Report of the National Commission Drug Use in America: Problem in Perspective (exhibit W).

This Court has recognized the need for the equal protection of equal laws. In Leege v. Martin, 379 P.2d 447 (Alaska 1963) this Court found it a denial of equal protection to prohibit commercial fishermen a right to stay the forfeiture of their license pending appeal.

> A discrimination against commercial fishermen can be justified only if there is some reasonable basis for placing them in a different class from those engaged in other licensed occupations and the reasonableness of the classification depends upon whether the class denied a stay pending appeal includes all persons who are similarly situated with respect to the purpose of the law, and none who are not.

Leege v. Martin, supra, 379 P. 2d at 452. The court found commercial fishermen similar to doctors, real estate brokers and dentists, yet in this latter class the legislature has made no law denying stays pending appeal. Consequently, the legislative act withdrawing this right from commerical fishermen was unconstitional. The equal protection clause

> . . . is a prohibition against laws which, in their applications make unjust distinction between persons. As to this case, the guarantee of equality of treatment prohibits legislation which denies to one group of persons the enjoyment of certain rights which are afforded to another group, when considering the purpose of the legislation, there is no reasonable basis for not treating both groups the same.

id. Precisely this reasoning applies to the prohibition against marijuana while there is none against the recreational drugs, tobacco and alcohol.

B. IRRATIONAL CLASSIFICATION

Marihuana in the form of Cannabis Sativa L. is included in AS 17.12.010 as a stimulant, hallucinogenic or depressant drug. Included with it are psilocybin, demethyltryptamine, lysergic acid diethylamide, and drugs of similar physiological effect, barbituric acid and amphetamines includin any of the optical isomers of amphetamines or any substance designated as habit forming or dangerous because of its stimulant, hallucinogenic or depressant effect on the central nervous system. AS 17.12.150(3). Obviously the legislature found all of the drugs listed as "dangerous" since the legislature also provided

> Rehabilitation. A person convicted of violating a provision of this chapter relating to the possession

> or control of depressant, hallucinogenic , nd stimulant drugs, when his possession or control is for his own use may, in place of a fine or imprisonment, be committed to the custody of the department for rehabilitative treatment for not more than one year.

AS 17.12.120. There are no marijuana rehabilitation plans in Alaska. There are none anywhere because use of marijuana is not a problem from which one needs to be rehabilitated. (Tr. Heesch p. 88-89)

Indeed pharmacologically, psychologically and medically it is unlike any of the drugs listed in AS 17.12.150 (3) and is irrationally classfied in being there.

There was also unanimity among the witnesses, and in scientific fact, that marihuana should be classified apart from the other dangerous drugs therein proscribed. Marihuana differs in terms of legitimate societal interest in all parameters of measurement. See testimony of Fort p. 36, 43; Grinspoon p. 61; Ungerleider p. 245, 353; Feinglass p. 33-41, 77; and Heesch p. 89-99.

The argument as to a misclassification is similar in nature to those used above concerning equal protection. For example in Ledger-Enquirer Company v. Brown, 213 Ga. 538, 100 S.E. 2d 166 (1957) the Supreme Court of Georgia had occasion to discuss the power of the Georgia legislature to classfiy, stating at S.E. 2d 168:

> It is clear that the legislature may, for purposes of legislation, classify and may legislate with respect to, each classification. The power of the legislature to classify for the purpose of legis-

> lation, however, is not without limitation. The classification must be natural and not arbitrary. It must have a reasonable relation to the subject matter of the legislation, and must furnish some legitimate ground of differentiation.

The converse must be equally true. The inclusion of marihuana within the classification of stimulants or depressants and hallucinogens must be based upon some "legitimate ground" for the inclusion to be correct. As shown by the evidence in this case, marihuana simply does not fit within such classification in terms of legitimate societal interest.

The United States Supreme Court has also held that a classification which does not rest upon a reasonable basis and which is essentially arbitrary in nature constitutes a violation of the equal protection clause. See, McLaughlin v. Florida, supra, where the court held at page 191:

> Judicial inquiry under the Equal Protection Clause, therefore, does not end with a showing of equal application among the members of the class defined by the legislation. The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose -- in this case, whether there is an arbitrary or invidious discrimination between those classes covered by Florida's cohabitation law and those excluded.

Even if the legislature was laboring under some misconception with respect to the proper classification for marihuana, nevertheless this court has a duty to rectify said error by holding the statute in question unconstitutional. As pointed out by the U.S. Supreme Court in Meyer v. Nebraska,

supra, at page 401:

> (A) desirable end cannot be promoted by prohibited means.

Further, as pointed out by the Supreme Court in Levy v. Louisiana, 391 U.S. 68 at page 71:

> While a state has broad power when it comes to making classifications (Ferguson v. Skrupa, 372 U.S. 726, 732), it may not draw a line which constitutes an invidious discrimination against a particular class. See Skinner v. Oklahoma, 316 U.S. 535, 541-542. Though the test has been variously stated, the end result is whether the line drawn is a rational one. See Morey v. Doud, 354 U.S. 457, 456-466.

In English v. Miller, 341 Fed. Supp. 714 (1972) the District Court for the Eastern District of Virginia considered the constitutionality of the Virginia law classifying marihuana as a narcotic and held at page 171:

> The classification of marijuana as a narcotic is, in this Court's opinion, violative of the equal protection clause of the United States Constitution. The statutory pronouncement that 'every substance not chemically distinguishable from coca leaves and opium, cannabis and isonipecaine is a narcotic durg,' as referred to in Virginia Code §54-487 (14), is so vague that, even if it could be pharmacologically substantiated, due process considerations compel its repudiation.

In the English case, in footnote number four at page 718, the court noted as follows:

> The court's power to determine the actual state of facts concerning marijuana, as well as the court's

> reliance on current writing of authorities in a rapidly developing field, is based upon pronouncements of the U.S.Sup.Ct. in Brown v. Board of Education, 347 U.S. 483, 494, F.N. 11, 74 S.Ct. 686, 98 L.Ed. 873 (1954) where unquestionably the court has the power to determine the true state of facts upon which a law is based. See also, People v. Sinclair, supra, 1972.

According to Justice Holmes, even a judge being bound to declare the law must know or discover the facts that established the law. See, Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908).

The courts have deferred to the rationality of the legislature in proscribing the possession of marihuana even though no legislative histories have been published which could offer the courts the basis for the legislature's promulgation of such laws. All that the courts have upon which to base their deference is the stated purpose of the statute. To Justice Holmes, the proposition that a mere statement of a proposition is sufficient to establish that proposition as a factual justification for a statute, is erroneous:

> Obviously, the facts should be accurately ascertained and carefully weighed, and this can be done more conceniently in the Supreme Court of the District than here. The evidence should be preserved so that if necessary it can be considered by this Court.

Chastleton Corp. v. Sinclair, 264 U.S. 543 (1926) at 549.

For purposes of this argument the state does have a compelling interest to regulate the use of drugs which have been proved harmful to the consumer, such as amphetamines and barbiturates. But marihuana may not rationally be

included within this category. Scientific evidence delineated in the record demonstrate that there is no potential for abuse of marihuana as having a depressant, stimulant, or hallucinogenic effect on the central nervous system. This may have been the belief of the legislators at the time the law was passed. A court has an on-going duty to examine legislation in light of modern developments. See, for example, Abie State Bank v. Bryan, 282 U.S. 765, stating:

> . . . (E)ven though a police power enactment have been or may have seemed to be valid when made, later events or later-discovered facts may show it to be arbitrary and confiscatory. Abie State Bank supra, at 772.

Thus, in performing this duty, this Court must look into the factual situation which exists in light of today's knowledge. See, Oteri and Silvergate, The Pursuit of Pleasure Constitutional Dimensions of the Marihuana Problem, 3 Suffolk L.Rev. 55 (1968) at 59, 60.

It is, now evident that the scientific classification of marihuana is well established as was shown by the evidence, and that by contrast the legislature's classification is so erroneous that such classification is unreasonable, irrational, arbitrary and unconstitutional, and in violation of the equal protection and due process clauses of the Fourteenth Amendment of the United States Constitution and the Constitution of the State of Alaska.[6]

6/ In People v. McCabe, 49 Ill. 2d 338; 275 N.E. 2d 407 (1971), the Illinois Supreme Court held that classifying marihuana under the Narcotic Drug Act rather

6/
(cont'd) than under the Drug Abuse Control Act was so arbitrary as to deprive the defendant of the equal protection of the law. The Court, with no more than a cursory analysis, noted that there were several cases contra but felt that those cases had not had the equal protection argument put before them in the same manner as had been the situation in McCabe.

Even though the McCabe case held it was improper to classify marihuana with opiates, the same rationale applies to the classification of marihuana with amphetamines, barbiturates, LSD, psilocybin, mescaline and dimethyltryptamine. The evidence presented disclosed that the effects of all of the foregoing were grossly different than marihuana in terms of addiction, tolerance, tissue damage, induced psychosis, deviant behavior and other criteria. In fact, some dangerous drugs are much more harmful to the individual and society than are narcotics.

The recent case of People v. Sinclair, 387 Mich. 91; 194 N.W. 2d 878 (1972), has also served to bring the marihuana issue into focus. In this case the defendant, leader of a politically radical group known as the White Panthers, was convicted of possession of marihuana and sentenced to 9½ to 10 years in prison. In reversing his conviction, the Michigan Supreme Court handed down four separate opinions in which four of the justices voted for reversal and two merely for modifying the sentence imposed. The arguments were many and varied, including the opinion written for the Court by Justice Swainson holding that the evidence used to convict was inadmissible because Sinclair had been entrapped. The argument that the sentence constituted cruel and unusual punishment was appealing to two of the justices while two also felt that classification of marihuana as a narcotic violated the Equal Protection Clause. Justice Kevanagh argued that the criminalization of marihuana was unconstitutional as "an impermissible intrusion upon the fundamental rights to life, liberty and the pursuit of happiness and. . . unwarranted interference with the right to possess and use private property". He stated as a constitutional principle that "an individual is free to do whatever he pleases, so long as he does not interfere with the right of his neighbor or society", and did not believe that "Big Brother" can dictate in the name of public health what one consumes in private.

IV. THE IMPOSITION OF ANY SENTENCE FOR THE PRIVATE POSSESSION OF MARIJUANA IS A VIOLATION OF THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENTS.

Possession of marijuana holds the maximum penalty for a misdemeanor. Also holding the maximum one-year penalty is driving while under the influence of intoxicating liquor, AS 28.35.030, a crime which involves substantial danger to others as well as a danger to oneself; shooting at buildings, AS 11.55.060, a crime which results in clear damage to property; possession of a firearm while under the influence of intoxicating liquor, AS 11.55.070, a crime which presents the danger of severe injury or death.

On the other hand, assault and battery, AS 11.15.230, is punishable by only six months imprisonment. Petty larceny, AS 11.21.040, is punishable by a lesser fine though it may provide for one year imprisonment. AS 11.44.080 provides that a person who cruelly beats or tortures or otherwise maltreats or neglects an animal is punishable by not less than ten days nor more than thirty days. AS 11.55.050 provides that one who flourishes or points or discharges a firearm in a public place is punishable by six months' imprisonment. Prior to its repeal, drunk in public was punishable by a maximum of thirty days in prison. In the context of other maximum fines and imprisonments the sentence of one year for possession of marihuana is grossly disproportionate. Considering the evidence produced at petitioner's hearing any sentence of imprisonment is

so grossly disproportionate as to be a cruel and unusual punishment.[7]

As early as 1910, in Weems v. United States, 217 U.S. 349, the Supreme Court established beyond any reasonable doubt that punishments excessive in length or severity were as constitutionally objectionable as those that were inherently cruel. In that case, the petitioner was sentenced to fifteen years at "hard and painful" labor following his conviction for falsifying government documents. In striking down the penalty imposed on Weems, the Court deemed it necessary to invalidate a penalty prescribed by a legislature for a particular offense. The Court examined the punishment in relation to the offense, compared the punishment in relation to the offense, compared the punishment to those inflicted for other crimes, and to those in other jurisdictions, and concluded that the punishment was excessive. Justice McKenna, speaking for the majority, asserted that in America "it is a precept of justice that punishment for crime should be graduated and proportioned to offense," at 367.

7/
Article 8 of the United States Constitution states

> Excessive bails shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Similarly Article I, Section 12 of the Alaska Constitution states

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Penal administration shall be based on the principle of reformation and upon the need for protecting the public.

The Weems Court, in its analysis, emphasized the minor nature of the offense, the opinion noting twice the trivial amount of cash Weems was convicted of claiming as a government expenditure (217 U.S. at 366) and twice emphasizing that an offender may "gain nothing" from this crime and "injure nobody" (id., at 365).

The Weems proportionality test was followed in Trop v. Dulles, 356 U.S. 86 (1958), where loss of citizenship by reason of a conviction for wartime desertion was found to violate the Eighth Amendment. In so holding, Chief Justice Warren added that the "Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society," 356 U.S. at 101.

The approach utilized by the Court first in Weems and then in Trop was to scrutinize the severity of the penalty in relation to the offense, examine the practice of other jurisdictions, compare the challenged penalty with punishments prescribed for different crimes in the same jurisdiction, and then determine whether or not the penalty imposed was excessive in light of the evolving standards of decency.

7/ (cont'd) See Faulkner v. State, 445 P. 2d 815 (Alaska 1968) (Dimond, J.) and State v. Chaney, 477 P. 2d 441 (Alaska 1970).

In his concurring opinion in Robinson v. California, 370 U.S. 660 (1962) Justice Douglas spoke of the constitutional prohibition against cruel and unusual punishment which strikes at punishments which are so disproportionate to the offense as to be constitutionally excessive:

> The questions presented in the earlier cases concerned the degree of severity with which a particular offense was punished or the element of cruelty present. A punishment out of all proportion to the offense may bring it within the ban against 'cruel and unusual punishments.' 370 U.S. at 676.

The Robinson case held that a state statute which made it a criminal offense, punishable by imprisonment for not less than 90 days nor more than one year, to be addicted to the use of narcotic drugs inflicted a cruel and unusual punishment upon the addict defendant.

Responding to the argument that ninety days in jail was neither excessive nor unusual, Justice Stewart, speaking for the Court in Robinson, clearly stated:

> To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold. 370 U.S. at 667.

In recent years, a number of State Courts have critically examined marihuana possession sentences for unconstitutional excessiveness.

The New Jersey Supreme Court, in State v. Ward, 270 A2d 1 (N.J. 1970),

granted certification "primarily to establish guidelines for the sentencing of first offenders who were found guilty of possession of marihuana for their own use." 270 A2d at 5. Defendant was sentenced to serve a state prison term of two to three years for illegal possession of marijuana, although a first offender. The court stated, 270 A.2d at 5:

> (I)t remains the policy of the law to reform the youthful offender. Sentencing judges should direct the punishments they impose to the goal of reformation. Too severe a punishment will do little towards advancing this goal. Incarceration is a traumatic experience for anyone. The effect must be particularly devastating upon young persons such as the defendant here. A sentence of two to three years in State Prison in a case like this will probably be more detrimental to both the offender and society than some other discipline. Even a sentence to a reformatory as suggested by the Appellate Division may be more punitive than is required. We think that generally a suspended sentence with an appropriate term of probation is sufficient penalty for a person who is convicted for the first time of possessing marihuana for his own use.

The Court in Ward recognized that "devastating" and traumatic" effect of incarceration upon the first offender convicted of marihuana possession. Any conviction, indeed any arrest, for marihuana is a personal tragedy that can ruin a life. An arrest record, even without a conviction, can bar a youth from future scholarships, employment, entrance into the professions, qualification for occupational licenses, and military service. It means an emotional ordeal for him or her, and their family, financial hardship, and for those who cannot make bail, a long wait in jail before trial. A conviction and prison term will

expose the youthful offender -- who in the vast majority of cases has never been arrested before -- to a school of drug abuse, violence, and crimianlity. As Harold H. Titus, Jr., on resigning as U. S. Attorney for the District of Columbia, recently said: "Our prisons turn out worse people than they take in -- especially the youth centers." Wash. Post, Dec. 30, 1973 at p. B1 col.7.

Incarceration for simple possession of marihuana is not only a cruelly harsh, excessive and unusual form of punishment, but serves no purpose to society. The New Jersey Supreme Court recognized this and established guidelines to protect from incarceration those first offenders charged with possession. Although the Court in Ward did not specifically refer to the Eighth Amendment, Eighth Amendment logic was the basis of the opinion. The court stated, 270 A. 2d at 425:

> (W)e think the sentence was entirely too harsh.
>
> . . .
>
> We think that a two or three year unsuspended sentence in State Prison for a first offender, whose possession is incidental to his own use, is far too severe.

This 5-2 decision of the New Jersey Supreme Court was unanimous on one point -- the sentence was "grossly excessive." See dissent of Justice Francis, joined by Justice Hall. 270 A.2d at 6.

In People v. Lorentzen 194 NW 2d 827, (Mich., 1972), the Supreme Court of Michigan held that a "compulsory prison sentence of 20 years for a non-violent

crime (i.e., sale of marijuana) imposed without consideration for defendant's individual personality and history is so excessive that it 'shocks the conscience.'" 194 N.W.2 ... 834. That such a sentence was excesive and in violation of the Eighth Amendment was unanimous.

The Lorentzen case cited the three generally recognized constitutional tests of what constitutes cruel and unusual punishment, namely (1) the proportionality test; (2) the evolving standards of decency test; and (3) the rehabilitation test.

The proportionality test was first proposed in Justice Field's dissent in O'Neil v. Vermont, 144 U.S. 323 (1892) when he stated that the prohibition against cruel and unusual punishment "is directed not only against punishments of (torture), but against all punishments which by their excessive length or severity are greatly disproportioned to the offense charged. The whole inhibition is against that which is excessive." 144 U.S. at 339-40. It was adopted by the majority in Weems, supra., and has been used in nearly all subsequent Eighth Amendment analyses. See, In re Lynch, 105 Cal.Rptr. 217, 503 P.2d 921 (1972), for an excellent discussion of this and the other tests.

The "evolving standards of decency test" was first enunciated in the Weems case, when the Court stated that the definition of cruel and unusual punishment is progressive and "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." The Court reiterated this point in the Trop case, supra., discussed earlier.

In determining whether the marihuana prohibition violates evolving standards of decency, this Court should look to statutes passed in some jurisdictions drastically reducing or eliminating criminal penalties for marijuana use. For example, the State of Oregon recently enacted a statute making possession of less than one ounce of marihuana subject to a civil fine up to $100, processed similar to motor vehicle violations. House Bill 2936, amending O.R.S. 167.207, .217, 1225 (effective Oct. 5, 1973). Possession of up to one ounce of marihuana is now classified as a "violation" in Oregon, rather than as a misdemeanor. In Nebraska, first offense possession of less than one pound of marijuana can result in seven days in county jail and/or $500.00 fine. Neb.Stat.Rev. 28-4115 et seq. (Supp. 1971) New Mexico and Hawaii have adopted similar laws.

In determining whether the marihuana prohibition violates evolving standards of decency, this Court could also look to the organizations which have recommended decriminalization of marihuana. In addition to the National Commisssion on Marihuana and Drug Abuse, the Alaska Bar Association and the Alaska State Medical Association, the following organizations have recommended decriminalization: The District of Columbia Mayor's Advisory Committee on Narcotics Addiction; The American Bar Association; the Canadian Commission of Inquiry into the Non-Medical Use of Drugs (the Le Dain Commission); the British Advisory Committee on Drug Dependence (the Wooten Commission); the American Public Health Association; Consumers Union, publishers of Consumer Reports; The National Conference of Commissioners on Uniform State

Laws; Board of Trustees, American Medical Association; National Council of Churches; and, National Education Association.

The National Advisory Commission on Criminal Justice Standards and Goals has also recently issued a report entitled, "A National Strategy to Reduce Crime: (1973). This Commission, established by the Law Enforcement Assistance Administration (L.E.A.A.) of the U. S. Department of Justice in 1971, recommended as follows, Id. at 203:

> The Commission recommends that State reevaluate their laws on gambling, marijuana uses and possession for use, pornography, prostitution, and sexual acts between consenting adults in private. Such reevaluation should determine if current laws best serve the purpose of the State and the needs of the public.
>
> The Commission further recommends that, as a minimum, each State should remove incarceration as a penalty for these offenses, except in the case of persistent and repeated offenses by an individual when incarceration for a limited period may be warranted.

Finally, Lorentzen cites the rehabilitation test, and explains, supra, 194 N.W. 2d at 833:

> This test looks to a consideration of the modern policy factors underlying criminal penalties -- rehabilitation of the individual offender, society's need to deter similar proscribed behavior in others, and the need to prevent the individual offender from causing further injury to society.

The Lorentzen Court applied each test to the minimum mandatory statute and concluded that the statute failed all three. Accord: People v. Sinclair, 194 N.W.

2d 878, (Mich. 1972) (concurring opinion of T. G.Kavanagh, J. and Adams, J.)

All three tests are closely related. Weems and subsequent recent cases have not favored the proportionality test over the decency test, or vice versa, but rather have used them in conjunction with one another. Similarly, the rehabilitation test is merely an extension of the decency test, and in our "maturing society," an increasingly important extension.

In determining whether penalties for possession of marihuana constitute cruel and unusual punishment, both the decency test and the rehabilitation test demand that the Court inquire into the objectives of criminal sanctions. It has been suggested that the objectives of criminal sanctions are:

> (1) rehabilitation of the convicted offender into a noncriminal member of society; (2) isolation of the offender from society to prevent criminal conduct during the period of confinement; (3) deterrence of other members of the community who might have tendencies toward criminal conduct similar to those of the offender (secondary deterrence), and deterrence of the offender himself after release; (4) community condemnation or the reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves; and (5) retribution or the satisfaction of the community's emotional desire to punish the offender. Note, 69 Yale L.J. 1453, 1455 (1960). Accord: State v. Chaney, supra.

Since the crime of possession and private use of marihuana is a victimless crime, i.e. not an act against person, property or society in general, the traditional objectives of criminal sanctions are not applicable in their ordinary sense.

The state interest in rehabilitation of the marihuana user is examined in the following:

> The concept of rehabilitation usually suggests the correction of the moral and or legal deficiencies considered responsible for one's criminal activities. Thus, the question of rehabilitation is intimately related to the individual's and society's moral attitude toward the smoking of marijuana; for the individual who believes that the right to use marijuana is one of his fundamental constitutional rights or that it is protected by the freedom of religion, any attempts at rehabilitation, in the commonly accepted sense, would be fruitless.

M. Dichter, "Marijuana and the Law," 13 Vil. L. Rev. 851, 870, (1968). There does not appear to exist, with respect to isolation, a sufficient state interest in isolating the marihuana user, again because of the "victimless" aspect of the crime.

Although deterrence would appear to be a primary objective of marihuana laws, the evidence indicates that the laws have not had any significant deterrent effect. According to the most recent survey by the National Commission on Marihuana and Drug Abuse, at least 26 million Americans have now tried marijuana, and over 12 million are current users. The survey indicated that marihuana is used by all classes, groups, ages, and occupations, although the greatest incidence of use is in the 18-25 year-old group. Id. at 5. As the uncontroverted evidence in petitioner's case showed, Alaskan usage at the very least confirms the national statistics.

Another potential objective of the marihuana laws in community con-

demnation -- the reaffirmation of social norms for the purpose of maintaining respect for the norms themselves. The marijuana laws do not accomplish this objective for a number of reasons. First, a recent survey by the National Commission on Marihuana and Drug Abuse has indicated that a majority of Americans no longer favor incarceration for private possession of marijuana. In addition, it must be clear that the major effect of the marihuana laws, and their selective enforcement, is to promote disrespect, not respect, for the law. Finally, in this area of "victimless" crimes, the Court should be very hesitant to subscribe to this community condemantion rationale, where the justification for the law may really be a desire to impose a concept of morality on a specific minority group in our society. All drug use should be discouraged in this country, including the use of alcohol. However, as the National Commission on Marihuana and Drug Abuse pointed out, there are numerous institutions in this society which are able to discourage drug use in addition to the criminal laws. First Report at 103-135. As the National Commission indicated (Id. at 140):

> 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.

The last objective of the criminal law is retribution. Whatever the

continuing validity of this rationale, the use of marihuana creates little emotional desire for punish[illegible] when compared to crimes against persons and property. No marihuana penalties can be justified by the rationale of retribution. See Note, "Marihuana and the Law," 13 Vil. L.Rev. 851, 870-71 (1968).

By any and all analyses used to determine what violates the Eighth Amendment, and Article I, Section 12 of the Alaska Constitution, the penalties for possession and private use of marijuana are excessively cruel and unusual in light of the harmless, non-violent nature of the offense, the penalties proscribed for more serious crimes and the evolving standards of decency in American society. Further, the harsh and cruel penalty of incarceration for even one day is disproportionate to the seriousness of the offense.

CONCLUSION

For the reasons cited above petitioner asks that this Court reverse the decision of Judge Tyner and grant petitioner's motion to dismiss his charge of possession of marihuana as being unconstitutional on its fact and as applied. Arrested every day are persons, like petitioner, who have for their own personal use a plant which grows wild the world over. They smoke it because it gives them pleasure. Yet marihuana is far less harmful than alcohol, and people use that for pleasure without the danger of arrest, or tobacco. The plant in petitioner's pocket is less dangerous than Ronalar (exhibit T-5), Sleep-eze (exhibit T-9), Sominex or Cheracol D. But these drugs have hallucinogenic, stimulant or depressant effects greater than marihuana and they unlike marihuana are lethal, but they are legal. No one holding two nutmegs is arrested, but using them that person can achieve a euphoria far greater than with marihuana.

Bromo-seltzer causes organic brain syndromes, uniodized salt causes states of chronic tiredness and possible death. Marihuana does not. Yet of all the drugs listed above only marihuana is illegal and a person, like petitioner, caught with a small amount in his pocket may be imprisoned for a year and forced to pay a thousand dollar fine.

Petitioner has argued above that such distinctions between substances a person chooses to place in his own body violate his right of privacy and liberty, constitutional guarantees. The prohibition of one drug, marihuana, and not others

is a violation of his right to the protection of equal laws, and that marihuana unlike the drugs with which it is classified is not dangerous and its proscription denied him due process and the protection of equal laws. Finally petitioner requests this Court find that any penalty for possession of so harmless a substance is a cruel and unusual punishment. In the evolving standards of our society and the ordered liberty of our Alaskan way of life the laws prohibiting petitioner from having in his pocket a plant man has had in his pocket or loincloth or animal skin for four thousand years cannot stand. They are unconstitutional and petitioner seeks this Court's determination accordingly.

Respectfully submitted this 10th day of June, 1974.

R. COLLIN MIDDLETON

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Counsel for Petitioner and the
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APPENDIX I

Columbia University
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For p.m. release Friday, January 25

A Columbia University study shows that habitual marihuana smoking weakens the body's immune defenses against disease and inhibits the division of cells that specialize in these defenses. The findings represent the first direct evidence of cellular damage from marihuana in man.

The study was undertaken to observe the behavior of certain white blood balls--mobile defenders against invading viruses--in samples of venous blood taken from chronic marihuana smokers. It measured the ability of these white cells, T lymphocytes, to respond to the addition in the test tube of foreign substances.

Besides the T lymphocytes, which are believed to specialize in hunting down and absorbing invading viruses and viruslike particles, the body's immune system maintains defenses against bacteria with another group of cells called the B lymphocytes. The T group of lymphocytes may be instrumental in preventing viruses from causing cancer.

The Columbia study, carried out by a quartet of researchers in the Departments of Anesthesiology, Surgery and Pediatrics of the Col-

-more-

lege of Physicians and Surgeons, or P&S, compared the T cells of 51 marihuana smokers with those of a control group of 81 healthy volunteers. Groups of patients with cancer, uremic poisoning and recent kidney transplants were drawn into the study to gain additional frames of reference.

"For a long time, educators and legislators have wanted hard facts about biological damage from long-term usage of this drug," commented Dr. Gabriel Nahas, research professor of anesthesiology and head of the team. "Now we are in a position to start supplying them with such facts."

Dr. Nahas and his colleagues, Drs. Nicole Suciu-Foca, Jean Pierre Armand and Akira Morishima, tested venous blood samples of young smokers from 16 to 35 years of age who had been smoking either marihuana or hashish at least once a week for more than one year. The median age of the smokers was 22, half the median age of the control group. The marihuana smokers maintained that they did not use any other mind-altering drugs. They drank alcoholic beverages and smoked cigarettes, as did the members of the control group.

The P&S scientists utilized a standard mixed-lymphocyte culture test and a test with PHA, a plant protein that induces lymphocytes

to enlarge and to reproduce. The responsiveness of a subject's lymphocytes to PHA reflects the capability of his immune defenses. The rate of reproduction of these cells can be measured by tagging their DNA with a radioactive label and then measuring the blood sample for additional radioactivity.

The P&S team found that "the ability of the T lymphocytes from marihuana smokers to undergo blast transformation (division of the cell nucleus) was 40 per cent less than that of a control group, made up of older individuals."

"The difference would be more marked if the control group were of the same age," Dr. Nahas remarked. "The immune response of white blood cells is known to decrease with age."

The immune response of marihuana smokers was inhibited to about the same degree as that of patients with a regionally spread tumor, the scientists noted in their report, which will appear in the February 1 issue of the journal Science.

"We don't know yet the mechanism responsible for this inhibition," Dr. Nahas said. "Possibly it is connected with the tendency of tetrahydrocannabinol (the active ingredient of marihuana, THC for short) to inhibit DNA reproduction."

The decrease of DNA synthesis in T cells from marihuana users was observed by Dr. Morishima in the build-up period between cell divisions, when the DNA content of a cell nucleus is normally expected to double.

Dr. Morishima also observed an increased incidence of broken

chromosomes in the T cells taken from marihuana smokers. He also found a marked increase in the number of micronuclei. A micronucleus contains less than a half of the normal complement of chromosomes, and its presence indicates a breakdown of normal cell reproduction.

Judging from these abnormal cell divisions, the Columbia report states, there may be a lag in the separation of daughter chromosomes during cell division. This phenomenon, called anaphase lag, combined with chromosome breakage, may lead to increased attrition of white blood cells and consequently to weakened resistance to invading organisms.

The new biochemical evidence of the untoward effects of THC on cell behavior has led Dr. Nahas to call for a thorough reappraisal of the findings of the National Commission of Marihuana.

"The medical profession should not accept those recommendations of the commission which might lead to marihuana legalization without further analysis of all the facts, especially those that are now being collected by researchers on a molecular level," Dr. Nahas declared in an appeal written for this month's (January) issue of the Bulletin of the New York Academy of Medicine.

Furthermore, says Dr. Nahas, "we have observed that marihuana products accumulate in the germ cells of the testes and ovaries. It is therefore most urgent to find out to what extent long-term marihuana use will impair the genetic equilibrium and the DNA metabolism

of these dividing germ cells and possibly affect adversely the offspring of the marihuana user."

In addition to his clinical research at P&S, Dr. Nahas has conducted extensive field investigations in areas of chronic marihuana use in Africa and Asia.

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3 July 1973; revised 24 September 1973

Inhibition of Cellular Mediated Immunity in Marihuana Smokers

Abstract. *The cellular mediated immunity of 51 young chronic marihuana smokers, as evaluated by the lymphocyte response in vitro to allogeneic cells and to phytohemagglutinin, was significantly decreased and similar to that of patients in whom impairment of T (thymus derived) cell immunity is known to occur. This inhibition of blastogenesis might be related to an impairment of DNA synthesis.*

It has been previously reported (*1*) that delta-9-tetrahydrocannabinol (Δ^9-THC), a psychoactive substance of *Cannabis*, when administered to rodents alters their cellular mediated immune responsiveness, and it was suggested that similar changes might also occur in man. In our study the mixed lymphocyte culture (MLC) and phytohemagglutinin (PHA) responsiveness of 51 marihuana smokers, 16 to 35 years old (median age 22), were studied. Only subjects who had used *Cannabis* products (at the exclusion of other drugs) at least once a week (average four times a week) for at least 1 year (average 4 years) were selected for this investigation.

Eighty-one healthy volunteers, 20 to 72 years of age (median age 44) were used as controls. Purified lymphocyte suspensions were prepared from fresh samples of venous blood by the Ficoll-Isopaque density gradient method (*2*). A microculture system was used for screening of cellular responsiveness (*3*). For the MLC test, 1×10^5 responding cells were incubated, per well, with 2×10^5 stimulating cells pooled from a panel of ten donors, phenotypically different [allogeneic cells in which 25 different HL-A specificities were represented (*4*)].

For the PHA test, 2×10^5 responding cells were incubated per well with 1 μg of purified PHA. The medium used was RPMI 1640 with penicillin, streptomycin, and glutamine, to which 25 percent autologous serum was added.

Results are summarized in Table 2 and compared with data obtained in 60 patients with cancer, 20 patients with uremia, and 24 renal allograft recipients with iatrogenically induced immunosuppression. The mean values registered in the group of marihuana users were significantly lower than those of the normal, but much older, subjects, as reflected by in vitro lymphocyte blastogenesis and aging (*5*), results obtained in the group of marihuana smokers may be interpreted as being indicative of cellular hyporesponsiveness. Supporting this conclusion is the close similarity between the depressed MLC and PHA responsiveness of marihuana users and that of cancer (*6*), uremia (*7*), and immunosuppressed transplant patients in whom impairment of T (thymus derived) cell immunity is known to occur. Furthermore, we observed that in vitro inhibition of PHA-induced blastogenesis of normal human lymphocytes started with 1.6 μ*M* THC and was complete with 20 μ*M*.

The major psychologically active constituent of *Cannabis sativa* is Δ^9-THC. This substance, as well as its metabolites, is insoluble in H_2O, but is very fat soluble, and has a half-life of several days in tissues where it might exert a cumulative and pharmacological effect (*8*). Such an effect might be related in a still unknown way to the depressed cellular immune response in vitro of chronic marihuana smokers. The effect of THC on adrenergic receptors (*9*) might also play a role in its immunosuppressive activity, as was suggested for other drugs administered continuously over a long period (*10*).

This inhibition of blastogenesis might result from an impairment of DNA synthesis. One of us (A.M.) sampled lymphocytes from four marihuana smokers, cultivated the cells for 72 hours, and then observed a decreased number of cells during the period of DNA synthesis (S period of the cell cycle). There was also an increased incidence of chromosomal breakages,

Table 1. Comparative cellular mediated immunity of normal subjects, marihuana smokers, and patients with impairment of T cell immunity. The in vitro blastogenic response of lymphocytes was studied by the MLC and the PHA tests. The incorporation rate of [³H]thymidine of the T lymphocytes is given in counts per minute ± the standard error.

Subjects	MLC		PHA	
	No. tested	[³H]Thymidine incorporated (count/min)	No. tested	[³H]Thymidine incorporated (count/min)
Normal controls	81	26400 ± 200	81	23250 ± 210
Cancer patients				
Primary tumors	16	14894 ± 792	16	17501 ± 124
Regional spread	23	15816 ± 420	23	13345 ± 540
Distant spread	21	8968 ± 459	21	10516 ± 580
Uremic patients	26	12001 ± 272		
Transplant patients*	24	12107 ± 357		
Marihuana smokers†	34	13679 ± 499	51	13779 ± 169

* After 1 to 4 years of immunosuppressive therapy. † At least 1 year, at least once a week; no other drug taken.

and an increase in the prevalence of micronuclei. Since it has been shown that lymphocytes of normal individuals will undergo three or four divisional cycles during 72 hours of culture (*12*), the observed micronuclei might indicate that there is an increased anaphase lag with or without chromosomal breakage during the preceding cell divisions in vitro. Anaphase lag, formation of hypodiploid cells, and alterations of DNA content were also observed in cultures of human lung explants exposed to marihuana smoke (*13*). Tetrahydrocannabinol in 3 to 9 μM concentration inhibits the growth of tetrahymena by reducing DNA and RNA synthesis (*14*).

Further studies are required to elucidate the exact mechanism by which marihuana products might affect DNA synthesis and the genetic equilibrium of T (thymus derived) lymphocyte population.

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15. Supported in part by the Philippe Foundation, a gift from H. G. Doll, State of New York Department of Health Kidney Disease Institute research grant C-43403, and NIH grant GM-06069-11. We thank G. Thelm for technical assistance.

16 July 1973; revised 9 October 1973

A Sensitive and Specific Enzymatic Assay

Abstract. A sensitive and specific enzymatic-isotopic method of determining plasma amphetamine concentrations in man is described. The assay is based on the transfer of the tritiated methyl group of S-adenosyl-L-[methyl-^{3}H]methionine to amphetamine in the presence of a partially purified N-methyltransferase from rabbit lung. With this assay as little as 10 nanograms of amphetamine per milliliter of plasma can be accurately determined. The concentrations of d- and l-amphetamine in the plasma after 20 to 30 milligrams of the drug had been ingested by human subjects are reported.

Amphetamine is a potent sympathomimetic amine widely abused for its central stimulant effects and used clinically in the treatment of hyperactive children (*1*), obesity (*2*), and narcolepsy (*3*). Amphetamine also produces a psychosis that has been a useful model for the study of schizophrenia (*4*).

The lack of a sensitive, specific, and reproducible assay for amphetamine in plasma has hampered efforts to establish therapeutic dosages, to understand tolerance and the different potencies and effects of *d*- and *l*-amphetamine, and to detect abusers of the drug. Several assay methods have been proposed (*5*), but none has, as yet, become fully accepted.

We now describe an enzymatic assay for amphetamine in plasma such that 10 ng of amphetamine per milliliter of plasma can be accurately and reproducibly measured. The assay is based on the *N*-methylation of amphetamine to form radioactive methamphetamine, by means of an *N*-methyltransferase from rabbit lung and *S*-adenosyl-L-[methyl-^{3}H]methionine (^{3}H-SAME) as methyl donor. Sensitivity and specificity are achieved by extraction into solvents and drying at high temperatures.

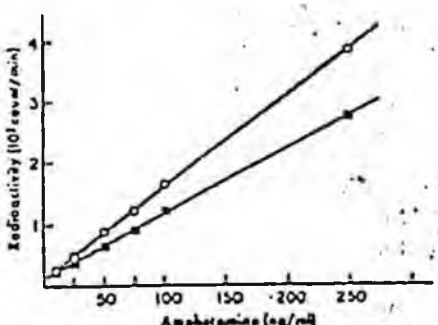

Fig. 1. Standard curves for *d*- (□) and *l*- (○) amphetamine added to plasma. Results are expressed as counts per minute produced per nanogram of amphetamine per milliliter of plasma. The blank values for amphetamine-free plasma were 60 to 150 counts per minute.

Blood samples were collected in heparinized syringes or in ACD-containing Vacutainers and were centrifuged at 4°C for 10 minutes at about 5000 rev/min. (Plasma samples can be stored at −15°C for at least 1 month without loss of amphetamine.) Samples (4 ml) of plasma were transferred to a 45-ml glass-stoppered centrifuge tube, adjusted to *p*H 11 with 50 μl of *5N* NAOH, and shaken with 15 ml of pentane (*6*) for 30 minutes at about 6°C to avoid evaporation. The tubes were centrifuged at 1500 rev/min for 10 minutes, the amphetamine was returned to the aqueous phase by transferring 15 ml of the pentane extract to another 45-ml glass-stoppered centrifuge tube containing 0.6 ml of 0.2 *mM* HCl and shaking for 15 minutes. After centrifugation, the acid phase was frozen with acetone and Dry Ice and the pentane was decanted. It is important that residual pentane be removed; normally this is done by leaving the centrifuge tubes containing the acid extracts in the cold room overnight. The acid phases were then divided into two 0.25-ml fractions and transferred to 13-ml glass-stoppered centrifuge tubes. The *p*H was adjusted to 8.6 with 25 μl of 0.01*M* tris buffer (*p*H 8.6), and 75 μl of lung enzyme plus 1.25 μc (0.156 nmole) of ^{3}H-SAME (*7*) were added. This mixture was incubated at 37°C for 90 minutes, and 0.5 ml of 0.5*M* borate buffer (*p*H 10) plus 2.5 μg (25 μl) of *dl*-methamphetamine hydrochloride were added. A mixture (6 ml) of heptane and isoamyl alcohol (98.5 : 1.5, by volume) was then added and the [^{3}H]methamphetamine was extracted into the organic phase by shaking for 10 minutes and centrifuging at 1500 rev/min. The following shaking and centrifuging steps were carried out in the same manner. The organic extract was then washed with an additional 0.5 ml of borate buffer, following which the [^{3}H]methamphetamine was extracted into 0.5 ml of 0.1*M*

HARVARD SCHOOL OF PUBLIC HEALTH

Department of Behavioral Sciences

677 Huntington Ave.
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February 25, 1974

Mr. R. Keith Stroup, Director
NORML
1237 22nd Street, N.W.
Washington, D. C. 20037

Dear Keith:

My reaction to the article in Science by Nahas and Associates (2/1/74) is that it is too technical for me to understand and that criticism from other specialists in immunology and related studies should be awaited. From the tenor of the inferences made in the press release issued prior to publication of the article, I fear that the generalizations may be considerably more sweeping than the facts warrant.

In any case, nothing in the report or the press release alters the significance of the data and recommendations contained in the two reports of the National Commission on Marihuana and Drug Abuse. Any and all serious and accurate research work done on the physiological and psychological effects of cannabis should be considered thoughtfully. Neither the article or the press release makes the Commission's recommendations out of date or inappropriate.

Warm personal regards,

Sincerely yours,

/mca

Dana L. Farnsworth, M.D.
Consultant on Psychiatry

Columbia University
in the City of New York
NEW YORK, N.Y. 10027
PRESIDENT'S ROOM

February 25, 1974

Dear Mr. Stroup:

We have received your letter of February eighth concerning the recently announced findings of Dr. Gabriel Nahas and his co-workers on the effects of tetrahydrocannabinol on bodily defenses against disease.

The community of scholars which is a University traditionally expresses no collective opinion about matters under scholarly investigation, and we intend to keep to that tradition in the matter of Dr. Nahas' report. To do otherwise would be highly destructive of one of the basic requirements of academic freedom.

Supporting the right of a scholar to publicize his findings entails the obvious risk that on occasion misinformation will be disseminated. In the same fashion our principles of due process entail the risk that a guilty person may go free occasionally. In both instances, we accept the risk because the freedom or right is so important to us.

You are probably aware that certain faculty members of two of the most prestigious universities in the country are currently questioning whether there is genetic equivalence between white and black people. The implications of this question are personally repugnant to me as well as to numerous other scholars, yet neither university would countenance any attempt to silence the individuals in question. In time, scholars throughout the world will discover pertinent evidence to support or refute the positions now being discussed. Dr. Nahas and his group will be accorded the same scrutiny by disinterested and objective researchers.

Some years ago, considerable publicity was given to reports that LSD caused chromosomal breakage, with the implication that users would be parents of congenitally defective

children. Because such findings could be confirmed by so few investigators and because the significance of the finding was at best so problematical, the allegation is given little credence today. It is true that refutations and retractions commonly receive much less publicity than the original statements, but this state of affairs reflects routine policy of the communications media. It is not our policy and it is certainly not the policy of the scientific community. Toppling a widely held erroneous belief is one of the things every scientist hopes to achieve.

To respond to some of your specific statements and questions, let me say first that Dr. Nahas' membership on our faculty is a matter of public record. Without specific authorization, no faculty member can speak for the University. Dr. Nahas speaks for himself, not for the University. The coupling in the public mind of Dr. Nahas' statements with the University's prestige is inevitable and, to us, unavoidable.

Whether a press conference is to be called to announce findings is a matter left to the discretion of individual faculty members. The various funding sources for the Nahas study are cited in Item 15 of the bibliography of his article in Science.

The University will not endorse or otherwise comment on Dr. Nahas' findings. It also neither endorses or rejects the recommendations of the National Commission on Marijuana and Drug Abuse. Such advocative activity is not consonant with our concept of the University's proper function. Individual members of our faculty are free to act as they wish under their own professional constraints. They may qualify or criticize any of the aforementioned findings and recommendations; and it is in the nature of our activity that both sides of the discussion will be represented here. The University does not, however, shape public attitudes on controversial topics. That comes in the public reaction to the

research and other activities of our faculty. We are obliged to protect the integrity of such work even when we disagree with it.

Sincerely,

William J. McGill
President

Mr. R. Keith Stroup, Director
National Organization for the Reform of Marijuana Laws
1237 22nd Street, N.W.
Washington, D.C. 20037

eh/t

HARVARD UNIVERSITY
THE BIOLOGICAL LABORATORIES
16 DIVINITY AVENUE
CAMBRIDGE, MASSACHUSETTS 02138

February 14, 1974

Mr. Keith Stroup
NORML
1237 22nd St. NW
Washington, D.C. 20037

Dear Mr. Stroup:

I'm writing this letter to reiterate what I said to you over the phone with respect to the article in Science by G. Nahas, et al. (Science 183:419, 1974). I would like to confine my comment only to the scientific merit of the publication which claims to have shown an inhibition of cell-mediated immunity in marijuana smokers.

The first thing that strikes the eye of anyone that works with mixed lymphocyte cultures is the fact that the data given in Table 1 shows an extremely low standard error. In other words, the variation from experiment to experiment reported seems abnormally low. Since it's not possible to tell exactly how this came about I would suspect that the individual replicated each experiment many,many, many times and got an artificially low standard error because of this. This is a statistical artifact if such is the case. The data should have been expressed in terms of standard deviation.

Also, there is no statistical analysis of the difference between the various groups. For example, is the difference between the mean for normal controls and marijuana smokers statistically significant either for the mixed lymphocyte culture activity or for the phytohemaglutinin response? This is not given in the paper. My own guess, and it is only a guess, is that these differences would not be significant. Everyone who works with mixed lymphocyte cultures knows they vary greatly from time to time and differences of this magnitude generally would not be considered very significant. But I would have to have access to their raw data in order to conclude this with any degree of certainty.

Another criticism that can be made of the study is that it is not clear that the control group was carefully matched with the experimental group for age, sex, or smoking habits. The latter could contribute significantly if the marijuana smokers also smoked more cigarettes and nicotine itself would suppress the cell-mediated immunity. But all these arguments aside, no experiment of this sort is believable until firstly, it is replicated in other labs, and secondly, and more importantly, experiments are done to evaluate the effect of tetrahydrocannabinol on various in vitro immune systems at concentrations within the physiological range. This may be technically somewhat difficult because tetrahydrocannabinol is not soluble in water, but this could probably

be gotten around. Before the experimenters claim that they have shown marijuana to cause defects in cell-mediated immunity, they should be able to demonstrate a clear *in vitro* effect of tetrahydrocannabinol on mixed lymphocyte culture, phytohemaglutinin responsiveness and responsiveness to an antigen such as tuberculin totally *in vitro* and with a reasonable dose response kinetics (in other words, increasing suppression with increasing dose). Such experiments would not prove that marijuana reduced resistance to infectious disease in chronic users, but it would be reasonable evidence for concern. At the moment, however, I do not think the data sufficient to cause great concern until the questions I have raised are answered and until the study is repeated.

Sincerely yours,

Thomas G. Wegmann
Associate Professor, Biology

TW: cmd

From the desk of...

Vera Rubin

Various lurid myths about marihuana are being exorcised by serious research, but this is a slow process, given the urge to sensationalism. The Jamaican study of long-term chronic ganja smokers found no deleterious effects that could be attributed to cannabis. The potency of ganja (marihuana) normally smoked in Jamaica is much higher than that of "pot" and the frequency and duration of ganja smoking is far greater than in the U. S. There was no difference in the incidence of disease and no "adverse effects" were reported for the offspring of smokers. Ganja teas and tonics have been taken by the rural population for the past fifty years -- from infancy to old age, for medical and energizing purposes. Life expectancy in Jamaica has increased dramatically during this period and there is no indication that resistance to disease has declined as a result of marijuana.

Medical studies underway in Czechoslovakia for over twenty years, have established the antibiotic as well as analgestic properties of cannabis; qualities that have been understood since ancient times in many parts of the world. Modern medicine is beginning to catch up with folk medicine. We need to refine research methodology and to slough off sensational stereotypes that result from questionable research methods.

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JOSEPH MAYER, PH.D. / DIRECTOR
ROBERT L. McVIE / PRESIDENT

washingtonian center
for addictions

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BOSTON, MASSACHUSETTS 02130
TELEPHONE 617 522-7151

February 7, 1974

Dr. Gabriel Nahas' research presents serious ethical and scientific problems. First and foremost, it is essential that no significant research be dismissed because of the credentials or bias of the researcher. Hence, Dr. Nahas' work deserves careful consideration. However, it is also essential that the position of the observer as a human being or a scientist be known and be taken into account, at least until new work is carefully validated. For instance, it would be worth knowing whether startling new work proving the existence of God was done by a Jesuit or an atheist. Similarly, if the man who announced the successful harnessing of fusion was known to be a tailor rather than a nuclear physicist, one would expect the average person to be skeptical until considerable checking of the work had been done by more usual authorities. Thus, it would seem to me of importance that, until Dr. Nahas' work is replicated by objective scientists, his long-held conviction, prior to this research, that marihuana is a powerfully dangerous drug be mentioned. His conviction has gone beyond simple prejudice. His concern about marihuana has led him to take the stump and testify before as many legislators as would hear him that criminal penalties against marihuana not be reduced or changed. The fervidity of his concern has gone beyond almost all other scientists, judges, policemen, and legislators. It seems to me ethically desirable that his position on this matter be well known when his research is considered. This is necessary because the possibility of experimentor bias affecting experimental result is a general problem of science, and most scientists are vigilant to that possibility.

On scientific grounds, there are two problems with Dr. Nahas' work. First, the whole issue of the DNA metabolism and the genetic equilibrium and how to know when it is affected is one which I do not know enough to consider, although I gather that Dr. Nahas' pronouncements in this area must be considered highly speculative. Second, however, and an area in which I have considerable experience, is the discrepancy between his research findings and the findings of clinicians working with young people. If his in vitro findings about the loss of immune capacity were correct in vivo, one would have anticipated that during these last five years the millions of young people smoking marihuana would have shown increased incidence of infections. At colleges, where marihuana use has been documented to include over 50% of the population, one would surely expect the use of the health services to have shown a significant increase. No such increase has been reported. This lack of clinical evidence to support the decrease in immune capacity is particularly striking when one considers how marihuana is

d. The ritual of passing a joint from mouth to mouth should be a good a way of spreading infections as anyone could devise. Were effective immune responses interfered with, clinicians should have been seeing a virtual deluge of infections, which is not so. Many researchers would themselves call attention to so obvious a discrepancy between the actual events and the logical suppositions implied by the research, but Dr. Nahas has not chosen to do so. Again, I must say that the behavior of the researcher does not affect the research, but the problems with the research itself, as well as Dr. Nahas' departures from usual ethical and scientific standards, make it especially important for both the lay and scientific communities to wait for replication before accepting these findings.

Norman Zinberg, M.D.
Chief of Psychiatry

HAIGHT-ASHBURY FREE MEDICAL CLINIC

– AN ACTIVITY OF YOUTH PROJECTS, INC. –

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February 12, 1974

R. Keith Stroup, Director
National Organization for the Reform
of Marijuana Laws
1237 22nd Street, N.W.
Washington, DC 20037

Dear Keith:

Thank you for your phone call and material on the Nahas study claiming increased susceptibility of marijuana smokers to infectious diseases. I am circulating the report and related materials to my colleagues at both the Haight-Ashbury Free Medical Clinic and at the West Coast Polydrug Abuse Project.

I agree that Dr. Nahas has used this study to achieve his own anti-marijuana political goals and I hope your release will help counteract the damage he has caused. The study is weak in several respects; but the area that was most striking to me as a toxicologist was his claim that the 51 marijuana smokers with a median age of 22 which he studied had used cannabis products exclusively and did not use any other drugs. In his press release, however, he stated that the marijuana smokers "maintained" that they did not use any other mind-altering drugs although they drank alcohol and smoked cigarettes. It is well known that alcohol is a mind-altering drug and a potent sedative-hypnotic. In fact the National Commission on Marijuana and Drug Abuse claims it to be the number one drug problem in the United States, producing far more problems than marijuana. It is also well known that nicotine is a minor stimulant and a mind-altering drug. Numerous toxicological studies have been published on far sounder scientific grounds than the Nahas study documenting the toxicity of both alcohol and cigarettes. For example, recently it was determined that heavy cigarette smoking during pregnancy caused an increase in prematurity by weight.

There is no way that Nahas could attribute the findings in his study to cannabis alone rather than alcohol, nicotine, or possibly even caffeine which I would speculate that the subjects used. By deliberately stating that the subjects used no mind-altering drugs, Nahas was both misleading and dishonest in his toxicological interpretations. It stretches scientific credibility as to how he could ascribe the findings to cannabis alone.

I also question why he used a control group with a median age of 44 when his study group had a median age of 22. This is no control group at all and also sheds doubt on his findings.

Finally, even if the toxicological findings were correct, the subsequent claim that marijuana should continue to be criminalized or that the National Commission of Marijuana and Drug Abuse study was inaccurate is also politically motivated, dishonest and a corruption of science. For example, almost daily toxicological reports of the negative consequences of heavy alcohol, tobacco and caffeine consumption are published in a variety of scientific journals. Never does the scientist who publishes such studies then claim for example that just because a woman smokes heavily during pregnancy thereby increasing prematurity by weight in her potential offspring that she should be placed in jail.

Dr. Nahas has obviously corrupted the scientific process to achieve his own preconceived political goals relative to marijuana and his study should be disregarded on both scientific and ethical grounds.

Peace and health,

David E. Smith

David E. Smith, M.D.

DES:mjg

P.S. It is also important, Keith, to emphasize that in our many years of studying and observing marijuana smokers, we have found no increase clinically in infections or birth defects that can be traced to marijuana smoking over that seen in a comparable age group that does not use marijuana.

D.S.

cc: John Newmeyer
Donald Wesson
Skip Gay

Enclosures

Mayo Clinic

Rochester, Minnesota 55901
Telephone 507 282-2511

Howard P. Rome, M.D.
Adult Psychiatry

February 26, 1974

Mr. R. Keith Stroup, Director
National Organization for the Reform of Marijuana Laws
1237 - 22nd Street N. W.
Washington, D. C. 20037

Dear Mr. Stroup:

In response to the repeated hyperboles by Doctor Gabriel G. Nahas, I wish to submit the following in refutation:

I enclose a statement prepared in May 1972 by the Council on Mental Health and the Committee on Alcoholism and Drug Dependence of the American Medical Association which itself is an updated version of the Board of Trustees Policy Statement on Marijuana issued in December 1969. Apparently the next to the last sentence on page 5; "Many of the strong emotions and controversies raging about marijuana are a result of years of misinformation" - is still the case.

The laws against marijuana not only have made criminals of our youth but also encouraged widespread disrespect for law-enforcement and in my judgment significantly contributed to the anti-establishmentarian attitudes that prevail currently. I think there are two cases in point. Our national experience during Prohibition certainly was enough to convince every thinking person that that law did more harm than good. Until it was repealed, it fostered an era of bootlegging and gangsterism which ravaged the country during the 1920's. Then too, the significant data that have been adduced for the past ten years since the Surgeon General's Report on the Hazards of Cigarette Smoking have done little to decrease the prevalence of cigarette smoking.

Doctor Nahas' premature release of his as yet unverified findings brings to mind a similar report released to the New York Times in October 1970 by Dr. Vincent de Paul Lynch of St. Johns University alleging that pregnant mice and rats breathing smoke from the equivalent of one marijuana cigarette a day for ten days produced defective offspring. To the best of my knowledge, those data were never confirmed by scientifically controlled genetic studies and moreover, the criticism of Lynch's findings on rats and mice were gratituously extrapolated to humans.

Other commentators have alluded to the definitive reports by the Secretary, Department of Health, Education and Welfare on "Marijuana and Health" submitted to the Subcommittee on Alcoholism and Narcotics of the Committee on Labor and Public Welfare, United States Senate, March 1971. "Marijuana: A Signal of Misunderstanding" was the First Report of the National Commission on Marijuana and Drug Abuse released to the President and Congress of the United States on March 22, 1972. Governor Shafer as Chairman noted in his covering letter the intention of the Commission "to place in proper perspective one of the most emotional and explosive issues of our time."

There are two paragraphs in that Report that I think are relevant at this juncture. On page 130, the Report continues:

> Marijuana'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.

The second paragraph appears on page 140:

> 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.

I am sure your consultants have referred to the voluminous data which appears in the Technical Papers of the Second Report of the National Commission on Marijuana and Drug Abuse: "Drug Use in America: Problem and Perspective" March 1973. Apropos of Doctor Nahas' incendiary statements which have appeared in the public press, may I suggest you refer to the Report of an Ad Hoc Committee of the Council of Academic Societies of the Association of American Medical Colleges: "A Policy for Biomedical Research which appears as a supplement to the Journal of Medical Education Vol. 46, August 1971. I have particular reference to the subchapter - Goals of Communication which appears on page 727 et seq.

Sincerely yours,

Howard P. Rome, M. D.

HPR:mm

A Few Comments About Dr. Gabriel G. Nahas, his book Marihuana - Deceptive Weed , and his recent study on lymphocytes

The jacket of Marihuana - Deceptive Weed calls the book " a scholarly work" and states that Dr. Nahas has "carefully evaluated the scientific data on marihuana and has produced a balanced and objective" work.

One picks up the book with enthusiasm to read the work of a scholar, but one's enthusiasm quickly turns to dismay and even horror as one becomes quickly aware of how adroitly a fanatic can twist the world literature to prove the premise he wants to prove. In spite of the promise of the jacket there is nothing objective or balanced in this warped presentation.

A few examples give the flavor of the book. Dr. Nahas devotes about 12 pages to a discussion of the National Commission on Marihuana and Drug Abuse. He gives many quotes which purport to be direct quotes from the Commission Report. They are indented from the rest of the text and put between quotation marks. I have been unable to find any of these "direct quotes" in the text of the Commission Report. Most of them consist of lifted sentences (some, but not all correctly quoted) strung together in a single paragraph. Qualifying statements are omitted.

Nahas denigrates the Jamaica Study - a study done for the Commission as follows:

He "quotes" in his fashion some of the basic findings of the Study to the effect that no organic damage could be detected attributable to heavy cannabis use.

Then to negate this finding by quoting from the same Study the fact that work performance was decreased immediately after use of heavy doses of cannabis.

The two points are a non-sequitor.

The lack of organic damage indicated that long time heavy use of cannabis did not injure the user permanently.

The fact that the intoxicated person did not work as efficiently as the non-intoxicated person has no bearing on long time organic damage.

Nahas summarizes the Commission Report as follows:

> "14. The first Report of the National Commission on Marihuana (1972) does not contain any novel information concerning Cannabis intoxication. It merely describes the prevalence of the usage of a mild form of marihuana in the United States during the past decade. Its recommendations, which would make private use and possession legal but public use and possession illegal, are difficult to reconcile with its policy of "discouragement" of marihuana usage. These recommendations were rejected by the President of the United States."

This is a rather cavalier way of disposing of the Commission's 1250 page report in which the world literature was exhaustively studied, 48 special assigned studies were carried out and 91 experts in the drug field acted as contributors and contractors.

It is perhaps worthy of note that the Commission looked at Nahas work and rejected it as not meeting the standards of the Commission for accuracy or objectivity.

In discussing the pharmacology of cannabis, Nahas states:

"The mechanism of the action (increased heart rate) is not clear and its persistence among chronic heavy users remains to be systematically studied".

Ignoring the well-documented evidence that chronic heavy users do <u>not</u> suffer from impaired cardiac function Nahas goes on to say:

"In the meantime, in view of the high incidence of acute

cardiac accidents in the United States the use of cannabis derivitives by middle-aged men might present some hazard"

This is an emotion loaded scare statement that has no place in an "objective" report. The only fact on which Nahas based this statement is that the pulse rate goes up moderately during the marihuana high.

Dr. Nahas relies heavily on the work of Dr. Jacques Morceau, a Frenchman who published a book in 1845 about his own personal experience with marihuana. Dr. Morceau's book may be interesting reading but his anecdotal reports can not be seriously used to refute modern controlled studies. Dr. Nahas quotes Morceau extensively in his chapter on mental illness, but he relies on Morceau also for social and pharmacologic information ignoring for the most part, modern research.

Throughout Nahas' book the presentation is warped. He picks and chooses what suits his premise giving his own coloration to what he reports, ignoring, or else treating with sarcasm, conflicting data.

This book is <u>not</u> the work of a scholar but that of a fanatic. Dr. Nahas most recent contribution.

Having gained some insight into the kind of man Nahas is as spelled out in his own book one approaches his recent conclusions.

Dr. Nahas is an anesthesiologist, a surprising background for work in molecular biology. However he conducted some in vitro experiments from which he concluded that the lymphocytes of marihuana smokers had less ability to fight viral infection than the lymphocytes of non-marihuana smokers.

Before publication of his results he called a press conference

in which he told the press of results of his test tube experiments. He did not confine him elf to his actual findings but drew sweeping conclusions of the implications of his studies, suggesting that marihuana smokers are more susceptible not only to viral infections but also to cancer.

When Dr. Nahas' paper was published in Science it contained no more information than the press release. The paper is only a summary, no details are given of how the work was done, no protocols of results were published. It is impossible to evaluate his work on the basis of what he has published.

Until some molecular biologists have an opportunity to scrutinize his study, and until his work can be duplicated in other laboratories, and ultimately transferred from the test tube to human beings Dr. Nahas' findings must be received with skepticism. This is particularly so since his findings are in direct contradiction to those of controlled clinical studies. No evidence has been obtained that shows marihuana smokers to be more susceptible to viral infection than non-smokers.

Dorothy V. Huffman, M.D.

The study, "Inhibition of Cellular Mediated Immunity in Marihuana Smokers," by Gabriel Nahas et al. raises the interesting possibility that chronic marihuana use may be correlated with weaking of the body's defenses against disease. Dr. Nahas and his co-workers suggest this possibility on the basis of retrospective reasoning. That is, they observed an effect in the present (apparent impairment of certain cells of the immune system) and tried to assign it to a cause in the past (chronic marihuana smoking). Regardless of how carefully controlled such investigations are, they are risky ways of drawing conclusions. For a very long time, logicians have known that retrospective reasoning is fraught with dangers of coming to incorrect hypotheses. Yet medical scientists, like Dr. Nahas and his colleagues, continue to use it, often with unfortunate results.

The only legitimate way to test a hypothesis is by prospective experiment. That is, groups of people should be examined, in this case for the health of their body defenses; then, marihuana should be administered in controlled fashion to some of the subjects; and changes in the immune system should be looked for over time. In the absence of such a prospective study, the possibility raised by the Nahas paper can be regarded as nothing more than a possibility, worth testing properly.

The trouble with possibilities based on retrospective information is that they may be nothing more than illusions motivated by the bias of the investigators. Especially in emotionally charged fields of inquiry, researchers may seize on something as a cause of a phenomenon only because they are blind to other possible causes. In his past writings and public statements, Dr. Nahas has made it clear that he regards marihuana as an evil and a menace. This obsession with marihuana makes the validity of his hypothesis especially suspect.

Moreover, the manner in which he chose to release his findings -- in a press conference before his article was pub-

Secondly, the studied group ranged in age from 16 to 35 years, with a median age of 22 years; the control group ranged in age from 20 to 72 years, with a median age of 44 years. This age difference is inappropriate.

Thirdly, carefully-conducted studies of biologic effects of other substances have shown similar in-vitro inhibition of leukocyte activity. I enclose a copy of one such reported study from a German university and published in 1971, concerning aspirin. Nahas is no fool: he almost certainly is aware of these other studies. His failure to mention them in connection with his report on the alleged effects of marijuana was, then, probably intentional. In that case, it was also very possibly a willfully misleading thing. At best, Nahas' report is a muddier, not a clarifier. And that is unfortunate, since we have plenty of that already.

This updating affords me again the opportunity of pointing out that NO substance is without the possibility of causing some damaging or disadvantageous effects on a living organism or its functions. That, however, is not really the question. If the "strength" of legislation concerning use of various substances is to depend upon scientific evaluations of biological dangers from use of those substances, then we must markedly change our approach and get to work legislatively on the demonstratedly-destructive substances which we now more or less accept for unchecked public use. We might begin with alcohol and nicotine --- but we won't. Cannabis is far, far down on the list of biologic threats, and to criminalise its user on that basis is patently indefensible.

Legislation which criminalises the user of cannabis simply cannot be justified by appeal to medical data concerning the threat of cannabis to the human organism. This remains the major message, and it is no way less certain now than when I wrote you some weeks ago.

Respectfully,

R. G. B. Bjornson, M.D.,
Associate Professor, University of Minnesota;
Member, Minnesota State Medical Association Subcommittee on Alcoholism and Other Chemical Dependency;
Co-director, Health Professionals

Lester Grinspoon, Harvard Medical School

of

Marihuana -- Deceptive Weed by Gabriel G. Nahas, New York, Raven Press, 1973

to appear in

New England Journal of Medicine

March 29, 1973

One property of cannabis, certainly as interesting as any other, is that an objective account of its psychoactive effects and the consequences of its prolonged use seems impossible to achieve. Judging by the reports of Bayard Taylor, Fitz Hugh Ludlow, Theophile Gautier, Charles Baudelaire and J. J. Moreau (de Tours), this was even more of a problem in the 19th century than it is today. Most contemporary authors writing in the field of psychoactive drugs are quite conscious of the role of their own bias and, beyond identifying it, attempt to minimize its influence on their work. Not so the author of this book. He has unabashedly published the most biased account of cannabis since the 1933 publication of Marihuana, The New Dangerous Drug by the anti-marihuana crusader, F. T. Merrill.[1] It is an attempt to update and lend some scientific authority to the dangers involved in the use of marihuana; the result is a repetitious and strident pasticcio of hazards which people who are knowledgeable about this drug now recognize as largely mythical. This is not to say that there are not real risks involved in the use of cannabis as there are with any psychoactive drug, but unfortunately the hyperbole which so characterizes this book makes it but one more addition to the scare literature which has been so counterproductive in drug education programs.

Given the fact that Dr. Nahas sees the growing use of marihuana in this country as the green menace which threatens to destroy our way of life, his missionary fervor and tendentiousness are understandable. But what he produces is a kind of psychopharmacologic McCarthyism which compels him to use

lished in Science -- suggests that he is more interested in propagandizing than in presenting data. In his press release he states: "For a long time educators and legislators have wanted hard facts about biological damage from long-term usage of this drug. Now we are in a position to start supplying them with such facts."

The facts of the recent Nahas study are not "hard." They are more of the same kind of research that anti-marihuana crusaders have relied on all along: conclusions based on sloppy reasoning drawn from observations that may or may not have something to tell us about real-world uses of the drug.

As a physician who has studied marihuana for many years, I do not believe that there is any evidence that use of the drug causes short-term or long-term adverse medical effects.

Andrew T. Weil, M.D.

Tucson, Arizona 85715

15 February 1974

Senator Stanley Thorup,
Chairman, Subcommittee on Criminal Law and Corrections,
Minnesota State Capitol Building,
SAINT PAUL, Minnesota 55101

Dear Senator Thorup:

During your Subcommittee hearings several weeks ago, you asked that I submit a written statement concerning the medically-related bases for judgement re decriminalisation of cannabis. I did that. Since your legislative judgement must, or should, depend upon current data, please accept this brief addendum to, or updating of, that statement.

In the weeks since your hearings and my statement, perhaps the most notable published information regarding cannabis has come from Nahas et all, who work at Columbia in New York. They released to the lay press, then published in the journal SCIENCE, information concerning inhibition of white blood cell activity in long-time users of marijuana. This material was reported in our local papers, and it may have come to your attention. I enclose a copy of that article from SCIENCE.

I cannot comment as a biochemist on this, but I can comment as one aware of scientific method. Also, I have heard Nahas speak and aware of his attitudes toward marijuana. Finally, I am aware of many other studies of biologic effects of various substances.

The experimental or study sample used by Nahas et al was made up of young persons who had used marijuana an average of four times per week for an average of four years. They were reported as using no other drugs. This freedom from other drugs is not just challengeable: it is preposterous. At least some, and perhaps all, of those subjects used caffeine, nicotine, alcohol, aspirin, amphetamines, barbiurates or antihistaminics, for example, during those same years. So any observations on white blood cell (leukocyte) activity or on anything else cannot establish causal relationship between cannabis and whatever "effects" may be observed. That is not to say the the inhibition of leukocyte activity noted by Naha was not caused by, or its cause contributed to by, cannabis. It is simply, but importantly, to point out that no causal relationship is established.

FEB

half-truths, innuendo, and unverifiable assertions and to discredit all the major commissions and reports which failed to certify cannabis as a great deceptive menace. Thus beginning with the British Hemp Commission of 1894, he dismisses the LaGuardia Report (1944), the Wootten Report (1969), the N.I.M.H. Report to Congress on Marihuana and Health (1971), and the First Report of the National Commission on Marihuana and Drug Abuse (1972). Along with attributing youth's involvement with marihuana to "permissive education" and the decline in "religious interest," and related to his view that drug information is too easily available, he also holds the authors of the leading recent books on cannabis as responsible for adding to the corruption of young people through misleading them.

With the exception of the chapter on chemistry which is both accurate and comprehensive (perhaps because it is the one which most nearly escapes the author's moral outrage), this book comes closer to being a demonology than a considered discussion of cannabis. As such it will undoubtedly be used by those who would retard the slowly developing progress of the last year or so toward a more enlightened approach to the growing social use of marihuana. But, alas, progress is rarely linear.

1. Merrill, F. T.: Marihuana, the New and Dangerous Drug." Opium Research Committee, Foreign Policy Association, Inc., Washington Office, 1200 National Press Building. Washington. D. C. (March 1938).

The Book Forum

Birth Defects

Is My Baby All Right? A Guide to Birth Defects, by Virginia Apgar and Joan Beck, 492 pp, with illus, $9.95, Trident Press, 1973.

"Is my baby all right?" Medical personnel often must struggle for words to explain the nature and consequences of birth defects to stunned parents. In the emotional milieu of such a birth and in later treatment, everyone who deals with these children—physicians, nurses, social workers, therapists and parents—will profit from reading Dr. Apgar's book. In collaboration with a professional writer, she has produced a readable, informative book.

This is not the usual enumeration of syndromes and statistics. A warm interest in parent and child is evident in the insertion of pertinent case histories and a patient, logical explanation of even the intricacies of cell division. Complicated medical terminology is refreshingly absent. However, terms commonly used in describing abnormalities or which would be encountered by affected families are included.

Most parents would do well to read the applicable parts of this source book. Its orientation is toward explaining the nature of a birth defect and the evolution of a rational plan of treatment. The authors have carefully avoided endorsing specific therapies so that one can get an overview of treatment modes currently in favor and fads are not given undue prominence. Specific references to medical literature are not included, but general references where laymen can obtain helpful literature are found in almost every chapter. This is particularly important in dealing with conditions that lead to chronic handicaps.

The first chapters of the book deal with life before birth and what can go wrong and why. These discuss how life begins, the various stages of fetal development and the many genetic and environmental interactions that produce the newborn child. Later chapters illuminate specific abnormalities and the book ends with an excellent chapter on genetic counseling and an interesting discourse on how to prevent birth defects.

Marietta M. Hevey, MD
Indianapolis

Marihuana

Marihuana: Deceptive Weed, by Gabriel G. Nahas, 331 pp, 25 illus, $12.50, Raven Press, 1973.

Of the spate of books about marihuana published recently, most have viewed cannabis as a rather benign drug. Its conclusion is usually reached after a plethora of pharmacologic, sociologic, and historic data have been presented and interpreted, often with a hint or more of bias in marihuana's favor. Granted that a totally objective book on the subject is probably not possible, one might settle for a well-reasoned and documented volume slanted against marihuana. This Nahas has attempted to do but has failed—due to his undisguised belief that marihuana is not only harmful but evil.

To support his essentially moralistic viewpoint, examples of biased selection and interpretation of studies and omissions of facts abound in every chapter. Although there is much accurate information in this book, especially in the areas of botany and chemistry, so much of the volume is distorted that one must know the marihuana literature in order to judge the accuracy of each statement. Accuracy, however, is not of prime importance to Nahas because for him, marihuana is not only destructive, but evil and should, therefore, be eliminated with little or no consideration of the cost to our basic social values. What he ultimately fails to face is the concept that to view cannabis as a curse rather than a problem is a tremendous step backward for medicine.

Barry I. Liskow, MD
US Public Health Service Hospital
Seattle

Medical Care

How You Can Get Better Medical Care for Less Money, by Morris N. Placere and Charles S. Marwick, 192 pp, $7.95, Walker & Co. (720 5th Ave, NY 10019), 1973.

This brief and easily read book presents a curious combination of condemnation and praise for the medical profession. On the one hand, physicians are described as almost diabolical in their intent to harm and impoverish patients; on the other hand, physicians are almost angelic in their ability to care for patients and to police themselves. It seems that the critical factors are specialty board certification, large university centers, and a monumental medical sophistication of patients.

The authors, by telling horror stories, build a case against the whole health care system. They point out some deficiences of hospitals, nursing homes and physicians. By substituting "all" for "some" they develop an indictment that is awesome in its expanse. With this as an assumption, it is relatively simple to justify their proposal of two or three thousand physician inspectors "fully qualified" in their specialties, traveling about the country 60 weeks a year evaluating all physicians.

Perhaps the nom de plume of the senior author is the key to this book. There appears to be a deliberate attempt "to please" those who could degrade the physician and control the system. An alternate interpretation might be for the physician "to please" the people by reclaiming the special position of the doctor in the public's heart—or else. . . .

It is well to know what is being said about the medical profession, but do not read this book if you are not prepared to be more objective than the authors.

Lawrence L. Hirsch, MD
Illinois Masonic Medical Center
Chicago

Hematology

Hematology: Principles and Practice, edited by Charles E. Mengel, Emil Frei, III, Ralph Nachman, 732 pp, with illus, $20, Year Book Medical Publishers, 1972.

The rapid expansion of knowledge in the field of hematology has stimulated a proliferation of new textbooks. It is also indicative of the wealth of information available that all the new books, with one exception, are multiauthored. This allows the various contributors to speak with authority in their fields, but does demand a strong editorial policy. The present monograph is highly successful in this particular area and Drs. Mengel, Frei, and Nachman are to be congratulated.

The sections of this book are logically presented. Erythropoiesis, red blood cell maturation, and stem cell kinetics are followed by a description of iron metabolism. Subsequently chapters concerning the aplastic and refractory anemias are presented. Next, the megaloblastic anemias are discussed and then this section is completed with a chapter devoted to transfusions and several chapters devoted to hemolysis.

I found the second section of this book to be the strongest. This is the portion devoted to white blood cells and their diseases. It begins with an excellent chapter concerned with leukocyte physiology and metabolism

APPENDIX II

Gabriel Nahas' book Marihuana Deceptive Weed should be closely examined by this Court. Several selected quotations follow which direct this Court to an understanding of Dr. Nahas' orientation.

> Hemp plants were widely cultivated in the United States as a fiber crop by early American settlers. George Washington grew Cannabis on his own farm, not to smoke, but to use in making ropes. Marihuana and hashish were unknown as pleasure-inducing drugs. The vigorous and industrious endeavors of the young Puritan American Republic seemed to be incompatible with a habit of inner contemplation and departure from reality. p.7-8

> 5. Recent reports confirm older ones made over the centuries, and indicate that the daily use of Cannabis preparations (containing 1 to 5% delta-9-THC) is associated with mental and physical deterioration as well as social stagnation. p.249

> According to some educators over the age of 40, the permissively brought up young people of America have been given too much too soon; and have not been offered any guidelines. In many instances, a major goal of progressive education is the instant and effortless gratification of the school child. Disciplined scheduling is frowned upon as preventing self-realization of the child. The fear of fostering a "destructive guilt complex" in the young leads to the withholding of traditional verbal reproach or light spanking. Many of these oversensitive, spoiled youths are unable to develop their own resources and resilience, and their threshold to frustration

and boredom is dangerously lowered. They are not taught the discipline of hard work; they are not told that the learning process is in most instances a hard one. p. 258

Man has a very deep craving to go beyond the narrow bonds of a mortal existence. Modern man escapes this permanent and fundamental drive no more than his ancestors did. When the rising generation uses drugs to quench its thirst for evasion, it is reverting to an old mystical practice in which the most primitive tribes have always indulged. It is also obvious that such practices, which do not ennoble man, can only prevent him from reaching a truly lofty goal. But youth is still willing to take the risk of damaging his future for the sake of passing exaltation of his imagination. p. 263

There is a need for wider professional and lay education about the dangers of taking drugs without informed medical advice. However, this information must be given with care. Too often education is the mere dispensation of objective information. Many young people report that only after hearing or reading about drugs do they decide to experiment themselves and find out "really what it is all about." p. 265

Cannabis sativa was first used as a mind-altering drug by significant segments of the European population in the 1950's, when the economic recovery of the postwar years created a demand for industrial and construction workers. With the influx of West Indians, Africans, and Turkish Cypriots, the use of Cannabis in the forms specific to each of these cultures became part of the British scene for the first time in the history of Great Britain. But the use of Cannabis rapidly extended from these migrant workers to the new "swinging" generation which was coming of age

in Britain. The erosion of traditional religious values, the breakdown of a life centered around the family, the Church of England, and the monarchy, and the general permissive attitude adopted by many educators, are general factors difficult to evaluate but which did contribute to the adoption of Cannabis intoxication as part of a new life style. Marihuana and hashish use are also inextricably linked amoug the young with the appearance of popular "rock" music, all-night clubs, coffee bars, Beatnik and Hippie culture. p. 25

It is possible for a group of intellectuals with important assets of talent and ability to use with taste and discrimination, for their own comfort and pleasure, psychotropic drugs including Cannabis. Many of them, after a number of years, may outgrow the marihuana habit, and find non-pharmacological ways to gratify themselves. But what about those who by birth or opportunity do not possess such resources? What about those who must be satisfied with a routine and uninspiring occupation? Will they outgrow or control as readily the chemical gratification so easily offered by Cannabis, especially if this drug has become socially acceptable because of its use by those in the professions and the universities? As a facetious Englishman remarked, "And what happens when grass hits the grass roots? Who will do the hard work?" p. 267.

Young people today prefer Cannabis to alcohol. They may obtain greater, longer-lasting euphoric effects than those derived from much larger quantities of alcohol and without the unpleasant side effects that follow excessive libation. "The pleasure of smoking marihuana has convinced many students that this drug is better than alcohol" (Greenwald, 1968). Just because Cannabis, when available, is preferentially used by the young, it represents a much greater abuse potential and consequently a greater danger to health in that age group

than does alcohol. Unlike wine, pond cannot take a little marihuana day in and day out without running the risk of rapidly developing tolerance to this drug. p. 72-73.

Criminal behavior is the most overt manifestation of social malaise and has multiple causes. Its incidence among Cannabis users has been exaggerated by well meaning anti-drug crusaders. p. 286

THE SUPREME COURT OF THE STATE OF ALASKA

IRWIN RAVIN,

Petitioner,

vs.

STATE OF ALASKA,

Respondent.

Supreme Court No. 2135

ON PETITION FOR REVIEW FROM THE DISTRICT
AND SUPERIOR COURTS OF THE THIRD JUDICIAL DISTRICT

PETITIONER'S REPLY BRIEF

Robert H. Wagstaff
R. Collin Middleton
Attorneys for Petitioner and the
American Civil Liberties Union

Filed this 7th day of October, 1974
in the Supreme Court of the State
of Alaska

By: Veronica A. Knapick
Deputy Clerk

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I. RESPONDENT'S APPENDIX OFFERS NO NEW OR COMPELLING INFORMATION

In an apparent attempt to supplement an already exhaustive record, respondent has included as an appendix to his brief several statements made before the Senate Subcommittee on Internal Security during May of 1974. Attached as appendix I of this brief is a letter from Senator James Eastland, Chairman of the committee, with that committee's press release dated May 8, 1974. Senator Eastland states:

> There is one point that I would like to make clear at the outset to avoid any possibility of misunderstanding. In its previous series of hearings on "The World Drug Situation and Its Impact on U.S. Security" the subcommittee made it abundantly clear that it was opposed to sending young people to jail for the simple possession of small quantities of marihuana for personal use. I have repeatedly gone on record and supported this position. This is no longer at issue.

The Committee was only concerned with the open distribution of marihuana, in the military, and invited known anti-marihuana persons to speak before it while endorsing decriminalization. A short commentary on the appendicized statements while not necessary, may be of interest.

The first statement submitted is that of Julius Axelrod and contains merely a description of some of marihuana's physical properties as purportedly found by Axelrod's research. He notes, as was discussed at hearing, that the polar metabolytes of THC are stored in the fatty substances of the body. Axelrod believes that the 11-hydroxy THC metabolyte does have essentially the same psychic effects as

cannabis in whole form. He cites no specific studies of his own or others for this proposition. Most importantly, he postulates no consequences as a result of his studies. He advises further research. At no time does Dr. Axelrod say anything that would indicate that marihuana is hazardous to public health or the general welfare.

The next paper in respondent's appendix is a statement by Nils Bejerot of the Karolinska Institute of Stockholm, Sweden. This paper demonstrates that unscientific fanataicism is not confined to our continent.

Bejerot believes that marihuana is addicting, describing an "abstinence phenomena". He states that physical dependence is not included in the strict concept of addiction, admitting the validity of the National Commission report on the subject (Marihuana: A Signal of Misunderstanding, page 87), but at arriving at his own peculiar conclusion that all euphorizing drugs may give rise to psychological dependence. As Judge Norman noted from the testimony of a witness in United States v. Grady and Thorne, set forth in full in appendix 2 to this brief:

> In human beings, pleasurable experiences are sought to be repeated. Thus for many persons, listening to the music of Bach induces "Bach-music seeking behavior," and in others Sunday TV programming of the NFL and AFL produces "football-watching seeking behavior." In essentially all persons, pleasurable experiences with eating and drinking produce, from a very early age, clearly noticeable 'nourishment-seeking behavior." (p.8)

Bejerot also notes:

> A serious complication of cannabis use is chronic psychosis (insanity), a condition which has long been recognized where cannabis abuse is endemic.

Statements such as this totally ignore the basic research and literature on the subject and the specific findings of the National Commission. (p. 59)

Bejerot continues:

> If the Committee has any doubts about the existence of chronic cannabis psychosis, it can initiate a simple investigation to eliminate the question. The rates of schizophrenia among relatives of verified cases of schizophrenia are compared with those of relatives of persons with chronic cannabis psychoses, there will be a difference in these two rates if we are dealing with two different conditions.

Obviously, Bejerot is making a lot of assumptions relating to genetic schizophrenia and the existence of a syndrome known as chronic cannabis psychosis. Additionally if such an experiment is so simple why has it never been done?

Getting to the real point of his testimony Bejerot states that marihuana causes "intellectual deterioration", which may be "irreversible" and "vagabondism". Again, this is sharply contrasted with the findings of the National Commission. (p. 98) Bejerot concludes his paper by comparing a Swedish two-year experiment of permitting limited access to opiates and amphetamines for intravenous injections as having a direct and positive corrolation to an undefined "crime rate" thereby concluding that marihuana would do the same.

The next statement is that of Henry Brill, a member of the National Commission as was Dr. Thomas Ungerleider. Brill states:

> In summary I would say that I found myself in complete agreement with the conclusions of the Commission,. and this attitude was reinforced by personal observations in mental hospitals here and in Greece, Morracco and Jamaica during my work with that body.

Next included by respondent is the Kolodny report concerning the depression of plasma testosterone levels after chronic intensive marihuana use. The impotency scare publicity given this article is thoughtfully included by respondent in the Newsweek exhibit. It is indeed ironic that the proponents of proscription who originally relied upon premises that marihuana directly induced the user to rape and kill now attempt to support their position with inferences of causal impotency. A reading of the report quickly dispels any such fears. Twenty heterosexual men who used marihuana at least four days a week for a minimum of six months without use of other drugs for six months were the test group. These facts were established only from the taking of a history and the subjects had control over their own dosage and quality of cannabis.

> Sexual functioning was unimpaired in all subjects studied except for subject 1, who reported potency problems intermittently over the preceding year, and subject 10, who reported markedly impaired libido and impotence of approximately six months duration. Subject 1 discontinued use of marihuana, and at followup study two months thereafter, was experiencing no difficulty with the erective function. Subject 10 declined abstention from marihuana.

So much for this anxiety. In those subjects who showed decreased testosterone levels during the study there was an immediate reversal upon cessation. Pragmatically, it can be said that at the present world population and considering the widespread

and 4,000 years of use there is no danger of infertility. Moreover, the study has not been replicated and in fact Drs. Mendelson and Meyer of the Harvard Medical School's alcohol and drug abuse research center have found no depression of testosterone concentrations in the blood of heavy users of cannabis under more controlled conditions.[1]

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[1] These studies are reported in Marihuana: The Grass May no Longer be Greener in the August 23, 1974 Science and Marihuana: Does It Damage the Brain? reported in August 30, 1974 Science both authored by Thomas H. Maugh. These two articles illustrate the position of those, like Senator Eastland, who have an exaggerated view of marijuana's potential for harm notwithstanding his decriminalization position. The articles at least provide a useful survey of the sharply conflicting medical reports currently available. A few comments:

a. The author erroneously claims that marihuana legalization advocates base their position on "an assumption that it is harmless." (p. 683) He is apparently setting up a straw-man which he then knocks down. This evidences either his ignorance of the social policy considerations behind marijuana decriminalization and/or legalization or his prejudices towards continuing the criminal prohibition. The medical debate concerning marijuana should not be permitted to frustrate decriminalization. No one is claiming now, nor has ever claimed, that marijuana is totally harmless.

In fact, marijuana was blamed for many years for violent crime, insanity, heroin addiction, and sexual excesses among other things. Thus the author is involving himself in misstatement when he claims that "marijuana in its various forms may be far more hazardous than was originally suspected." (p. 683)

b. The author appears willing to list as "may cause" every claim made even by a single researcher, regardless of the lack of replication by H.E.W. or others;

c. The author erroneously says "The research indicates that cannabis causes sharp personality changes. . ." (p. 683) when in fact this is merely an unsupported claim. The author, a week later, considerably softens his position to "the possibility that long term, heavy use of marijuana may produce sharp personality change. . ." (p. 775);

d. The author makes no attempt to differentiate between the serious researchers and those who offer only their personal prejudices and opinions, e.g. Hardin Jones (pp.683 and 775), Kolansky-Moore (pp. 685 and 775), W.D.M. Paton (p.685). (In one instance, Hardin Jones is actually used to support Kolansky-Moore (p. 775)).

Next the statement of W.D.M. Paton is submitted. Paton is discussed at some length in Dr. Grinspoon's book Marihuana Reconsidered.

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(cont'd)

e. Several of the reports cited involved extremely high dose levels of THC rendering the results inapplicable to the question of how marijuana affects humans. This is not always mentioned by the author. E.g. Rosenkrantz (p. 684), Heath (p.776), and Tennant (pp. 685 and 776).

f. The discussion of the Harris and Lessin-Silverstein research as contrasted to the Nahas study is helpful. Lessin-Silverstein suggest the possibility that other components may compensate for any supposed immune reduction as claimed by Nahas. They found no actual immune reduction when marijuana smokers were administered a standard skin patch test. The Nahas data is based on in vitro studies only.

g. The author fails to note that the subjects in the Kolodny research used their own marijuana; there was absolutely no control over dosage or strength. Nevertheless, the Mendelson-Mello controlled study is discussed, which found no change in the testosterone level under controlled conditions (p. 685).

h. The entire second part of the series ignores the H.E.W. Report which offered the following comments concerning the possibility of brain damage:

> "Definitive conclusions regarding cannabis use and possible brain damage cannot be reached at this time. Thus far, such a causal connection remains unproven but neither can cannabis be completely exonerated on the basis of present evidence. It does seem likely on the basis of the Jamaican study that brain damage is not an inevitable nor even a likely result of chronic cannabis use when at a level that would be considered heavy (e.g., an average of 7 cigarettes per day) by American standards. In general, there continues to be little evidence to suggest that light or occasional use of cannabis has serious deleterious physical effects."

i. The author gives wide discussion to the claim by Stenchever that marijuana causes chromosome damage (p. 683). He apparently ignores the H.E.W. conclusion in their 1971 Report that:

> "The possibility that cannabis preparation might cause genetic or birth defects has been a source of concern although there has been little evidence to support it. The bulk of present evidence, par-

> Even one of the most vociferous opponents of the legalization of marihuana in England, W.D.M. Paton, admits that "life is in fact built up of such dependencies. . . (he is referring to his habit of eating Kellogg's cornflakes each morning). Any habit represents one: some dependences are trivial, some benign and pleasurable, some not so benign: some, such as dependences on friends and family and work, are part of what makes you what you are." The possibility of harm to the individual or society is not a function of dependency per se, but rather of the harmfulness of that which is depended upon. In the case of marihuana, the dangers are not well established.[2]

Dr. Grinspoon also discusses Paton's theories relating to the association between

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1 (cont'd)

> ticularly that of well controlled studies, suggests that the likelihood of genetic or neonatal abnormalities arising from cannabis use at present social levels of use is low. There is no convincing evidence that chromosomal abnormalities arise from marijuana use. The Jamaican study of chronic users as well as other studies of the effects of THC on chromosomes in human lymphocytes (type of white blood cell) indicate no changes related to cannabis use. Although there have been isolated case reports of abnormal offspring born to mothers who have used marijuana and other illicit drugs during pregnancy, more systematic controlled investigation has not borne this out. As has been indicated, animal research at substantially higher dosage levels than those likely to be employed by users showed no evidence of hazard to fetal development."

2 Marihuana Reconsidered at p. 259 (Bantam ed.)

cannabis and heroin.[3] After citing Paton's three stepping stone hypothesis, he logically, scientifically, and factually refutes each.

Paton states:

> The question of lethality in man is important. Since few practitioners would know how to diagnosis a death caused, or contributed to, by cannabis, and since it could not at present be proved by forensic analysis, only scanty information can be expected in any case. The case reported by Heyndricks, et al., in light of this, is rather convincing.

It is difficult to follow a scientist who postulates because it cannot be proven it must be so. Paton ignores the findings of the National Commission (page 56).[4] Paton then proceeds to show how marihuana "could" theoretically cause death. One could also postulate a death due to marihuana where a man walking beneath a tall building is hit on the head by a large package of marihuana thrown from the uppermost floor.

Paton makes claims of teratogenicity and fetal deformity citing absolutely no studies and which is completely contrary to the National Commission report's findings at page 84. It is also contradictory to the statement of Stenchever, infra, also offered by respondent. Paton, like Nahas, is apparently privy to exclusive and

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3 Ibid. at p. 271-277.

4 See also testimony of Fort (p.50) and Grinspoon (p.84) on this subject.

unpublished research. He states:

> A very important question is whether cannabis directly affects the genetic material, i.e., nucleic acid. Early reports of interference with cell division indicated this. These have been confirmed. Dr. Nahas' report here has clinched the issue. One must notice that general anesthetics as a class can also produce fetal abnormality. A provisional hypothesis for teratogenicity therefore, is that this action of cannabis reflects its fat solubility and relation to anesthetics, and constitutes a sort of anesthesia, for instance, of limb buds developing in the fetus at critical periods-hence the reduction-deformity.

This "provisional hypothesis", of Paton's is contrary to all competent research on the subject, the literature, and impirical data. Respondent is suggesting that such a "provisional hypothesis" equals a compelling state interest.

Paton also cites unreported, unreplicated, and unpublished claimed "studies" relating to carcigenicity and brain damage. One might ask where are these studies? As respondent points out on page 9 of his brief these studies only "apparently" exist.

Paton also speaks of irreversible psychological change and concludes:

> It is quite likely that all this would be accepted and acted upon, by the cannabis user, were it not for the visual imagery, and (here cannabis is very like nitrous oxide) the euphoria and the conviction of insight and cosmic significance.

The final statement submitted is of Dr. Morton A. Stenchever, the man who first claimed "chromosome breakage" from marihuana use. He has become a little more guarded since first reports stating:

> We have not demonstrated a link between marihuana use and an increase in fetal damage or fetal loss, in mutagenesis or the increased incidence of cancer.

In fact the results of his tests were:

> While there was an increase in abnormal chromosome form seen in the users' group over those in the control, the number of cells involved were small enough that no statistical analysis could be carried out.

II. THERE IS NO COMPELLING STATE INTEREST IN THE CRIMINAL PROSCRIPTION OF THE PRIVATE POSSESSION AND USE OF MARIHUANA BY ADULTS. A COMPELLING INTEREST EXISTS ONLY WHEN THERE IS A CLEAR AND PRESENT DANGER OF IMMINENT HARM TO SOCIETY.

This Court on August 12, 1974, stated in Gray v. State, Opinion No. 1068:

> In 1972 Alaska amended its Constitution expressly providing that, "the right of the people to privacy is recognized and shall not be infringed." There is no available recorded history of this amendment, but clearly it shields the ingestion of food, beverages or other substances butthe right of privacy is not absolute. Where a compelling state interest is shown, the right may be held to be subordinate to express constitutional powers such as the authorization of the legislature to promote and protect public health and provide for the general welfare.

As was recognized in Gray, the state carries the heavy burden of showing the compelling state interest in proscription of marihuana. In the evidentiary hearing petitioner came forward with evidence demonstrating there is not even a rational basis for criminal proscription.

The National Commission on Marihuana and Drug Abuse has found:

> Medical and Health Data:
>
> "The most notable statement that can be made

about the vast majority of marijuana users -- experimenters and intermittent users is that they are essentially indistinguishable from their non-marijuana using peers by any fundamental criterion other than their marijuana use. (p. 41)

From what is now known about the effects of marijuana, its use at the present level does not constitute a major threat to public health. (p. 90)

No conclusive evidence exists of any physical damage, disturbances of bodily processes or proven human fatalities attributable solely to even very high doses of marijuana. (pp 56-57)

Although a number of studies have been performed, at present no reliable evidence exists indicating that marijuana causes genetic defects in man. (p. 84)

No objective evidence of specific pathology of brain tissue has been documented. This fact contrasts sharply with the well-established brain damage of chronic alcoholism. (p. 85)

In a word, cannabis does not lead to physical dependence. (p. 87)

Research has not yet proven that marijuana use significantly impairs driving ability or performance. (p. 79)

Public Safety:

Neither the marijuana user nor the drug itself can be said to constitute a danger to public safety. (p. 78)

In sum, the weight of the evidence is that marijuana does not cause violent or aggressive behavior. (p. 73)

Marijuana and Hard Drugs:

Marijuana use <u>per se</u> does not dictate whether

> other drugs will be used; nor does it determine the rate of progression, if and when it occurs, or which drug might be used. (p. 88-89)
>
> The fact should be emphasized that the overwhelming majority of users do not progress to other drugs. (p. 87)

In an excellent opinion by D.L. Norman, Superior Court Judge for the District of Columbia, in United States v. Grady and Thorne, decided on May 17, 1974, and reported in part in 102 D.W.L.R. 1161 at 1167 and included in the appendix here, it was concluded after a lengthy evidentiary hearing that "marihuana is not a narcotic drug; that the use of marihuana is not addictive; the use of marihuana has no short term or long term harmful effects upon the individual user; (and) that the ordinary use of marihuana does not lead to the commission of crimes or induce acts of violence by the user." The opinion is persuasive for its logic and factual findings. Judge Norman was reversed by the District of Columbia Court of Appeals on August 7, 1974, (see Appendix) on the basis that he should have deferred to legislative findings as the issue was "at least debatable" under the rational basis test. Interestingly, when the court noted that the issue of the effects of marihuana was still not settled it cited, in footnote 5, Gabriel Nahas' immune response studies as then reported in the Washington Post. The District of Columbia Court of Appeals did not quarrel with Judge Norman's findings of fact but rather with his right to make them citing United States v. Carolene Products, 304 U.S. 144 (1938). In Alaska compelling state interest is the only relevant applicable standard. In Alaska Judge Norman would be upheld.

Respondent admits that there is no compelling state interest in the continued proscription of the possession and use of marijuana by adults when he states "its use does not directly provoke any user into the commission of dangerous anti-social acts" (Respondent's brief p. 15), and "the evidence concerning its physical, psychological and social effects is in conflict, and little about it can be said for certain" (Respondent's brief p. 59). Respondent's position that there exists a "sharp conflict" in the evidence under the facts of this case equates a voice crying in the wilderness with an overwhelming body of evidence. The stylized "existence of a controversy" because of an ability to find a handful of persons with scientific credentials who will speak out against marijuana "legalization" not as scientists, but as moralists to justify wholesale invasions of liberty and privacy does not give rise to a compelling state interest. The only question is must the state act in proscribing marijuana in order to stop emminent harm to society? and the only answer is the emminent harm of marijuana is only in its continued proscription.

The heart of respondent's brief is a plea for this Court not to legislate when the will of the people has spoken. Our Bill of Rights, both state and federal, interposes constitutional limitations on government between respondent's characterized will of the people and the people themselves. Minorities are thus protected from the abuses of power by simple majority rule. It is this Court's function to enforce these Constitutional restrictions upon exercises of legislative power.

Respondent urges that the failure to regulate an ingestible substance is to legalize it. Throughout his brief Respondent mingles arguments concerning right

of the legislature to regulate distribution of a particular substance with the right of the legislature to make it a crime to possess a particular substance urging that decriminalization is only a way station to open legalization. (Respondent's brief p. 59) Similarly, the rational basis test as applied to the former is urged upon the latter. Respondent relies heavily upon the United States Supreme Court opinion in Paris Adult Theatre v. Slaton, 413 U.S. 49, 37 L.Ed.2d 446 (1973) and particularly the following language:

> "We do not demand of legislatures scientifically certain criteria of legislation." Noble State Bank v. Haskell, 219 U.S. 104, 110 (55 L.Ed. 112, 31 S.Ct. 186). Although there is no conclusive proof of a connection between anti-social behavior and obscene material, the legislature of Georgia could quite reasonably determine that such a connection does or might exist.

Even though Respondent recognizes that the Court was not dealing directly with a compelling state interest question he urges this specific reasoning upon this Court. Paris Adult Theatre was a 5 to 4 decision in which Justice Douglas filed a dissenting opinion, and Justice Brennan filed a separate dissent in which Justices Stewart and Marshall joined. The case was a companion case to Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607 (1973), which was, at the time, hailed as a signal for renewed book burnings. That book burnings have not happened is testimony that the clock cannot be turned back, nor halted, by any single branch of government nor can society be stopped from its normal course of evolution and growth as was contemplated by the Founding Fathers. Justice Douglas stated in

his dissent:

> When man was first in the jungle he took care of himself. When he entered a societal group, controls were necessarily imposed. But our society -- unlike most in the world -- presupposes that freedom and liberty are in a frame of reference that makes the individual, not government, the keeper of his tastes, beliefs, and ideas. That is the philosophy of the First Amendment; and it is the article of faith that sets us apart from most nations in the world. 413 U.S. 73, 37 L.Ed.2d 466.

The judicially found fact that the legislature of Georgia could reasonably determine that a connection between obscene material and anti-social behavior might exist does not fair well with Justice Douglas' eloquence. In his dissent in Paris Adult Theatre, Justice Brennan states:

> Like the proscription of abortions, the effort to suppress obscenity is predicated on unprovable, although strongly held, assumptions about human behavior, morality, sex, and religion. The existence of these assumptions cannot validate a statute that substantially undermines the guarantees of the First Amendment, any more than the existence of similar assumptions on the issue of abortion can validate a statute that infringes the constitutionally protected privacy interests of a pregnant woman.
>
> If, as the Court today assumes, "a state legislature may. . . act on the . . . assumption that commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior," ante, at 63, 37 L.Ed.2d at 460, then it is hard to see how state-ordered regimentation of our minds can ever be forestalled. For if a State may, in an effort to maintain or create a particular moral tone, prescribe what its citizens cannot read or cannot see, then it would seem to follow that in pursuit of that same objective a State could decree

> that its citizens must read certain books or must view certain films. Cf. United States v. Roth, 237 F.2d 796, 823 (CA2 1954) (Frank, J., concurring). However laudable its goal -- and that is obviously a question on which reasonable minds may differ -- the State cannot proceed by means that violate the Constitution. 37 L.Ed.2d 446, 488-89 (footnote omitted).

Justice Brennan's dissent, simply stated, is the better view. Respondent urges upon this Court the recognition of the legislative right to invade the privacy and liberty of the citizenry whenever a Gabriel Nahas can be found to warn of potential dangers not yet known. Ironically, even Nahas supports decriminalization. Men of common knowledge realize that the basis for the proscription of the possession and use of marijuana springs from this same bush which bears the fruit of fear that the human mind can be corrupted by obscene materials. This Court should not say that although there is no conclusive proof of a connection between the use of marijuana by adults and anti-social behavior, the legislature of Alaska could quite reasonably determine that such a connection does or might exist.

Respondent urges that the evidence supports the finding of compelling state interest. The purported facts cited scarcely, if at all, rise to the threshold of justifying a regulatory scheme for the distribution of marijuana. The evidence and credibility of witnesses and the reliability of their testimony has been explored in depth in petitioner's opening brief. Respondent urges with respect to public safety that because there is no reliable test at present which can be used to prove cannabis intoxication that therefore blanket proscription is justified. Assuming arguendo that

marihuana does affect driving, the concept of overbroad legislation as being justified by such a failure of technology cannot give rise to or rise to the stature of a compelling state interest anymore than an unprovable assumption which gives rise to a provisional hypothesis can. When respondent says that decriminalization and private possession for personal use amounts to legalization of its use by drivers and that the level of automobile accidents will therefore be increased (respondent's brief p. 24) he is appealing to passion and prejudice. He states:

> Respondent urges this Court, likewise, to declare that the people of Alaska are not constitutionally required to welcome into their midst yet another mind altering chemical. (Respondent's brief p. 25).

The true issue is whether society can Constitutionally make persons who may be popularly unwelcome in its midst, criminals,absent a compelling state interest to do so.

Respondent speaks of the United States Supreme Court's opinion in Roe v. Wade, 410 U.S. at 154, 35 L.Ed.2d at 177-78 as showing the exercise of a balancing process since the Court found there is a point in pregnancy where the state interest becomes sufficiently compelling to sustain the regulation of the factors governing the abortion decision. Paranthetically it should be noted that the Supreme Court used the word "regulation" not "criminalization." Respondent urges that a similar process be applied to the right to ingest substances and it will be seen, he states, that the state will then have the power to forbid the ingestion of harmful or potentially harm-

ful substances. (Respondent's brief pp. 33-34). Applying the actuality of Roe v. Wade to respondent's theory, it would appear that by his own argument the present legislative proscription of all possession and use of marijuana is constitutionally overbroad assuming, arguendo, that at some point acute and chronic marijuana use could give rise to a compelling state interest to regulate.

A compelling state interest is directly analogous to the clear and present danger test of the First Amendment. Speech was first in the order of priorities to the Founding Fathers and relates well to a revolutionary government. Mr. Justice Brandeis, in his now famous Olmstead dissent, first recognized the importance of the privacy doctrine in this century.

> The protection guaranteed by the Amendments is much broader in scope. 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 of his intellect. They knew that only a part of the pain, pleasure and satisfactions 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. Olmstead v. United States, 277 U.S. 438 (1928), 72 L.Ed. 944.

At this time in our history privacy is the most important constitutional guarantee and has in fact even surpassed the First Amendment. Mr. Justice Holmes' dissent in Abrams v. United States, 250 U.S. 616, 63 L.Ed. 1173 (1919) at p. 630 lays the proper spirit and significance [illegible]ed to the competing interests of society and privacy.

Persecution for ..e expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a may says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But whe men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas, -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree with the argument of the government that the 1st Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of July 14, 1798 (1 Stat. at L.596, chap. 74), by repaying fines that it imposed. Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, "Congress shall make no law abridging the freedom of speech." Of course I am speaking only of expression of opinion and exhortations, which were all that were uttered here; but I regret that I cannot put into more impressive words my belief that in their conviction upon this indictment the defendants were deprived of their rights under the Constitution of the United States.

We must be eternally vigilant against attempts to invade privacy unless what is occurring in private emminently threatens immediate interference with the lawful and pressing purposes of the law so that an immediate check is required to save society.

Mr. Justice Douglas in delivering the opinion of the Court in Terminiello v. Chicago, 337 U.S. 1, 93 L.Ed. 1131, 1134 (1949) stated:

> That is why freedom of speech, though not absolute, Chaplinsky v. New Hampshire, supra, (315 U.S. pp. 571, 572, 86 L.Ed.1034, 1035, 62 S.Ct. 766), is nevertheless protected against censorship or punishment unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. See Bridges v. California, 314 U.S. 252, 262, 86 L.Ed. 192, 202, 62 S.Ct. 190, 159 A.L.R. 1346; Craig v. Harney, 331 U.S. 367, 373, 91 L.Ed. 1546, 1550, 67 S.Ct. 1249. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

The same rationale applies to privacy as well as speech. Our Constitution now dictates that unless a particular activity is shown to produce a clear and present danger of a serious and substantive evil, there is no justification for a state invasion of this privacy particularly, and specifically here, through the criminal law processes. The prohibition against restriction and regulation upon free speech is the same vital spirit of freedom which shall now give life to our Alaska Constitutional mandate of privacy when legislative actions which threaten privacy are held to the test.

III. PETITIONER HAS BEEN DENIED EQUAL PROTECTION

In response to petitioner's irrational classification arguments respondent cites United States v. Maiden, 355 F.Supp. 743 (1973). Petitioner urges that the reasoning of this case not be followed. In Maiden, the Court stated:

> In setting penalties, Congress is not limited to an assessment of harm. Even if barbituates and amphetamines pose greater health hazards than marijuana, Congress is entitled to conclude that the pervasiveness of marijuana distribution justifies an equivalent maximum penalty or that such penal purposes as general deterrence will be appropriately served by such a penalty. . . . Congress can rationally conclude that interstate traffic in such a drug should be prohibited by a maximum five-year penalty. Id. 747-48.

The rational basis test is inappropriate when determining criminal classifications of substances which can be used in private. A substance to be so classified must also pass the compelling state interest hurdle. Respondent states that we are not here dealing with an inherently suspect classification such as race or national origin (respondent's brief p. 41). In reality we are dealing with an inherently suspect classification as it provides for the exercise of the police power into citizens' protected privacy and liberty. As such any classification within these parameters is suspect absent compelling state interest.

In speaking of petitioner's unequal protection arguments respondent urges cognizance by this Court that it would not be possible to muster the necessary votes in the legislature to pass a measure proscribing alcohol and tobacco, and that such

a measure would probably be unenforceable if passed. Such a phenomenon, which is probably true, speaks of neither the strong recognition of the citizens' rights to privacy and liberty for it is equally true that it would probably not be politically possible to muster the necessary votes to repeal AS 17.12.150 with respect to Cannabis Sativa L.

IV. CRUEL AND UNUSUAL PUNISHMENT

A. The state argues that since petitioner has not been sentenced he cannot raise the issue of a cruel and unusual punishment.[5] Such a narrow reading of this important provision of the Bill of Rights is unsupported by the language or the known history of the constitutional provision (see Weems v. United States, 217 U.S. 349, 368-373 (1910)), and is as inconsistent with the interpretive decisions of the Supreme Court as it is with common sense.

The Court in Weems, supra was at least as much concerned with the statutory scheme of penalties as with the sentence imposed. While examples can be multiplied, a few convey the flavor of the Court's constitutional concern:

> These provisions (of the statutes) are attacked as infringing that provision of the Bill of Rights . . . which forbids the infliction of cruel and unusual punishment. It must be confessed that they (the provisions of the legislation) and the sentence in this case, excite wonder in minds accustomed to

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5 Petitioner however does take heart from the state's position that probation is indicated since his "record is good" and the quantity possessed "small". (Respondent's brief p. 50).

> a more considerate adaptation of the punishment to the degree of crime. (emphasis supplied)

Weems, supra 217 U.S. at 365.

> We can now give graphic description of Weems' sentence and of the law under which it was imposed. Let us confine it to the minimum degree of the law, for it is with the law that we are most concerned.

Weems, supra 217 U.S. at 366.

The principle that statutes themselves, and not merely particular sentences imposed, can be repugnant to the cruel and unusual punishment clause of the Eighth Amendment was again forcefully applied by the Supreme Court in Robinson v. California, 370 U.S. 660 (1962).

Common sense would dictate that a statutory scheme of penalties must be challengable by themselves whether a defendant has been sentenced or not. It is not only the interest of the isolated criminal defendant, who may or may not on conviction be subjected to the maximum penalty allowed, that the Eighth Amendment protects. Rather it is the interest of society, and that of each of its members -- including potential defendants -- in assuring some degree of proportionality between the act and the consequences, which the Eighth Amendment secures.

It is true that any particular defendant may, after conviction, receive a sentence less than the maximum allowed. But society's members are "presumed to know the law" Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57 (1910), and the knowledge presumed by the law in citizens is not knowledge of the Court's discretion,

but knowledge of the maximum penalty. He is not charged with knowing, nor could he know, what judge will ultimately determine the degree of punishment, within the statutory limits, to be imposed; he is not charged with knowing, nor could he know, the factors which might influence the sentencing judge. Because he has a good record and because the quantity possessed was small, Irwin Ravin could receive probation. Because he has long hair or seems unrepentant or says the wrong words he could receive one year in jail and a thousand dollar fine. See Judge Marvin Frankel, Criminal Sentences: Law Without Order (1973). As the Supreme Court observed in Trop v. Dulles, 356 U.S. 86, 102 (1958), "It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear. . . . The threat makes the punishment obnoxious."

It seems clear that petitioner's claim is properly before the court and ripe for decision. That he must go be sentenced seems an absurd requirement for him to raise the issue that any sentence whatsoever for possession of marihuana violates the prohibition against cruel and unusual punishments.

B. The state argues "men are not hanged for stealing horses, but that horses may not be stolen". Respondent's brief, p. 54. Men, of course, are no longer hanged for any reason; however, the state apparently overlooks State v. Chaney, 477 P.2d 441 (Alaska 1970). "That horses may not be stolen" is not shorthand for

> rehabilitation of the offender into a non-criminal member of society, isolation of the offender from society to prevent criminal conduct during any period of confinement, deterrence of the offender himself after his release from confinement or other

> penalogical treatment, as well as deterrence of other members of the community who might possess tendencies toward criminal conduct similar to that of the offender, and community condemnation of the individual offender, or, in other words, reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves.

State v. Chaney, supra, at 444. Obviously, many more criteria are to be considered than preventing horse theft. People are to be considered, the nature of the offense and the offender. Indeed, appellee sets forth a good digest of recent sentencing opinions on page 53 of its brief. For possession of marihuana the fact remains that rehabilitation is not accomplished because there is nothing to rehabilitate (the legislature was clearly mistaken in giving the option of treatment in AS 17.12.020 since none does nor can exist for marihuana possession, see testimony of Heesch). Considering the harmless, non-violent nature of marihuana possession, the possessor need not be removed from society to make society feel safer, and the reaffirmation of societal norms, deterrence of harmless conduct is as relevant as penalogical cures for the common cold. Robinson v. California, 370 U.S. 660, 667 (1962).

> We thus reach the conclusion from objective scientific evidence (as to the relative harmlessness of the offense of the possession and use of marihuana) and the legislature's own punishment standards (with respect to offenses which are self-evidently much more dangerous and threatening to human being) that the punishment prescribed for the possession of marihuana is extremely disproportionate to the offense proscribed. From these objectively ascertainable standards the conclusion is inescapable that the statutory provisions involved in this case violate the prohibition against cruel and unusual punishment contained in

the Eighth Amendment to the Constitution of the United States.

United States v. Grady and Thorne, (D.C.S.C. 1974). The above decision was reversed, United States v. Thorne and Grady, (D.C. App. 1974), the appellate court stating "any party assailing the constitutionality of a statute has the heavy burden of demonstrating that it has no rational basis." id., at 846. In Alaska the standard is compelling state interest and not rational basis. Gray v. State, ___ P.2d ___, (Opinion No. 1068, Alaska, August 12, 1974); Breese v. Smith, 501 P.2d 159 (Alaska 1972); see Bush v. Reid, 516 P.2d 1215 (Alaska 1973). The opinion of the District Court in Grady and Thorne, supra, consequently remains of great persuasive effect in Alaska.

Nor does this Court's decision in Green v. State, 390 P.2d 433 (Alaska 1964 mandate any different determination. At issue there was the mandatory minimum sentence imposed for two forms of homicide. The vitality of the decision was undercut by AS 12.55.085(a) allowing probation no matter what mandatory minimum sentence was set by statute. See Fresneda v. State, 458 P.2d 134, 136 (Alaska 1969). Whatever continued vitality Green has it cannot stand for appellee's proposition that the Eighth Amendment of the United States Constitution after which our own Article I, Section 12 was patterned allows sentences systematically disproportionate to crimes. The Eighth Amendment requires and "it is a precept of justice that punishment for crime should be graduated and proportioned to offense". Weems v. United States, supra, 217 U.S. 367.

While Appellee may be correct that the criminal penalty for possession

and use of marihuana deters many from possession and using it, in fact there is no compelling reason for such deterrence and the use of a criminal sanction creates a cruel and unusual punishment for an activity that simply is not criminal.

CONCLUSION

Respondent concludes that the only reason for prohibiting the possession of a dangerous drug is to discourage its use, in the interest of the health and safety of the public. (respondent's brief p. 54). In a rational, free, and constitutional society discouragement of use is properly accomplished by education, not through use of the criminal law as emphatically stated by the National Commission on Marijuana and Drug Abuse. Respondent states that a criminal statute which is never violated is in all probability unnecessary (respondent's brief p. 56). Similarly, a criminal statute which has no rational or compelling basis, is always violated and yet enforced (see appendix) is more than unnecessary as its existence is inimicable to the continued existence of government founded upon constitutional law.

Respectfully submitted this 4th day of October, 1974.

Robert H. Wagstaff

R. Collin Middleton
Counsel for Petitioner and the
American Civil Liberties Union

(4) chlorhexadol
(5) glutethimide
(6) lysergic acid
(7) lysergic acid amide
(8) methyprylon
(9) sulfondiethylmethane
(10) sulfoethylmethane
(11) sulfonmethane
(c) Schedule III includes
(1) benzphetamine
(2) Schedule III includes unless specifically excepted or unless listed in another schedule any material, compound, mixture, or preparation containing any of the following narcotic drugs or their salts calculated as the free anhydrous base or alkaloid, in the following quantities:
(1) not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with an equal or greater quantity of an isoquinoline alkaloid of opium.
(2) not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.
(3) not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid of opium.
(4) not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active nonnarcotic ingredients in recognized therapeutic amounts;
(5) not more than 1.8 grams of dihydrocodeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active nonnarcotic ingredients in recognized therapeutic amounts.
(6) not more than 300 milligrams of ethylmorphine per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active nonnarcotic ingredients in recognized therapeutic amounts;
(7) not more than 500 milligrams of opium per 100 milliliters or per 100 grams or not more than 25 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.
(8) not more than 50 milligrams of morphine per 100 milliliters or per 100 grams, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.
(f) Schedule IIIA includes
(1) hashish,
(2) hashish oil or tetrahydrocannabinols (1:2:3 in 15 SLA 1982)

THE SUPREME COURT OF THE STATE OF ALASKA

IRWIN RAVIN,
Petitioner,
vs.
STATE OF ALASKA,
Respondent.

No. 2135

BRIEF OF RESPONDENT

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Filed in the Supreme Court of the State of Alaska this 4th day of September, 1974.

Veronica H. Knapick
~~Chief~~ Deputy Clerk

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TABLE OF AUTHORITIES

Constitutional Provisions

Statutes

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

UNITED STATES CONSTITUTION

Eighth Amendment provides:

> Bails, fines and punishments. Excessive bails shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ALASKA CONSTITUTION

Article I, Sec. 12 provides:

> Excessive Punishment. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Penal administration shall be based on the principle of reformation and upon the need for protecting the public.

ALASKA STATUTES

Sec. 65-2-4 ACLA provides:

> Punishment for Misdemeanors. That whenever, by any law relating to said Territory, an act is declared to be a misdemeanor, and no punishment is prescribed therefor, the person committing the same, upon conviction thereof, shall be punished by imprisonment in the county jail not more than one year, or by fine not more than five hundred dollars.

Ch. 53, Sec. 15, SLA 1973 provides:

> Punishment for Misdemeanors. Whenever an act is declared to be a misdemeanor, and no punishment is prescribed, the person, upon conviction, is punishable by imprisonment for not more than one year, or by a fine of not more than $500.

AS 17.12.010 provides:

> Acts Prohibited. Except as otherwise provided in this chapter, it is unlawful for a person to manufacture, compound, counterfeit, possess, have under his control, sell, prescribe, administer, dispense, give, barter, supply or distribute in any manner, a depressant, hallucinogenic or stimulant drug.

AS 17.12.150(3)(A) provides:

> "depressant, hallucinogenic or stimulant drug" means:
>
> > cannabis, psilocybin, dimethyltryptamine, lysergic acid diethylamide, and every other substance having similar physiological effects.

AS 17.12.110(a) provides:

> A person who violates a provision of this chapter relating to the possession or control of depressant, hallucinogenic and stimulant drugs, when his possession or control is for his own use, is guilty of a misdemeanor and upon conviction is punishable by imprisonment for not more than one year, or by a fine of not more than $1,000, or by both.

AS 12.55.085 as provided in pertinent part at Page 50, infra.

STATEMENT OF JURISDICTION

The State of Alaska accepts respondent's jurisdictional statement.

TABLE OF TRANSCRIPT REFERENCES

The transcribed record in this case is quite extensive, and is divided into a number of small volumes rather than a few large ones. In order to avoid both confusion and lengthy citations to the transcript, the State in this brief has made reference to specific testimony using transcript volume numbers assigned as follows:

VOL. NO.	DESCRIPTION
I	H & M Court Reporting "Transcript of Proceedings" dated May 2, 1973, of 107 pages.
II	H & M Court Reporting "Transcript of Proceedings" dated May 2, 1973, of 108 pages.
III	H & M Court Reporting "Transcript of Proceedings" dated May 3, 1973, of 28 pages.
IV	State of Alaska "Transcript of Evidentiary Hearing and Motion to Dismiss (Excerpt)" dated May 3, 1973, of 70 pages.
V	H & M Court Reporting Transcript, Cross-Examination of Joel Fort, of 57 pages.
VI	H & M Court Reporting transcript, testimony of Lester Grinspoon, of 136 pages.
VII	H & M Court Reporting transcript, testimony of Sanford Feinglass, of 146 pages.
VIII	H & M Court Reporting "Transcript of Proceedings" dated May 5, 1973, of 29 pages.

VOL. NO.	DESCRIPTION
IX	R & R Court Reporters "Transcript of Testimony of David Powelson, M.D., before the Hon. Dorothy Tyner", dated June 21, 1973.
X	H & M Court Reporting "Transcript of Proceedings" dated June 22, 1973, of 94 pages.
XI	State of Alaska "Transcript of Proceedings Vol. I of III," dated June 22, 1973--Pages 3-194.
XII	State of Alaska "Transcript of Proceedings Vol. II of III," dated June 25, 1973--Pages 197-362.
XIII	State of Alaska "Transcript of Proceedings Vol. III of III," dated June 26, 1973--Pages 365-429.
XIV	H & M Court Reporting "Transcript of Proceedings," incorrectly dated May 25, 1973, 94 pages.

STATEMENT OF THE CASE

The Legislature of the State of Alaska has prohibited the possession of the psychoactive drug cannabis or marijuana, including its possession for private, personal use. The offense is a misdemeanor, and carries a common misdemeanor penalty: a fine of up to $1,000, a jail term of up to one year, or both. Pursuant to this statute, petitioner Irwin Ravin has been charged.

By means of a motion to dismiss before trial, Ravin has raised the issue of the constitutionality of Alaska's marijuana statute, claiming that the possession of marijuana for personal use by adults may not be prohibited.

Evidentiary hearings were conducted, and a voluminous body of expert testimony was introduced by both parties.[1] Evidence was presented on the chemical nature of

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[1] Although the evidence presented to the court below was unusually extensive in scope, it is not correct to say, as petitioner claims, that "There are no known facts concerning marijuana that were not presented to the court and which are not contained in the transcript and record. New research is constantly being done and new facts, or possible facts, are constantly coming to light." E.g., "Pot and Sexuality," Newsweek, April 29, 1974 at 57 (effects on male hormones, sperm count, etc.), commenting upon Kolodny, et al, Depression of Plasma Testosterone Levels After Chronic Intensive Marijuana Use, The New England Journal of Medicine, April 18, 1974 at 872.

marijuana and its principal psychoactive ingredients, Delta-8 and Delta-9 tetrahydrocannabinol,[2] its effects upon the mind, upon the body and upon the user's performance as a member of society. The cultural and social patterns of the use of the drug both in Alaska and elsewhere were also explored. Evidence was introduced to the effect that various groups, including the Alaska State Medical Association, had recommended that criminal penalties, at least for private use, be removed.[3]

The evidence concerning marijuana's potential for social harm is, to say the least, in conflict. As the

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[2]The two most active ingredients of cannabis were referred to by most witnesses according to the nomenclature which denominates them as Delta-8 and Delta-9 tetrahydrocannabinol. One defense witness, the psychoanalyst Lester Grinspoon (VI Tr. 3) used a different system of nomenclature to refer to the same substances (VI Tr. 9). Some of the other cannabinols found in the marijuana plant may be active, and some are definitely inactive, but these two substances, so far as is now known, are the principal intoxicants. Ibid. See Paton, Statement Before the United States Senate Internal Security Subcommittee at 1 (May 16, 1974).

[3]The Medical Association's resolution was apparently passed by one vote (II Tr. 19) after an initial tie, which was broken by disqualifying one "no" voter for nonpayment of dues. (X Tr. 91). The Association also passed, almost unanimously, a resolution disapproving the use of marijuana (X Tr. 90).

district court stated:

> The evidence presented at the hearing clearly indicates that there exists a real controversy in the scientific community regarding the effects of the use of marijuana, including mental, physical and social consequences.

Opinion of the District Court at 12. For example, the existence of a marijuana-related "amotivational syndrome" was denied by defense witness Joel Fort (IV Tr. 57-59); Dr. Grinspoon stated that it was "certainly a possibility" although he apparently doubted that the effect was permanent (VI Tr. 38), and Dr. Gabriel Nahas was quite sure that the syndrome did occur, and, in his opinion, was caused by prolonged heavy use of the drug (XI Tr. 156).[4] Dr. Fort also stated chat marijuana does not cause a physical tolerance to develop in the user (IV Tr. 38); Dr. Nahas testified that it did (XI Tr. 29-31). The controversial phenomenon of "reversed tolerance" has been explained in various ways (XI Tr. 53-54), and its very existence has also been called into question (XI Tr. 120).[5] Dr. Nahas testified that

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[4] Other authorities have agreed. N. Bejerot, Statement to the United States Internal Security Subcommittee on the Physical, Psychological Senate and Social Consequences of Cannabis Use at 3.

[5] The weight of evidence seems to be that such a phenomenon does exist. Recent r[illegible]a[illegible] would indicate that Dr. Powelson's explanation of it, to [illegible]ect that it is caused by the accumulation of the d[illegible]he body (IX Tr. 29), may be substantially correct. [illegible]. Statement Before the United States Senate Internal [illegible] Subcommittee at 3-4 (May 20, 1974).

cannabis has been shown to be related to chromosonal breakage in man (XI Tr. 109-11); Dr. Feinglass testified that this appeared unlikely, although there were a number of conflicting reports (VII Tr. 117).[6] There do exist, apparently, animal studies indicating that fetal damage may occur. W. Paton, Statement Before United States Senate Internal Security Subcommittee at 3 (May 16, 1974). (Fetal death and abnormality observed in three species of animals.) Although defense witnesses testified that there was no truth to the theory that the use of marijuana leads to the use of other drugs, including narcotics (e.g. IX Tr. 55-57), there

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[6] The author of one of these studies, Dr. Morton A. Stenchever, has stated:

> In conclusion, we feel our data have demonstrated that there is an increased chromosone breakage rate in users of marijuana and that this apparently is not related to the extent of use of the drug, as light users had about the same damage rate as did heavy users. We have not demonstrated only between marijuana use and an increase in fetal damage or fetal loss, in mutagenesis or in the increased incidents of cancer. We have demonstrated a need to identify the agent in marijuana which causes chromosone damage and our data would suggest that further studies in both humans and animals should be undertaken to determine if indeed this agent is capable of damaging fetuses, causing an increased mutation rate and possibly being related to the development of neoplasms.

M. Stenchever, Statement Before United States Senate Internal Security Subcommittee at 6 (May 16, 1974).

does appear to be a statistical relationship between marijuana use and the abuse of other drugs (XI Tr. 28, 83-90). Even the generally agreed-upon statement that cannabis does not cause a physical dependence and abstinence syndrome (withdrawal symptoms) has been challenged.[7]

Amid all of the controversy, certain facts appear to be fairly well agreed. Cannabis or marijuana is a psychoactive drug. It is not harmless, and its use, and particularly continuous heavy use, is attended by certain risks, particularly to the younger user. It adversely affects the user's ability to operate an automobile; it is capable of precipitating a psychotic reaction, at least in individuals who are predisposed toward such reactions. The "at risk" population in this regard cannot be determined, since the number of such people abroad in society is unknown (VI Tr. 50-52). Although it has been used in other countries for a long period of time, its introduction into American society as a psychoactive drug used by a significant percentage of the population is quite recent, and prolonged

[7] See Kaymakcalan, Physiological and Psychological Dependence on THC in Rhesus Monkeys, in Paton and Crown, Cannabis and Its Derivatives, 142 (1972).

heavy use by Americans, particularly of the stronger forms of the drug, is still relatively rare.[8]

Having received its evidence, the district court in a written opinion denied defendant's motion to dismiss. A petition for review was then taken to the superior court, and the decision of the trial court was affirmed. This petition followed.

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[8] The extent to which this rarity is due to the current social policy of prohibiting possession of cannabis is, like almost everything else about this drug, a debatable question. A study of the incidence of intravenous drug abuse in Sweden, however, where the legal policy toward dangerous drugs was twice radically altered during the 1960's, would appear to indicate that the current policy is more effective than its opponents believe.

> The study comparing drug abuse and drug policy showed that during a liberal and permissive period of drug policy intravenous abuse accelerated. On a return to a traditional restrictive policy in 1967, the acceleration was checked, and when an extra restrictive policy was introduced with a police offensive on the drug trade in 1969, the rates of abuse fell in this study.

N. Bejerot, Statement Before the United States Senate Internal Security Subcommittee, supra at 5.

ARGUMENT

Introduction: Judicial review and the role of the Legislature

The power and duty of the courts "to pass on the validity of legislation is now too much part of our constitutional system to be brought into question." American Federation of Labor v. American Sash & Door Co., 335 U.S. 538, 556-557, 93 L. Ed. 222, 233 (1949) (Frankfurter, J., concurring). "But the judicial function exacts considerations very different from those which may determine a vote" in the legislature, or the decision of a governor to sign or veto a bill. United States v. Lovett, 328 U.S. 303, 319, 90 L. Ed. 1252, 1261 (1946) (Frankfurter, J., concurring). The power of judicial review is not the power "to set right that which is wrong," Brief for Petitioner at 10, but is instead the power, and the correlative duty, to strike down enactments of the people's duly elected representatives only when those enactments clearly contravene the commands of the Constitution.

"Prominence is given to the power of the Legislature to define crimes and their punishment," Weems v. United States, 217 U.S. 349, 378, 54 L. Ed. 793, 803 (1910), for under our democratic political system, the Legislature, directly

responsible to the people, is entrusted with the primary power to define social policy.

> The judicial process is too principle-prone and principle-bound--it has to be, there is no other justification or explanation for the role it plays. It is also too remote from conditions, and deals, case by case, with too narrow a slice of reality. It is not accessible to all the varied interests that are in play in any decision of great consequence. It is, very properly, independent. It is passive. It has difficulty controlling the stages by which it approaches a problem. It rushes forward too fast, or it lags; its pace hardly ever seems just right. For all these reasons, it is, in a vast, complex, changeable society, a most unsuitable instrument for the formation of policy.

Bickel, The Supreme Court and the Idea of Progress 175 (1970).[1] The importance of remembering these principles is underscored by the very independence of our judiciary which is so necessary for the functioning of the constitutional system, for "the province and duty of the judicial department to say what the law is," Marbury v. Madison, 1 Cranch 137, 177, 2 L. Ed. 60, 73 (1803), necessarily includes the responsibility

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[1] As one respected judge has written:

> It is folly and a contradiction of the teachings of history to believe, whatever the defects of the legislative institution, that democracy can be preserved without legislative primacy in a people-elected and a people-responsive delegate legislature.

C. Breitel, The Lawmaker, 65 Colum. L. Rev. 749, 762 (1965).

to define its own powers. Petitioner urges, in effect, that this be done as broadly as possible, and that this court must now take upon itself what is normally a legislative function: that of deciding a strongly contested political controversy over the State's fundamental policy toward the drug marijuana; a question which has been loudly and not always responsibly debated in public and in private by the proponents of both sides. The State replies that that issue should properly be determined by the people's elected representatives. The court's decision of this cause will have far-reaching effects, not only upon the marijuana controversy, but also upon the future course of legislative power in Alaska. Your respondent asks only that it be grounded firmly upon constitutional principles, with due regard for the principle of separation of powers. For as one of our greatest jurists has said,

> Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

Northern Securities Co. v. United States, 193 U.S. 197, 24 S. Ct. 436, 468 (1904) (Holmes, J., dissenting).

ARGUMENT

I

THE RIGHT TO PRIVACY DOES NOT PRECLUDE PROHIBITION OF MARIJUANA.

A. Where substantial evidence exists from which a compelling state interest could be found, the courts should defer to the legislature.

A perusal of petitioner's brief would leave the reader with the impression that there is no scientific evidence whatever indicating that marijuana is in any way dangerous to anyone. In fact, of course, this is not the case. As has been shown supra, the expert testimony and scientific publications presented to the court below are in sharp conflict on almost every aspect relating to the social necessity to prohibit the possession of cannabis. The only areas of relatively complete agreement among the experts would seem to be embodied in the statements that (1) marijuana is not harmless, and (2) its use does not directly provoke in the user the commission of dangerous anti-social acts.

Thus, this case differs widely from the situation presented in such cases as Griswold v. Connecticut, 381 U.S. 479, 14 L. Ed. 2d 510 (1965), in which the basic controversy is the legal weight to be accorded the State's claimed

interest, rather than the actual nature and effects of the object of prohibition.

If we are to assume that within the right of privacy provided by Art. I, Section 22, of the Alaska Constitution, there is a "fundamental" right to "the ingestion of food, beverages or other substances," Gray v. State, Op. No. 1068 at 9 (Alaska, August 12, 1974), and that a "compelling state interest" is required before any state regulation may touch upon the subject, the question of the nature and amount of evidence necessary to establish such an interest arises. In Breese v. Smith, 501 P.2d 159, 174 (Alaska 1972), that question was expressly left open.

If the State is required to prove by some absolute or nearly absolute standard that it is compelled to prohibit or limit the possession of an ingestible substance, there is probably no regulation affecting the ultimate consumer of any such substance which could stand, for "experts" can be found to testify that it would be wise social policy to legalize, or at least to "decriminalize," the possession of almost anything, including LSD and heroin.[1] In the area of regulation of food, drugs and poisons, the State would indeed be in the position envisaged by Mr. Chief Justice

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[1] See testimony of Joel Fort, V Tr. 23-25.

Burger in Dunn v. Blumstein, quoted by Mr. Justice Irwin of this court in Breese v. Smith, 501 P.2d at 177.[2] Yet to fail to regulate an ingestible substance is to legalize it, and thus the Legislature would be faced with a forced option in all such matters, despite the fact that "The basic objective of government is to protect and promote the health, safety and general welfare of the people." Suber v. Alaska State Bond Committee, 414 P.2d 546, 551 (Alaska 1966).

A far more workable approach is that taken to a similar question by the United States Supreme Court in Paris Adult Theatre vl Slaton, 413 U.S. 49, 37 L. Ed. 2d 446 (1973). There the Court, working in the delicate area of censorship and freedom of communication, was faced with an argument to the effect that there were no scientific data conclusively demonstrating that exposure to pornography had an adverse

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> Some lines must be drawn. To challenge such lines by the 'compelling state interest' standard is to condemn them all. So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection.

405 U.S. 330, 31 L. Ed. 2d 274, 296 (1972).

social effect, and that therefore regulation of obscene films and literature was not permissible. The court rejected this contention, and stated that

> 'We do not demand of Legislature's scientifically certain criteria of legislation.' Noble State Bank v. Haskell, 219 U.S. 104, 110 [55 L. Ed. 112, 31 S. Ct. 186]. Although there is no conclusive proof of a connection between anti-social behavior and obscene material, the Legislature of Georgia could quite reasonably determine that such a connection does or might exist.

413 U.S. at 60-61, 37 L. Ed. 2d at 459.

It is, of course, recognized that in Paris Adult Theatre, the court was not dealing directly with a requirement that a "compelling state interest" be found, for neither the first amendment nor "penumbral" privacy protects the dissemination of obscene material. However, the court went on to say:

> From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. Such assumptions underlie much lawful state regulation of commercial and business affairs. . . . The same is true of the Federal securities, anti-trust laws and a host of other Federal regulations. . . . On the basis of these assumptions both Congress and State legislatures have, for example, drastically restricted associational rights by adopting anti-trust laws, and have strictly regulated public expression by issuers of and dealers in securities, profit sharing

> "coupons," and "trading stamps," commanding what they must and may not publish and announce. . . . Understandably those who entertain an absolute view of the First Amendment find it uncomfortable to explain why rights of association, speech, and press should be severely restrained in the market place of goods and money, but not in the market place of pornography.

413 U.S. at 61-62, 37 L. Ed. 2d at 459-60.

It is submitted that Paris Adult Theatre points the way toward a resolution of any difficulty which may be encountered in enunciating a standard of review in cases such as that at bar. For if first amendment rights may be limited on the basis of "unprovable assumptions" relative to economic effects, surely the Legislature may limit to some degree the right of privacy in pursuit of its "primary objective" of protecting the public health and safety in a case where there is substantial evidence indicating the existence of a compelling state interest, even though that evidence is contradicted.

B. The evidence supports a finding of a compelling state interest.

The State has a compelling interest in the protection of the health of its citizens. As previously noted, this court has described that interest as a basic objective of government, Suber v. Alaska State Bond Committee, supra. One well-known commentator has stated:

> One of the most important societal interests is that of safeguarding and protecting the public health and it can be expected to prevail over most other interests.

Antieau, Modern Constitutional Law, Section 2.2 (1969). In the interests of health, religious freedom has been abridged, Braunfeld v. Brown, 366 U.S. 599, 6 L. Ed. 2d 563 (1961); see Application of President and Directors of Georgetown College, 331 F.2d 1000 (D.C. Cir. 1964); United States v. George, 239 F. Supp. 752 (D. Conn. 1965); Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson, 201 A. 2d 537 (N.J. 1964), and children have been protected over the objection of their legal guardians, even when those objections were religious in nature, Anderson v. State, 65 S.E. 2d 848 (Ga. 1951); Commonwealth v. Green, 168 N.E. 101 (1929); State v. Drew, 192 A. 629 (N.H. 1937).

The position of public safety is similar, Suber v. Alaska State Bond Committee, supra, and the State clearly

has the power to prevent a citizen from inflicting harm upon himself, either for his own good, see State v. Mele, 247 A. 2d 176, 178 (N.J. 1968), or to prevent him from possibly becoming a burden upon society. Colvin v. Lombardi, 241 A. 2d 625, 627 (R.I. 1968); People v. Newhaouse, 287 N.Y.S. 2d 713, 715 (N.Y. 1968). In Kingery v. Chappel, 504 P.2d 831 (Alaska 1972), this court said:

> Because of the compelling state interests in providing for safety of the travelling public, we are not confronted with an invasion of privacy issue such as was present in Breese v. Smith. . . .

Id. at 835 n.6 (emphasis added).

There is substantial evidence in the record indicating that the use of marijuana presents hazards to the public health, and that the long-term use of the drug, particularly in its more concentrated forms, presents additional hazards. In its Memorandum in Opposition to Motion to Dismiss in the District Court at 15-19 (filed September 18, 1973), the State listed a large number of the actual and potential harmful effects from the consumption of cannabis as reflected in the record. The State will not here repeat that list, for the memorandum is before the court; the court is urged to examine it carefully. In addition, a number of other points should be mentioned.

It is interesting to note that the State's witness, Dr. Powelson, originally believed that marijuana was not harmful, and has said so in print (IX Tr. 5). After dealing with patients who used the drug over a number of years in psychotherapy, he came to different conclusions (IX Tr. 6). In the field of mental health, Dr. Powelson's observations lead him to believe that even small amounts of the drug affect the thinking process to an observable degree for as long as 48 hours, that regular use increasingly impairs the memory and judgment and accentuates whatever pathological thinking is already present. Further, if use is continued over a period of years, these changes become less and less reversible by mere cessation of use (IX Tr. 24-25, 30-32). He also feels that, because late adolescence and early adulthood are periods of great instability in the lives of many, the drug is more dangerous to the young (IX Tr. 40-41), and further that it is particularly dangerous to children and younger adolescents (IX Tr. 47-49).

Dr. Gabriel Nahas, an anaesthesiologist with further background in physiology and pharmacology, who has conducted lengthy research on marijuana and other drugs acting on the central nervous system (X Tr. 3-4), and has

been consultant to the French Ministry of Health on marijuana and drug abuse since 1969 (X Tr. 9), testified not only to his own research on the effect of tetrahydrocannabinol on the immune systems of the body (XI Tr. 16-24), but also on other effects of the drug. His principal concern was with the use of the stronger preparations such as hashish (XI Tr. 25-28), and in particular with long-term users, (XI Tr. 115, 123, 156), due apparently to his study of other cultures where chronic, long-term use is endemic.[3] In such users, a physical tolerance develops (XI Tr. 29-31, 123), the controversial "amotivational syndrome" can occur (XI Tr. 156), and one study has demonstrated an association with various respiratory ailments, decrease in respiratory function and the presence of abnormal bronchial tissue of the type associated with lung cancer, such as is observed in heavy cigarette smokers (XI Tr. 41-42).[4]

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[3] See Nahas, Marijuana - Deceptive Weed 19-24 (1973).

[4] The same author has indicated that hashish abuse in conjunction with alcohol is particularly hazardous (XI Tr. 167). There are animal studies which indicate that THC potentiates the action of certain other drugs. Kaymakcalan, Physiological and Psychological Dependence on THC in Rhesus Monkeys, in Paton and Crown, Cannabis and Its Derivatives 142, 145 (1972).

With relation to public safety, both State's and defendant's witnesses were concerned with the effect of cannabis upon the ability to drive. While the scientific evidence in this area is not entirely in agreement (IX Tr. 67), there are definite adverse effects "like with alcohol, barbituates, etc." (XII Tr. 329.) It is no answer to this problem to state that "driving under the influence" could be specifically prohibited, as with alcohol, because there is no reliable test at present which could be used to prove cannabis intoxication in court (XII Tr. 330). No valid information is as yet available on the present number of deaths and injuries on the highway caused by marijuana intoxication (II Tr. 78). It is apparent, however, that because of the lack of a usable test for such intoxication, "decriminalizing" private possession of the drug for personal use would amount to legalization of its use by drivers, and that whatever the present level of cannabis-caused accidents is, that level could be expected to increase. The same thing can be said, of course, for the effect of cannabis intoxication upon other potentially hazardous activities, such as the use of firearms, power tools, machinery, etc. We are a mechanized society, and the interaction of mechanization and alcohol has already created quite a sufficient hazard. To relax our control

over an additional drug can only increase that hazard.[5]

Among all the conflicting evidence, it is worthy of note that no witness, not even the proponents of "decriminalization," would say that cannabis is harmless. And it is not harmless. It is a psychoactive drug with definite abuse potential, and with at least the capability of becoming a major obstacle to public health and safety. We live today in a society in which the problem of drug abuse has achieved frightening proportions. The elected representatives of that society have so far chosen not to remove the State's deterrent hand from the drug marijuana, even in the context of private possession. The district and superior courts have found the evidence below sufficient to justify that action. Respondent urges this court, likewise, to declare that the people of Alaska are not constitutionally required to welcome into their midst yet another mind-altering chemical.

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[5] One study in which cannabis was compared with alcohol in its effect on driving skills has concluded that

> Cannabis has such pronounced effects on skills and judgments essential for driving to make motoring during cannabis intoxication a hazardous undertaking.

Rafaelsen, Cannabis and Alcohol: Effects on Simulated Car Driving and Psychological Tests in Paton and Crown, Cannabis and Its Derivatives 184, 189 (1972). In some aspects, the effects of cannabis were found to be more pronounced than those of alcohol. Id. at 185-88.

C. Is there a "fundamental" right to possess marijuana?

Up to this point, it has been assumed that the "fundamental" right to privacy implies a right to possess substances such as marijuana, and that therefore a "compelling state interest" must be shown in order to justify the State's prohibition of the drug. Respondent now, however, propcses to examine some of the implications of that position.

Under the Federal Constitution, the existence of a limited right to privacy is well-established. See Griswold v. Connecticut, 381 U.S. 479, 14 L. Ed. 2d 510 (1965). Recent decisions of the United States Supreme Court, however, clearly suggest that neither this right nor the Fourteenth Amendment concept of "liberty" make "fundamental" any right which the individual may have to ingest harmful or potentially harmful substances into his body. In Paris Adult Theatre I v. Slaton, 37 L. Ed. 2d 446 (1973), the Court stated:

> It is argued that individual "free will" must govern, even in activities beyond the protection of the First Amendment and other constitutional guarantees of privacy, and that Government cannot legitimately impede individual's desire to see or acquire obscene plays, movies, and books. We do indeed base our society on certain assumptions that people have the capacity for free choice. Most exercise of individual free choice--those in politics, religion and expression of ideas--explicitly protected by the

> Constitution. Totally unlimited play for free will, however, is not allowed in ours or any other society. We have just noted, for example, that neither the First Amendment nor "free will" precludes States from having "blue sky" laws to regulate what sellers of securities may write or publish about their wares. . . . Such laws are to protect the weak, the uninformed, the unsuspecting, and the gullible from the exercise of their own volition.

Id. at 460-61.

> Our prior decisions recognizing a right to privacy guaranteed by the Fourteenth Amendment included "only those personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.'" . . . This privacy right encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing. . . . Nothing, however, in this Court's decision intimates that there is any "fundamental" privacy right "implicit in the concept of ordered liberty" to watch obscene movies in places of public accommodation.

Id. at 462 (citations omitted). In Roe v. Wade, 410 U.S. 113, 35 L. Ed. 2d 147 (1973), the Court said:

> In fact, it is not clear to us that the claim asserted by some amici that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. . . .

410 U.S. at 154; 35 L. Ed. 2d at 177. Nor does Stanley v. Georgia,

394 U.S. 557, 22 L. Ed. 2d 542 (1969) assist petitioner's argument, for in that decision the court specifically disclaimed any limitation on the power of government to punish the possessionoof narcotics or other private acts as crime. Id. at 568 n.11, 22 L. Ed. 2d at 551.

Turning to state law, it is submitted that the case of Breese v. Smith, 501 P.2d 159 (Alaska 1972) likewise does not suggest a "fundamental" right to use psychoactive drugs. There this court found that the "spectre of governmental control of the physical appearances of private citizens, young and old, is antithetical to a free society, contrary to our notions of a government of limited powers, and repugnant to the concept of personal liberty." Id. at 169. Surely, however, that cannot be said of the time-tested and well-established governmental practice of insuring the health and safety of its citizens by regulating the use of harmful and potentially harmful substances.

Recently, however, this court decided the case of Gray v. State, Op. No. 1068 (Alaska August 12, 1974). In that opinion, Article I, Section 22 of the Alaska Constitution was interpreted for the first time. That section provides:

> The right of the people to privacy is recognized and shall not be infringed.

This court noted that there wasnno available recorded history

of this recent amendment, but suggested that "clearly it shields the ingestion of food, beverages or other substances." Gray v. State, supra, at 9. The court further stated:

> But the right of privacy is not absolute. Where a compelling state interest is shown, the right may be held to be subordinate to express constitutional powers such as the authorization of the legislature to promote and protect public health and provide for the general welfare.

Id. at 9-10.

The implications of this language are vast, and vastly troubling. If there is a "fundamental" right to ingest all "substances" and a "compelling state interest" in the strict sense must be shown in order to justify regulation, does it then follow that one has a constitutional right to abuse barbituates? LSD? Heroin? Is there a right to commit suicide by the ingestion of poison? Is there a right to drink alcohol in any manner one chooses? If so, is AS 47.37.190 (Involuntary Commitment of Alcoholics) constitutional? Since children too have fundamental rights, Breese v. Smith, 501 P.2d 159, 167 (Alaska 1972), can the state prohibit a minor from possessing or consuming alcohol, which petitioner's witnesses characterized as the worst and most abused drug in America? Medicinal drugs, too,

are "substances." Can the state prohibit their sale without prescription, or is every man now his own physician?[5]

The root of the problem lies, in respondent's view, in the bipolar concept of "rights" to which the appellate courts of this country generally subscribe. That is, a right is either "fundamental" or it is not. If it is "fundamental," any encroachment upon it is viewed with "strict scrutiny" and must be justified by a "compelling state interest," a standard which often seems impossible to meet. If, on the other hand, the right is not "fundamental," the state may infringe it upon any "rational basis." This polarization does justice neither to the state nor to the citizen. In a recent law review article, the problem has been stated very well:

> The fundamental rights doctrine, as it has been developed by the Court, lacks coherent and objective underlying principles. It therefore seems impossible to determine, other than by judicial fiat, just what rights should be treated

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[5]The State recognizes, of course, that a constitutional distinction can be drawn between the sale of something and its private use. Compare Paris Adult Theatre I v. Slaton, supra, with Stanley v. Georgia, supra. An argument of some logic can be made, however, for the proposition that if there is a constitutional right to use a substance, there is a concomitant right to obtain it, and the fact that Gray, supra was a sale case would seem to indicate that the problem is real. If so, "decriminalization" of marijuana may be a red herring, and "legalization" the constitutionally foreordained result.

as fundamental and as justifying strict review. The threat of judicial legislation is thus raised and, without a showing of principles, cannot be satisfactorily allayed.

There is also what might be called the cannonization problem. Declaring a right to be fundamental appears to give the right an infrangible sanctity, for state authority cannot regulate or burden its exercise without showing a compelling interest to do so. Most "rights" are just categorical names for recognized legal protection of a variety of similar or related human interests. The interests subsumable under any given right may range from the trivial to the extremely important. If the right is declared fundamental, the state may be precluded from regulating even the trivial instances of its exercise. On the other hand, strained analysis may be required to show that the claimed right is not really an issue, or that the state actually has a compelling interest, or that the exercise of the right is not really burdened in the particular case. Declaration of a right as fundamental, therefore, without an attendant statement as to wherein it is fundamental, generates severe analytic problems and precludes judgments responsive to the real nature of the rights and interests involved.

The fundamental rights doctrine also does not solve the problems of a double standard of judicial review, a standard felt to be correct when first amendment or minority right are involved, but never even then satisfactorily justified on a sound jurisprudential basis. The winner-take-all result of the double standard encourages the upgrading or downgrading of interests so that they may fit into the proper category, but in doing so does not do justice to the interests under review. On the other hand, if justice is to be done, there may be a

> watering down of both the rational basis and the strict scrutiny standards of review. When this happens, it screens a more subtle form of judicial legislation and, more importantly, fails to give principle guidance to the lower levels of our vast legal system.
>
> Finally, the current fundamental rights doctrine creates an anomaly in our constitutional life under which interests which may be of little importance to many, such as travel, are given extreme protection, while interests of extreme importance to virtually all, such as opportunities to work, do not receive special protection. . . . But contemporaneous pressures are generated to distill constitutional protection for highly valued human interests from out of the often times vague generalities of the Constitution. The fundamental right of privacy, for example, was found in that way. But the creation of constitutional rights by implication may be the very substance of judicial legislation. Thus, the fundamental rights doctrine generates constitutional action and reaction, expansion and retrenchment--all without ever having resolved the basic intellectual and jurisprudential issues.

G. Goodpaster, The Constitution and Fundamental Rights, 15 Ariz. L. Rev. 479, 505-06 (1973). Professor Goodpaster reasons that the chief issue presented by all this is not what the fundamental rights are, but "whether there shall be judicial review and how much judicial review there shall be." Id. at 513. He concludes that only a few very basic rights justify full-fledged strict review, and that, in all other cases, a sort of balancing test is needed.

In the recent case of Roe v. Wade, supra, the United States Supreme Court appears to have engaged in something resembling such a process. Consider the following passage:

> The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some amici that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the court's decisions. The court has refused to recognize an unlimited right of this kind in the past. . . .
>
> We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.

410 U.S. at 154, 35 L. Ed. 2d at 177-78. Although the Roe decision does speak in terms of compelling state interests, it is apparent that some sort of balancing process is going on. The State submits that if a similar process is applied to the right to ingest "substances," considered against the State's

traditionally broad power and important interests in public health and safety, it will be seen that the State must have the power to forbid the ingestion of harmful or potentially harmful substances, and that, given the evidence of its harmfulness discussed supra, the "right" to ingest marijuana is not "fundamental" in the strict sense at all, although the right to eat the foods of one's choice may well be.

II

THE UNEQUAL APPLICATION QUESTIONS

A. The Legislature need not prohibit tobacco and alcohol in order to prohibit marijuana.

Defendant has argued that to prohibit the possession of marijuana without at the same time prohibiting the possession of tobacco and alcohol is violative of the principle of equal protection of the law. Such arguments have been dealt with in two recent Federal cases. In United States v. Maiden, 355 F. Supp. 743 (1973), an opinion which also dealt with petitioner's second contention concerning unreasonable classification, the court stated:

> Next defendants attack as arbitrary the provisions of federal law that accomplish the proscription of marijuana distribution. They contend the provisions are irrational in omitting alcohol and nicotine, and providing equivalent penalties for marijuana and for such drugs as amphetamines, barbituates and LSD, and in classifying marijuana in Schedule I along with heroin.
>
> The premise of defendant's first two contentions is that the Equal Protection Clause requires legislators to scale penalties in proportion to the danger of the conduct penalized. The premise is not sound. In setting penalties, Congress is not limited to an assessment of harm. Even if barbituates and amphetamines pose greater health hazards than marijuana, Congress is entitled to conclude that

> the pervasiveness of marijuana distribution justifies an equivalent maximum penalty or that such penal purposes as general deterrence will be appropriately served by such a penalty. Nor is Congress required to take an all or nothing approach to drug regulation. Marijuana, however slight a health hazard it may be to the total population, is a drug that can cause euphoria at low doses and hallucinogenic reaction at higher doses among most users, and a severe psychological disturbance among a few users. Congress can rationally conclude that interstate traffic in such a drug should be prohibited by a maximum five-year penalty. This judgment is not rendered irrational because a similar penalty is established for distribution of more dangerous substances, nor because other drugs with capacity for harm are not prohibited. The legislative judgment concerning alcohol and nicotine may well have taken into account the degree to which their dangers are known, the adverse consequences of prohibition, and the economic significance of their production. Whether such factors should lead to similar judgments concerning marijuana is within legislative discretion.

Id. at 747-48.[1]

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[1] As pointed out in respondent's trial memorandum, this case is particularly significant because the court in reaching its conclusion had the aid of expert testimony from Doctors Grinspoon and Fort, who testified for the defendant in this case.

In United States v. Kiffer, cited in respondent's trial memorandum at 14-15, the court again considered the question of the necessity to prohibit alcohol and tobacco, and concluded:

> If Congress decides to regulate or prohibit some harmful substances, it is not thereby constitutionally compelled to regulate or prohibit all. It may conclude that half a loaf is better than none.

477 F.2d 349, 355 (2d Cir. 1973).

When weighing a legislative decision to adopt a policy of legislating upon one subject and not upon another, perhaps similar one, it must be remembered that

> [m]atters of policy . . . are by definition matters which demand the resolution of conflicts of value, and the elements of conflicting values are largely imponderable. Assessment of their competing worth involves differences of feeling; it is also an exercise in prophecy. Obviously the proper forum for mediating a clash of feelings and rendering a prophetic judgment is the body chosen for those purposes by the people.

American Federation of Labor v. American Sash & Door Co., supra, (Frankfurter, J. concurring). Surely one of the values which a Legislature is entitled to weigh in deciding to prohibit, or not to prohibit, a particular substance is the political feasibility of the proposed prohibition.

Although marijuana may have been used in other societies for thousands of years, in our culture alcohol and tobacco are, unfortunately, inseparably woven into the social fabric. As is well known, an attempt at prohibition of alcohol on a national scale has already failed with disasterous results. In contrast, marijuana, despite the statements of those who advocate its use, is a relatively recent newcomer upon the American scene. The Legislature may well have decided that, in view of the problems which alcohol demonstrably causes in the State of Alaska, we do not need another intoxicant freely available.

On the other hand, any rational legislator contemplating prohibition of alcohol and tobacco must realize that, (1) it would not be possible to muster the necessary votes to pass such a measure, and (2) it would in all probability be unenforceable if passed. Whatever one's political views on the question of "gun control," it is apparent that similar considerations have motivated the congressional decision to curtail severely the lawful private possession of such things as machine guns and dynamite, while leaving the regulation of sporting firearms largely in the hands of the several states. This is the sort of political judgment which legislators are peculiarly

competent to make, and which they must be permitted to make in a democratic society. To hold that, because it is not politically feasible to prohibit certain hazardous substances, it is constitutionally forbidden to prohibit others would be an exercise in absurdity, and dangerous to the concept of government by the people.

B. Alaska's classification of marijuana with other dangerous drugs is not unreasonable.

In the State of Alaska, marijuana is legislatively classified not as a narcotic, as is done in some states, see, e.g., People v. Summit, 517 P.2d 850 (Colo. 1974), nor in its own separate category, as defendant urges. Instead, it is grouped together with a number of other substances in a category called "depressant, hallucinogenic or stimulant drugs." This class includes:

> (A) cannabis, psilocybin, dimethyltryptamine, lysergic acid diethylamide, and every other substance having similar physiological effects;
>
> (B) a drug which contains barbituric acid or any of the salts of barbituric acid; or a derivative of barbituric acid which has been designated by the commissioner under Section 40 of this chapter as habit forming or dangerous;
>
> (C) a drug which contains amphetamine or any of its optical isomers; or a substance which has been designated by the commissioner as habit forming or dangerous because of its stimulant effect on the central nervous system; or
>
> (D) a drug which contains any quantity of a substance which the commissioner, after investigation, has found to have, and by regulation designates as having, a potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect. . . .

AS 17.12.150(3). Petitioner contends that this is a constitutionally irrational classification. The State submits that

such an argument is supported neither by the law nor by the evidence.

The basic legal framework in which such contentions must be placed has been discussed at length by the State in its Memorandum in Opposition to Motion to Dismiss in the district court below, as has most of the case law directly bearing on the subject of the classification of marijuana. Memorandum at 3-9. The State will not reiterate that argument here; it is enough at this point to note that the equal protection clause

> permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others,

McGowan v. Maryland, 366 U.S. 420, 425, 6 L. Ed. 2d 393, 399 (1961), and that a statutory discrimination is not to be set aside as a denial of equal protection "if any state affects reasonably may be conceived to justify it." Metropolitan Casualty Insurance Co. v. Brownell, 294 U.S. 580, 584, 79 L. Ed. 1070, 1073 (1935). It should be remembered that we are not dealing here with an inherently suspect classification such as race or national origin.[2] As the defendant's witnesses were at pains to point out, there is no particular

[2] See Goodpaster, The Constitution and Fundamental Rights, 15 Ariz. L. Rev. 480, 494 (1973).

class of society which is peculiarly identified with the use of marijuana.

Although some courts have found it unreasonable to classify marijuana as a "narcotic" drug, e.g. People v. McCabe, 275 N.E. 2d 407, 414 (Ill. 1971), other recent cases have disagreed. State v. Wadsorth, 505 P.2d 230 (Ariz. 1973); Egan v. Sheriff, 503 P.2d 16, 19 (Nev. 1972); Sanders v. State, 482 S.W. 2d 648, 651-52 (Tex. 1972). In People v. Summit, 517 P.2d 850 (Colo. 1974), the Supreme Court of Colorado, after considering a wealth of published authority on the subject, held that although the issue was "a decidedly close one," it was proper to defer to the Legislature as the forum in which to settle the issue of whether marijuana should be classified as a narcotic. Id. at 854.

Defendant cites no single case holding that marijuana cannot properly be classified with the depressant, stimulant and hallucinogenic drugs. The cases which he does cite on the classification of cannabis, all of which deal with the propriety of classifying it as a narcotic, in fact constitute better authority for the State than they do for petitioner's position. In McCabe, supra, the rationale of the court's decision was to the effect that marijuana would be more properly classified with the barbituates, LSD, etc. than with the true narcotics such as heroin, and that there was no [illegible]ional basis for

distinguishing between marijuana and the depressant, stimulant or hallucinogenic drugs. Id. at 411-14. In People v. Sinclair, 194 N.W. 2d 878 (Mich. 1972), the case arose after a statute had been passed by the State Legislature classifying possession of marijuana as a misdemeanor, and removing it from the "narcotic drug" group. Two justices were of the opinion that the "narcotic" classification, which had been in effect at the time of appellant's conviction, constituted a denial of equal protection. The most extensive opinion on the subject, that of Swainson, J., suggests that, until the effective date of the new statutes, marijuana offenses be prosecuted under the section relating to hallucinogenic drugs. Id. at 887 n.36. The separate opinion of Justice Williams upon the equal protection question does not suggest otherwise. Id. at 891.

In English v. Miller, 341 F. Supp. 714 (E.D. Va. 1972), it was indeed held constitutionally impermissible for th State of Virginia to classify marijuana as a "narcotic drug." In addition to the fact that such holdings have little if any bearing on the precise question before this court in the case at bar, it should also be noted that the value of the English opinion as Federal precedent is undermined, to say the least, by the fact that the case was reversed by

the Fourth Circuit Court of Appeals, which stated:

> Assuredly, the legislative classification inherent question was not so arbitrary and unreasonable as to deny English the full protection of the law.

English v. Virginia Probation & Parole Board, 481 F.2d 188, 192 (4th Cir. 1973).

Bearing in mind that the Constitution does not require the Legislature to scale penalties precisely in proportion to "the danger of the conduct penalized," United States v. Maiden, supra, 355 F. Supp. at 747, it is apparent from the record that there is ample evidence to justify the Alaska Legislature's inclusion of cannabis among the depressant, stimulant and hallucinogenic drugs--much of it from the mouths of defendant's own witnesses. Thus, defense witness Joel Fort, although he was of the opinion that marijuana more properly belonged in a separate category of its own (IV Tr. 43), testified that it had some of the qualities of depressant drugs, and some of the qualities of stimulant drugs (V Tr. 13), and that it was capable of producing hallucinatory experiences (V Tr. 11). He also stated that cannabis was more properly classified with the depressants and stimulants than it would be with the opiates or narcotics (V Tr. 13).[3] The psychoanalyst, Lester Grinspoon, said

[3] Dr. Fort would not, apparently, classify the hallucinogenic drugs such as LSD along with stimulants or depressants either (V Tr. 10-13).

that he would not classify cannabis as a "true hallucinogen," for the reason that it normally produces a distorted perception of something which actually exists in the environment, rather than a true hallucination, which he defined as a phenomenon in which "one believes something exists or he hears something, and, in fact, there is absolutely nothing in the reality from which this comes from." (XI Tr. 66) Despite this, he testified that the drug does have some of the traits of the hallucinogens (XI Tr. 104).

Sanford Feinglass, a pharmaceutical chemist, testified that the chemical structure of tetrahydrocannabinol was quite different from that of the other drugs in the depressant, stimulant and hallucinogenic group, and he would thus expect it to have different effects on the body (XII Tr. 36-46). He also testified, however, that THC was a psychoactive drug, and produced alterations in perception relating to time and space (XII Tr. 51), some of which it apparently shares with other drugs of the group such as LSD and mescaline (XII Tr. 105-06). He further stated that he knew of one individual in whom the ingestion of a large quantity of marijuana had produced actual hallucinations (XII Tr. 103-04). Dr. Thomas Ungerleider, a psychiatrist (XII Tr. 197) who had been a member of the National Commission on Marijuana and Drug Abuse (XII Tr. 202), also testified

that marijuana had "some sedative properties and it also has some what we call psychedelic or hallucinogenic properties." (XII Tr. 334) Thus, in a legal system which attempts to classify drugs at least in part by their effects upon the user, it would appear that the manner in which the Legislature of the State of Alaska has classified marijuana is perfectly rational, even if not pharmacologically precise.

III

CRUEL AND UNUSUAL PUNISHMENT

Section 17.12.010 of the Alaska Statutes makes it unlawful for any person to possess, except as otherwise authorized, a depressant, hallucinogenic or stimulant drug, which, of course, includes cannabis or marijuana. AS 17.12.150(3)(A). AS 17.12.110(a) provides:

> A person who violates a provision of this chapter relating to the possession or control of depressant, hallucinogenic and stimulant drugs, when his possession or control is for his own use, is guilty of a misdemeanor and upon conviction is punishable by imprisonment for not more than one year, or by a fine of not more than $1,000, or by both.

Petitioner contends that this provision runs contrary to the constitutional prohibitions against cruel and unusual punishment.[1] The State replies that, to begin with, that question is not properly before the court, and, further,

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[1] The Constitution of Alaska at Article I, Section 12, provides in pertinent part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The wording of the United States Constitution, Amend. VIII, is identical.

that the range of penalties provided by the statute is neither cruel nor unusual.

A. The issue of cruel and unusual punishment is not properly before this court.

This case is here upon petition for review, which is a proceeding in the nature of an interlocutory appeal.[2] Mr. Ravin has not yet even been convicted, much less sentenced. In the words of the State and Federal Constitutions, no punishment has been "inflicted" upon him.

In People v. Summit, 517 P.2d 850, 854 (Colo. 1974), one of the appellants advanced an argument similar to that in question here. Noting that this defendant had been given a suspended sentence and granted probation, the court refused to consider the question, quoting from People v. Stark, 400 P.2d 923, 928 (Colo. 1965):

> With reference to the argument that the several offenses defined in the statute are punishable by 'cruel and unusual punishment' we hold that until some person has been convicted of a crime and a sentence has been imposed which is then asserted to be 'cruel and unusual' there is no justiciable question presented. No one would contend that the minimum sentence provided by statute for the offenses

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[2] Alaska R. App. P. 23, 24.

> with which the defendants in error stood charged, would be 'cruel or unusual.' Generally, the matter of punishment for commissions of crime is a matter for determination by the Legislature. Where there is a wide spread between the minimum and maximum punishment, whether any particular sentence is 'cruel or unusual' is a matter to be determined under all the facts and circumstances surrounding each offense. Until the defendants in error have actually been sentenced in a 'cruel or unusual' manner, they cannot be heard to say that they or some other person might at some future time be subjected to 'cruel or unusual' punishment.

See People v. Sinclair, 194 N.W. 2d 878, 904 (Mich. 1972) (Kavanagh, J., concurring).

If the statute in question made provision for a mandatory minimum punishment such that the defendant, if convicted, could be certain of receiving at least a jail sentence of some given length "imposed without consideration for [his] individual personality and history," see People v. Lorentzen, 194 N.W. 2d 827, 834 (Mich. 1972), perhaps an argument might be made, but that is not the case here. Permissible sentences under our statute begin with a fine of one penney and no jail time at all. Further, the execution of any sentence imposed could be suspended; indeed, under the provisions of AS 12.55.085, Mr. Ravin might never

be sentenced at all.[3]

Certainly no one could argue that a sentence of probation, or a suspended imposition of sentence, or a relatively light fine constitutes cruel and unusual punishment. Yet although it does not appear in the record at bar, from the facts known to the State at this point Mr. Ravin would seem to be an excellent candidate for this type of sentence.[4]

Petitioner argues that incarceration for possession of marijuana is constitutionally impermissible.

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[3] AS 12.55.085 provides in pertinent part:

> (a) If it appears that there are circumstances in mitigation of the punishment, or that the ends of justice will be served, the court may, in its discretion, suspend the imposition of sentence and may direct that the suspension continue for a period of time. . . .
>
> * * *
>
> (e) Upon the discharge by the court without imposition of sentence, the court may set aside the conviction and issue to the person a certificate to that effect.

[4] Information on file in the office of the District Attorney, Third Judicial District at Anchorage, indicates that petitioner's prior record is good, and that the quantity of marijuana found in his possession was quite small.

Brief for petitioner at 72. But he is not incarcerated, nor has he been ordered to be incarcerated, nor is there any law requiring him to be incarcerated, nor can he even point to any facts which would indicate that he will probably be incarcerated. Under such circumstances, he has raised no issue of cruel and unusual punishment.

B. The range of penalties provided for possession of marijuana is neither cruel nor unusual.

Petitioner argues that the penalty provided for possession of marijuana in this State amounts, on its face, to cruel and unusual punishment. His contention actually divides itself into several sub-issues. The first question is whether a range of penalties beginning at zero and ending at one year in jail and a fine of $1,000.00 can be considered to be cruel and unusual because it is "disproportionate" to the penalties provided for other misdemeanors. At the outset, this argument encounters the opinion of this court in Green v. State, 390 P.2d 433 (Alaska 1964), which states:

> There are a number of states in which the courts have held that punishment for crime must be proportioned to the offense. Such holdings have usually been based upon the enunciation of the restriction in the respective state constitutions that penalties

> shall be proportioned to the nature of the offense. The Alaska Constitution, though of recent origin, contains no such restriction, nor does one appear in the Federal Constitution. We conclude, therefore, that in this jurisdiction punishment for crime need not be strictly proportioned to the offense. Only those punishments which are cruel and unusual in the sense that they are inhuman and barbarous, or so disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice may be stricken as violating the due process clauses of the State and Federal Constitutions. Such punishments would also be void under Article I, Section 12, of the Alaska Constitution which declares that cruel and unusual punishments shall not be inflicted.

Id. at 435 (Footnotes omitted.)

The wording of the Alaska Constitution's clause concerning criminal penalties, and the development of the law of sentencing in this state since the passage of the sentence appeal statutes, indicate the continued necessity to maintain the rule of Green. Article I, Section 12, of our Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Penal administration shall be based on the principle of reformation and upon the need for protecting the public.

As this court has made clear in the cases interpreting this clause in the context of sentence review, our Constitution

does not envision "standard" penalties strictly proportioned according to the nature of the offense, considered in a vacuum. See Adams v. State, Op. No. 2105 at 9 (Alaska April 22, 1974). Instead, penalties must be tailored not only to the nature of the offense, State v. Chaney, 477 P.2d 441, 446 (Alaska 1970), but also to the circumstances under which the crime is committed, see Gordon v. State, 501 P.2d 772, 776-77 (Alaska 1972), the personality and character of the offender, Robinson v. State, 484 P.2d 686, 690 (Alaska 1971); Newsom v. State, 512 P.2d 557, 562 (Alaska 1973), his age, Gullard v. State, 497 P.2d 93, 94 (Alaska 1972), his attitude toward his offense, State v. Chaney, supra at 447, his prior criminal record and other behavior patterns, Adams v. State, supra at 9-10, etc. Given this body of law, and considering also the range of discretion which must be afforded the trial courts in their efforts to achieve the proper objectives of criminal sentencing, Nicholas v. State, 477 P.2d 447, 448-49 (Alaska 1970), it is apparent that a penalty should be held to be "cruel and unusual" only when it is barbarous in its nature, or when, considered in the context of the individual offense as committed by the individual offender, it is so disproportionate that it is "completely arbitrary and shocking to the sense of justice." Faulkner v. State, 445 P.2d 815, 818 (Alaska 1968) (Dimond, J.).

Petitioner also argues that criminal penalties for the private possession of marijuana accomplish none of the goals that this Court has set as the objectives of punishment for crime. These are:

> rehabilitation of the offender into a non-criminal member of society, isolation of the offender from society to prevent criminal conduct during any period of confinement, deterrence of the offender himself after his release from confinement or other penalogical treatment, as well as deterrence of other members of the community who might possess tendencies toward criminal conduct similar to that of the offender, and community condemnation of the individual offender, or, in other words, reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves.

Chaney v. State, supra at 444 (Footnote omitted). In order to understand the relationship of these objectives to the crime in question, it is necessary first to examine the reason why statutes such as AS 17.12.010 are enacted.

"Men are not hanged for stealing horses, but that horses may not be stolen." Similarly, the only reason for prohibiting the possession of a dangerous drug is to discourage its use, in the interest of the health and safety of the public. In such a context, the concepts of rehabilitation, deterrence both primary and secondary, and maintenance of respect for societal norms merge into

ons. Obviously, one who is neither physically nor psychologically dependent upon a drug does not need to be "rehabilitated" in the sense that a heroin addict, for instance, does. Indeed, one who "believes that the right to use marijuana is one of his fundamental constitutional rights or that it is protected by the freedom of religion" is probably not "rehabilitatable" at all.[6] Most users of marijuana, however, fall into neither of these categories. They are merely people who use this drug, which the Legislature has determined to be dangerous, because they find its effects pleasant, or because friends or acquaintances use it. Each time one of these is deterred by his brush with the law, so that in future he seeks his pleasures elsewhere, he has been "rehabilitated" to the extent necessary.

In a similar situation are those who have never tried the drug at all. If their unwillingness to do so is influenced to any significant degree by the possibility of criminal sanctions (secondary deterrence) or by a desire to live as a law abiding citizen (respect for societal

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[6] M. Dicther, Marijuana and the Law, 13 Villanova L. Rev. 851, 870 (1968), quoted in brief for petitioner at 77.

norms), then the statute is accomplishing its objectives.

Petitioner's argument that "the evidence indicates that the laws have not had any significant deterrent effect;" (Brief for Petitioner at 77) is an attempt at "the insertion of judicial conceptions of wisdom and propriety"[7] to limit "the legislative power to define crimes and fix their punishment. . . ." Weems v. United States, 217 U.S. 349, 378, 54 L. Ed. 793, 803 (1910). The question of the need to redefine social policy in light of the effect, or lack of effect, of a particular statute on the crime rate is a matter for the Legislature. In addition, such an argument fails for lack of logic. A criminal statute is enacted precisely because a significant number of citizens are ndulging in a particular type of socially undesirable behavior. Universal deterrence is not a result that can reasonably be expected of any law, and a criminal statute which is never violated is in all probability unnecessary. Some criminal and quasi-criminal offenses are extremely common. Probably a great deal more than 24 or 26 million Americans have, at some time or another, committed a moving

[7] Furman v. Georgia, 408 U.S. 238, 269, 33 L. Ed. 2d 346, 366 (1972).

traffic violation. The number of those who have violated the prohibition against drunken driving is certainly very great; most people have probably, at some time in their lives, stolen something, even if only a pencil from the office. Yet it cannot be seriously suggested that no penalty should therefore attach to speeding, drunken driving and petty larceny. Even those cynics who maintain that everybody cheats on his income tax do not suggest that tax fraud be legalized. The effectiveness of a criminal statute as against some other means of discouraging unwanted behavior may be a weighty consideration in a legislative determination of social policy; it should not, however, be permitted to raise the constitutional spectre of cruel and unusual punishment in the courts.

Surely little need be said about "evolving standards of decency," Trop v. Dulles, 356 U.S. 86, 101, 2 L. Ed. 2d 630, 642 (1958). Imprisonment for a period of up to one year, together with a fine, is one of the most commonly prescribed punishments for misdemeanors in the State of Alaska. Indeed, imprisonment for not more than one year is the jail sentence provided in the "catchall" statute defining the punishment for any misdemeanor for

which no specific penalty is prescribed.[8] AS 11.05.010. Certainly such a penalty cannot be described as "so severe as to be degrading to the dignity of human beings," Furman v. Georgia, supra, 408 U.S. at 271, 33 L. Ed. 2d at 367. It is true, of course, that other jurisdictions have recently prescribed lesser penalties for possession of marijuana, see Brief for Petitioner at 74, but petitioner cites no authority suggesting that they were constitutionally required to do so. We are not dealing here with lengthy prison sentences,[9] and the State knows of no constitutional requirement that our Legislature place itself in what some might describe as the "forefront" of reform in its enactments of criminal penalties.

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[8] Whenever an act is declared to be a misdemeanor, and no punishment is prescribed, the person, upon conviction, is punishable by imprisonment for not more than one year, or by a fine of not more than $500.00.

This statute was amended only last year, but the penalty was not changed. Compare Section 65-2-4 ACLA 1949 with Ch. 53, Section 15 SLA 1973.

[9] E.g., People v. Lorentzen, 194 N.W. 2d 827 (Mich. 1972) (20 years), relied upon by petitioner. Even when such penalties are involved, the Federal cases have held that the question of reducing them is a legislative one. United States v. Drotar, 415 F.2d 914, 916 (5th Cir. 1969); United States v. Ward, 387 F.2d 843, 848 (5th Cir. 1969).

CONCLUSION

A new intoxicant has intruded itself upon the American scene. Although it has been used in other societies for many years, true scientific study of its effects has been but recent. The evidence concerning its physical, psychological and social effects is in conflict, and little about it can be said for certain.[1] In a classic exercise of their function as the electorate's chosen directors of social policy, our legislators have prohibited its use. Petitioner now asks that this court assume that function, and overturn the legislature's decision.

If this court should choose to do so, the social consequences will in all probability be irreversible, no matter what evidence is unearthed in the future. Our cultural experience with alcohol has, if nothing else, shown that when a psychotropic drug has once become ingrained into the social fabric, it becomes not only impossible to extirpate altogether, but also essentially uncontrollable, no matter how harmful it may be.

"Decriminalization" as a true social policy is in all likelihood impossible; it is a way-station on the road to legalization, and to free availability. And as with

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[1] Cf., H. Brill, Statement Before the United States Senate Sub-committee on Internal Security (May 9, 1974).

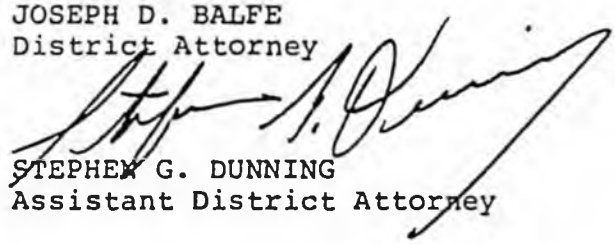
alcohol, free availability is just that; availability to all, adult and child, driver and non-driver, incipient psychotic and stable personality. Surely so momentous a step should be taken by the people, through their elected representatives. The decision of the court below must stand.

DATED at Anchorage, Alaska, this 4th day of September, 1974.

Respectfully submitted,

NORMAN C. GORSUCH
Attorney General

JOSEPH D. BALFE
District Attorney

By: 

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December 11, 1986

MEMORANDUM

TO: Representative-Elect Johnny Ellis

FROM: Penelope Weyhrauch
Legislative Analyst

RE: New York Drug Legislation
Research Request 87.059

You requested a copy of the recently enacted New York law which increased penalties for selling drugs on school grounds.

New York

The New York legislation which increased penalties for selling drugs on school grounds was passed on July 16, 1986. A copy of the new law with related statutes and notes is Attachment A. The new law established sentences of no less than six years and no more than 25 years for selling controlled substances on or near school grounds to persons less than 19 years of age.

Alaska

The **delivery** of a controlled substance to a person under 19 and at least three years younger than the person delivering the substance is a felony. A person delivering Schedule IA, IIA or IIIA substances to a person under 19 and at least three years younger than the deliverer is committing an unclassified felony. IA, IIA, and IIIA substances are considered to be dangerous to an individual or the public. The sentence for an unclassified felony is from five to 99 years and a $75,000 fine. A person 18 years or older **possessing** a controlled substance on school grounds, or a parking lot adjacent to a school, commits a class B or C felony subject to a sentence of up to ten years and a fine of up to $50,000. (Applicable Alaska Statutes are attached as Attachment B.)

Delivering or possessing controlled substances other than IA, IIA or IIIA substances, on or near school grounds, is a class B or C felony. Although marijuana is classified as a schedule VIA substance and is considered to have the lowest degree of danger to individuals or the public, delivery or possession of marijuana on or near school grounds is a class B or C felony and is subject to the penalties stated above.

I hope this information is helpful to you. If you have any questions or would like additional information please contact this agency.

PW

Attachments

Chapter 280

CONTROLLED SUBSTANCES--SALE ON SCHOOL GROUNDS

--INCREASED PENALTIES

AN ACT to amend the penal law, in relation to increasing the penalties for sale of controlled substances or school grounds, defined to include within one thousand feet thereof

Approved July 16, 1986, effective as provided in § 6.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph (b) of subdivision two of section 70.00 of the penal law, as amended by chapter two hundred seventy-six of the laws of nineteen hundred seventy-three, is amended to read as follows: § 1

(b) For a class B felony, the term shall be fixed by the court, and shall not exceed twenty-five years; provided, however, that where the sentence is for a class B felony offense specified in subdivision two of section 220.44, the maximum term must be at least six years and must not exceed twenty-five years;

§ 2. Paragraph (b) of subdivision three of section 70.00 of such law, as amended by chapter eight hundred seventy-three of the laws of nineteen hundred eighty, is amended to read as follows: § 2

(b) Where the sentence is for a class B or class C violent felony offense as defined in subdivision one of section 70.02, the minimum period shall be fixed by the court pursuant to subdivision four of section 70.02. Where the sentence is for a class B felony offense specified in subdivision two of section 220.44, the minimum period must be fixed by the court at one-third of the maximum term imposed and must be specified in the sentence. Where the sentence is for any other felony, the minimum period shall be fixed by the court and specified in the sentence and shall be not less than one year nor more than one-third of the maximum term imposed.

§ 3. Section 220.00 of such law is amended by adding a new subdivision fourteen to read as follows: § 3

14. "School grounds" means in or on or within any building, structure, athletic playing field, playground or land contained within the real property boundary line of a public or private elementary, parochial, intermediate, junior high, vocational, or high school, or within one thousand feet of the real property boundary line comprising any such school.

or in *italics* is new; matter in brackets [ ] is old law to be deleted.

§ 4 § 4. Section 220.34 of such law, as amended by chapter three hundred forty-one of the laws of nineteen hundred eighty-five, is amended to read as follows:

§ 220.34 Criminal sale of a controlled substance in the fourth degree.

A person is guilty of criminal sale of a controlled substance in the fourth degree when he knowingly and unlawfully sells:

1. a narcotic preparation; or

2. ten ounces or more of a dangerous depressant or two pounds or more of a depressant; or

3. concentrated cannabis as defined in paragraph (a) of subdivision five of section thirty-three hundred two of the public health law; or

4. fifty milligrams or more of phencyclidine; or

5. methadone; or

6. any amount of phencyclidine and has previously been convicted of an offense defined in this article or the attempt or conspiracy to commit any such offense; or

7. a controlled substance in violation of section 220.31 of this chapter to a person less than nineteen years of age, when such sale takes place upon school grounds.

Criminal sale of a controlled substance in the fourth degree is a class C felony.

§ 5 § 5. Such law is amended by adding a new section 220.44 to read as follows:

§ 220.44 Criminal sale of a controlled substance in or near school grounds.

A person is guilty of criminal sale of a controlled substance in or near school grounds when he knowingly and unlawfully sells:

1. a controlled substance in violation of any one of subdivisions one through six of section 220.34 of this chapter to a person less than nineteen years of age, when such sale takes place upon school grounds; or

2. a controlled substance in violation of any one of subdivisions one through eight of section 220.39 of this chapter to a person less than nineteen years of age, when such sale takes place upon school grounds.

Criminal sale of a controlled substance in or near school grounds is a class B felony.

§ 6 § 6. This act shall take effect on the first day of November next succeeding the date on which it shall have become a law.

EXPLANATION—Matter underlined or in *italics* is new;

...quent conviction committed
...f 18 months, a fine of not less
...re than $750 or imprisonment
...180 days, or both such fine and
...S Veh & Tr Law § 1174(c), (d).
...dded.—5 CLS Adv Leg Serv ch

...tricts may purchase insurance
...juries incurred by an authorized
...hool volunteer program, includ-
...d to, those authorized partici-
...l school buses, school sponsored
...nd from school, or on school
...s or any other school sponsored
... Law §§ 1604 subd 31-b, 1709
...ubd 4, 2503 subd 10-b, 2559
...as amended —6 CLS Adv Leg

...1987, every passenger seat on
...manufactured for use in New
...e equipped with approved seat
...reased seat back padding; fur-
...ing school bus which is sched-
...g must be retrofitted with ap-
...belts and additional padding;
...: for limiting liability of boards
...s of trustees, and school district
...onal injuries relating to seat
...aw §§ 3602 subd 7, 3623 subd
...d 4, CLS Veh & Tr Law § 383
...l and added.—7 CLS Adv Leg

...ch school districts which
...rganization incentive building
...capital projects and earn such
...ed to July 1, 1988 CLS Educ
...4.—7 CLS Adv Leg Serv ch

...r of education is authorized to
...ain a demonstration program
...ealth education in elementary
...: grants under the program to
...boards of cooperative educa-
...Educ Law § 804-a, as added
...erv ch 730.

...ning purchases of produce by
...een amended to allow smaller
...nily farms to combine their
...allow them to take advantage
...ng the volume requirement of
...Gen Mun Law § 103 subd 9,
...Adv Leg Serv ch 741.

...ay enter into agreements for
...instructional equipment, with
...applied against the purchase
...nt CLS Educ Law § 1725-a,
...dv Leg Serv ch 759.

...n demanded of a claimant
..., town, village, fire district or
...commenced within 90 days of service of the demand, the claimant may commence an action against the municipality or district unless the claimant has failed to appear or has requested an adjournment or postponement beyond the 90 day period; if the claimant has requested an adjournment, hearing of the examination will be rescheduled at the earliest available date. CLS Gen Mun Law § 50-h subd 5, as amended.—7 CLS Adv Leg Serv ch 761.

★ A student who is not permitted by a school district to participate in an athletic program because of a physical impairment, based upon a medical examination conducted by the school physician, may commence a special proceeding in Supreme Court to enjoin the school district from prohibiting his participation, subject to certain limitations. CLS Educ Law § 2308-a, as added —7 CLS Adv Leg Serv ch 763.

★ Municipalities and school districts may issue sinking fund bonds for any object or purpose for which serial bonds may be issued. CLS Local Fin Law §§ 22.00, 22.10, 31.00, 90.10, as amended and added.—7 CLS Adv Leg Serv ch 866.

SCHOOL GROUNDS

Penalties are increased for the sale of controlled substances on school grounds to a maximum prison sentence of no less than 6 years and no more than 25 years, and the minimum sentence must be set at ½ the maximum term imposed. CLS Penal Law §§ 70.00 subds 2, 3, 220.00 subd 14, 220.34, 220.44, as added and amended.—6 CLS Adv Leg Serv ch 280.

The Governor, in his memorandum concerning said chapter 280, appearing at 6 CLS Adv Leg Serv p Gm-189, states that the crack problem is one of the most important issues facing our nation today, and that the bill amends the Penal Law to increase the penalties for selling drugs to school children and defines school grounds to include the area within 1000 feet, equivalent of two city blocks, of the real property boundary line of the school.

SCHOOLS

★ The hours for voting in school board elections and budget votes may now begin as early as 6 o'clock a.m. CLS Educ Law § 2013, as amended. —7 CLS Adv Leg Serv ch 589.

★ In promulgating regulations governing the tuition liability of students attending private schools, the commissioner shall require that the tuition charge for programs approved for participation in student financial aid general awards programs shall be apportioned on the basis of terms or semesters or on the basis of portions of the calendar year if instruction is not offered by term or semester; in addition, the tuition refund policy for such programs which are offered on a flexible start basis shall provide for a full refund of tuition to any student who cancels his or her enrollment agreement prior to or during the first week of instruction. CLS Educ Law §§ 665 subds 1, 3, 665-a, 681-a, 5001 subd 3, 5002 subds 3-5, 5003, 5004, 5005, as added and amended.—7 CLS Adv Leg Serv chs 680, 681.

★ An occupational therapist permitee is authorized to practice in an elementary or secondary school for the purpose of providing occupational therapy as a related service for a handicapped child. CLS Educ Law § 7905 subd 2, as amended —7 CLS Adv Leg Serv ch 703.

★ The office of mental health is responsible for tuition expenses for a child who is a resident of New York State receiving care in a residential treatment facility for children and youth, who was not placed in the facility by a school district, social services district, the division for youth or the Family Court. CLS Educ Law § 4004 subd 2, CLS Men Hyg Law § 31.26 subd f, as amended and added.—7 CLS Adv Leg Serv ch 810.

SECRETARY OF STATE

The Secretary of State shall determine the type and amount of all fees to be collected by the Department of State for services rendered by the department pursuant to the provisions of the Uniform Commercial Code, and the Uniform Commercial Code services account is established in which shall be deposited all such fees. CLS Exec Law § 96-a; CLS Lien Law § 243; CLS State Fin Law § 97-y; CLS Uniform Commercial Code §§ 9-403—9-407, as added, amended and repealed —6 CLS Adv Leg Serv ch 453.

SECURITY

A distributor of motor fuel, alcoholic beverages or cigarettes must file with the department of taxation and finance a bond issued by an approved surety company as to solvency and responsibility and authorized to transact business in the state or other security acceptable to the tax commission; if it becomes necessary to sell the security in order to recover any taxes due, no sale shall be had until after the person has had an opportunity to litigate the validity of any tax, and upon such sale, any surplus above the sums due must be returned to the person. CLS Tax Law §§ 283 subd 3, 4, 5, 422, 423, 431 subd 3, 472 subd 1, 481 subd 3, 509 subd 4, 511 subd 4, 1137 subd (e)(2), 1817 subd (h), as amended.—6 CLS Adv Leg Serv ch 275.

★ Any petroleum business selling, transferring, using or otherwise disposing of petroleum within the state of New York must register with the tax commission, unless the transaction is one as to which the United States Constitution or laws enacted thereunder preclude such a requirement. In addition, the tax commission may require the business to post a bond or other security to secure the payment of any sum due from the business to the commission. CLS Tax Law § 302, as added and amended —7 CLS Adv Leg Serv chs 581, 582.

SECURITY EMPLOYEES

A survivor's benefit for a state employee in a

and such possession was established solely through application of statutory provision making presence of dangerous drug in automobile presumptive evidence of knowing possession thereof by each and every person in automobile at time such controlled substance was found, but marijuana and paraphernalia were discovered after defendant and his companions were removed from automobile, application of statutory presumption under such circumstances was highly questionable. People v Bennett (1975, 1st Dept) 47 AD2d 322, 366 NYS2d 639 (ovrld on other grounds People v Simone (1st Dept) 48 AD2d 497, 370 NYS2d 583, revd on other grounds 39 NY2d 818, 385 NYS2d 765, 351 NE2d 432).

Even though drug was in kitchen of apartment and defendants were found by police in other rooms, defendants were not outside ambit of statute to effect that presence of narcotic drug in open view in room, other than public place, under circumstances evincing intent to unlawfully prepare it for sale it is presumptive evidence of knowing possession by each and every person in close proximity to such drug when found. People v Caban (1977) 90 Misc 2d 43, 393 NYS2d 303.

Evidence was not sufficient to convict 16-year-old girl of criminal possession of more than one-eighth of ounce of heroin found in open view in kitchen of apartment in which defendant, who was not member of family which occupied apartment, had recently taken up residence. People v Caban (1977) 90 Misc 2d 43, 393 NYS2d 303.

There were insufficient circumstances to give rise to the presumption of possession contained in Penal Law § 220.25 by a defendant who was present in a room when two plastic bags containing cocaine were removed from a brown bag by a second individual, placed on a table near defendant and opened briefly for a third individual to sample since the drugs were neither mixed, packaged nor compounded, and merely displaying drugs, even when the purpose of such display is to sell the drugs, would not, in itself, constitute preparing them for sale as required by the statute. People v Uribe (1982) 113 Misc 2d 207, 448 NYS2d 987.

The presumption of knowing possession of a controlled substance and a firearm by all who occupy a vehicle at the time such contraband is found would not apply to a driver for hire whose license had been temporarily suspended, since such driver can no more reasonably be said to be aware and culpably involved in the possession of such contraband in a vehicle not necessarily owned by him, not accessible exclusively to him, and used by passengers not ordinarily known to him, than his counterpart with a currently valid license, so that it was error for the district attorney to instruct the Grand Jury that it could apply those presumptions in indicting an unlicensed driver for hire for possession of an unlicensed firearm and a quantity of a controlled substance allegedly recovered by police from the rear of the vehicle he was operating. People v Allison (1983) 117 Misc 2d 461, 458 NYS2d 496.

The presumption contained in this section passes constitutional muster where habeas corpus petitioner, convicted of first and fourth degree criminal possession of dangerous drugs, was one of three persons arrested while in a car containing over one pound of cocaine. Under these facts a rational juror could have found, beyond a reasonable doubt, knowing possession of the drug by petitioner. Leyva v Superintendent, Green Haven Correctional Facility (1977, DC NY) 428 F Supp 1.

9.–15. [Reserved for future use. Please consult your supplement.]

16. Under former § 1751

Where defendants were accused of acting in concert, and defendant in rear seat threw heroin out of automobile, the 2 defendants in the front seat were chargeable with the presumption of a knowing possession and control of heroin. People v Potter (1956) 4 Misc 2d 796, 162 NYS2d 439.

If a peace officer has reasonable grounds to believe that there is in an automobile enough narcotics to base the presumption of subd 2 of the above statute, he has by virtue of the provisions of subd 4 thereof reasonable grounds to believe that each occupant of such automobile was in possession of such drugs and is thereby justified in arresting any or all of them under Criminal Code § 177. People v Rodolitz (1965) 47 Misc 2d 129, 261 NYS2d 959, adhered to 48 Misc 2d 546, 265 NYS2d 460.

Section 1751(4) of the Penal Law is constitutional. People v Mitchell (1965) 51 Misc 2d 82, 272 NYS2d 523.

§ 220.30. [Repealed]

HISTORY:

Add, L 1965, ch 1030. Substance derived from §§ 1747-b, 1747-c, 1751(1). Amd, L 1969, ch 787; repealed, L 1973, ch 276, § 18, eff Sept 1, 1973.

§ 220.31. Criminal sale of a controlled substance in the fifth degree

A person is guilty of criminal sale of a controlled substance in the fifth degree when he knowingly and unlawfully sells a controlled substance.

Criminal sale of a controlled substance in the fifth degree is a class D felony.

HISTORY:

Add, L 1973, ch 276, § 19, eff Sept 1, 1973; amd, L 1979, ch 410, § 16, eff Sept 1, 1979.

Section heading, amd, L 1979, ch 410, § 16, eff Sept 1, 1979.

NOTES:

See 1973 note under Art 22 .
See 1979 note under § 220.34.

CROSS REFERENCES:

This section referred to in CLS CPL § 700.05.

FEDERAL ASPECTS:

Drug abuse offenses and penalties, 21 USCS §§ 841 et seq.

RESEARCH REFERENCES AND PRACTICE AIDS:

Law Reviews:

Heroin deaths: homicidal responsibility of the seller in New York. 37 Albany L Rev 497.

CRIMINAL JURY INSTRUCTIONS, NEW YORK:

3 CJI (NY) PL 220.31 p 1732.

CASE NOTES

1. In general

Sentence of six months' imprisonment imposed upon defendant who was convicted, on plea of guilty, of attempted criminal possession of a controlled substance in the sixth degree would be reduced to probation for five years, the same sentence imposed upon codefendant who was convicted of attempted defacement of weapons and dangerous instruments and appliances. People v Ascani (1977, 2d Dept) 56 AD2d 891, 392 NYS2d 675.

Defendant, who was convicted of criminal sale of a controlled substance, sixth degree, and criminal possession of a controlled substance, seventh degree, was improperly sentenced to one year imprisonment on each count to run concurrently, where the absence of a prior criminal record and both the nature and the amount of the drugs involved suggested that such sentence was not appropriate. People v Reilly (1981, 4th Dept) 81 App Div 2d 739, 438 NYS2d 405.

Section of Penal Law proscribing sales of controlled substances places no culpability re ment in element of "unlawfully sells." People v Vargas (1976) 86 Misc 2d 1018, 384 NYS2d 643.

While the People must show specific intent that defendant charged with sale of controlled substance was aware of nature of substance sold, they need not demonstrate whether or not defendant thought sale was authorized by law. People v Vargas (1976) 86 Misc 2d 1018, 384 NYS2d 643.

2. Criminal sale in fifth degree compared

As they relate to sale of marihuana, provisions of statute relating to criminal sale of controlled substances in the sixth degree, and those of statute relating to criminal sale of controlled substance in the fifth degree, are as baffling as they are identical, since no minimum weights are assigned for sale of marihuana in either statute, and where there is no other element recited that would distinguish sale of marihuana under one statute from sale of marihuana under the other. People v Kinnicut (1975) 83 Misc 2d 229, 371 NYS2d 984.

Because statutes relating to criminal sale of controlled substance in the sixth and fifth degree are identical, proof sufficient to return an indictment for a violation of one statute would be proof sufficient to return an indictment for violation of the other. People v Kinnicut (1975) 83 Misc 2d 229, 371 NYS2d 984.

Difference to a defendant between an indictment fo e of controlled substance in the sixth degree an indictment charging a sale in the fifth

degree is material and su charges defendant only which permits imprisonme the latter charges him wi permits imprisonment for nicut (1975) 83 Misc 2d 2

3. Indictment; grand jury

Return by grand jury of controlled substance in charged sale of marihua instructed grand jury on substance in the sixth required dismissal of the because the statutes were to permit indictment for would be proof sufficient violation of the other, sin under the sixth-degree sta for up to seven years. A under fifth-degree statute up to 15 years. People 2d 229, 371 NYS2d 984

Instruction of prosecut stated, inter alia, that a sale of controlled substan he knowingly and unlaw substance, and that mar substance, was proper wh were stated correctly, and controlled substance as de v Kinnicut (1975) 83 Mi 984.

4. Burden of proof

Even though under sub Health Law burden of pr of prescription justifying stance would rest with d violation of Law, same bu respect to defendant char with sale of controlled sub (1976) 86 Misc 2d 1018,

5. Admissibility of evidence

Where defendant's primar he was acting as an age which tended to show that controlled substance was e for People to introduce tap defendant to show the inte even though the tapes sho crime which dealt with subsequent to dates of the indictments. People v Flana AD2d 959, 367 NYS2d 9 46 L Ed 2d 266, 96 S Ct 2

Although unjustified, ad recordings of defendant's removing racial reference where proof that defenda nally selling a controlled

Because statutes relating to criminal sale of controlled substance in the sixth and fifth degree are identical, proof sufficient to return an indictment for a violation of one statute would be proof sufficient to return an indictment for violation of the other. People v Kinnicut (1975) 83 Misc 2d 229, 371 NYS2d 984.

Difference to a defendant between an indictment for sale of controlled substance in the sixth degree and an indictment charging a sale in the fifth degree is material and substantial, since the former charges defendant only with a class D felony, which permits imprisonment for seven years, while the latter charges him with a class C felony, which permits imprisonment for 15 years. People v Kinnicut (1975) 83 Misc 2d 229, 371 NYS2d 984.

Return by grand jury of indictment for sale of controlled substance in the fifth degree, which charged sale of marihuana, after prosecutor had instructed grand jury only as to sale of controlled substance in the sixth degree, was improper and required dismissal of the indictment, even where, because the statutes were identical, proof sufficient to permit indictment for violation of one statute would be proof sufficient to permit indictment for violation of the other, since a defendant convicted under the sixth-degree statute could be imprisoned for up to seven years, while defendant convicted under fifth-degree statute may be imprisoned for up to 15 years. People v Kinnicut (1975) 83 Misc 2d 229, 371 NYS2d 984.

4. Agency; defenses

Evidence in prosecution for criminal sale of controlled substance in fifth degree was sufficient to create jury question on defense of agency. People v Belknap (1977, 3d Dept) 57 AD2d 970, 394 NYS2d 94.

Jury in prosecution for criminal sale of controlled substance in fifth degree was properly instructed on burden of disproving defense of agency beyond reasonable doubt and as to relationship between agency and sale elements of crime. People v Belknap (1977, 3d Dept) 57 AD2d 970, 394 NYS2d 94.

One who is merely agent for buyer cannot commit the offense of selling narcotics. People v Simone (1977, 2d Dept) 59 AD2d 918, 399 NYS2d 154, later app (2d Dept) 78 AD2d 685, 432 NYS2d 248.

§ 220.35. [Repealed]

HISTORY:

Add, L 1965, ch 1030. Substance derived from § 1751(1). Amd, L 1969, ch 787; repealed, L 1973, ch 276, § 18, eff Sept 1, 1973.

§ 220.37. [Repealed]

HISTORY:

Add, L 1973, ch 276, § 19, eff Sept 1, 1973; amd, L 1978, ch 772; repealed, L 1979, ch 410, § 18, eff Sept 1, 1979.

§ 220.39. Criminal sale of a controlled substance in the third degree

A person is guilty of criminal sale of a controlled substance in the third degree when he knowingly and unlawfully sells:

1. a narcotic drug; or

2. a stimulant, hallucinogen, hallucinogenic substance, or lysergic acid diethylamide and has previously been convicted of an offense defined in article two hundred twenty or the attempt or conspiracy to commit any such offense; or

3. one gram or more of a stimulant; or

4. one milligram or more of lysergic acid diethylamide; or

5. twenty-five milligrams or more of a hallucinogen; or

6. one gram or more of a hallucinogenic substance; or

7. one or more preparations, compounds, mixtures or substances of an

aggregate weight of one-eighth ounce or more containing methamphetamine, its salts, isomers or salts of isomers; or

8. undiluted phencyclidine in an amount of one gram or more; or

9. a narcotic preparation to a person less than twenty-one years old.

Criminal sale of a controlled substance in the third degree is a class B felony.

HISTORY:

Add, L 1973, ch 276, § 19; amd, L 1973, ch 278, both eff Sept 1, 1973, L 1973, ch 1051, § 14, eff Sept 1, 1973.
Sub 2, add, L 1973, ch 1051, § 14, eff Sept 1, 1973.
Former sub 2, add, L 1973, ch 278, eff Sept 1, 1973; renumbered sub 3, L 1973, ch 1051, § 14, eff Sept 1, 1973.
Prior sub 2, repealed, L 1973, ch 278, eff Sept 1, 1973.
Sub 3, formerly sub 2, renumbered sub 3 and amd, L 1973, ch 1051, § 14, eff Sept 1, 1973.
Former sub 3, add, L 1973, ch 278, eff Sept 1, 1973. Substance derived from former sub 2. Repealed, L 1973, ch 1051, § 14, eff Sept 1, 1973.
Prior sub 3, repealed, L 1973, ch 278, eff Sept 1, 1973.
Sub 4, add, L 1973, ch 278, eff Sept 1, 1973; amd, L 1973, ch 1051, § 14, eff Sept 1, 1973.
Sub 5, formerly sub 6, renumbered sub 5 and amd, L 1973, ch 1051, § 14, eff Sept 1, 1973.
Former sub 5, add, L 1973, ch 278, eff Sept 1, 1973. Substance derived from former sub 3. Repealed, L 1973, ch 1051, § 14, eff Sept 1, 1973.
Sub 6, formerly sub 8, renumbered sub 6 and amd, L 1973, ch 1051, § 14, eff Sept 1, 1973.
Former sub 6, add, L 1973, ch 278, eff Sept 1, 1973; renumbered sub 5, L 1973, ch 1051, § 14, eff Sept 1, 1973.
Sub 7, formerly sub 10, renumbered sub 7 and amd, L 1973, ch 1051, § 14, eff Sept 1, 1973, L 1979, ch 410, § 19, eff Sept 1, 1979.
Former sub 7, add, L 1973, ch 278, eff Sept 1, 1973. Substance derived from former sub 3. Repealed, L 1973, ch 1051, § 14, eff Sept 1, 1973.
Sub 8, add, L 1979, ch 410, § 19, eff Sept 1, 1979.
Former sub 8, add, L 1973, ch 278, eff Sept 1, 1973; renumbered sub 6, L 1973, ch 1051, § 14, eff Sept 1, 1973
Sub 9, add, L 1979, ch 410, § 19, eff Sept 1, 1979.
Former sub 9, add, L 1973, ch 278, eff Sept 1, 1973. Substance derived from former sub 3. Repealed, L 1973, ch 1051, § 14, eff Sept 1, 1973.
Sub 10, add, L 1973, ch 278, eff Sept 1, 1973; renumbered sub 7, L 1973, ch 1051, § 14, eff Sept 1, 1973.
Sub 11, add, L 1973, ch 278, eff Sept 1, 1973; repealed, L 1973, ch 1051, § 14, eff Sept 1, 1973.
Closing par, amd, L 1979, ch 410, § 19, eff Sept 1, 1979.

NOTES:

See 1973 note under Art 220.
See 1979 note under § 220.34.

CROSS REFERENCES:

This section referred to in § 60.09; CLS CPL §§ 220.20, 700.05.
Eavesdropping warrants in prosecutions for criminally selling a dangerous drug in the third degree, CLS CPL §§ 700.05 et seq.

FEDERAL ASPECTS:

Drug abuse offenses and penalties, 21 USCS §§ 841 et seq.

The time between the arrest charged July 2 and 16, 1969 and the indictment Sept. 25, 1969 was not unreasonable and did not constitute a denial of due process in that the delay was purposeful, unjustifiable, and prejudiced his ability to prepare a defense. McKay v. State, Sup. Ct. Op. No. 729 (File No. 1284), 489 P.2d 145 (1971).

A seven month interval from the alleged drug sale until arrest was an unreasonable delay denying accused due process. McKay v. State, Sup. Ct. Op. No. 729 (File No. 1284), 489 P.2d 147 (1971).

Dismissal of the criminal proceedings was constitutionally mandated where eight months had elapsed between the occurrence of the alleged sale and the filing of the indictment. Marks v. State, Sup. Ct. Op. No. 787 (File No. 1414), 496 P.2d 66 (1972).

Classification of drug offenders under prior law. — See Waters v. State, Sup. Ct. Op. No. 651 (File No. 1276), 485 P.2d 1069 (1971); Meyers v. State, Sup. Ct. Op. No. 720 (File No. 1393), 488 P.2d 71 (1971).

Penalty provisions of former laws construed. — See Wright v. State, Sup. Ct. Op. No. 823 (File No. 1288), 501 P.2d 1360 (1972); Speas v. State, Sup. Ct. Op. No. 889 (File No. 1555), 511 P.2d 130 (1973); Call v. State, Sup. Ct. Op. No. 890 (File No. 1544), 511 P.2d 116 (1973); Gonzales v. State, Sup. Ct. Op. No. 1030 (File No. 2002), 521 P.2d 512, cert. denied, 419 U.S. 868, 95 S. Ct. 125, 42 L. Ed. 2d 106 (1974); Darling v. State, Sup. Ct. Op. No. 1027 (File No. 1807), 520 P.2d 793 (1974); White v. State, Sup. Ct. Op. No. 1055 (File No. 1907), 523 P.2d 425 (1974); Salazar v. State, Sup. Ct. Op. No. 1404 (File No. 2567), 562 P.2d 694 (1977); Hull v. State, Sup. Ct. Op. No. 1493 (File No. 1201), 565 P.2d 1014 (1977), aff'd on other grounds, 586 P.2d 621 (1978); Johnson v. State, Sup. Ct. Op. No. 1709 (File No. 3446), 577 P.2d 230 (1978); Davis v. State, Sup. Ct. Op. No. 1599 (File No. 3540), 577 P.2d 690 (1978); Moreau v. State, Sup. Ct. Op. No. 1770 (File No. 3353), 588 P.2d 277 (1978); Wharton v. State, Sup. Ct. Op. No. 1797 (File No. 3380), 590 P.2d 427 (1979); Elliott v. State, Sup. Ct. Op. No. 1798 (File No. 3379), 590 P.2d 881 (1979); Sanders v. State, Sup. Ct. Op. No. 1975 (File No. 4190), 602 P.2d 1252 (1979); Morgan v. State, Sup. Ct. Op. No. 2108 (File No. 3678), 618 P.2d 272 (1980); Strahan v. State, Sup. Ct. Op. No. [illegible] (File No. 4905), 615 P.2d 613 (1980).

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unclassified felony

Sec. 11.71.010. Misconduct involving a controlled substance in the first degree. (a) Except as authorized in AS 17.30, a person commits the crime of misconduct involving a controlled substance in the first degree if the person

(1) delivers any amount of a schedule IA controlled substance to a person under 19 years of age who is at least three years younger than the person delivering the substance; or

(2) delivers any amount of a schedule IIA or IIIA controlled substance to a person under 19 years of age who is at least three years younger than the person delivering the substance; or

(3) engages in a continuing criminal enterprise.

(b) For purposes of this section, a person is engaged in a "continuing criminal enterprise" if

(1) the person commits a violation of this chapter which is punishable as a felony; and

(2) that violation is a part of a continuing series of five or more violations of this chapter

(A) which the person undertakes in concert with at least five other persons organized, supervised, or otherwise managed by the person; and

Sec. 11.71.030. Misconduct involving a controlled substance in the third degree. (a) Except as authorized in AS 17.30 or AS 17.35, a person commits the crime of misconduct involving a controlled substance in the third degree if the person

(1) manufactures or delivers any amount of a schedule IIA or IIIA controlled substance or possesses any amount of a schedule IIA or IIIA controlled substance with intent to manufacture or deliver;

(2) delivers any amount of a schedule IVA, VA or VIA controlled substance to a person under 19 years of age who is at least three years younger than the person delivering the substance; or

(3) being 18 years of age or older, possesses any amount of a schedule IA or IIA controlled substance within the grounds of or on a parking lot immediately adjacent to a public or private preschool, elementary, junior high, or secondary school.

(b) It is an affirmative defense to a prosecution under (a)(3) of this section that at the time of the possession the school was closed to any organized activity involving persons under 18 years of age. Nothing in this subsection precludes a prosecution under any other provision of this section or any other section of this chapter.

(c) Misconduct involving a controlled substance in the third degree is a class B felony. (§ 2 ch 45 SLA 1982)

Class B felony

NOTES TO DECISIONS

Editor's notes. — The cases cited in the notes below were decided under former AS 17.10 and 17.12.

Defenses. — Where, on appeal from a conviction of selling cocaine, the defendants argue that this section under which they were charged, prohibits the sale only of natural or l-cocaine, derived from coca leaves, and where the state's chemist testified on cross-examination that his tests did not exclude the possibility that the substance sold by the defendants was D-cocaine, an artificial compound not produced from coca leaves, but where the chemist also testified that to the best of his knowledge D-cocaine had never been synthesized in any quantity, the supreme court construing his testimony most favorably to the state, concluded that reasonable persons could find beyond a reasonable doubt that D-cocaine was not involved in the case and thus rejected the "D-cocaine" defense. Leduff v. State, Sup. Ct. Op. No. 2192 (File Nos. 4117, 4136), 618 P.2d 557 (1980).

Fact going to weight of evidence, not admissibility. — Where the informer who purchased bags of drugs from defendant testified and thus [illegible] the chain of custody of the bags, and where there was no evidence that the informer tampered with the bags, the fact that the informer was out of sight of the police for short periods of time before turning the bags over to the police went to the weight of the evidence, not its admissibility. Robinson v. State, Sup. Ct. Op. No. 1837 (File No. 3393), 593 P.2d 621 (1979).

Sentence for sale of cocaine. — See Johnson v. State, Sup. Ct. Op. No. 1506 (File No. 1146), 577 P.2d 230 (1978); Elliott v. State, Sup. Ct. Op. No. 1708 (File No. 3379), 590 P.2d 881 (1979); Robinson v. State, Sup. Ct. Op. No. 1837 (File No. 3393), 593 P.2d 621 (1979); Mangold v. State, Sup. Ct. Op. No. 2108 (File No. 1678), 614 P.2d 272 (1980); Hawley v. State, Sup. Ct. Op. No. 2137 (File No. 4200), 614 P.2d 1349 (1980); Leduff v. State, Sup. Ct. Op. No. 2192 (File Nos. 4117, 4136), 618 P.2d 557 (1980). See also Strachan v. State, Sup. Ct. Op. No. 2151 (File No. 4901), 615 P.2d 611 (1980); Kelly v. State, Sup. Ct. Op. No. 2258 (File Nos. 4097, 4529), 622 P.2d 452 (1981); State v. Dana, Ct. Op. App. No. 03 (File No. 4888), 623 P.2d 348 (1981).

Sentence for sale of amphetamines — see [illegible] State, Sup. Ct. Op. No. [illegible] File No. 2745, 551 P.2d 541 (1976).

Sentence for possession of amphetamine tablets with intent to distribute or sell — see Keller v. State, Sup. Ct. Op. No. 1221, File No. 2330, 543 P.2d [illegible] (1975).

Sentence for selling LSD. — See [illegible] State, Sup. Ct. Op. No. 1534 [illegible].

Sentence for sale of acid, mescaline and amphetamines — see Meyers v. State, Sup. Ct. Op. No. 730, File No. [illegible], 522 P.2d 713 (Alaska).

Sentence for possession of hallucinogenic drug with intent to sell or distribute — see Cook v. State, Sup. Ct. Op. No. [illegible], File No. 991, [illegible], 574 P.2d 1296 (1978).

Sec. 11.71.040. Misconduct involving a controlled substance in the fourth degree. (a) Except as authorized in AS 17.30 or AS 17.35, a person commits the crime of misconduct involving a controlled substance in the fourth degree if the person

(1) manufactures or delivers any amount of a schedule IVA or VA controlled substance or possesses any amount of a schedule IVA or VA controlled substance with intent to manufacture or deliver;

(2) manufactures or delivers, or possesses with the intent to manufacture or deliver, one or more preparations, compounds, mixtures, or substances of an aggregate weight of one ounce or more containing a schedule VIA controlled substance;

(3) possesses

(A) any amount of a schedule IA or IIA controlled substance;

(B) 25 or more tablets, ampules, or syrettes containing a schedule IIIA or IVA controlled substance;

(C) one or more preparations, compounds, mixtures, or substances of an aggregate weight of three grams or more containing a schedule IIIA or IVA controlled substance;

(D) 50 or more tablets, ampules, or syrettes containing a schedule VA controlled substance;

(E) one or more preparations, compounds, mixtures, or substances of an aggregate weight of six grams or more containing a schedule VA controlled substance; or

(F) one or more preparations, compounds, mixtures, or substances of an aggregate weight of one pound or more containing a schedule VIA controlled substance;

(4) being 18 years of age or older, possesses a schedule IIIA, IVA, VA, or VIA controlled substance within the grounds of or on a parking lot immediately adjacent to a public or private preschool, elementary, junior high, or secondary school;

(5) knowingly keeps or maintains any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place which is used for keeping or distributing controlled substances in violation of a felony offense under this chapter or AS 17.30;

(6) makes, delivers, or possesses a punch, die, plate, stone, or other thing which prints, imprints, or reproduces a trade mark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of these upon a drug, drug container, or labeling so as to make the drug a counterfeit substance.

(7) knowingly uses in the course of the manufacture or distribution of a controlled substance a registration number which is fictitious, revoked, suspended, or issued to another person;

(8) knowingly furnishes false or fraudulent information in or omits material information from any application, report, record, or other document required to be kept or filed under AS 17.30;

(9) obtains possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge; or

(10) affixes a false or forged label to a package or other container containing any controlled substance.

(b) It is an affirmative defense to a prosecution under (a)(4) of this section that at the time of the possession the school was closed to any organized activity involving persons under 18 years of age. Nothing in this subsection precludes a prosecution under any other [illegible] of this section or any other section of this chapter.

(c) Nothing in [illegible] of this section precludes [illegible] proceeding [illegible] any other [illegible] of this [illegible] or any other section of this chapter or [illegible] AS 17.

(d) Misconduct involving a controlled substance in the fourth degree is a class C felony. ([illegible] 17 SLA 1982)

NOTES TO DECISIONS

Editor's notes. — The cases cited in the notes below were decided under former AS 17.10 and 17.12.

Access to cocaine for personal use. — Right of privacy does not permit reasonable access to cocaine for personal and social use. State v. Erickson, Sup. Ct. Op. No. 1747 (File No. 3250), 574 P.2d 1 (1978).

There is a sufficiently close and substantial relationship between the means chosen to regulate cocaine and the legislative purpose of preventing harm to health and welfare so as to justify the prohibition [illegible] State v. Erickson, Sup. Ct. Op. No. 1747 (File No. 3250), 574 P.2d 1 (1978).

Possession of even a trace of a prohibited drug may be sufficient to sustain a conviction where other evidence supports the inference of knowledge. Moreau v. State, Sup. Ct. Op. No. 1770 (File No. 2335), 588 P.2d 275 (1978).

Age of purchaser. — [illegible] were charged with [illegible] former AS 17.12, the purchaser's age has no bearing on the question of whether the defendants [illegible] punishment that could be imposed for that offense. Morris v. State, Sup. Ct. Op. No. 2376 (File Nos. 4264, 4318), 630 P.2d 13 (1981).

Knowing possession must be proved for conviction. — To sustain a conviction for possession of narcotics the prosecution must prove a knowing possession by the accused. Davis v. State, Sup. Ct. Op. No. 836 (File No. 1532), 501 P.2d 1026 (1972).

Proving defendant's knowledge of substance's character. — Where the prohibited substance is itself mixed with or contained within an innocuous substance [illegible] it is necessary that the state prove the defendant's knowledge of the narcotic character of the substance. Moreau v. State, Sup. Ct. Op. No. 1770 (File No. 2335), 588 P.2d 275 (1978).

Knowledge can be shown by inferences. — A defendant's knowledge of the narcotic character of a substance can be shown by inferences that can be reasonably drawn from facts in evidence. Moreau v. State, Sup. Ct. Op. No. 1770 (File No. 2335), 588 P.2d 275 (1978).

Evidence of previous possession of contraband admissible. — In the prosecution of possessive offenses, where it is necessary to prove the defendant's knowl-

(2) the biomedical hazard of the substance including

(A) its pharmacology, in the effects and modifiers of the effects of the substance;

(B) its toxicology, the acute and chronic toxicity, interaction with other substances, whether controlled or not, and the degree to which it may cause psychological or physiological dependence;

(C) the risk to public health and the particular susceptibility of segments of the population;

(3) whether the substance is an immediate precursor of a substance already controlled under this chapter;

(4) the current state of scientific knowledge regarding the substance, including whether there is any acceptable means to safely use the substance under medical supervision;

(5) the relationship between the use of the substance and other criminal activity, including

(A) whether persons engaged in illicit trafficking of the substance are also engaged in other criminal activity;

(B) whether the nature and relative profitability of manufacturing or delivering the substance encourages illicit trafficking in the substance;

(C) whether the commission of other crimes is one of the effects of abuse of the substance;

(D) whether addiction to the substance relates to the commission of crimes to support the continued use of the substance.

(d) If the committee designates a substance as an immediate precursor of a controlled substance, a precursor of that immediate precursor is not subject to control solely because it is a precursor of the immediate precursor.

(e) The committee has no authority over tobacco or alcoholic beverages as defined in AS 04.21.080. (§ 2 ch 45 SLA 1982)

NOTES TO DECISIONS

Construction of former law. — For construction of former AS 17.12.040, concerning [illegible] and authorizing the commissioner of health and social services [illegible] State v. Erickson, [illegible]

Sec. 11.71.140. Schedule IA. (a) A substance shall be placed in schedule IA if it is found under AS 11.71.120(c) to have the highest degree of danger or probable danger to a person or the public.

(b) Schedule IA includes, unless specifically excepted or listed in another schedule, any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(1) opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate, excluding apomorphine, dextrorphan, nalbuphine, naloxone, and naltrexone, and their respective salts, but including the following:

(A) raw opium;

(B) opium extracts;

(C) opium fluid extracts;

(D) powdered opium;

(E) granulated opium;

(F) tincture of opium;

(G) codeine;

(H) ethylmorphine;

(I) etorphine hydrochloride;

(J) hydrocodone;

(K) hydromorphone;

(L) metopon;

(M) morphine;

(N) oxycodone;

(O) oxymorphine;

(P) thebaine;

(2) any salt, compound, derivative, or preparation of a substance included in (b)(1) of this section which is chemically equivalent or identical to any of the substances referred to in (b)(1) of this section; however, these substances do not include the isoquinoline alkaloids of opium;

(3) opium poppy and poppy straw;

(4) concentrate of poppy straw which is the crude extract of poppy straw in either liquid, solid, or powder form which contains the phennanthrine alkaloids of the opium poppy.

(c) Schedule IA includes, unless specifically excepted or unless listed in another schedule, any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of these isomers, esters, ethers, and salts is possible within the specific chemical designation, dextrorphan excepted:

(1) acetylmethadol;

(2) allylprodine;

(3) alphacetylmethadol;

(4) alphameprodine;

(5) alphamethadol;

(6) alphaprodine;

(7) anileridine;

(8) benzethidine;

(9) betacetylmethadol;

(10) betameprodine;

(11) betamethadol;
(12) betaprodine;
(13) bezitramide;
(14) clonitazene;
(15) dextromoramide;
(16) diampromide;
(17) diethylthiambutene;
(18) difenoxin;
(19) dihydrocodeine;
(20) dimenoxadol;
(21) dimepheptanol;
(22) dimethylthiambutene;
(23) dioxaphetyl butyrate;
(24) diphenoxylate;
(25) dipipanone;
(26) ethylmethylthiambutene;
(27) etonitazene;
(28) etoxeridine;
(29) fentanyl;
(30) furethidine;
(31) hydroxypethidine;
(32) isomethadone;
(33) ketobemidone;
(34) levomethorphan;
(35) levomoramide;
(36) levorphanol;
(37) levophenacylmorphan;
(38) meperidine, also known as pethidine;
(39) metazocine;
(40) methadone;
(41) methadone-intermediate, 4-cyano-2-dimethylamino-4, 4-diphenyl butane;
(42) moramide-intermediate, 2-methyl-3-morpholino-1, 1-diphenyl propane-carboxylic acid;
(43) morpheridine;
(44) noracymethadol;
(45) norlevorphanol;
(46) normethadone;
(47) norpipanone;
(48) pethidine, also known as meperidine;
(49) pethidine-intermediate-A, 4-cyano-1-methyl-4-phenyl piperidine;
(50) pethidine intermediate-B, ethyl-4-phenylpiperidine-4-carboxylate;
(51) pethidine-intermediate-C, 1-methyl-4-phenylpiperidine-4-carboxylic acid;

(52) pheriadone;
(53) phenampromide;
(54) phenazocine;
(55) phenomorphan;
(56) phenoperidine;
(57) piminodine;
(58) piritramide;
(59) propheptazine;
(60) properidine;
(61) propiram;
(62) racemethorphan;
(63) racemoramide;
(64) racemorphan;
(65) trimeperidine.

(d) Schedule IA includes, unless specifically excepted or unless listed in another schedule, any of the following opium derivatives, their salts, isomers, and salts of isomers whenever the existence of these salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) acetorphine;
(2) acetyldihydrocodeine;
(3) benzylmorphine;
(4) codeine methylbromide;
(5) codeine-n-oxide;
(6) cyprenorphine;
(7) desomorphine;
(8) dihydromorphine;
(9) drotebanol;
(10) etorphine, except hydrochloride salt;
(11) heroin;
(12) hydromorphinol;
(13) methyldesorphine;
(14) methyldihydromorphine;
(15) morphine methylbromide;
(16) morphine methylsulfonate;
(17) morphine-n-oxide;
(18) myrophine;
(19) nicocodeine;
(20) nicomorphine;
(21) normorphine;
(22) pholcodine;
(23) thebacon. (§ 2 ch 45 SLA 1982)

Sec. 11.71.150. Schedule IIA. (a) A substance shall be placed in schedule IIA if it is found under AS 11.71.120(c) to have a degree of danger or probable danger to a person or the public which is less than substances listed in schedule IA, but higher than substances listed in schedule IIA

(b) Schedule IIA includes, unless specifically excepted or unless listed in another schedule, any material, compound, mixture or preparation which contains any quantity of the following hallucinogenic substances, or which contains any of its salts, isomers, whether optical, position, or geometric, or salts of isomers whenever the existence of these salts, isomers, or salts of isomers is possible within the specific chemical designation.

(1) 4-bromo-2,5-dimethoxy-amphetamine, also known as 4-bromo-2,5-dimethoxy-α-methylphenethylamine and 4-bromo-2, DMA.

(2) 2,5-dimethoxyamphetamine, also known as 2,5-dimethoxy-α-methylphenethylamine and 2,5-DMA.

(3) 4-methoxyamphetamine, also known as 4-methoxy-α-methylphenethylamine and paramethoxyamphetamine, PMA.

(4) 5-methoxy-3,4-methylenedioxy-amphetamine.

(5) 4-methyl-2,5-dimethoxy-amphetamine, also known as 4-methyl-2,5-dimethoxy-α-methylphenethylamine.

(6) 3,4-methylenedioxy amphetamine.

(7) 3,4,5-trimethoxy amphetamine.

(8) bufotenine, also known as 3-(β-dimethylaminoethyl)-5-hydroxyindole, 3-(2-dimethylaminoethyl)-5-indolol, N,N-dimethylserotonin, 5-hydroxy-N,N-dimethyltryptamine and mappine.

(9) diethyltryptamine, also known as N,N-diethyltryptamine and DET.

(10) dimethyltryptamine, also known as DMT.

(11) ibogaine, also known as 7-ethyl-6,6β,7,8,9,10,12,13-octahydro-2-methoxy-6,9-methano-5H-pyrido[1',2':1,2]azepino[5,4-b]indole and tabernanthe iboga.

(12) lysergic acid diethylamide, also known as LSD.

(13) mescaline.

(14) n-ethyl-3-piperidyl benzilate.

(15) n-methyl-3-piperidyl benzilate.

(16) peyote.

(17) analogs of phencyclidine [PCP] as follows:

(A) ethylamine analog, also known by some trade or other names as follows: N-ethyl-1-phenylcyclohexylamine, (1-phenylcyclohexyl)-ethylamine, N-(1-phenylcyclohexyl)-ethylamine, cyclohexamine, PCE.

(B) pyrrolidine analog, also known by some trade or other names as follows: 1-(1-phenylcyclohexyl)-pyrrolidine, PCPY, PHP.

(C) thiophene analog, also known as 1-[1-(2-thienyl)-cyclohexyl]-piperidine and 2-thienylanalog of phencyclidine, TPCP, and TCP.

(18) psilocybine.

(19) psilocyn.

(c) Schedule IIA includes coca leaves and any salt, compound, derivative, mixture, isomer, salt of isomer, or preparation of coca leaves or coca leaves produced directly or indirectly by extraction from coca leaves or independently by means of chemical synthesis or by a

combination of extraction and chemical synthesis including the isomers, salts, and salts of isomers of cocaine and other derivatives of coca leaves whenever the existence of these esters, ethers, isomers or salts is possible, but does not include decocainized coca leaves or extractions of coca leaves which do not contain cocaine or ecgonine.

(d) Schedule IIA includes, unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system, including their salts, isomers, and salts of isomers whenever the existence of these salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) amobarbital;

(2) mandrix or mandrax;

(3) mecloqualone;

(4) methaqualone;

(5) pentobarbital;

(6) phencyclidine, also known as PCP;

(7) secobarbital.

(e) Schedule IIA includes, unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the nervous system:

(1) amphetamine, its salts, optical isomers, and salts of its optical isomers;

(2) methamphetamine, its salts, isomers, and salts of its isomers;

(3) methylphenidate;

(4) phenmetrazine and its salts.

(f) Schedule IIA includes, unless specifically excepted or unless listed in another schedule, any material, mixture, or preparation which contains any quantity of the following substances:

(1) immediate precursor to amphetamine and methamphetamine: phenylacetone also known as phenyl-2-propanone, P2P, benzyl methyl ketone, methyl benzyl ketone;

(2) immediate precursors to phencyclidine also known as PCP:

(A) 1-phenylcyclohexylamine;

(B) 1-piperidinocyclohexanecarbonitrile, also known as PCC. (§ 2 ch 45 SLA 1982)

NOTES TO DECISIONS

Editor's notes. — Cases cited in the notes below were decided under former AS 17.10.

Regulation of cocaine. — Word "narcotic" in common usage includes cocaine although cocaine is not a "narcotic

pharmacologically. State v. Erickson, Sup. Ct. Op. No. 347, File No. 8256, 574 P.2d 1 (1978).

The legislature specifically intended to regulate the use and possession of cocaine regardless of its particular pharma

...United States v. Erickson, Sup. Ct. Op. No. 1547, File No. 4250, 574 P.2d 1 (1978).

Constitutionality of classification of cocaine as narcotic. The classification of cocaine with narcotics under former AS 17.10 was not violative of equal protection or due process. State v. Erickson, Sup. Ct. Op. No. 1547, File No. 4250, 574 P.2d 1 (1978).

Where viewed in the overall legisla... purpose of [illegible] a drug harmful to society, the classification ... narcotic drug was not so irrational or arbitrary as to violate due process. State v. Erickson, Sup. Ct. Op. No. 1547, File No. 4250, 574 P.2d 1 (1978).

Cocaine was not unconstitutionally classified as a narcotic drug by former AS 17.10. Johnson v. State, Sup. Ct. Op. No. 1596 (File No. 4310, 577 P.2d 2 (Alaska 1978).

Sec. 11.71.160. Schedule IIIA. (a) A substance shall be placed in schedule IIIA if it is found under AS 11.71.120(c) to have a degree of danger or probable danger to a person or the public less than the substances listed in schedule IIA but higher than substances listed in schedule IVA.

(b) Schedule IIIA includes, unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including their salts, isomers whether optical, position, or geometric, and salts of these isomers whenever the existence of these salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) benzphetamine;

(2) chlorphentermine;

(3) clortermine;

(4) mazindol;

(5) phendimetrazine;

(6) any compound, mixture, or preparation in dosage unit form containing any stimulant substance listed in schedule IIA, which compound, mixture, or preparation was listed on August 25, 1971, as an excepted compound under 21 C.F.R. sec. 1308.32, and any other drug of the quantitative composition shown in that list for those substances, or which is the same except that it contains a lesser quantity of any controlled substance.

(c) Schedule IIIA includes, unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system:

(1) amobarbital, secobarbital, or pentobarbital or any salt of these substances, combined with one or more other active medicinal ingredients which are not listed in any other schedule;

(2) amobarbital, secobarbital, or pentobarbital or any salt of these substances, approved by the federal Food and Drug Administration for marketing only as a suppository;

(3) any substance which contains any quantity of a derivative of barbituric acid or any salt of barbituric acid;

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

P.O. Box Y, State Capitol
Juneau, Alaska 99811-3100
Mail Stop 3100
(907) 465-3991

February 24, 1988

MEMORANDUM

TO: Representative John Sund

ATTN: Shari Kochman

FROM: Karla Hart KH
Legislative Analyst

RE: **City Ordinances and Federal Laws on Possession of Marijuana**
Research Request 88.180

Attached are copies of the Ann Arbor, Michigan and Madison, Wisconsin city ordinances on the possession of marijuana and U.S. Code Title 23, Section 844, relating to penalties for possession of controlled substances (including marijuana).

If you require additional information, please call.

Attachments

ANN ARBOR, MI

Provided, That, nothing in this section shall limit the right of the grantee of any public utility franchise to mortgage its property or franchise, or shall restrict the rights of the purchaser, upon foreclosure sale, to operate the same, except that such mortgagee or purchaser shall be subject to the terms of the franchise and provisions of this chapter.

CHAPTER 16
CONTROLLED SUBSTANCES

Restrictions on Alcoholic Beverages

SECTION 16.1. The City Council, in addition to the powers and duties specially conferred upon them by this Charter and law, shall have power, within said city, to enact, make, continue, modify, establish, amend and repeal such ordinances, by-laws and regulations as they may deem desirable, within said city, for the following purposes:

> To forbid and prevent the vending or other disposition of liquors and intoxicating drinks in violation of the laws of this State, and to forbid the selling or giving to be drunk any intoxicating or fermented liquors to any common drunkard, or to any child or young person. (Amended April 6, 1964; November 3, 1964; November 8, 1966; April 7, 1969)

Restrictions on Marijuana

SECTION 16.2. (a) No person shall possess, control, use, give away, or sell marijuana or cannabis, which is defined as all parts of the plant cannabis sativa L., whether growing or not; its seeds or resin; and every compound, manufacture, salt, derivative, mixture, or preparation of the above, unless such possession, control, use, or sale is pursuant to a license or prescription as provided in Public Act 196 of 1971, as amended. This definition does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compounds, manufacture, sale, derivative, mixture or preparation of the mature stalks, except the resin extracted therefrom, fiber, oil or cake, or the sterlized seed of the plant which is incapable of germination.

ANN ARBOR, MI

(b) Any violation of this section shall be subject to a sentence of up to $5.00, including judgement fees and costs, and no probation or any other punitive or rehabilitative measure shall be imposed; provided, however, that this section shall not be construed to prohibit deferred sentencing. The District Court clerk shall accept any plea of guilty which is made in the same manner as pleas of guilty are accepted at the Parking Violations Bureau of the Fifteenth District Court, as of September 5, 1973. Persons pleading guilty of violations of this section shall be allowed to tender the sum of $5.00 to the District Court clerk as a full and complete satisfaction and discharge of liability, and no appearance before a district judge or other judicial officer shall be required. In any prosecution for violation of this section the burden of establishing any license or prescription shall be upon the defendant but this does not shift the burden of proof for the violation.

(c) In all arrests and prosecutions for violations of this section, appearance tickets and the relevant procedures set forth in Public Act 147 of 1968, as amended, shall be used.

(d) No Ann Arbor police officer, or his or her agent, shall complain of the possession, control, use, giving away, or sale of marijuana or cannabis to any other authority except the Ann Arbor city attorney; and the city attorney shall not refer any said complaint to any other authority for prosecution.

(e) Should the State of Michigan enact lesser penalties than that set forth in subsection (b) above, or entirely repeal penalties for the possession, control, use, giving away, or sale of marijuana or cannabis, then this section, or the relevant portions thereof, shall be null and void.

(f) The people of the City of Ann Arbor specifically determine that the provisions herein contained concerning marijuana or cannabis are necessary to serve the local purposes of providing just and equitable legal treatment of the citizens of this community, and in particular of the youth of this community present as university students or otherwise; and to provide for the public peace and safety by preserving the respect of such citizens for the law and law enforcement agencies of the City. Such provisions are necessary within the City because of the widespread local use of marijuana or cannabis. (Added by election of April 2, 1974)

Madison, WI

(2) No person, firm, or corporation which routinely conducts its business within the City of Madison shall wear or cause its employees or agents to wear a uniform, insignia, badge, pants, shirt, jacket and any other combination of clothing articles and paraphernalia which by their color, style, design and other characteristics would lead a reasonably prudent person to conclude that such person so garbed is a commissioned City of Madison police officer. It is the intent of this proviso to prohibit garb and paraphernalia which in its totality would create the impression in a reasonably prudent person that the one so clothed is a commissioned City of Madison police officer.

(3) Exceptions. This ordinance is not applicable to any official governmental body or subdivision thereof or to such body's employees or agents so long as such employees or agents are so attired in the regular course of such employment. Further, this ordinance is not applicable to theatrical productions.

(4) Severability. If any part or parts of this ordinance are for any reason held to be invalid, such decision shall not affect the validity of the remaining portions of this ordinance. The Common Council hereby declares that it would have passed this ordinance and each section, subsection, sentence, clause, and phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses, or phrases might be declared invalid.

(5) Penalty. Any person, firm, or corporation which violates any provision of this ordinance shall be subject to a forfeiture of not less than twenty dollars ($20) nor more than two hundred dollars ($200) for each violation.

(6) Effective Date. This ordinance shall be in full force and effect six months after adoption and publication.

(Sec. 23.16 Cr. by Ord. 7548, 10-29-81)

23.17 BILLIARD HALL CLOSING HOURS. All persons who run a billiard hall, whether licensed or not, shall close such places of business or use and keep them closed from 1:00 a.m. to 5:00 a.m. of each day.

23.18 CRUELTY TO DUMB ANIMALS. It shall be unlawful for any person to inhumanely, unnecessarily or cruelly beat, injure or otherwise abuse any dumb animal.

23.19 DESTRUCTION OF BIRDS PROHIBITED. No person shall injure or attempt to injure or destroy, within the limits of the City of Madison, any wild bird.

23.20 REGULATIONS CONCERNING MARIJUANA AND CANNABIS.

(1) Purpose. The people of Madison specifically determine that the regulations herein contained concerning marijuana and cannabis are necessary to serve the ethical purpose of providing just and equitable legal treatment of the citizens of this community and to preserve the respect of such citizens for law, its process, and its administration.

(7) Separability Clause. If any subsection, sentence, clause, phrase, or portion of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision, and such holding shall not affect the validity of the remaining portions hereof.

(Section 23.20 Cr. by Ord. 5833, 4-18-77)

23.21 PRUNING OR REMOVING TREES IN PUBLIC HIGHWAYS OR PUBLIC PLACES.

(1) No person, corporation, or association shall plant, cut, prune, or remove any living tree or shrub in a public highway in the City of Madison, or cut, disturb or interfere in any way with the roots of any tree, to the extent of causing serious injury to such tree, in such public highway, or spray any such trees or shrubs with any chemical or insecticides without written permit of the Board of Park Commissioners.

(2) Nothing herein shall be construed as preventing the City Engineer or Superintendent of Streets, Sewers, and Sanitation (Superintendent of Sanitation) from trimming trees so as to prevent interference with street illumination, provided that before trimming the trees said City Engineer or Superintendent of Streets, Sewers, and Sanitation (Superintendent of Sanitation) shall obtain the suggestion of the City Forester, and if the trimming suggested by him shall be sufficient to accomplish the purpose the tree shall be trimmed accordingly.

23.22 PLANTING OF THESE TREES IN PUBLIC HIGHWAY. No shade or ornamental tree or shrub shall be planted in any of the public streets of the City of Madison until such tree and the place where it is to be planted shall first have been approved by the Board of Park Commissioners, and a permit granted by said Board therefor.

23.23 DEPOSITING MATERIALS NEAR TREES. No person shall place or maintain upon the ground, in a public highway of the City of Madison, stone, cement, lumber, or other substance or material which may impede the free passage of water and air to any tree or shrub in such highway without leaving an open space of ground outside the trunk of said tree or the base of said shrub, of an area not less than sixteen (16) square feet. Before depositing any material in any highway of the City of Madison near to trees therein, the person so depositing said materials shall place such guards around the trees as shall effectively prevent injury to them.

23.24 BREAKING OR INJURING TREES. No person shall break or injure any tree planted in any highway in the City of Madison, nor shall he pour salt water on any such public highway in such places as to injure any tree or shrub planted or growing therein.

23.25 ATTACHING ELECTRIC WIRES, ETC., TO TREES. No person, corporation, or association, shall attach any electric insulator, or any device for holding of electric wire, to any tree growing or planted upon any public highway of the City of Madison. Every person, corporation, or association having any wire or wires charged with electricity running

item after narcotics investigator advised of inadquacy of office records and nurse's central role in rication of several hundred dispensing cards ntaining false statements. U.S. v. Vamos, A.2 (N.Y.) 1986, 797 F.2d 1146.

Defendant's proposed instruction referring to e use of a telephone to order cocaine for others l not refer to a lesser included offense of unlawuse of a telephone facility in connection with a caine conspiracy. U.S. v. Brown, C.A.Cal. 85, 761 F.2d 1272

Intoxication instruction, which stated that being der influence of drug provides legal excuse for mmission of crime only if effect of drug makes impossible for accused to have specific intent to mmit charged crime, adequately explained proption that proof of intoxication, in and of itself, es not excuse commission of a specific intent me. U.S. v. Echeverry, C.A.9 (Wash.) 1985, 9 F.2d 1451

Denial of defendant's request for instruction on ue of entrapment was not reversible error in ug conspiracy prosecution where defendant reuited cellmate and was abundantly predisposed commit the crime and did not show any govnmental inducement; his vague assertions that llmate had induced him to cooperate did not ffice as cellmate did not assist the government ntil well after defendant solicited his assistance. S. v. Leon, C.A.Tex.1982, 679 F.2d 534.

2. Verdict

Acquittal on charges of conspiracy to possess caine and possession of cocaine did not require at convictions of using telephone to facilitate ose offenses be vacated on ground of inconsistcy of verdicts. U.S. v. Powell, Cal.1984, 105 Ct. 471, 469 U.S. 57, 83 L.Ed.2d 461.

Defendant could properly be convicted for usg a communications facility to commit a felony here the offense charged to have been facilitated as a substantive crime and, in any event, defendit was not acquitted of the underlying crime. S. v. Ramos, C.A.Fla.1982, 666 F.2d 469.

3. Judgment of acquittal

Verdicts of acquittal on a substantive RICO harge and of conviction on a substantive count lentical to one of the predicate facts for the ICO charge are not inconsistent; acquittal of ubstantive RICO and RICO conspiracy charges nd conviction of using a telephone to facilitate istribution of controlled substance were not inonsistent. U.S. v. Russo, C.A.11 (Fla.) 1986, 96 F.2d 1443.

4. Sentence and punishment

U.S. v. Fontanez, 628 F.2d 687 [main volume] ertiorari denied 101 S.Ct. 1401, 450 U.S. 935, 67 .Ed.2d 371.

5. Parole

In denying parole to defendant serving four-ear term for illegally using communication facilies to facilitate unlawful cocaine transaction, Jnited States Parole Commission remanded with-n its own guidelines in considering facts surounding underlying smuggling charge which was lismissed in return for plea bargain. Page v. U.S. 'arole Commission, C.A.Tex.1981, 651 F.2d 083.

26. Venue

Overt act within Northern District of West Virginia was sufficient for venue thereof prosecution charging conspiracy to possess a narcotic with intent to distribute. U.S. v. Goldman, C.A. W.Va.1984, 750 F.2d 1221.

District in which defendant's telephone call was received was district in which venue was proper for prosecution for use of "communication facility" in facilitating conspiracy to import cocaine and conspiracy to possess with intent to distribute cocaine, even though the telephone call was made from outside of the district. U.S. v. Barnes, C.A.Fla.1982, 681 F.2d 717, rehearing denied 694 F.2d 233, certiorari denied 103 S.Ct. 1447, 460 U.S. 1046, 75 L.Ed.2d 802.

Fact that defendant was not physically present in the Western District of Wisconsin during any of telephone conversations and did not initiate telephone calls himself did not preclude him from being found to have used communication facilities in Western District of Wisconsin and to have committed the offense there of using a communication facility for illegal drug transactions; thus, venue was proper in the Western District of Wisconsin. U.S. v. Andrews, D.C.Wis.1984, 598 F.Supp. 296

27. Privacy

Pharmaceutical industry, like the mining, firearms, and liquor industries, is a pervasively regulated industry and consequently pharmacists and distributors subject to provisions of this section have a reduced expectation of privacy in the records kept in compliance with this chapter. U.S. v. Acklen, C.A.Tenn.1982, 690 F.2d 70

28. Facilitate

To "facilitate" within meaning of statute [21 U.S.C.A. § 843(b)] governing unlawful use of communication facility is merely to make easier or less difficult. U.S. v. Reese, C.A.9 (Cal.) 1985, 775 F.2d 1066

§ 844. Penalties

(a) Simple possession

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $1,000 but not more than $5,000, or both, except that if he commits such offense after a prior conviction under this subchapter or subchapter II of this chapter, or a prior conviction for any drug or narcotic offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of $2,500 but not more than $10,000, except, further, that if he commits such offense after two or more prior convictions under this subchapter or subchapter II of this chapter, or two or more prior convictions for any drug or narcotic offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of $5,000 but not more than $25,000. The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon conviction, a person who violates this subsection shall be fined the reasonable costs of the investigation and prosecution of the offense, including the costs of prosecution of an offense as defined in sections 1918 and 1920 of Title 28, except that this sentence shall not apply and a fine under this section need not be imposed if the court determines under the provision of Title 18 that the defendant lacks the ability to pay.

(b) Probation; expungement of records relating to arrest, etc.

(1) If any person who has not previously been convicted of violating subsection (a) of this section, any other provision of this subchapter or subchapter II of this chapter, or any other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, is found guilty of a violation of subsection (a) of this section after trial or upon a plea of guilty, the court may, without entering a judgment of guilty and with the consent of such person, defer further proceedings and place him on probation upon such reasonable conditions as it may require and for such period, not to exceed one year, as the court may prescribe. Upon violation of a condition of the probation, the court may enter an adjudication of guilt and proceed as otherwise provided. The court may, in its discretion, dismiss the proceedings against such person and discharge him from probation before the expiration of the maximum period prescribed for such person's probation. If during the period of his probation such person does not violate any of the conditions of the

probation, then upon expiration of such period the court shall discharge such person and dismiss the proceedings against him. Discharge and dismissal under this subsection shall be without court adjudication of guilt, but a nonpublic record thereof shall be retained by the Department of Justice solely for the purpose of use by the courts in determining whether or not, in subsequent proceedings, such person qualifies under this subsection. Such discharge or dismissal shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime (including the penalties prescribed under this part for second or subsequent convictions) or for any other purpose. Discharge and dismissal under this section may occur only once with respect to any person.

(2) Upon the discharge of such person and dismissal of the proceedings against him under paragraph (1) of this subsection, such person, if he was not over twenty-one years of age at the time of the offense, may apply to the court for an order to expunge from all official records (other than the nonpublic records to be retained by the Department of Justice under paragraph (1)) all recordation relating to his arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this section. If the court determines, after hearing, that such person was dismissed and the proceedings against him discharged and that he was not over twenty-one years of age at the time of the offense, it shall enter such order. The effect of such order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest or indictment or information. No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information or trial in response to any inquiry made of him for any purpose.

(c) Definition

As used in this section, the term "drug or narcotic offense" means any offense which proscribes the possession, distribution, manufacture, cultivation, sale, transfer, or the attempt or conspiracy to possess, distribute, manufacture, cultivate, sell or transfer any substance the possession of which is prohibited under this subchapter.

(As amended Pub.L. 99-570, Title I, § 1052, Oct. 27, 1986, 100 Stat. 3207-8.)

Amendment of Section

Pub.L. 98-473, Title II, §§ 219, 235, Oct. 12, 1984, 98 Stat. 2027, 2031, as amended by Pub.L. 99-217, § 4, Dec. 26, 1985, 99 Stat. 1728, provided that this section is amended, effective Nov. 1, 1987, by striking out subsec. (b) and by deleting the designation "(a)" in subsec. (a). See note set out under section 3551 of Title 18, Crimes and Criminal Procedure.

Legislative History. For legislative history and purpose of Pub.L. 99-570, see 1986 U.S. Code Cong. and Adm. News, p. 5393.

Federal Jury Practice and Instructions

Removal of goods from custody of Customs Service, see § 16.07 Notes.

Notes of Decisions

Injunction 86

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2. Constitutionality

Church declared that it considered peyote divine, an embodiment of the deity, and use of peyote a sacrament, and record did not show a compelling state interest in denying church members the right to use peyote in religious ceremonies or that the denial was narrowly drawn to attain the important governmental purpose; therefore, remand was appropriate for further proceedings to determine whether Vernon's Ann. Texas Civ.St. art. 4476-15, §§ 4.032, 4.041, and 4.042 making possession or distribution of peyote a criminal act denied to members of the church the right freely to exercise their religion under U.S.C.A. Const. Amend. 1. Peyote Way Church of God, Inc. v. Smith, C.A.Tex.1984, 742 F.2d 193.

8. —— Dominion and control

Conviction for possession of cocaine was supported by sufficient evidence, where defendant retained constructive possession over cocaine since he had ability to use it and remove it, and therefore to exercise dominion and control over the substance. U.S. v. Schocket, C.A.Va.1985, 753 F.2d 336.

Use of a portion of narcotics by a defendant is relevant to the extent of his control over the larger quantity. U.S. v. White, C.A.Ill.1981, 660 F.2d 1178, on remand 541 F.Supp. 1114.

9. —— Knowledge or intent

Irrespective of what defendant's intentions were regarding ultimate disposition of heroin he claimed to have found while performing his duties as a janitor in prison, defendant's knowledge of illicit nature of substance and purposeful possession of substance was a violation of heroin possession statute. U.S. v. Holloway, C.A.3 744 F.2d 527.

Assistance which defendant subsequ to another in selling heroin which a t had given to the other person in defend ence could be considered as evidence ant's knowledge that the substance gi other person by the third person was her v. Wilson, C.A.Tex.1981, 657 F.2d 755, denied 102 S.Ct. 1456, 455 U.S. 951, 7 667.

10. —— Actual or constructive

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Possession of a controlled substance w to distribute it may be either actual or tive; "constructive possession" may be e by a showing of ownership, dominion, over the contraband itself, or dominion over the premises or the vehicle in contraband was concealed; constructi sion may be exclusive or joint and may by either direct or circumstantial evider v. Wilson, C.A.Tex.1981, 657 F.2d 755, denied 102 S.Ct. 1456, 455 U.S. 951, 7 667.

12. —— Proximity to narcotic

Proximity, under certain circumstan amount to constructive possession of co U.S. v. James, C.A.D.C.1985, 764 F.2d

16. Measurable or usable quantity

Evidence showed beyond doubt that d agreed to possess more than simply a m amount of marijuana for personal cons rather, police arrested the three defenda near a truck filled with more than or marijuana; therefore, evidence did no instruction on conspiracy simply to "measurable amount" with no intent to as defined in Comprehensive Drug Abus tion and Control Act of 1970, § 404, 21 § 844. U.S. v. Anello, C.A.1 (Me.) F.2d 253.

Quantity of marihuana is not a consid cases of simple possession. U.S. v. C.A.4 (W.Va.) 1985, 757 F.2d 1439.

19. Arrest

Probable cause to arrest defendant fo sion of a controlled substance was es where anonymous tip regarding valium two women was substantially corroborat lice officer's observation of women mat formant's description apparently makin narcotics to defendant, particularly in officer's knowledge of previous valium that area, which was within one block c done and detoxification center. U.S. v C.A.D.C.1985, 778 F.2d 885.

20. Search and seizure

In drug prosecution, government did tain its burden of proving that defendant' to search of his apartment in which dr found was voluntary, that consent was p

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which is prohibited under this subchap-

7, 1986, 100 Stat. 3207-8.)

f Section

ct. 12, 1984, 98 Stat. 2027, 2031, as 1985, 99 Stat. 1728, provided that 1, 1987, by striking out subsec. (b) in subsec. (a). See note set out and Criminal Procedure.

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—— Dominion and control

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Irrespective of what defendant's intentions were regarding ultimate disposition of heroin he claimed to have found while performing his duties as a janitor in prison, defendant's knowledge of illicit nature of substance and purposeful possession of substance was a violation of heroin possession statute. U.S. v. Holloway, C.A.Mich.1984, 744 F.2d 527.

Assistance which defendant subsequently gave to another in selling heroin which a third party had given to the other person in defendant's presence could be considered as evidence of defendant's knowledge that the substance given to the other person by the third person was heroin. U.S. v. Wilson, C.A.Tex.1981, 657 F.2d 755, certiorari denied 102 S.Ct. 1456, 455 U.S. 951, 71 L.Ed.2d 667.

10. —— Actual or constructive

A person having an association with those having physical custody of drug so as to enable him to assure their production, without difficulty, to a customer as a matter of course may be held to have constructive possession. U.S. v. White, C.A.Ill.1981, 660 F.2d 1178, on remand 541 F.Supp. 1114.

Possession of a controlled substance with intent to distribute it may be either actual or constructive; "constructive possession" may be established by a showing of ownership, dominion, or control over the contraband itself, or dominion or control over the premises or the vehicle in which the contraband was concealed; constructive possession may be exclusive or joint and may be proved by either direct or circumstantial evidence. U.S. v. Wilson, C.A.Tex.1981, 657 F.2d 755, certiorari denied 102 S.Ct. 1456, 455 U.S. 951, 71 L.Ed.2d 667.

12. —— Proximity to narcotic

Proximity, under certain circumstances, may amount to constructive possession of contraband. U.S. v. James, C.A.D.C.1985, 764 F.2d 885.

16. Measurable or usable quantity

Evidence showed beyond doubt that defendants agreed to possess more than simply a measurable amount of marijuana for personal consumption, rather, police arrested the three defendants in or near a truck filled with more than one ton of marijuana; therefore, evidence did not warrant instruction on conspiracy simply to possess a "measurable amount" with no intent to distribute as defined in Comprehensive Drug Abuse Prevention and Control Act of 1970, § 404, 21 U.S.C.A. § 844. U.S. v. Anello, C.A.1 (Me.) 1985, 765 F.2d 253.

Quantity of marihuana is not a consideration in cases of simple possession. U.S. v. Bernard, C.A.4 (W.Va.) 1985, 757 F.2d 1439.

19. Arrest

Probable cause to arrest defendant for possession of a controlled substance was established where anonymous tip regarding valium sales by two women was substantially corroborated by police officer's observation of women matching informant's description apparently making sale of narcotics to defendant, particularly in light of officer's knowledge of previous valium sales in that area, which was within one block of methadone and detoxification center. U.S. v. Lucas, C.A.D.C.1985, 778 F.2d 885.

20. Search and seizure

In drug prosecution, government did not sustain its burden of proving that defendant's consent to search of his apartment in which drugs were found was voluntary, that consent was product of defendant's submitting to what he reasonably believed was exercise of lawful authority, and that consent was not result of free and rational choice by defendant. U.S. v. Restrepo-Cruz, D.C.N.Y. 1982, 547 F.Supp. 1048.

43. Pleas—Generally

Fact that 18-year-old dependent's conditional plea to possession of marijuana could not operate as conviction did not negate factual circumstances surrounding underlying arrest for possession of marijuana and, therefore, statute preventing conditional plea from being a conviction did not preclude air force base commander from entering bar order. Berry v. Bean, C.A.4 (Md.) 1986, 796 F.2d 713.

Once the district court had accepted a bargained guilty plea agreement, thereby binding defendant and prosecution, it could not simply change its mind on basis of information in presentence report, at least where that information revealed less than fraud on the court; thus, since jeopardy attached, under facts of case, when defendant's guilty plea was accepted, information charging defendant with simple possession of cocaine, the misdemeanor to which defendant had pled guilty, had to be reinstated and case remanded for sentencing. U.S. v. Cruz, C.A.Puerto Rico 1983, 709 F.2d 111.

46. —— Double jeopardy

Where oral decision granting defendants' motions for judgments of acquittal on count charging possession with intent to distribute heroin was followed promptly by modification providing for reduction of count to lesser included offense instead of elimination of count, and where reduced count could be and was submitted in normal course of trial to original jury, submission of reduced count did not violate double jeopardy. U. S. v. LoRusso, C.A.N.Y.1982, 695 F.2d 45, certiorari denied 103 S.Ct. 1525, 460 U.S. 1070, 75 L.Ed.2d 948.

60. —— Particular cases sufficient

Evidence that 17 marihuana plants, ranging in height between five and six feet, were growing in field cleared out of forest on defendant's land and about 100 yards from farmhouse in which defendant lived with his family, and that there were 24 marihuana stumps in field and 24 marihuana plants similar to those found in field, hanging in plain view in defendant's barn only few yards away from his residence, was sufficient to sustain conviction for possession of marihuana. U.S. v. Bernard, C.A.4 (W.Va.) 1985, 757 F.2d 1439.

In prosecution for simple possession of heroin, evidence of heroin found in automobile of which defendant was both owner and driver, only shortly after defendant had left automobile, was sufficient to sustain conviction. U.S. v. Maldonado, C.A. Tex.1984, 735 F.2d 809.

Evidence in defendant's prosecution for possession of cocaine, including evidence that substance had appearance of illicit cocaine, that when sampled and tested by experienced user of cocaine, it had effect of cocaine, that price paid for substance was "high," that sale and delivery were conducted furtively and with deviousness, and that all persons dealing with substance treated and dealt with it as cocaine, was sufficient to support defendant's conviction, even though substance delivered to

Note 60

defendant had not been seized and government was unable to chemically analyze substance and thereby establish its illicit character. U.S. v. Scott, C.A.W.Va.1984, 725 F.2d 43.

61. —— Particular cases insufficient

Evidence that defendant accompanied another person when that other person gave a third person 25 capsules of heroin for further distribution and that defendant then assisted the third party in selling the 25 capsules to others was insufficient to sustain defendant's conviction for distribution of heroin to the third person. U.S. v. Wilson, C.A. Tex.1981, 657 F.2d 755, certiorari denied 102 S.Ct. 1456, 455 U.S. 951, 71 L.Ed.2d 667.

65. Instructions—Generally

In prosecution which resulted in conviction of defendant on single misdemeanor count of possessing 1/100 of an ounce of cocaine, trial court erred in instructing jury that D-cocaine was the chemical equivalent of L-cocaine, the only one of the eight cocaine isomers covered under this section, in that jury could reasonably have determined that substance was either L-cocaine or D-cocaine. U.S. v. Ross, C.A.N.Y.1983, 719 F.2d 615.

70. Sentence and punishment—Generally

Defendant's testimony before district court established that he distributed marijuana for remuneration, thereby supporting sentence, on defendant's guilty plea to distribution of marijuana, to five-year prison term, rather than maximum two-year term under statute, 21 U.S.C.A. § 844(a), which provides for lesser punishments for possession or delivery of small amounts of marijuana without remuneration. U.S. v. Harvey, C.A.8 (Ark.) 1986, 784 F.2d 330.

Imposition of sentence of six months for possession of controlled substance was not excessive. Orosco v. U.S., D.C.Okl.1981, 526 F.Supp. 756.

71. —— Disbarment or suspension

Federal convictions on three counts of stealing property from an agency of the United States government, and two counts of possession of narcotic drug controlled substances, which crimes, if committed within New York, would be felonies, warrant automatic disbarment. Matter ... Perlmutter, N.Y.A.D. 1 Dept.1986, 500 N.Y.S.2d 700.

75. —— Admissibility of evidence

District court, in imposing maximum sentence of one year imprisonment and $5,000 fine for possession of marihuana, committed no error in considering government agent's testimony, which jury rejected in reaching its verdict, that defendant intended to distribute the marihuana he possessed, since defense counsel cross-examined such agent, and defendant had opportunity to introduce his own expert testimony at trial and opportunity to address district court with regard to the issue at the sentencing hearing. U.S. v. Bernard, C.A.4 (W.Va.) 1985, 757 F.2d 1439.

86. Injunction

Teenager who was barred from residing with her stepfather and brothers on air force base by order of the base commander because she had been cited for possession/use of a controlled/dangerous substance was entitled to preliminary injunction to permit her to return and live with the other members of her family; her alternative was to live on her own in metropolitan Washington, D.C. area, any dilution of the base commander's authority if she were allowed to return would be minimal, the base commander's action appeared to be arbitrary and beyond statutory limits, and it would be in public interest to keep the family together. Berry v. Bean, D.C.Md.1985, 623 F.Supp. 977.

§ 845. Distribution to persons under age twenty-one

(a) Except as provided in section 845a of this title, any person at least eighteen years of age who violates section 841(a)(1) of this title by distributing a controlled substance to a person under twenty-one years of age is (except as provided in subsection (b) of this section) punishable by (1) a term of imprisonment, or a fine, or both, up to twice that authorized by section 841(b) of this title, and (2) at least twice any special parole term authorized by section 841(b) of this title, for a first offense involving the same controlled substance and schedule. Except to the extent a greater minimum sentence is otherwise provided by section 841(b) of this title, a term of imprisonment under this subsection shall be not less than one year.

(b) Except as provided in section 845a of this title, any person at least eighteen years of age who violates section 841(a)(1) of this title by distributing a controlled substance to a person under twenty-one years of age after a prior conviction or convictions under subsection (a) of this section (or under section 333(b) of this title as in effect prior to May 1, 1971) have become final, is punishable by (1) a term of imprisonment, or a fine, or both, up to three times that authorized by section 841(b) of this title, and (2) at least three times any special parole term authorized by section 841(b) of this title, for a second or subsequent offense involving the same controlled substance and schedule. Except to the extent a greater minimum sentence is otherwise provided by section 841(b) of this title, a term of imprisonment under this subsection shall be not less than one year. The mandatory minimum sentencing provisions of this paragraph shall not apply to offenses involving 5 grams or less of marihuana.

(As amended Pub.L. 98–473, Title II, § 503(b)(3), Oct. 12, 1984, 98 Stat. 2070; Pub.L. 99–570, Title I, § 1105(a), (b), Oct. 27, 1986, 100 Stat. 3207–11.)

1984 Amendment. Subsec. (a). Pub.L. ... § 503(b)(3), added exception for section ... this title.

Amendment

Pub.L. 99–570, Title I, § 1... that, effective on the date of ... Crimes and Criminal Proced... "special parole term" and s... vised release" wherever appe...

Repeals. Pub.L. 98–473, Title II, §§ 235, Oct. 12, 1984, 98 Stat. 2030, 203... provided that, effective Nov. 1, 1986, this ... is amended in subsection (a), by deleting "... second place it appears, and by deleting "... at least twice any special parole term ... by section 841(b) of this title, for a first ... involving the same controlled substance ... schedule"; and in subsection (b), by deleting ... the second place it appears, and by deleting ... (2) at least three times any special parole ... authorized by section 841(b) of this title ... second or subsequent offense involving the ... controlled substance and schedule", was re... by Pub.L. 99–570, Title I, § 1005(b)(1), Oct. ... 1986, 100 Stat. 3207–6.

Legislative History. For legislative history ... purpose of Pub.L. 98–473, see 1984 U.S. ... Cong. and Adm. News, p. 3182. See, also, ... 99–570, 1986 U.S. Code Cong. and Adm. ... p. 5393.

Federal Practice and Procedure

Special parole terms given to certain ... offenders, see Wright: Criminal 2d § 53...

§ 845a. Distribution or manufact...

(a) Penalty

Any person who violates section ... or manufacturing a controlled subst... real property comprising a public ... school or a public or private colle... provided in subsection (b) of this se... or fine, or both up to twice that au... least twice any special parole term a... offense. Except to the extent a gre... section 841(b) of this title, a term of ... less than one year. The mandator... graph shall not apply to offenses i...

(b) Second offenders

Any person who violates section ... or manufacturing a controlled subst... real property comprising a public ... school or a public or private colle... conviction or convictions under sub... punishable (1) by the greater of (A) ... years and not more than life impris... three times that authorized by sect... up to three times that authorized by ... both, and (2) at least three times an... section 841(b) of this title for a firs...

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

P.O. Box Y, State Capitol
Juneau, Alaska 99811-3100
Mail Stop 3100
(907) 465-3991

December 3, 1986

MEMORANDUM

TO: Representative Alyce Hanley

ATTN: Cassie Russell

FROM: Penelope Weyhrauch
Legislative Analyst

RE: Recriminalization of Marijuana
Research Request 87.047

You requested a discussion of federal and State law criminalizing marijuana, and were interested in which states had amended their constitutions to conform with federal drug law. You also asked for information on recriminalizing marijuana in Alaska by constitutional amendment and/or legislation.

Federal Law

The Comprehensive Drug Abuse Prevention and Treatment (CDAPT) Act of 1970 (also known as the Controlled Substances Act) criminalizes the possession and distribution of marijuana. Under the act, possession of any amount of marijuana is a criminal offense. Both a fine and incarceration can be imposed on a person possessing marijuana, subject to a court's discretion. Any offense other than simple possession (first offense) is a felony. Attachment A contains a copy of applicable sections of the CDAPT Act.

The Anti Drug Abuse Act of 1986 set mandatory sentences for simple possession of marijuana and for possession with intent to distribute. Penalties are specified in Table 1. The act also specified penalties for distributing drugs to juveniles and pregnant women, distributing drugs near schools and appropriated funds for states to improve narcotics control.

Federal drug laws may be enforced in any state by federal agents. State law enforcement officers may also enforce federal drug laws. According to Gretchen Derr, Special Assistant to the Alaska Commissioner of Public Safety, Alaska State Police usually will not pursue a federal offense until the U.S. Attorney's office authorizes such action.

TABLE 1
FEDERAL PENALTIES FOR THE POSSESSION OF MARIJUANA

	First Offense		Second Offense	
	Fine (000)	Incarceration (Years)	Fine (000)	Incarceration (Years)
Simple Possession	$5	1 or probation	$1 to $5*	1*
Possession with Intent to Distribute				
Quantity (kilograms):				
0 to 50				
individual	250	5	500	10
corporation	1,000		2,000	
50 to 99				
individual	1,000	20	2,000	30
corporation	5,000		10,000	
100 to 999				
individual	2,000	5 to 40*	4,000	10 to life*
corporation	5,000		10,000	
1000 and up				
individual	5,000	10 to life*	8,000	20 to life*
corporation	10,000		20,000	
Cultivation:				
< 100 plants & 0-50 kg	250	5	500	10
> 100 plants & 0-99 kilograms	1,000	20	2,000	30

NOTES:

*--Mandatory Sentencing.

Simple possession by quantity is not defined in federal law. A first offender of simple possession will often be put on probation, with the record expunged after the completion of probation. If the offense is repeated, courts then apply either the first or second offense penalties.

Possession with intent to distribute can be inferred by the quantity of marijuana in possession, even if a sale has not occurred. Distribution of a small amount of marijuana for no renumeration is often treated as simple possession.

Cultivation of more than 100 plants with a weight greater than 99 kilograms, carries the same penalties, according to the quantity, as possession with intent to distribute.

"Corporation" includes any organization, asssociation, or group of drug traffickers.

Prepared by the House Research Agency, December 1986.

According to Jim Walsh, Assistant Attorney with the U.S. Department of Justice Controlled Substance Unit, the federal government has no interest in prosecuting for possession of small amounts of marijuana. Federal enforcement agencies are interested in the smuggling and trafficking of large amounts and rarely pursue or prosecute small-scale possessors.

State Law

Although most states have traditionally followed the federal lead regarding drug legislation, a state is not in violation of federal law because its prohibitions on the possession and distribution of marijuana differ from federal law. Adoption of federal provisions in this area is not mandatory, and states may develop their own policies regarding marijuana within their state boundaries. No state has amended its constitution in order to conform with federal drug legislation. The Uniform Controlled Substance Act of 1970--model legislation drafted by the National Conference of Commissioners on Uniform State laws--was designed to make state laws more compatible with federal law. Between 35 and 40 states have adopted the Uniform Act.

State marijuana laws are listed on Table 2. As shown on this table, eleven states--Alaska, California, Colorado, Maine, Minnesota, Mississippi, Nebraska, New York, North Carolina, Ohio, and Oregon--have decriminalized marijuana. Decriminalization means that the possession of marijuana is considered a civil offense or a criminal infraction and is not punishable by incarceration. In states which have decriminalized marijuana, a citation and a small fine are the usual penalties for violations. None of the states that have decriminalized marijuana have recriminalized it.

Twenty-eight states allow for a conditional discharge for first-time, simple possession violators; defendants are released, generally without an adjudication of guilt, on condition that they satisfy certain requirements, such as participation in a drug education program. In Massachusetts, a first offense possessor of any amount of marijuana is subject only to probation.

State laws relating to subsequent violation of simple possession provisions and for cultivation and selling marijuana vary greatly. In a majority of states, cultivation is punished as heavily as the sale of marijuana.

TABLE 2
STATE MARIJUANA LAWS

PREPARED BY THE NATIONAL ORGANIZATION FOR THE REFORM OF MARIJUANA LAWS (NORML)
SPRING 1985

State	Amount[1]	Possession	Cultivation	Sale
Federal Law	any amount	0-1 yr. & $5,000*	0-5 yrs. & $15,000	0-5 yrs. & $15,000
Alabama†	up to 2.2 lbs. for personal use	0-1 yr. & $1,000	2-15 yrs. & $25,000	2-15 yrs. & $25,000
	up to 2.2 lbs. not for personal use	2-15 yrs. & $25,000	2-15 yrs. & $25,000	2-15 yrs. & $25,000
	2.2-2,000 lbs.	3-15 yrs. & $25,000	3-15 yrs. & $25,000	3-15 yrs. & $25,000
	2,000-10,000 lbs.	5-15 yrs. & $50,000	5-15 yrs. & $50,000	5-15 yrs. & $50,000
	over 10,000 lbs.	15 yrs. & $200,000	15 yrs. & $200,000	15 yrs. & $200,000
Alaska	any amount for personal home use	Legal	Legal	N.A.
	any amount "not in a public place" for personal use	$0-$100	$0-$100	N.A.
	up to 1	$0-$100	$0-$100	0-1 yr. & $1,000
	public use or display over 1 oz. or poss. over 4 oz.	0-90 days & $1,000	N.A.	0-5 yrs. & $10,000
Arizona†	any amount not for sale	1-5 yrs. & $0-$150,000	1-5 yrs. & $0-$150,000	N.A.
	any amount for sale	4 yrs. & $0-$150,000	4 yrs. & $0-$150,000	7 yrs. & $0-$150,000
Arkansas†	up to 1 oz. for personal use	0-1 yr.* & $1,000	3-10 yrs. & $10,000	3-10 yrs. & $10,000
	1 oz.-10 lbs.	4-10 yrs. & $25,000	4-10 yrs. & $25,000	4-10 yrs. & $25,000
	10 lbs.-100 lbs.	5-20 yrs. & $50,000	5-20 yrs. & $50,000	5-20 yrs. & $50,000
	over 100 lbs.	6-30 yrs. & $100,000	6-30 yrs. & $100,000	6-30 yrs. & $100,000
California†	up to 1 oz.	$0-$100	16 mo., 2 or 3 yrs.	2,3, or 4 yrs.
	over 1 oz.	0-6 mos. $500	16 mo., 2 or 3 yrs.	2,3, or 4 yrs.
Colorado*	0-1 oz. not in public	$0-$100	2-4 yrs.	2-4 yrs.
	0-1 oz. in public	0-15 days $0-$100	2-4 yrs.	2-4 yrs.
	1 oz.-8 oz.	0-2 yrs. $0-$500	2-4 yrs.	2-4 yrs.
	over 8 oz.	1-2 yrs	2-4 yrs.	2-4 yrs
Connecticut†	up to 1 oz.	0-1 yr. & $1,000	0-7 yrs. & $1,000	0-7 yrs. & $1,000
	1 oz.-2.2 lbs.	0-5 yrs. & $2,000	0-7 yrs. & $1,000	0-7 yrs. & $1,000
	over 2.2 lbs.	0-5 yrs. & $2,000	5-20 yrs.	5-20 yrs.
Delaware	up to 50 lbs.	0-2 yrs.* & $500	0-10 yrs. & $10,000	0-10 yrs. & $10,000
	50-100 lbs.	3 yrs. & $50,000	3-10 yrs. & $50,000	3-10 yrs. & $50,000
	100-5,000 lbs.	5 yrs. & $100,000	5 yrs. & $100,000	5 yrs. & $100,000
	over 5,000 lbs.	15 yrs. & $400,000	15 yrs. & $100,000	15 yrs. & $400,000
Florida†	up to 20 gms.	0-1 yr* & $1,000	0-5 yrs. & $5,000	0-5 yrs. & $5,000
	20 grs.-100 lbs.	0-5 yrs. & $5,000	0-5 yrs. & $5,000	0-5 yrs. & $5,000
	100-2,000 lbs.	3-30 yrs. & $25,000	3-30 yrs. & $25,000	3-30 yrs. & $25,000
	2,000-10,000 lbs.	5-30 yrs. & $50,000	5-30 yrs. & $50,000	5-30 yrs. & $50,000
	over 10,000 lbs.	15-30 yrs. & $200,000	15-30 yrs. & $200,000	15-30 yrs. & $200,000
Georgia†	up to 1 oz.	0-1 yr.* & $1,000	1-10 yrs.	1-10 yrs.
	1 oz.-100 lbs.	1-10 yrs.	1-10 yrs.	1-10 yrs.
	100-2,000 lbs.	3-10 yrs. & $25,000	3-10 yrs. & $25,000	3-10 yrs. & $25,000
	2,000-10,000 lbs.	7-10 yrs. & $50,000	7-10 yrs. & $50,000	7-10 yrs. & $50,000
	over 10,000 lbs.	15 yrs. & $200,000	15 yrs. & $200,000	15 yrs. & $200,000
Hawaii	up to 1 oz.	0-30 days* & $500	0-30 days & $500	0-1 yr. & $1,000
	1-2 oz	0-1 yr. & $1,000	0-1 yr. & $1,000	0-1 yr. & $1,000
	2 oz.-2.2 lbs.	0-1 yr. & $1,000	0-1 yr. & $1,000	0-5 yrs. & $5,000
	over 2.2 lbs.	0-5 yrs. & $5,000	0-5 yrs. & $5,000	0-5 yrs. & $5,000
Idaho	up to 1 oz	0-1 yr.* & $1,000	0-5 yrs. & $1,000	0-5 yrs. & $1,000
	over 1 oz	0-5 yrs. & $10,000	0-5 yrs. & $15,000	0-5 yrs. & $15,000
Illinois†	under 2.5 gms	0-30 days* & $500	0-6 mos. & $500	0-6 mos. & $500
	2.5-10 gms	0-1 yr. & $1,000	0-1 yr. & $1,000	0-1 yr. & $1,000
	10-30 gms	0-1 yr. & $1,000	1-3 yrs. & $10,000	1-3 yrs. & $10,000
	30-500 gms	1-3 yrs. & $10,000	2-5 yrs. & $50,000	2-5 yrs. & $50,000
	over 500 gms.	2-5 yrs. & $10,000	3-7 yrs. & $100,000	3-7 yrs. & $100,000

State	Amount[1]	Possession	Cultivation	Sale
Missouri	up to 35 gms.	0-1 yr. & $1,000	0-5 yrs. & $1,000	5 yrs. life
	over 35 gms.	0-5 yrs. & $1,000	0-5 yrs. & $1,000	5 yrs. life
Montana†	up to 60 gms.	0-6 mos. & $500	1 yr. life & $50,000	1 yr. life & $50
	over 60 gms.	0-5 yrs. & $50,000	1 yr. life & $50,000	1 yr. life & $50
Nebraska	up to 1 oz.	$100 & drug ed.	0-5 yrs. & $10,000	0-5 yrs. & $10,000
	1 oz.-1 lb.	0-7 days & $500	0-5 yrs. & $10,000	0-5 yrs. & $10,000
	over 1 lb.	0-5 yrs. & $10,000	0-5 yrs. & $10,000	0-5 yrs. & $10,000
Nevada†	up to 1 oz. by person under 21	0-6 yrs.* & $2,000	1-15 yrs. & $5,000	1-15 yrs. & $5,000
	up to 100 lbs. (any age)	probation-6 yrs. & $5,000	1-15 yrs. & $5,000	1-15 yrs. & $5,000
	100-2,000 lbs.	3-20 yrs. & $25,000	3-20 yrs. & $25,000	3-20 yrs. & $25,000
	2,000-10,000 lbs.	5-20 yrs. & $50,000	5-20 yrs. & $50,000	5-20 yrs. & $50,000
	over 10,000 lbs.	15 yrs.-life & $200,000	15 yrs.-life & $200,000	15 yrs.-life & $200,000
New Hampshire†	up to 1 lb.	0-1 yr. & $1,000	0-15 yrs. & $2,000	0-15 yrs. & $2,000
	over 1 lb.	0-7 yrs. & $2,000	0-15 yrs. & $2,000	0-15 yrs. & $2,000
New Jersey†	up to 25 gms.	0-6 mos.* & $500 2 yr. driving suspension	0-5 yrs. & $15,000	0-5 yrs. & $15,000
	over 25 gms.	0-5 yrs. & $15,000	0-5 yrs. & $15,000	0-5 yrs. & $15,000
New Mexico†	up to 1 oz.	0-15 days & $100	9 yrs. & $10,000	18 mos. & $5,000
	1 oz.-8 oz.	0-1 yr. & $1,000	9 yrs. & $10,000	18 mos. & $5,000
	8 oz.-100 lbs.	0-18 mos. & $5,000	9 yrs. & $10,000	18 mos. & $5,000
	over 100 lbs.	3 yrs. & $5,000	9 yrs. & $10,000	3 yrs. & $5,000
New York†	up to 25 gms. in private	$0-$100	0-1 yr. & $1,000	0-1 yr. & $1,000
	25 gms.-2 oz.	0-3 mos. & $500	0-1 yr. & $1,000	0-4 yrs.
	2-4 oz	0-1 yr. & $1,000	0-1 yr. & $1,000	0-4 yrs.
	4-8 oz.	0-1 yr. & $1,000	0-1 yr. & $10,000	0-7 yrs.
	8 oz.-1 lb.	0-4 yrs.	0-4 yrs	0-7 yrs.
	1-10 lbs.	0-7 yrs.	0-7 yrs	0-15 yrs.
	over 10 lbs.	0-15 yrs.	0-15 yrs	0-15 yrs.
North Carolina†	up to 1 oz.	$0-$100	0-2 yrs. & $2,000	0-2 yrs. & $2,000
	over 1 oz.	0-2 yrs. & $2,000	0-2 yrs. & $2,000	0-2 yrs. & $2,000
North Dakota	up to 5 oz. not in vehicle	0-30 days* & $500	0-10 yrs. & $10,000	0-10 yrs. & $10,000
	5-1 oz. or up to 5 oz. in vehicle	0-1 yr. & $1,000	0-10 yrs. & $10,000	0-10 yrs. & $10,000
	over 1 oz	0-5 yrs. & $5,000	0-10 yrs. & $10,000	0-10 yrs. & $10,000
Ohio†	up to 100 gms.	$0-$100*	6 mos.-5 yrs. & $2,500	6 mos.-5 yrs. & $2,500
	100-200 gms.	0-30 days & $250	6 mos.-5 yrs. & $2,500	6 mos.-5 yrs. & $2,500
	200-600 gms.	6 mos.-5 yrs. & $2,500	1-10 yrs. & $5,000	1-10 yrs. & $5,000
	over 600 gms.	1-10 yrs. & $5,000	2-15 yrs. & $7,500	2-15 yrs. & $7,500
Oklahoma†	any amount	0-1 yr.*	2-10 yrs. & $5,000	2-10 yrs. & $5,000
Oregon†	up to 1 oz.	$0-$100	0-10 yrs. & $2,500	0-10 yrs. & $2,500
	over 1 oz.	probation-10 yrs. & $2,500	0-10 yrs. & $2,500	0-10 yrs. & $2,500
Pennsylvania	up to 30 gms.	0-30 days* & $500	0-5 yrs. & $15,000	0-5 yrs. & $15,000
	over 30 gms.	0-1 yr. & $5,000	0-5 yrs. & $15,000	0-5 yrs. & $15,000
Rhode Island†	any amount	0-1 yr. & $500	0-30 yrs. & $50,000	0-30 yrs. & $50,000
South Carolina†	up to 1 oz	0-30 days* & $200	0-5 yrs. & $5,000	0-5 yrs. & $5,000
	over 1 oz	0-5 yrs. & $5,000	0-5 yrs. & $5,000	0-5 yrs. & $5,000
South Dakota	up to 1 oz	0-30 days & $100	0-30 days & $100	0-1 yr. & $1,000
	1 oz.-1 lb	0-1 yr. & $1,000	0-1 yr. & $1,000	0-2 yrs. & $2,000
	1-10 lbs	0-2 yrs. & $2,000	0-2 yrs. & $2,000	0-10 yrs. & $10,000
	over 10 lbs.	0-10 yrs. & $10,000	0-10 yrs. & $10,000	0-10 yrs. & $10,000
Tennessee†	up to 5 oz.	0-1 yr. & $1,000	1-5 yrs. & $5,000	0-1 yr. & $1,000
	5 oz.-10 lbs	0-1 yr. & $1,000	1-5 yrs. & $5,000	1-5 yrs. & $5,000
	over 10 lbs	4-10 yrs. & $10,000	4-10 yrs. & $10,000	4-10 yrs. & $10,000

TABLE 2
STATE MARIJUANA LAWS

	Amount[1]	Possession	Cultivation	Sale
Indiana	up to 30 gms	0-1 yr.* & $5,000	0-1 yr. & $5,000	0-1 yr. & $5,000
	over 30 gms	0-2 yrs. & $10,000	0-2 yrs. & $10,000	0-2 yrs. & $10,000
Iowa[†]	any amount	0-6 mos.* & $2,500	0-5 yrs. & $2,500	0-5 yrs. & $10,000
Kansas	any amount	0-1 yr.* & $2,500	0-1 yr. & $2,500	1-10 yrs. & $10,000
Kentucky	up to 8 oz.	0-90 days* & $250	0-90 days & $250*	0-1 yr. & $500
	8 oz.-5 lbs.	0-1 yr. & $500	see footnote [1] below	1-5 yrs. & $5,000
	over 5 lbs.	0-1 yr. & $500	1-5 yrs. & $5,000*	5-10 yrs. & $10,000
Louisiana[†]	up to 100 lbs.	0-6 mos.* & $500	0-10 yrs. & $15,000	0-10 yrs. & $15,000
	100-2,000 lbs.	5-15 yrs. & $50,000	5-15 yrs. & $50,000	5-15 yrs. & $50,000
	2,000-10,000 lbs.	15-25 yrs. & $200,000	15-25 yrs. & $200,000	15-25 yrs. & $200,000
	over 10,000 lbs.	25-35 yrs. & $500,000	25-35 yrs. & $500,000	25-35 yrs. & $500,000
Maine[†]	any amount for personal use	$0-$200	$0-$200*	
	up to 1.5 oz.	$0-$200	$0-$200*	0-1 yr. & $1,000
	1.5 oz.-2 lbs.	0-1 yr. & $1,000	0-1 yr. & $1,000	0-1 yr. & $1,000
	2-1,000 lbs.	0-5 yrs. & $2,500	0-5 yrs. & $2,500	0-5 yrs. & $2,500
	over 1,000 lbs.	0-10 yrs. & $10,000	0-10 yrs. & $10,000	0-10 yrs. & $10,000
Maryland	any amount for personal use	0-1 yr.* & $1,000	0-1 yr. & $1,000	0-5 yrs. & $15,000
	any other amount	0-5 yrs. & $15,000	0-5 yrs. & $15,000	0-5 yrs. & $15,000
	import over 100 lbs. into state	0-25 yrs. & $50,000		0-25 yrs. & $50,000
Massachusetts	any amount	probation*	0-2 yrs. & $5,000	0-2 yrs. & $5,000
Michigan[†]	any amount	0-1 yr.* & $1,000	0-4 yrs. & $5,000	0-4 yrs. & $5,000
	use	0-90 days & $100		
Minnesota[†]	up to 1.5 oz.	$0-$100*	0-5 yrs. & $30,000	0-5 yrs. & $30,000
	over 1.5 oz.	0-3 yrs. & $3,000	0-5 yrs. & $30,000	0-5 yrs. & $30,000
Mississippi	up to 1 oz. not in vehicle	$100-$250	0-1 yrs. & $1,000	0-1 yrs. & $1,000
	1 gm.-1 oz. in vehicle	0-90 days & $1,000	0-1 yrs. & $1,000	0-1 yrs. & $1,000
	1 oz.-2.2 lbs.	0-2 yrs. & $3,000	0-20 yrs. & $30,000	0-20 yrs. & $30,000
	over 2.2 lbs.	0-20 yrs. & $1 million	0-30 yrs. & $1 million	0-30 yrs. & $1 million
Texas[†]	up to 2 oz.	0-6 mos.* & $1,000	0-6 mos. & $1,000	2-10 yrs. & $...
	2-5 oz.	0-1 yr. & $2,000	0-1 yr. & $2,000	2-10 yrs. & $...
	over 5 oz.	2-10 yrs. & $5,000	2-10 yrs. & $5,000	2-20 yrs. & $...
Utah	any amount	0-6 mos.* & $299	0-5 yrs. & $5,000	0-5 yrs. & $5,...
Vermont[†]	up to 1 oz.	0-6 mos. & $500	0-5 yrs. & $5,000	0-5 yrs. & $5,...
	1-2 oz.	0-5 yrs. & $5,000	0-5 yrs. & $5,000	0-5 yrs. & $5,...
	over 2 oz.	0-5 yrs. & $5,000	0-5 yrs. & $5,000	0-5 yrs. & $5,...
Virginia[†]	up to 5 oz.	0-30 days & $500	0-30 days & $500	0-1 yr. & $1,...
	5 oz.-5 lbs.	0-30 days & $500	0-30 days & $500	0-10 yrs. & $...
	over 5 lbs.	0-30 days & $500	5-30 yrs.	5-30 yrs.
Washington[†]	up to 40 gms.	0-90 days & $250	0-5 yrs. & $10,000	0-5 yrs. & $10,...
	over 40 gms.	0-5 yrs. & $10,000	0-5 yrs. & $10,000	0-5 yrs. & $10,...
West Virginia[†]	up to 15 gms.	discharge*	1-5 yrs. & $15,000	1-5 yrs. & $1...
	over 15 gms.	30 days-6 mos. & $1,000	1-5 yrs. & $15,000	1-5 yrs. & $1...
Wisconsin[†]	any amount	0-30 days* & $500	0-5 yrs. & $10,000	0-5 yrs. & $1...
Wyoming	any amount	0-6 mos.* & $1,000	0-6 mos. & $1,000	0-10 yrs. & $...
Alaska[2]	any amount	0-1 yr.* & $500	0-20 yrs. & $20,000	0-20 yrs. & $...
American Samoa	any amount	0-1 yr.* & $500	0-20 yrs. & $20,000	0-20 yrs. & $...
District of Columbia	any amount	0-1 yr.* & $1,000	0-1 yr. & $1,000	0-1 yr. & $1...
Guam	any amount	0-3 mos.* & $500	0-5 yrs. & $5,000	0-5 yrs. & $5,...
Puerto Rico	any amount	1-5 yrs.* & $5,000	3-20 yrs. & $20,000	3-20 yrs. & ...
Trust Territory of Micronesia	up to 1 oz.	$0-$50	0-5 yrs. & $5,000	0-5 yrs. & $...
	1 oz.-2.2 lbs.	0-3 mos. $500	0-5 yrs. & $5,000	0-5 yrs. & $...
	over 2.2 lbs.	0-1 yr. & $1,000	0-5 yrs. & $5,000	0-5 yrs. & $...
Virgin Islands	any amount	0-1 yr. & $5,000	0-5 yrs. & $15,000	0-5 yrs. & $...

Note: This chart contains the penalties for first offense possession, sale, and cultivation of marijuana.
The 11 states which have decriminalized possession are shaded and indicated as follows: Alaska.

Many states have increased penalties for subsequent offenses. A number of states also have separate penalties for offenses not included in this summary chart, including possession with intent to distribute.

The penalties set out above are the maximum authorized by law. When the penalty is a prison term and a fine, both can be imposed unless the chart specifically indicates otherwise. For example, the penalty for possession in Alabama can be up to 1 year in prison and/or a fine of up to $1,000.

* Conditional discharge is authorized for first offense possession. This permits judges to release defendants, generally without an ajudication of guilt, on condition that they satisfy certain requirements, such as participation in a drug education program. If the conditions of the program are satisfied, the criminal case will then be dismissed.

† These states have enacted laws allowing for the medical use of marijuana, generally for patients being treated for glaucoma and cancer. Marijuana helps counteract the nausea associated with chemotherapy treatment.

[1] Many state laws have different penalties for possession or sale of different amounts of marijuana. Some of these statutes distinguish by ounce (oz.) weights, and others by gram (gm.) weights. For comparitive purposes:

1 oz. = 28.35 gms. 1 lb. = 453.59 gms. 2.2 lbs. = 1 kilogram

[2] In 1975, the Supreme Court of Alaska held that the constitutional Right of Privacy protects the possession of marijuana for personal use in the home by adults.

[3] Cultivation of under 25 plants is punishable as possession; cultivation of 25 or more plants is punishable by 1-5 yrs. and a $5000 fine.

[4] There is a rebuttable presumption that possession of more than 1.5 ozs. is with intent to distribute, which has the same penalty as sale.

Alaska Law

In Ravin v. State, the Supreme Court of Alaska held that the possession of marijuana for personal use in the home by adults is protected by the right to privacy clause in the Alaska Constitution.[1] Decriminalization of marijuana, however, applies only to the possession of marijuana in the home, as the Ravin case states. Possession outside the home in any amount is a criminal violation.

Under Alaska law, penalties for the possession of marijuana increase as the quantity involved increases. It is a criminal violation to possess up to one ounce of marijuana in a public area (AS 11.71.070). It is a class B misdemeanor to possess one ounce or more in a public area or to possess more than four ounces of marijuana anywhere (AS 11.71.060). According to Gayle Horetski, Assistant Attorney General with the Criminal Division of the Alaska Attorney General's office, AS 11.71.060 could apply to the possession of more than four ounces in a private home. Alaska statutes prohibiting the possession and distribution of marijuana are Attachment B of this memorandum.

Recriminalizing Marijuana

Recriminalization of marijuana in Alaska could occur by amending the Alaska Constitution or by repealing existing legislation and enacting new legislation. If the Alaska Constitution were amended to exempt the possession of marijuana from the right to privacy clause, State statutes would still have to be amended in order to criminalize possession of small amounts of marijuana. If State statutes were amended to criminalize marijuana and the constitution were not amended, the amended statutes would probably be challenged under the Ravin decision.

Amending the Alaska Constitution requires a two-thirds vote of the legislature and a majority vote by the people [Article 13, Section 1 of the constitution (Attachment C)]. Ms. Horetski suggests that langauge to exempt the possession of marijuana from the constitutional right to privacy might be: "Rights embodied in this section do not extend to the possession of controlled substances (or marijuana)." In 1985, a Senate resolution was proposed to exempt the possession of controlled substances from the constitutional right to privacy (Attachment D).

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[1]The Ravin decision is unique among states. Of the nine states which have right to privacy clauses in their constitutions, California and Hawaii have also addressed the clause in regard to possession of marijuana. In both states, the courts found the claim to be untenable.

Amending State statutes would involve redesigning the structure of the current drug statutes. This would include the repeal of AS 11.71.070, amending statutes which specify penalties for possession of marijuana, and cross referencing statutes to amend all statutes that relate to marijuana. According to Ms. Horetski, if the constitution were not amended to exclude marijuana from the right to privacy clause, statutes criminalizing marijuana could be struck down at the trial court level and the case would probably be appealed to the Supreme Court. According to a fiscal note prepared by the Attorney General's office, convincing the trial court to reverse the Ravin ruling would require that the prosecutor present scientific evidence that the effects of marijuana use are so injurious to a person's mental and physical health as to justify the legislative decision to prohibit the use of marijuana by anyone at any time.

On appeal, the Supreme Court would decide whether the State has proved that there is a "compelling State interest" in prohibiting the use of marijuana which outweighs an individual's right to privacy under the State Constitution. The fiscal note also stated that to prove a compelling State interest, the State must show that the legislature's consideration of the recriminalization of marijuana included extensive public hearings, debate on the merits of recriminalization and discussions of the most recent studies regarding the physical, emotional, and social effects of marijuana usage.

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I hope this information is helpful to you. Please contact us if you have any questions or if we can be of further assistance.

PW

Attachments

THE FOLLOWING DOCUMENT HAS NOT BEEN FILMED BUT IS AVAILABLE IN THE ORIGINAL FILE