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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

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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. 20011

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
Chairman

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PREFACE

In 1978 the Committee on Substance Abuse and Mental Health 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 alternatives. 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

February 7, 1986

MEMORANDUM

TU: Representative Andre Marrou

FROM: Mary Jennings *mg*
Legislative Analyst

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

	<u>Population</u>	<u>Property Crimes</u>	<u>Rate Per 100,000</u>	<u>Marijuana</u>			
				<u>Sale Arrest Rate</u>	<u>Possession Arrest Rate</u>		
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	119
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 enforcement agencies in Alaska combined forces. Troopers developed a statewide strategy of drug source interdiction, with the



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

March 4, 1986

MEMORANDUM

TO: Representative Andre Marrou

FROM: Mary Jennings *mg*
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.

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

Representative Marrou
March 4, 1986
Page Three

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 California 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 defendants processed that year. Under the system of civil penalties 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 penalties 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.

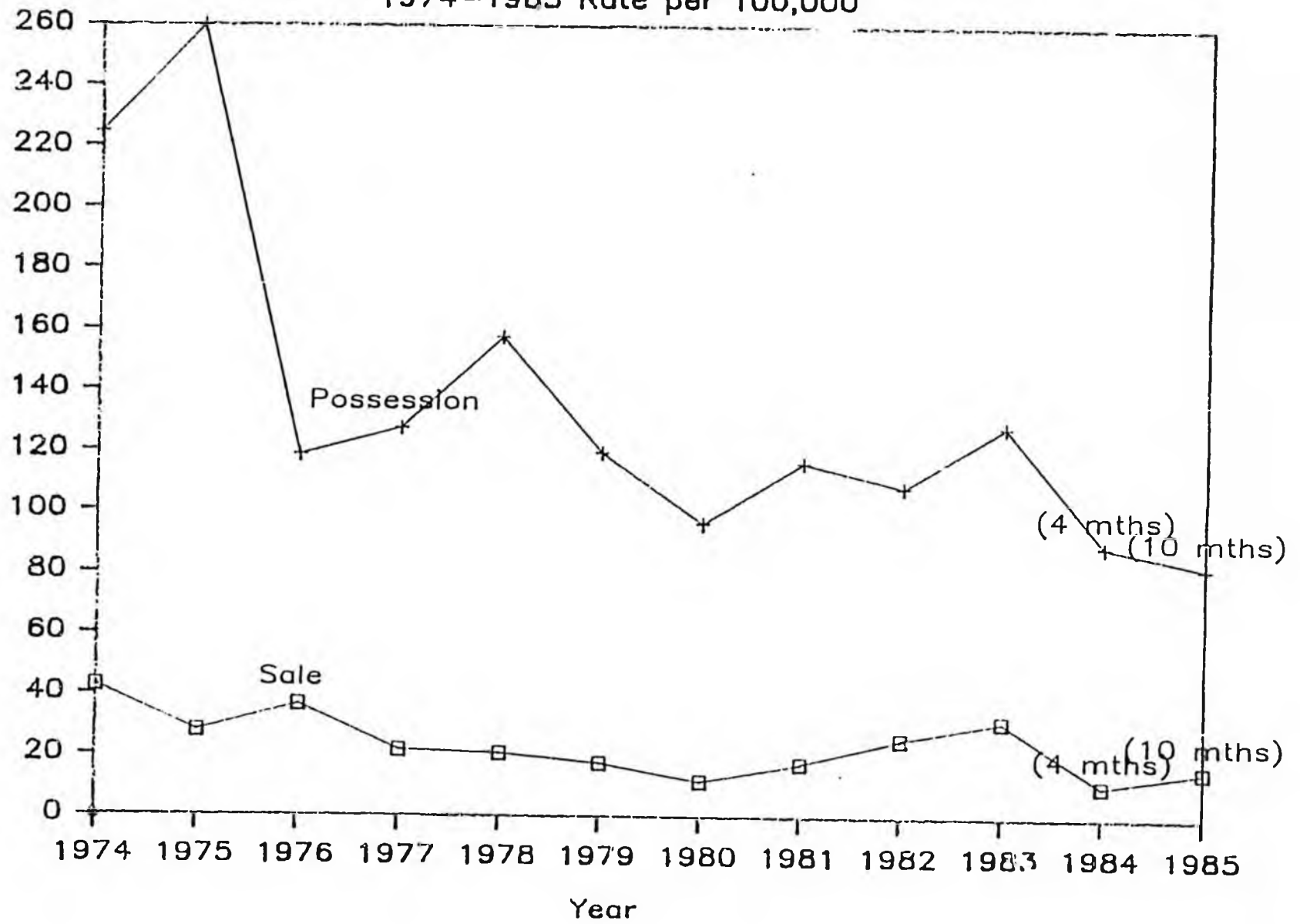
Marijuana and Other Crime

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

8 (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							Second Offense						
		Trace	5g	100g	500g	1kg	10kg	50kg or More	Trace	5g	100g	500g	1kg	10kg	50kg or More
I & II	LSD	Maximum 20 Years \$250,000							Maximum 40 Years \$500,000						
	Narcotics*														
	PCP	Maximum 15 Years \$125,000							Maximum 30 Years \$250,000						
	Cocaine														
	Others**	Maximum 5 Years \$50,000							Maximum 10 Years \$100,000						
	Hash Oil														
	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		Import/Export		Manufacturer/Distributor Reports to DEA	
					Security	Quotas	Narcotic	Non-Narcotic	Narcotic	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

FILGIN, PAYAD

Rand Studies: 1986

- 4. Drug abusers commit more burglaries, thefts, check writing crimes, con-type crimes than non-drug abusers.
- 5. 2 out of 5 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
- 7. At the time of their offense, 1/3 of all prisoners in the penitentiary were under the influence other than alcohol.
- 8. 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

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: 11.8 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.

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: most, 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

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

Appendix VIII

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, Benzoyllecgonine, 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, Phenobarbital	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
Benzoyllecgonine, 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
Cocaine, 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 1992 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

DRUG INFORMATION



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, 1957.

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 1957.

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

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

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)
<u>Simple Possession</u>	\$5	1 or probation	\$1 to \$5*	1*
<u>Possession with Intent to Distribute</u>				
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	
<u>Cultivation:</u>				
< 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 remuneration 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, association, or group of drug traffickers.

Prepared by the House Research Agency, December 1986.

December 3, 1986

Page 3

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	State	Amount ¹	Possession	Cultivation	Sale
General Law	any amount	0.1 yr. & \$5,000*	0.5 yrs. & \$15,000	0.5 yrs. & \$15,000	Missouri	up to 4 gms. over 4 gms.	0.1 yr. & \$1,000 0.5 yrs. & \$1,000	0.5 yrs. & \$1,000 0.5 yrs. & \$1,000	over life over life
Alabama	up to 2.2 lbs. for personal use	0.1 yr. & \$1,000	2.15 yrs. & \$25,000	2.15 yrs. & \$25,000	Montana	up to 40 gms. over 40 gms.	0.5 yrs. & \$500 0.5 yrs. & \$1,000	1 yr. life & \$50,000 1 yr. life & \$100,000	over life & \$100,000 over life & \$100,000
	up to 2.2 lbs. not for personal use	2.15 yrs. & \$25,000	2.15 yrs. & \$25,000	2.15 yrs. & \$25,000	Nebraska	up to 1 oz. over 1 oz.	\$100 & drug ed. ² 0.5 yrs. & \$500	0.5 yrs. & \$5,000 0.5 yrs. & \$5,000	0.5 yrs. & \$10,000 0.5 yrs. & \$10,000
	2.2 lbs. or more	0.5 yrs. & \$25,000	1.5 yrs. & \$25,000	1.5 yrs. & \$25,000	Nevada	up to 1 oz. over 1 oz.	0.5 yrs. & \$2,000 0.5 yrs. & \$2,000	1.5 yrs. & \$5,000 1.5 yrs. & \$5,000	0.5 yrs. & \$10,000 0.5 yrs. & \$10,000
	10 lbs. or more	0.5 yrs. & \$50,000	1.5 yrs. & \$50,000	1.5 yrs. & \$50,000					
	over 10 lbs.	1.5 yrs. & \$200,000	1.5 yrs. & \$200,000	1.5 yrs. & \$200,000					
Alaska	any amount for personal home use	Legal ³	Legal	N/A					
	any amount "not in a public place for personal use"	\$0-\$100	\$0-\$100	N/A					
	up to 1 lb.	\$0-\$100	\$0-\$100	0.1 yr. & \$1,000					
	public use or dispersal over 1 oz. or pass over 4 oz.	0.5 yrs. & \$1,000	N/A	0.5 yrs. & \$1,000					
Arizona	any amount not for sale	1 yr. & \$0 \$1,000	1 yr. & \$0 \$1,000	N/A	New Hampshire	up to 1 lb. over 1 lb.	0.1 yr. & \$1,000 0.7 yrs. & \$2,000	0.5 yrs. & \$2,000 0.5 yrs. & \$2,000	0.5 yrs. & \$2,000 0.5 yrs. & \$2,000
	any amount for sale	1 yr. & \$0-\$10,000	1 yr. & \$0-\$10,000	1 yr. & \$0-\$10,000	New Jersey	up to 2 gms. over 2 gms.	0.6 yr. & \$500 1 yr. driving impairment	0.5 yrs. & \$1,000 0.5 yrs. & \$1,000	0.5 yrs. & \$1,000 0.5 yrs. & \$1,000
Arkansas	up to 1 oz. for personal use	0.1 yr. & \$1,000	2.0 yrs. & \$10,000	2.0 yrs. & \$10,000					
	over 1 oz.	1.0 yr. & \$2,000	1.0 yrs. & \$25,000	1.0 yrs. & \$25,000	New Mexico	up to 1 oz. over 1 oz.	1.0 yr. & \$100 0.1 yr. & \$1,000	0.5 yrs. & \$2,000 0.5 yrs. & \$2,000	0.5 yrs. & \$5,000 0.5 yrs. & \$5,000
	10 lbs. or more	0.5 yrs. & \$5,000	1.0 yrs. & \$5,000	1.0 yrs. & \$5,000					
	over 10 lbs.	0.5 yrs. & \$10,000	0.5 yrs. & \$10,000	0.5 yrs. & \$10,000	New York	up to 20 gms. in private	\$0-\$100	0.1 yr. & \$1,000	0.1 yr. & \$1,000
California	up to 4 lbs. over 1 oz.	\$0-\$100 0.6 mos. \$500	6 mos., 2 or 3 yrs 10 mos., 2 or 3 yrs	2, 3, or 4 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 lb.	0.2 yrs. \$0-\$500	2.4 yrs.	2.4 yrs.					
	over 1 lb.	1.2 yr.	2.4 yrs.	2.4 yrs.	North Carolina	up to 1 oz. over 1 oz.	\$0-\$100 0.5 yrs. & \$2,000	0.5 yrs. & \$2,400 1.0 yrs. & \$1,000	0.2 yrs. & \$2,000 0.2 yrs. & \$2,000
Connecticut	up to 1 oz.	0.5 yr. & \$1,000	0.7 yrs. & \$1,000	0.7 yrs. & \$1,000	North Dakota	up to 1 oz. over 1 oz.	0.5 yrs. & \$500 0.5 yrs.	0.5 yrs. & \$1,000 0.5 yrs. & \$1,000	0.5 yrs. & \$1,000 0.5 yrs. & \$1,000
	over 1 oz.	0.5 yr. & \$1,000	0.7 yrs. & \$1,000	0.7 yrs. & \$1,000					
Delaware	up to 1 oz.	0.5 yr. & \$1,000	0.5 yrs. & \$1,000	0.5 yrs. & \$1,000					
	over 1 oz.	0.5 yr. & \$1,000	0.5 yrs. & \$1,000	0.5 yrs. & \$1,000	Ohio	up to 100 gms. over 100 gms.	\$0-\$100 ⁴ 0.5 yrs. & \$2,000	0.5 yrs. & \$1,000 0.5 yrs. & \$1,000	0.5 yrs. & \$1,000 0.5 yrs. & \$1,000
Florida	up to 4 gms.	0.5 yr. & \$1,000	0.5 yrs. & \$1,000	0.5 yrs. & \$1,000					
	over 4 gms.	0.5 yrs. & \$1,000	0.5 yrs. & \$1,000	0.5 yrs. & \$1,000					
	over 10 gms.	0.5 yrs. & \$1,000	0.5 yrs. & \$1,000	0.5 yrs. & \$1,000					
	over 20 gms.	0.5 yrs. & \$1,000	0.5 yrs. & \$1,000	0.5 yrs. & \$1,000					
	over 40 gms.	0.5 yrs. & \$1,000	0.5 yrs. & \$1,000	0.5 yrs. & \$1,000					
	over 100 gms.	0.5 yrs. & \$1,000	0.5 yrs. & \$1,000	0.5 yrs. & \$1,000					
Georgia	up to 1 oz.	0.5 yr. & \$1,000	0.5 yrs. & \$1,000	0.5 yrs. & \$1,000	Oklahoma	up to 1 oz. over 1 oz.	\$0-\$100 0.5 yrs. & \$1,000	0.5 yrs. & \$1,000 0.5 yrs. & \$1,000	0.5 yrs. & \$1,000 0.5 yrs. & \$1,000
	over 1 oz.	0.5 yr. & \$1,000	0.5 yrs. & \$1,000	0.5 yrs. & \$1,000	Oregon	up to 1 oz. over 1 oz.	\$0-\$100 0.5 yrs. & \$1,000	0.5 yrs. & \$1,000 0.5 yrs. & \$1,000	0.5 yrs. & \$1,000 0.5 yrs. & \$1,000
	over 1 lb.	0.5 yr. & \$1,000	0.5 yrs. & \$1,000	0.5 yrs. & \$1,000					
	over 1 lb.	0.5 yr. & \$1,000	0.5 yrs. & \$1,000	0.5 yrs. & \$1,000					
Idaho	up to 1 oz.	0.5 yr. & \$1,000	0.5 yrs. & \$1,000	0.5 yrs. & \$1,000	Pennsylvania	up to 1 oz. over 1 oz.	\$0-\$100 0.5 yrs. & \$1,000	0.5 yrs. & \$1,000 0.5 yrs. & \$1,000	0.5 yrs. & \$1,000 0.5 yrs. & \$1,000
	over 1 oz.	0.5 yr. & \$1,000	0.5 yrs. & \$1,000	0.5 yrs. & \$1,000	Rhode Island	up to 1 oz. over 1 oz.	\$0-\$100 0.5 yrs. & \$1,000	0.5 yrs. & \$1,000 0.5 yrs. & \$1,000	0.5 yrs. & \$1,000 0.5 yrs. & \$1,000
	over 1 lb.	0.5 yr. & \$1,000	0.5 yrs. & \$1,000	0.5 yrs. & \$1,000	South Carolina	up to 1 oz. over 1 oz.	\$0-\$100 0.5 yrs. & \$1,000	0.5 yrs. & \$1,000 0.5 yrs. & \$1,000	0.5 yrs. & \$1,000 0.5 yrs. & \$1,000
Illinois	up to 2.2 lbs.	0.5 yr. & \$1,000	0.5 yrs. & \$1,000	0.5 yrs. & \$1,000	South Dakota	up to 1 oz. over 1 oz.	\$0-\$100 0.5 yrs. & \$1,000	0.5 yrs. & \$1,000 0.5 yrs. & \$1,000	0.5 yrs. & \$1,000 0.5 yrs. & \$1,000
	over 2.2 lbs.	0.5 yr. & \$1,000	0.5 yrs. & \$1,000	0.5 yrs. & \$1,000					
Indiana	up to 1 oz.	0.5 yr. & \$1,000	0.5 yrs. & \$1,000	0.5 yrs. & \$1,000	Tennessee	up to 1 oz. over 1 oz.	\$0-\$100 0.5 yrs. & \$1,000	0.5 yrs. & \$1,000 0.5 yrs. & \$1,000	0.5 yrs. & \$1,000 0.5 yrs. & \$1,000
	over 1 oz.	0.5 yr. & \$1,000	0.5 yrs. & \$1,000	0.5 yrs. & \$1,000					
	over 1 lb.	0.5 yr. & \$1,000	0.5 yrs. & \$1,000	0.5 yrs. & \$1,000					
	over 1 lb.	0.5 yr. & \$1,000	0.5 yrs. & \$1,000	0.5 yrs. & \$1,000					

STATE MARIJUANA LAW

State	Amount*	Possession	Cultivation	Sale
Alabama	up to 1 oz	0.1 yr & \$5,000	0.1 yr & \$5,000	0.1 yr & \$5,000
Alaska	up to 1 oz	0.2 yrs & \$10,000	0.2 yrs & \$10,000	0.2 yrs & \$10,000
Arizona	up to 1 oz	0.1 yr & \$2,000	0.1 yr & \$2,000	0.1 yr & \$2,000
Arkansas	up to 1 oz	0.1 yr & \$2,000	0.1 yr & \$2,000	0.1 yr & \$2,000
California	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Colorado	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Connecticut	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Delaware	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Florida	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Georgia	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Hawaii	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Idaho	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Illinois	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Indiana	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Iowa	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Kansas	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Kentucky	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Louisiana	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Maine	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Maryland	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Massachusetts	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Michigan	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Minnesota	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Mississippi	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Missouri	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Montana	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Nebraska	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Nevada	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
New Hampshire	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
New Jersey	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
New Mexico	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
New York	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
North Carolina	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
North Dakota	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Ohio	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Oklahoma	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Oregon	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Pennsylvania	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Rhode Island	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
South Carolina	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
South Dakota	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Tennessee	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Texas	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Utah	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Vermont	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Virginia	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Washington	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
West Virginia	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Wisconsin	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Wyoming	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Alaska	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Arizona	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
California	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Colorado	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Connecticut	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Delaware	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Florida	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Georgia	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Hawaii	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Idaho	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Illinois	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Indiana	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Iowa	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Kansas	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Kentucky	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Louisiana	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Maine	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Maryland	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Massachusetts	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Michigan	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Minnesota	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Mississippi	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Missouri	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Montana	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Nebraska	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Nevada	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
New Hampshire	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
New Jersey	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
New Mexico	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
New York	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
North Carolina	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
North Dakota	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Ohio	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Oklahoma	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Oregon	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Pennsylvania	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Rhode Island	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
South Carolina	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
South Dakota	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Tennessee	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Texas	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Utah	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Vermont	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Virginia	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Washington	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
West Virginia	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Wisconsin	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500
Wyoming	up to 1 oz	0.1 yr & \$500	0.1 yr & \$500	0.1 yr & \$500

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 then be dismissed.

† These states have enacted laws allowing for the medical use of marijuana by patients who are being treated for glaucoma and cancer. Marijuana helps counteract the nausea associated with chemotherapy treatment.

‡ Many state laws have different penalties for possession or sale of different amounts of marijuana. Some of these statutes distinguish by ounce, by weight, and others by gram (g) weights. 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 includes the possession of marijuana for personal use by 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 \$500 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 language 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).

¹The 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.

December 3, 1986

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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

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

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

"lidine" means 1-(1-phenylethoxy) piperidine, rate precursor, homolog, analog, or derivative (or phenylethoxy) piperidine that is included in :B of this title.

includes its salts and acyl derivatives.

91-513, Title II, Part C, § 310, as added Nov. 10, 11, § 202(a), 92 Stat. 3774)

SECONDARY 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

of this section, is Title III of Act Oct. 27, 1970, 1245, which appears generally as 21 USCS classification of such Title, consult USCS Tables

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

of this section, see Act Nov. 10, 1978, P. L. 95-1, 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:

ided under paragraph (2), the amendments made by 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 ation, 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(c), 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

is a controlled substance manufactured, distributed, or possession, or revocation.

(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, 10 kilograms of hashish, or 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 \$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

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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.

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))

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(h), 952. *United States v Falcione* (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

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, marijuana, 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, § 424, 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, § 703(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
- 2. Applicability
- 3. Possession, generally
- 4. —Quantity of drug possessed
- 5. Probable cause for search and arrest
- 6. Separate offenses
- 7. Indictment
- 8. Witnesses
- 9. Evidence
- 10. —Sufficiency
- 11. Defenses
- 12. Jury instructions
- 13. Sentence

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, 415 F.2d 626.

21 USCS § 844(a), insofar as it prohibits possession of marijuana, does not violate individually 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. *Willman 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 not in trial, who did have such personal custody or control of narcotic drugs. *Herrington v United States* (1962, CA9 Cal) 300 F.2d 174.

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

cept 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 possession. *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 measurable 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, remark by defendant that "I don't sell bundles in a district" together 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) 411 F2d 938.

Suspicious circumstances involving observation by narcotic 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) 509 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, CAS 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 on two counts unlawful possession and unlawful 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. [Circuit Amend. 5. *United States v Johnson* (1979, CA7 Ill) 235 F2d 159, cert den 452 US 1006, 41 L Ed 2d 551, 77 S Ct 567.

ATTACHMENT B

Sec. 11-71-010. Misconduct involving a controlled substance in the third degree. (a) Except as authorized in AS 17.30 or AS 17.31, 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 18 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. (4-2 ch 45 SLA 1982)

NOTES TO DECISIONS

Editor's notes — The cases cited in the notes below were decided under former AS 17.19 and 17.12.

Defenses — Where an 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 chemical testified on cross-examination that his tests did not exclude the possibility that the substance sold by the defendants was cocaine, an artificial compound not produced from coca leaves, but where the chemist also testified that to the best of his knowledge, 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 cocaine was not involved in the case and thus rejected the cocaine defense. *Leduff v. State*, Sup. Ct. Op. No. 2192 (File No. 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. 1799 (File No. 4379), 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), 617 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 No. 4117, 4136), 618 P.2d 557 (1980). See also *Strachan v. State*, Sup. Ct. Op. No. 2121 (File No. 4901), 615 P.2d 611 (1980); *Kelly v. State*, Sup. Ct. Op. No. 2208 (File No. 4097, 4529), 622 P.2d 432 (1981); *State v. Dana*, Ct. Op. App. No. 01 (File No. 4888), 623 P.2d 348 (1981).

Sentence for sale of amphetamines. — See *Thorbjall v. State*, Sup. Ct. Op. No. 1270 (File No. 2500), 581 P.2d 141 (1978); Sentence for possession of amphetamine tablets with intent to distribute or sell. — See *Robinson v. State*, Sup. Ct. Op. No. 1421 (File No. 3400), 610 P.2d 1211 (1979); Sentence for selling LSD. — See *Arvola v. State*, Sup. Ct. Op. No. 1711

(File No. 2800), 621 P.2d 1001 (1977); Sentence for sale of acid, marijuana and amphetamines. — See *Meyer v. State*, Sup. Ct. Op. No. 1700 (File No. 3400), 610 P.2d 1100 (1979); Sentence for possession of hallucinogenic drug with intent to sell or distribute. — See *Clark v. State*, Sup. Ct. Op. No. 1570 (File No. 2941, 2945), 614 P.2d 1260 (1978).

Sec. 11-71-010. 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.

to know, in the course of the manufacture or distribution of a controlled substance, a registration number which is fictitious or does not pertain to the substance transferred to another person.

(c) It is a defense to a charge of manufacture, distribution, or possession of a controlled substance if the defendant can prove by a preponderance of the evidence that the substance was lawfully acquired and lawfully possessed by the defendant.

(d) It is a defense to a charge of possession of a controlled substance by manufacture, distribution, or possession if the defendant can prove by a preponderance of the evidence that the substance was lawfully acquired and lawfully possessed by the defendant.

(e) It is a defense to a charge of possession of a controlled substance if the defendant can prove by a preponderance of the evidence that the substance was lawfully acquired and lawfully possessed by the defendant.

(f) 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 provision of this section or any other section of this chapter.

(g) Nothing in (a)(5) or (f) 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.

(h) Misconduct involving a controlled substance in the fourth degree is a class C felony. (S 2 ch 45 S.L.A. 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 No. 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 knowl-

edge, evidence of previous possession of the contraband material is admissible. *Wright v. United States*, 14 Alaska 111 (1924), 24-95-946 Cr. 1951.

Sufficiency of evidence. — Evidence was sufficient to warrant conviction for possession of heroin. *See Ross v. State*, Sup. Ct. Op. No. 1769 (File No. 4129), 580 P.2d 1016 (1978).

Sufficient evidence existed to support a conviction for possession of heroin which 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, numorpham, was tried on the theory that numorpham 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 numorpham had "similar physiological effects" to any of those drugs. *Casey v.*

State Sup. Ct. Op. No. 860 (File No. 1701), 505 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*, 14 Alaska 675 (1924), 24-721-994 Cr. 1952.

Sentence for possession of narcotics.

See Jones v. State, Sup. Ct. Op. No. 892 (File No. 1586), 510 P.2d 1070 (1974);

Whitton v. State, Sup. Ct. Op. No. 1135 (File No. 2250), 511 P.2d 266 (1975); *State v. Trunell*, Sup. Ct. Op. No. 1240 (File No.

2637), 549 P.2d 550 (1976); *Kuman v. State*, Sup. Ct. Op. No. 1521 (File No.

2856), 570 P.2d 1235 (1977); *Wetlin 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.

3668), 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. Walla*, 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); *Rosa 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 69 (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 No. 4027, 4529), 622 P.2d 432 (1981).

Sentence for uttering forged prescription. — See *Stonefield v. State*, Ct.

App. Op. No. 54 (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 *Pogges 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;

(c) less than 30 tablets, ampules, or syrettes containing a schedule IIA or IV controlled substance;

(d) less than 30 preparations, compounds, mixtures, or substances of an aggregate weight of less than three grams containing a schedule IIB or IV controlled substance;

(e) less than 30 tablets, ampules, or syrettes containing a schedule VA controlled substance;

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

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

(h) fails to make, keep, or furnish any record, notification, order form, statement, invoice, or information required under AS 17.30.

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 206 (1975).

Age of purchaser. — Where defendant was 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 defendant was guilty of a violation. The purchaser's age was important only in determining the punishment that could be imposed for that

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).

Age of purchaser. — Where defendant was 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 defendant was guilty of a violation. The purchaser's age was important only in determining the punishment that could be imposed for that

abuse. *Morris v. State*, Sup. Ct. Op. No. 2126 (File No. 2164), 415 P.2d 114 (1966).

The state must demonstrate knowing possession. *Bent v. State*, Sup. Ct. Op. No. 1005 (File No. 1005), 494 P.2d 914 (1973).

Evidence sufficient to prove knowing possession. Evidence was sufficient to establish that defendant was aware that he possessed an illicit drug. *Hell 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. 1744 (File No. 1141), 585 P.2d 229 (1978); *Anderson v. State*, Sup. Ct. Op. No. 2261 (File No. 2166), 621 P.2d 1143 (1978).

Sentence for sale of marijuana. — See *Salazar v. State*, Sup. Ct. Op. No. 1114 (File No. 2167), 562 P.2d 694 (1977); *Sanders v. State*, Sup. Ct. Op. No. 1975 (File No. 4196), 601 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 No. 4097), 45291, 622 P.2d 432 (1981).

Sentence for sale and distribution of marijuana. — See *Walf 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 defendant was charged with possession of marijuana in public place in connection with sale, the state could prove the defendant's possession of marijuana by showing that defendant had been in the area of the sale at the time the marijuana was sold. The state could also prove the defendant's possession of marijuana by showing that defendant had been in the area of the sale at the time the marijuana was sold.

Possession or ingestion of marijuana while driving. — See Brown v. State, Sup Ct Op. No. 1443 (File No. 2522), 565 P.2d 127 (1977).

Effect of the evidence of the effect of marijuana on driving an individual's right to possess or ingest marijuana while driving. — See Bell v. State, Sup Ct Op. No. 1156 (File No. 2135), 537 P.2d 44 (1975).

Factors for control of drivers under the influence of marijuana and the existing

doubts as to the safety of marijuana consumption. — See Bell v. State, Sup Ct Op. No. 1156 (File No. 2135), 537 P.2d 44 (1975).

Possession of home for personal use. — See notes to AS 11.71.070 under same caption.

Marijuana found on person and in automobile at time of arrest. — See Price v. State, Sup Ct Op. No. 1794 (File No. 3524), 599 P.2d 419 (1979).

Proof of knowing control. — Mere presence at the scene, alone, was insufficient to prove knowing control of the prohibited substance. Eger v. State, Sup Ct Op. No. 784 (File No. 1443), 495 P.2d 1272 (1972). Also, see Bell v. State, Sup Ct Op. No. 1085 (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 lan-

guage 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 cigarette 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.

Section	Section
100. Controlled substance - advisory committee	150. Schedule IIA
101. Duties of committee	160. Schedule IIIA
110. Authority to schedule controlled substances	170. Schedule IVA
120. Schedule IA	180. Schedule VA
	190. Schedule VIA
	195. Exempt drugs

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) — (b) 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

ATTACHMENT D

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

BY P. FISCHER, FERGUSON
AND FAIKS

1 IN THE SENATE

2

SENATE JOINT RESOLUTION NO. 16

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

FOURTEENTH LEGISLATURE - FIRST SESSION

5

Proposing an amendment to the Constitu-

6

tion of the State of Alaska providing

7

that an individual's right of privacy

8

does not extend to the unlawful posses-

9

sion or use of cocaine, heroin, mari-

10

juana, or other controlled substances.

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

12 * Section 1. Article I, sec. 22, Constitution of the State of Alaska.

13 is amended to read:

14

SECTION 22. RIGHT OF PRIVACY. The right of the people to

15

privacy is recognized and shall not be infringed. The legislature

16

shall implement this section. The right of privacy does not extend to

17

the unlawful possession or use of cocaine, heroin, marijuana, or other

18

controlled substances as defined in the criminal law of the state.

19

* Sec. 2. The amendment proposed by this resolution shall be placed

20

before the voters of the state at the next general election in conformity

21

with art. XIII, sec. 1, Constitution of the State of Alaska, and the elec-

22

tion 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

Kopouev

"THE BEST DOPE ON POT SO FAR."

—The New York Times

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Marihuana Reconsidered

By Lester Grinspoon, M.D.



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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 Constitution³ 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. Mc Guire, *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 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 home⁸ 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-

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 test¹⁴ 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-

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 12E.

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 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 to privacy." See *Ravin*, 537 P.2d at 504. The principles derived from the cas-

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

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

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

Since *Griswold*, the Supreme Court has struggled to define the scope of this federal right to privacy. Of the many privacy decisions handed down by the Supreme Court in the last two decades, three have been of particular significance for Alaska constitutional law. These three cases have formed the basis for many of Alaska's privacy decisions.³¹

*Katz v. United States*³² was the search and seizure case which introduced a privacy component into fourth amendment analysis. The case involved a challenge to the admissibility of evidence gained through a warrantless wiretapping of a public telephone booth. The majority held that, even though the government had not physically invaded the zone of privacy in the booth, the wiretap itself was unconstitutional without a warrant³³ because of the expectation of privacy one has when the door to the telephone booth is closed. Even more significant than the majority opinion, however, was Justice Harlan's concurrence. Justice Harlan laid out a test to determine when an expectation of privacy will be protected under the fourth amendment. The Alaska Supreme Court later adopted this test as its own for interpreting the Alaska counterpart to the fourth amendment.³⁵

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

public schools held unconstitutional as an unreasonable interference with the "liberty of parents to raise their children as they please).

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 (1969); *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 *Olmstead v. 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. 517 P.2d 394 (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 because they have been cited as persuasive authority by the Alaska Supreme Court in defining the right to privacy, but also because they illustrate different types of privacy analysis. The *Katz* approach finds a right to privacy implicit in the text of a constitutional amendment and employs a test of societal reasonableness in defining the parameters of that right. *Stanley* also finds an implicit right to privacy but ties it to a fundamental right and therefore allows encroachment upon these rights only upon a showing of a compelling state interest. Finally, *Roe* recognizes a right to privacy which is itself fundamental. Invasions of this fundamental right to privacy must be judged by a compelling state interest standard.

The diversity of approaches to privacy questions in the federal courts is mirrored in Alaska case law. Such a variety of analytical approaches seems unnecessary in a state where an explicit textual basis for a right to privacy exists. Alaska courts continue, however, to apply at least two different analytical approaches: one for search and seizure cases⁴⁵ 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 1972, Alaska courts rarely considered the right to privacy. Since so little Alaska precedent exists, it is difficult to determine the status of the right to privacy before the adoption of the amendment. The only conclusion that can safely be drawn is that the Alaska pre-amendment right to privacy was at least as broad as the federal right.⁴⁷

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

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

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

47. This result is mandated by the supremacy clause of the federal Constitution, U.S. CONST., art. VI, cl. 1. Any state decision granting less protection than the federal Constitution would in effect invalidate the federal protections and thus conflict with the supremacy clause. An interesting question is whether, if a decision like *Roe v. Wade*, 410 U.S. at 113, were overturned, the privacy amendment would require 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" right⁵⁸ 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," 417 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, 201-14, 218 (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 synonymous with the privacy of the home. For instance, the holding in *Stanley v. Slaton* 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 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 that can legally be possessed in the home without a prescription. See *State v. Erickson*, 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 the conduct of children in the home. *Anderson v. State*, 562 P.2d 351 (Alaska 1977) (court in *Anderson* avoided a decision on whether the right to privacy protects contacts between consenting adults within the privacy of the home. *Id.* at 351).

vacancy 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 privacy⁶⁴ 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 the *Gray* dispute returned to the supreme court, the court held in *Ravin* that the state's interest in preventing possession of marijuana in the home for personal use was not compelling.⁶⁹

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

In *State v. Erickson*,⁷² the Alaska Supreme Court used the "sliding scale" test to analyze the asserted privacy right to ingest cocaine in the home.⁷³ The sliding scale test compares the infringing government conduct with the privacy interest in question. The more fundamental the privacy right, the greater the burden that is put on the state to show "the relationship of the intrusion to a legitimate governmental interest."⁷⁴ In *Erickson*, the privacy interest was the same as in *Ravin* — the right to use controlled substances in the home. Nevertheless, the state intrusion in *Erickson* was upheld. The distinction made by the court was based on the nature of the relative effects of cocaine and marijuana on users of the drugs. Employing extensive scientific and sociological data, the court concluded that use of cocaine, even in small amounts in the home, presented a greater danger to public health and safety than marijuana use.⁷⁵ The court noted that a fundamental personal right "must yield when it interferes in a serious manner with the health, safety, rights and privileges of others or with the public welfare."⁷⁶ Therefore, the court found that the right to ingest cocaine

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*, 537 P.2d at 515 (Boochever, J., concurring), and in *Woods & Rohde, Inc. v. State of Alaska 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 test.

A decision which clearly illustrates the application of the sliding 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 Law⁸² that he furnish a list of patients with whom he had done more than \$100 worth of business during the previous year. The court held that *Falcon* did not have a personal privacy interest in the disclosure but he was allowed to assert his patients' right to privacy, even though the doctor-patient privilege did not protect the information.⁸³

The court's analysis in *Falcon* began with a determination of the nature of the privacy interest involved.⁸⁴ The privacy interest, which arose in the context of the doctor-patient relationship, was the interest in not having one's identity revealed where such a revelation disclosed personal information. Next, the court applied a level of scrutiny appropriate to that interest. To justify interference with the doctor-patient relationship, the state had to show "a fair and substantial relation between the statutory means and a legitimate governmental purpose."⁸⁵ The court then balanced the "nature and the extent of privacy invasion and the strength of the state interest requiring disclosure"⁸⁶ in order to determine the validity of the state's action. In forming the balancing, the court examined the interest of the state in promoting fair and honest government and weighed that interest against the patients' interest in concealing their identity as patients of this doctor.⁸⁷ Because the state regulation provided a potential for revealing sensitive information without a procedure for screening patients who would be harmed by such disclosure, the operation of the disclosure law was suspended until procedural safeguards were introduced.

An example of an informational privacy case in which the Alaska 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 is 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 one had seen a doctor would not be regarded as a revelation of very sensitive matter. In certain cases, however, the mere fact that the patient had been seeing a doctor could amount to revelation of a sensitive matter. This would be the case where the doctor specializes in contraceptive matters or performs abortions, or in the case where one spouse sees a doctor without the other's knowledge. *Id.* 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 test⁸⁹ 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 would 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 fail. 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 "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 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. *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 follows *Oliver*.

102. *Oliver*, 636 P.2d at 1167.

103. *Id.* These statements seem to indicate a pro-taxpayer viewpoint. In the reported tax case citing *Oliver*, however, the privacy argument again lost to the public 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 and

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 activity¹⁰⁶ 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 court assumed that Glass had exhibited an actual expectation that the conversation would not be recorded. The discussion in *Glass* focused on the "reasonableness" of such an expectation. The court first noted that the United States Supreme Court decision supporting such a dropping did not produce a majority opinion,¹¹⁰ and that the Alaska court was not bound by the Supreme Court's holding.¹¹¹ The court then distinguished the situation where a "false friend" actually testified concerning a conversation that he had with the accused¹¹² from the introduction of recordings of that conversation surreptitiously made with the cooperation of the "false friend." The court noted that the expectation that one's confidential conversations would not be repeated by a friend is qualitatively different from the expectation that the same conversation would not be recorded.¹¹³

Finally, the court stated that the Alaska privacy amendment "affords broader protection than the penumbral right inferred from other [federal and state] constitutional provisions. Were that not the case, there would have been no need to amend the constitution."¹¹⁴ Based on these principles, the *Glass* court held that the expectation that one's conversations would not be recorded is reasonable within the meaning of the Harlan test.¹¹⁵

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

State, 510 P.2d 793, 797 (Alaska), *cert. denied*, 414 U.S. 1086 (1973). The two prongs 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 that they could construe the Alaska Constitution as providing rights additional to those provided by the federal constitution. *Id.* n.12 (citing, among others, *Zehring v. State*, 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 *B'ue v. State*, 558 P.2d 636 (Alaska 1977)).

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

113. *Glass*, 583 P.2d at 876-78. The court quoted extensively from Judge Hufstедler's dissent in *Holmes v. Burr*, 486 F.2d 55, 72 (9th Cir.), *cert. denied*, 414 U.S. 1116 (1973). Judge Hufstедler stated that uninhibited discussion is an essential component of a democratic society. While the risk of one's confidential conversations being repeated can be just as inhibiting as the risk that the conversation is being recorded, the risk of recording is not one that society is willing to accept. Therefore, the expectation that confidential conversations are not being recorded is reasonable. *Id.* 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 before¹¹⁷ or after¹¹⁸ 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., *Colley 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 strong, 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 society.

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 in 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 independent protection of rights for Alaskans, rather than merely an excuse for a 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 form of analysis in privacy jurisprudence.¹²⁷ Search and seizure remains the main area in which the court has not adopted a separate privacy analysis. The adoption of the sliding scale test in search and seizure cases would, therefore, make search and seizure part of a uniform and independent privacy analysis. An independent privacy analysis focuses squarely on the privacy issues involved and forces recognition of the independent validity of the privacy amendment. The recognition of independent analysis requires the recognition of a separate exclusionary rule specifically applicable to the privacy amendment.¹²⁸

A separate exclusionary rule would not only provide an independent analysis in the search and seizure area, it would provide

127. The emergence of the sliding scale test is discussed *supra* notes 83-104 and accompanying text.

128. Prospects for an independently significant privacy amendment depend on convincing the supreme court to explicitly recognize an exclusionary rule based on the privacy amendment. Although *Glass* was decided based upon the right to privacy it did not explicitly hold that article 1, section 22 provides a basis for excluding evidence independent of the search and seizure provision. In fact, earlier in the same year in which *Glass* was decided, the court had refused to recognize that any additional protection was provided by the privacy amendment in a search and seizure case, *Weltin v. State*, 574 P.2d 816, 821 n.15 (Alaska 1978). That refusal was confined to the facts of the case. The effect of the *Glass* decision on this language was not stated in *Glass* itself. Subsequent to *Glass*, however, at least one Alaska appeals court has held that there is no such independent exclusionary rule under the privacy amendment, *Wortham v. State*, 641 P.2d 223, 224 n.2 (Alaska Ct. App. 1982), *aff'd* *sub nom.* 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 Alaska Supreme Court in fact recognized an independent exclusionary rule based on the privacy amendment in *Glass*. The court deviated from federal precedent in particular, monitoring of conversation because it believed the privacy amendment provided protection in addition to that provided by the fourth amendment and its Alaska counterpart. *Glass*, 583 P.2d at 879. If the privacy amendment did not provide additional protection, the court reasoned, there would have been no reason to amend the constitution. *Id.* See also *Palmer v. State*, 604 P.2d 1106, 1108 (Alaska 1979) (where the court said that in *Glass*, "we held that the privacy amendment, Alaska Const., art. § 22, prohibited the electronic recording of a narcotics transaction."):

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

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 Walmski & Tucker, *Expectations of Privacy: Fourth Amendment Legitimacy through State Law*, 16 *HAVER. C.R.-C.I. L. REV.* 1 (1981).

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

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

The privacy analysis would have the greatest potential impact where a "fundamental" right to privacy was found to be infringed. If an aspect of privacy were deemed "fundamental," then any search infringing on this right would be presumed unconstitutional, thereby requiring justification by a showing of an important governmental interest and the least intrusive means chosen to further that interest. The important governmental interest would be balanced against the fundamental privacy interests involved. The traditional exception to the warrant requirement would generally satisfy this test, since in these cases the governmental interest is heightened by the need to protect officers or to keep evidence from being destroyed.

If the results would be substantially the same under either the sliding scale analysis or the traditional search and seizure test, the court would employ a separate privacy test as a second tier of analysis at all. The reason for employing the test is that the recognition of a distinction between the aspects of privacy protected by the Harlan test and the sliding scale test suggests that the results would not be the same under 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 where the requirement that the police obtain a search warrant would impose so slight a burden that warrantless searches would be invalid. An example of such a situation would be a case involving warrantless wiretapping of a massage parlor, a place where patrons and employees have been held to have no reasonable expectation of privacy. *Hilbers v. Municipality of Anchorage*, 611 P.2d 31 (Alaska 1980). If, in such a case, some privacy interests were found to be infringed, a search could be invalid if the facts showed that there would have been no burden on the police in obtaining a 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

against the increasing threats to privacy posed by the demands of the Information Age in which Alaskans now live.¹⁴³ What is needed is a 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 a comprehensive form of protection to be developed. The sliding scale test provides the vehicle for the attainment of comprehensive 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

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 Hufstедler'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.

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

Serial No. 96-54

Printed for use of the Committee on the Judiciary



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The Greatest Addiction of All

by Jon Gettman,
NORML Director

NORML — IZED

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 in-

crease 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 his 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 mari-

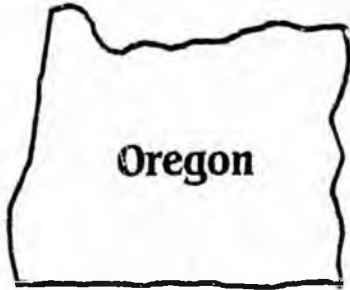
juana users and promoting their widespread persecution. Our dignity is debased when Carlton Turner, the President's drug advisor, encourages employers to discriminate against marijuana users by stating they are unfit for work. Our dignity is debased when the National Institute on Drug Abuse releases 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:



Oregon

(pop. 2,633,149)



Nevada

(pop. 944,038)



Idaho

(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, Litterriver, 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.

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National Organization for the Reform of Marijuana Laws

ACTIVIST NEWS

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

The House Bill allowed illegally seized evidence to be used in federal cases, not just state cases. (Remember John Adams' "Writ of Habeas Corpus" that allowed Brits to search for any dwelling?) Over the course of the history of Defense Casper Weinberger, we've asked for the military to use the bill within thirty days of enactment of the bill, and let us not forget the President's call for more than one million federal soldiers to turn themselves to a urine test without any prior individual basis for suspicion.

In the end, only sixteen Representatives had the courage to just say no to such inherently imposed 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 (La.), Rep. Michael Lowry (WA),

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 activists. 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 eerily awaiting and amazingly gullible media.

Here's one example of the lies that were spread by the government in the September 1987. 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 "joints" 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.

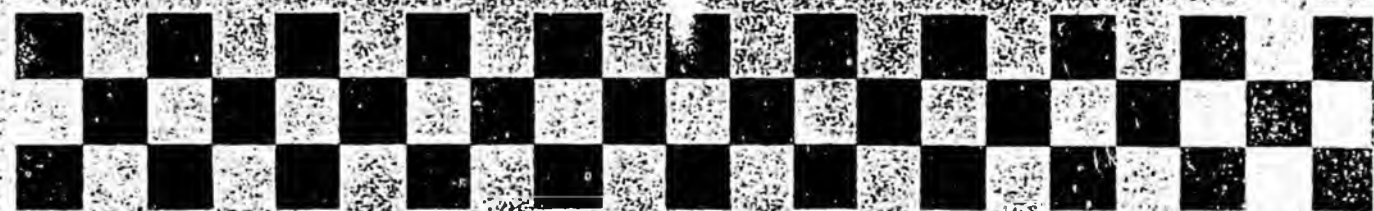
Rep. Edward Roybal (CA), Rep. Martin Olivasabo (MN), Rep. Gus Savage (IL), Rep. Louis Stokes (OH), Rep. James Weaver (OK), Rep. Ted Weiss (NY), and one Republican, Rep. Philip Crane (IL). No other Congressman is not on this list. Why don't you let him know your displeasure with his actions.

Meanwhile on the other side of the Capitol, Senate Majority Leader Bob Dole introduced a bill which would have allowed the arbitrary of drug, alcohol, and mental health bills 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 discriminating 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.



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, be-

come 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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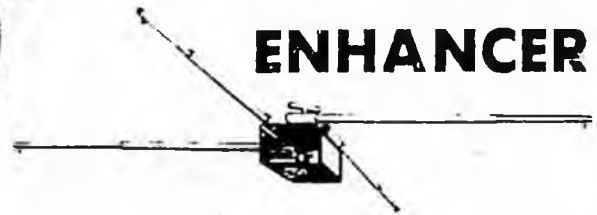
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CASE IN POINT

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) 77.8 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 grew ever longer. Heroin takers are being squeezed out of their expensive methadone programmes. Cocaine treatment, which is not yet well developed, has been over-

whelmed 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 Ar-

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

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



BY WRIGHT FOR THE MIAMI NEWS

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 Columbia, 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 brutal 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 "ataboys" (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 kill-

ing 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 McCintick, the author of "Indoent 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 hostage-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 stirs up the old ones. Should we retaliate in kind against the terrorists or their sponsors? Is a assassination a proper weapon? If not, what other choice 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.

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 tra-



William Higgins

ASSOCIATED PRESS

ditional 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	61,543	50.9
1968	198,900	94,571	48.2
1969	234,600	115,903	51.2
1970	275,600	188,682	68.5
1971	312,000	225,828	72.9
1972	327,400	292,179	89.4
1973	328,900	320,700	97.5
1974	342,080	335,900	98.2
1975	341,300	310,100	91.2
1976	379,700	441,100	116.4
1977	412,700	457,600	111.2
1978	423,700	445,800	105.2
1979	435,000	391,600	89.8
1980	580,900	405,600	69.8
1981	559,900	400,300	71.5
1982	676,000	455,600	67.4
1965-82	4,309,180	5,312,639	123.3

Source: FBI Uniform Crime Reports 1965-1983

TABLE 2

How do people rank the severity of crime?

<u>severity score</u>	<u>offense</u>
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

<u>Crime</u>	<u>Number of Arrests</u>
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
Embezzlement	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

<u>Total Marijuana Arrests</u>	<u>Total Possession</u>	<u>Total Sale/Cultivation</u>
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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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 (less than 1 oz in public)	if not \$100	90 days (4 oz to 1/2 lb) (1 oz or more in public) 1 yr (more than 1/2 lb)	\$1,000 \$5,000	5 yrs (more than 1 oz.)	\$50,000
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) 5-20 yrs (10 lbs - 100 lbs) 6-30 yrs (over 100 lbs)	\$25,000 \$50,000 \$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.) 1-2 yrs (over 8 ozs.)	\$5,000	2-4 yrs	
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