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DECRIMINALIZING THE MARIJUANA USER: A DRAFTER'S GUIDE

Richard J. Bonnie*

In 1972, the National Commission on Marijuana and Drug Abuse recommended decriminalization of possession of marijuana for personal use.[1] Since that time, ten states[2] have enacted some variant of the Commission's recommendation, and similar proposals are currently being considered in most of the remaining states and in Congress.[3] This article is designed to survey and discuss the numerous issues of policy and law which must be confronted in evaluating legislative proposals to implement the Commission's recommendation.

The article does not discuss the arguments in favor of decriminalization, a matter which the author[4] and others[5] have covered elsewhere. Nor does the article consider the even more difficult questions involved in a legislative decision to legalize the drug and authorize its distribution for nonmedical uses. International obligations, federal law, and current political realities preclude enactment of a regulatory approach toward the availability of marijuana, including any variant of the so-called alcohol

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[1] NATIONAL COMMISSION ON MARIHUANA AND DRUG ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING 150-60 (1972) [hereinafter cited as MARIHUANA COMMISSION REPORT.]

[2] ALASKA STAT. § 17.12.010 (1975); CAL. HEALTH & SAFETY CODE § 11357 (West Supp. 1976); COLO. REV. STAT. § 12-22-412 (Supp. 1977); ME. REV. STAT. tit. 22, § 2383 (Supp. 1975); MINN. STAT. ANN. § 152.15 (West Supp. 1977); MISS. CODE ANN. §§ 41-29-139, 41-29-149 (Supp. 1977); Marihuana Reform Act, ch. 360, 1977 N.Y. Laws 500; N.C. GEN. STAT. §§ 90-95, ch. 862, 1977 N.C. Sess. Laws; OHIO REV. CODE ANN. § 2925.03 (Page Supp. 1976); OR. REV. STAT. § 167.207.

[3] The Senate Judiciary Committee recently approved a compromise version of S. 1437, 95th Cong., 1st Sess. (1977), the long-pending proposal to overhaul the federal criminal code. S. 1437 includes a provision which would make possession of one ounce or less a "criminal infraction." The Washington Star, Nov. 2, 1977, at A-6. *See* note 65 *infra*.

[4] *See Marihuana Research and Legal Controls: Hearings Before the Subcomm. on Alcoholism and Narcotics of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 2d Sess. 134-74 (1974) (testimony of Richard J. Bonnie); R. BONNIE & C. WHITEBREAD, THE MARIHUANA CONVICTION 294-304 (1974).

[5] *See, e.g.*, J. KAPLAN, MARIJUANA: THE NEW PROHIBITION (1970); A. HELLMAN, LAWS AGAINST MARIJUANA: THE PRICE WE PAY (1975).

model.[6] Although a state conceivably could repeal its laws against cultivation and distribution of marijuana, including only the federal prohibitions in effect, such an overt departure from prevailing national sentiment seems unlikely. One must assume, for present purposes, that commercial activities will remain prohibited by state law.

Within these contours, the range of public policy choices has both statutory and administrative dimensions. The statutory issues involve the appropriate penalty structure for possession of marijuana for personal use and other consumption-related behavior. Possible sanctions include criminal penalties of varying severity as well as several forms of decriminalization, including civil sanctions. Although administrative choices by police and prosecutors are extremely important and should not be overlooked by reformers,[7] this article will focus only on legislative options, providing a drafter's guide for lawmakers who have concluded that the traditional criminal penalties for consumption-related behavior should be substantially modified.

Decriminalization has been used to describe these legislative reforms, but, because the operational meaning of the criminal sanction is itself ambiguous, neither legislators nor criminal justice personnel share a common conception of what decriminalization means. In this article, the term will be employed to refer to a threshold concept rather than a definitional one: decriminalization refers to any statutory scheme under which the least serious marijuana-related behavior is not punishable by incarceration. Incarceration is a useful threshold device for several reasons: the elimination of the possibility of imprisonment and its attendant social stigma reflects a significant change in official attitudes toward marijuana offenses; total confinement is a sanction different in kind as well as in degree from other legal sanctions; and a lesser sanction suggests or requires less severe and less elaborate criminal processes.

Beyond this threshold, two important questions must be addressed. First, legislators must decide what behavior should be decriminalized. Only possession of small amounts? Nonprofit accommodation sales to friends? Cultivation of a few plants in the home? These questions will be addressed in Part I.

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[6] An analysis of the various regulatory mechanisms for making marijuana available legitimately for recreational users appears in MARIHUANA COMMISSION REPORT, *supra* note 1, at App. Vol. II, 1179-84.

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

To the extent that the governor and other policymakers at the state level can influence the behavior of local police and prosecutors, decisions regarding enforcement priorities and practices can substantially reduce the social costs of prohibitory policies. Also, because they may be implemented without the heightened public visibility associated with the legislative process, administrative choices may substantially alter the operation of the legal system without sacrificing the deterrent benefits of the prohibition and incurring the symbolic costs of repeal. These costs include both decreased deterrence as well as heightened anxieties among those who are frightened by the change. *See generally* R. BONNIE & C. WHITEBREAD, *supra* note 4, at 273-293.

Second, legislators must determine what residual sanctions, if any, should be retained to implement the state's interest in discouraging decriminalized behavior. Conduct that is decriminalized may or may not remain subject to lesser sanctions. In each of the ten states which have thus far enacted decriminalization reforms, least serious marijuana-related behavior is still punishable by a fine. In some of those states the behavior is still labeled a criminal offense, although a person convicted of the offense may have no record. Should the commission of a decriminalized offense be punishable by a monetary penalty or by participation in some educational or counseling program? Should the person be booked and taken into custody after detection of a decriminalized offense? Should such a person be stigmatized by an arrest or conviction record? These questions will be addressed in Parts II, III and IV.

I. DECRIMINALIZED OFFENSES

The scope of decriminalized behavior, and the drafting techniques used to define the residual offenses, will be determined primarily by the purpose of the reform. If, for reasons of fairness, justice, or institutional integrity, the legislature's main goal is to withdraw the criminal sanction from mere consumers of marijuana, the statutes should be revised in a way that most accurately distinguishes between consumption-related activity and commercial activity. On the other hand, if the primary legislative objective is to promote the efficient administration of criminal justice by reducing the burden of processing petty marijuana cases, decriminalization may be restricted to the narrowest range of behavior consistent with this goal.

Drug offenses are usually separately defined for possessory conduct, distributional conduct, and production or cultivation. Legislators have traditionally recognized that possessory activity may be indicative of either intended consumption or intended distribution, depending upon the amount possessed and other indicia of intent. Similarly, legislators have been sufficiently aware of the patterns of marijuana use that they have distinguished since the late 1960's between purely commercial activity and gratuitous or nonprofit transfers among friends. A similar distinction may be drawn between forms of cultivation, which may range from growing one plant in a window box to a large-scale agricultural enterprise. This Part will consider the drafting alternatives for defining decriminalized or least serious marijuana-related behavior with reference to possessory conduct, noncommercial transfers, and noncommercial cultivation.

A. Possessory Conduct

1. *Statutory Relationships Between Intent and Amount*—Traditionally, the possession offense has been divided into at least two categories:

simple possession and possession with intent to sell, with more severe penalties authorized for the latter category. A clear legislative trend in recent years has been to dispense with proof of intent and to substitute gradations of amount with correspondingly graduated penalties. Thus, in discriminating between less serious and more serious possessory activity, legislatures can utilize two criteria, intent to sell and amount possessed, which can be combined in several different ways.

Under one statutory scheme, the pure intent approach, possession of any amount of marijuana is decriminalized unless the prosecution proves intent to sell. The principal advantage of this approach is that it reflects the essential difference between commercial activity[8] and possession for personal consumption. The primary drawback is that the prosecution rarely has any independent evidence of intent to sell and usually relies entirely on inferences drawn from the amount of marijuana possessed. Because noncriminal and criminal conduct are difficult to distinguish, the pure intent approach does little to reduce the cost or enhance the fairness of enforcing marijuana prohibitions.[9] The user cannot confidently adjust his conduct to avoid criminal sanctions. Criminal justice resources may be unnecessarily squandered if the police cannot recognize the decriminalized offense when they see it, although the promulgation of prosecutorial charging guidelines can solve this problem. In addition, defendants charged with criminal possession are more likely to insist on a trial under the pure intent approach because the prosecutor must prove actual intent, a more difficult task than proving that the amount possessed exceeded a designated quantity. Since the defendant has a greater chance of prevailing under the pure intent approach than under a strict amount approach, the prosecutor will not have as much leverage for plea bargaining.

A variation of the pure intent approach which shifts the burden of proof to the defendant may increase the prosecutor's leverage. Under this approach, possession of any amount is presumed to be criminal unless the defendant proves that the possession was solely for personal use.[10] Although the question is unsettled, this approach may be unconstitutional: it may not satisfy the constitutional requirement that the state prove each

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[8] Commercial activity refers only to transfers in which the transferor realizes a profit. It may be more appropriate to place casual, not-for-profit transfers in the same category as mere possessory activity. *See* text at notes 42-46 *infra*.

[9] This is not so serious a drawback in ordinary legislative grading among felonies and other serious criminal offenses: the entire range of conduct is punishable by imprisonment and the criminal process will proceed in the same manner regardless of which offense the person has really committed. However, when the lesser offense is decriminalized, the violator is either not subject to punishment or his case will be processed in a significantly different way. For this reason it is more important to employ objective criteria in drawing statutory lines. The expanding use of citations and other less burdensome procedural devices in misdemeanor cases calls for clearer lines between misdemeanors and related felonies as well.

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

element of the crime beyond a reasonable doubt;[11] and there may be an insufficient connection between the proven fact, possession of any amount, and the apparently presumed fact, intent to distribute.[12] It may be argued, in response, that since the legislature is constitutionally entitled to classify simple possession of any amount of marijuana as a crime, it can, a fortiori, create what is in effect a reduced offense for cases in which the offender can demonstrate his intent to consume. On the other hand, if the legislature has chosen to employ the offenders' purpose as the central element in distinguishing criminal conduct from noncriminal conduct, it may be required to assign the burden of proof in a way which bears some empirical connection to the offenders' actual state of mind. Thus, unless statutory presumptions are based on the amount possessed, the legislature may be constitutionally bound, in effect, to presume intent to consume from the mere fact of possession of any amount of marijuana or not to presume anything at all, defining mere possession without any intent as the offense.

However the constitutional issue is resolved, it is clear that decriminalization of possession only if the violator proves that his intent is to consume will not result in any major change in the operation of marijuana laws. Not surprisingly, none of the ten states which have thus far adopted decriminalization provisions have employed either version of the pure intent approach.[13]

A second method of drawing the statutory boundaries for possessory activity is to decriminalize possession of less than a specified amount and to retain the criminal penalty for possession of any quantity exceeding that amount, without regard to intent to sell. Nine of the ten states which have decriminalized marijuana have utilized this pure amount approach.[14] The principal advantages of this scheme are fairness and efficiency: defining the offense by the amount possessed permits both possessors and police to know precisely what conduct is criminally prohibited; moreover, this approach gives the prosecutor greater leverage to plea bargain with

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[11] *Compare* Mullaney v. Willbur, 421 U.S. 684 (1975) *with* Patterson v. New York, 45 U.S.L.W. 4708 (June 17, 1977). *See* Cole v. State, 511 P.2d 593 (Okl. Crim. App. 1973), where the court invalidated a possession of paraphernalia statute on the theory that mere possession is a neutral fact from which one cannot fairly infer an illegal purpose, and therefore the state cannot in effect shift the burden to the defendant to prove that his intentions were innocent. *But see* State v. Garcia, 16 N.C.App. 344, 192 S.E.2d 2 (1972), in which the court upheld a statute providing that possession of more than five grams of marijuana raised a presumption of intent to distribute.

[12] *See* Leary v. United States, 395 U.S. 6 (1969); *Cf.* Sharp v. Commonwealth, 213 Va. 269, 192 S.E.2d 217 (1972), where the court invalidated a statutory provision which permitted the fact-finder to base a finding of intent to distribute solely upon evidence as to the quantity of marijuana unlawfully possessed.

[13] The Alaska statute does employ the pure intent approach for possession of marijuana in the home, using a pure amount approach for possession in public. *See* note 14 *infra*..

[14] ALASKA STAT. §§ 17.12.110(d), (e) (1975); CAL. HEALTH & SAFETY CODE § 11357(b) (West Supp. 1976); COLO. REV. STAT. § 12-22-412(12)(a) (Supp. 1977); ME. REV. STAT. tit. 22, § 2383, tit. 17-A, § 1106(3) (Supp. 1975); MISS. CODE ANN. § 41-29-139(d)(2) (Supp. 1977); Marihuana Reform Act, ch. 360, § 3, 1977 N.Y. Laws 500; N.C. GEN. STAT. §§ 90-95(d)(4) *as amended by* Act of 1977, ch. 862, 1977 N.C. Sess. Laws; OHIO REV. CODE ANN. § 2925.03 (Page Supp. 1976); OR. REV. STAT. § 167.202.

those who possess above-the-line amounts. On the other hand, the method may be at once over and underinclusive: it may decriminalize the behavior of some sellers who possess amounts below-the-line and may retain criminal penalties for some consumers who possess above-the-line quantities.[15] The respective degrees of over and underinclusion obviously depend upon where the line is drawn.

If a legislature is impressed with the advantages of the pure amount method but wishes to alleviate either the underinclusion or the overinclusion, it may select a scheme which combines the intent and amount approaches. There are four basic variations on this theme. The first errs in the direction of underinclusion. If the major impetus behind decriminalization is a desire to reduce the administrative costs of processing most petty consumption offenses, then the statutory amount could be relatively small and the law could be drafted to make possession of above-the-line amounts always criminal and possession of below-the-line amounts criminal only if the prosecution proves intent to distribute. In below-the-line cases, however, such a statute will involve the same problems of fairness and cost as the pure intent approach since the seriousness of the possessor's offense is indeterminate at the time of the offense in the absence of definitive prosecutorial guidelines. The main advantage of this combined approach is that police and prosecutors may utilize evidence of intent against dealers who are careful to possess only below-the-line amounts. Also, a criminal above-the-line offense will give the prosecutor a plea bargaining tool for persons charged with possession with intent to sell.

A second combined approach errs in the direction of overinclusion. If the core objective is to ameliorate the unfairness of criminalization of an activity which is engaged in and approved of by a large segment of the populace, a larger statutory amount could be used and possession of below-the-line amounts would always be noncriminal while above-the-line possession would be noncriminal unless the prosecution proved intent to distribute.

If the legislature believes that this approach will permit commercial dealers to avoid prosecution by limiting their possession to below-the-line amounts or will generate too many contested cases due to the prosecutor's reduced leverage, the statute could presume intent to distribute in above-the-line cases, in effect shifting the burden of proving intent to consume to the defendant in such cases. This third variation was adopted by Maine in its decriminalization statute.[16] Although similar statutes have been challenged on constitutional grounds, they have generally been upheld on the theory that the proven fact, the amount pos-

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

[16] ME. REV. STAT. tit. 17-A, § 1106(3) (Supp. 1975).

sessed, is rationally related to the presumed fact, intent to distribute.[17] However, a Michigan court invalidated a statute which provided that possession of more than two ounces of marijuana raised a presumption of intent to sell based on its finding that the specified amount was inadequate to support the presumption.[18] Again, the constitutional question is a tangled one, and extensive treatment is not warranted here. The soundest position seems to be that the legislature may employ any amount it chooses as a grading variable, decriminalizing possession of less than that amount, but if it chooses to link the amount with the violator's purpose, making the latter the ultimate issue for grading purposes, then it must assign the burden of proof in a way which bears a reasonable relationship to the amount possessed. For example, a statute which decriminalized possession of less than five grams but decriminalized possession of more than five grams only if the defendant proved intent to consume might be invalid, whereas a similar statute using four ounces as the grading variable would be clearly constitutional.

A statute combining the intent and amount criteria in this way, when compared with the pure amount approach, has the advantage of providing the possessor with an opportunity to contest the presumed fact of his intent to distribute. The person who possesses marijuana for personal use only, in amounts near the borderline, may be criminally punished if the quantity is slightly in excess of the designated amount. The disadvantage of this approach is that intent to distribute will be a triable issue in every case, even when the police are convinced that it was not intended solely for personal use; some retail dealers may thus be able to avoid serious sanctions even if they are detected in possession of small above-the-line quantities. Policymakers wishing to alleviate this problem and still retain the advantage of the combined intent-amount approach could create a buffer zone. This fourth variation will set two amounts, X and Y, so that possession of less than X will never be a criminal offense, while possession of more than Y will always be a criminal offense. Possession of more than X but less than Y will be criminal only if the prosecution proves intent to sell.[19]

2. *Designating the Amount*—If a legislature has decided to decriminalize some marijuana-related behavior and intends to implement that choice by utilizing at least one specific amount, the legislators must also decide what that specific amount will be and whether a distinction should be drawn between different cannabis products.

Determining a statutory amount is necessarily somewhat arbitrary. It is clear that a person possessing over a kilogram of marijuana is holding it

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

[18] People v. Serra, 55 Mich. App. 514, 223 N.W.2d 28 (1974) (alternative holding). This aspect of *Serra* was reaffirmed in People v. Gallagher, 68 Mich. App. 63, 241 N.W.2d 759 (1976).

[19] Again, the burden of disproving intent to sell might be shifted to the defendant, but this alternative may be subject to constitutional challenge if there is a major difference in the applicable penalty. *See* notes 11-12 and accompanying text *supra*.

for sale and that one holding less than half an ounce is holding it for his personal use and perhaps the use of his friends. Between these extremes, however, there is no single amount for decriminalization which is a priori more appropriate than another.

The precise amount should reflect the legislature's specific goal of decriminalization. If the goal is merely to reduce petty nuisance arrests and to retain the criminal sanction for as much marijuana-related conduct as possible, then a relatively small amount, such as one ounce, should be chosen. Since ninety to ninety-five percent of all arrests are for simple possession and approximately two-thirds of these involve one ounce or less,[20] decriminalizing possession of one ounce or less will significantly reduce enforcement costs. The one-ounce amount also conforms to current patterns of retail distribution of marijuana.[21] Of the ten states which have decriminalized some marijuana-related behavior, six fixed the amount at one ounce,[22] one used twenty-five grams, an amount slightly less than an ounce,[23] and two others decided on an ounce and a half.[24]

If, on the other hand, legislators want the statutory amount to approximate the distinction between commercial and consumer behavior, one ounce is too low, although available data about use and distribution patterns do not indicate clearly which amount would be most realistic. It has been shown both in free access studies, where marijuana users are kept under observation and told to smoke as much as they wish, and in survey studies, where users are asked how much marijuana they consume, that even a heavy user will not use more than an ounce of marijuana in a week.[25] Yet, many persons engaging in strictly consumer activity, including casual, not-for-profit distribution to friends, frequently possess more than one ounce because the drug is usually smoked communally and because many users hold a supply for longer periods than one week. If a legislature wishes to keep users out of the criminal justice system, it should probably draw the line at about four ounces. In Ohio, possession of less than 100 grams, a little more than three and a half ounces, was decriminalized.[26]

One problem which a higher amount leaves unresolved is that of the commercially oriented retailer who deals only in amounts of four ounces or less, returning to his secreted supply for frequent replenishment. A

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[20] Goode, *Sociological Aspects of Marijuana Use*, 4 CONTEMP. DRUG PROB. 397, 441 (1975).

[21] *See* MARIHUANA COMMISSION REPORT, *supra* note 1, at App. Vol. II 1173-74.

[22] ALASKA STAT. § 17.12.110(d) (1975); Cal. HEALTH & SAFETY CODE § 11357(b) (West Supp. 1976); COLO. REV. STAT. § 12-22-412(12)(a) (Supp. 1977); MISS. CODE ANN. § 41-29-139(d)(2) (Supp. 1977); N.C. GEN. STAT. §§ 90-95(d)(4) *as amended by* Act of 1977, ch. 862, 1977 N.C. Sess. Laws; OR. REV. STAT. § 167.202.

[23] Marihuana Reform Act, ch. 369 § 3, 1977 N.Y. Laws 501.

[24] ME. REV. STAT. tit. 17-A, § 1106(3) (Supp. 1975); MINN. STAT. ANN. § 152.01(16) (West Supp. 1976).

[25] Telephone conversation with Dr. Robert Willette, National Institute on Drug Abuse (Oct. 15, 1976).

[26] OHIO REV. CODE ANN. §2925.11(c)(3) (Page Supp. 1976).

buffer zone statute[27] could be used to reach this situation: possession of less than one ounce could be decriminalized, while possession of more than four ounces remains a crime, and possession of an amount in the buffer zone would be a criminal offense if the prosecution proved intent to sell.

3. *The Potency Problem*—Variability in the potency of marijuana poses an additional problem once the legislature has decided upon an amount. Different parts of the cannabis plant contain the psychoactive substance, delta-nine-tetrahydrocannabinol (THC), in different proportions, generally decreasing in the following sequence: resin, flowers and leaves. Almost no THC is contained in the stems, roots, or seeds.[28] The level of THC also varies among plants depending upon agricultural conditions. For example, Mexican-grown marijuana usually contains one percent THC by weight; Colombian or Jamaican marijuana can contain as much as three to five percent THC; and marijuana grown domestically almost always contains less than one percent THC.[29] Marijuana refers to a preparation of the flowers, leaves, seeds, and small stems. Hashish, on the other hand, generally refers only to the resin and flowering tops of the plant, and its potency may range from one to fourteen percent THC.

A decriminalization scheme might distinguish between preparations of varying potency in order to deter more effectively use of the more potent ones. Two methods for making this distinction have been proposed. The potency approach makes criminal liability entirely dependent upon the percentage of THC contained in the particular preparation. For example, possession of less than four ounces of any cannabis will no longer be a crime if the potency is less than one percent, but possession of any amount containing more than one percent THC remains a crime.

The potency approach poses three basic problems: fairness, cost, and inconsistency with the goals of decriminalization. The fairness objection implicates the fundamental requirement of our criminal law that actus reus and mens rea coincide. Unless all consumers purchase the equipment necessary to perform THC assays, a person smoking marijuana cannot know the potency of his supply, and a potency distinction therefore imposes the criminal sanction on one who could not have known he was committing a crime.[30]

Implementing a potency approach would also be costly for the state because each police department would be required to equip their chemical laboratories for THC assays.[31] Scientists at the National Institute on Drug

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[27] *See* text at note 19 *supra*.

[28] *See* MARIHUANA COMMISSION REPORT, *supra* note 1, at App. Vol. II 1171.

[29] Goode, *supra* note 20, at 404. The author also notes that marijuana is rarely laced with more expensive and dangerous drugs, such as mescaline and opium, since these substances are unprofitably sold in this manner. *Id.* at 404-05.

[30] A potency distinction is not necessarily violative of due process. The Supreme Court has recently reaffirmed the constitutionality of strict liability regulatory offenses. United States v. Park, 421 U.S. 658 (1975).

[31] Alternatively, departments might pool their resources to establish a central lab, or the chemical evaluation could be done on the state level. However, considerable expense is involved both in setting up the apparatus and in conducting each assay, regardless of which alternative is chosen.

Abuse claim that the cost would be prohibitive even though it is now technologically feasible to assay every compound seized.[32]

The most serious objection to the potency approach is that it could undermine the benefits of decriminalization. Since any marijuana sample could contain an excessive percentage of THC, the police might be directed to detain all persons possessing marijuana pending chemical analysis. This could increase rather than reduce the expenditure of scarce police resources in enforcing marijuana laws. Further, the potency approach does not distinguish the commercial seller from the consumer, and it retains the potential for harrassment and selective enforcement which plagues the present system. Finally, the potency distinction may actually be insignificant. The Drug Enforcement Administration has analyzed street samples of marijuana compounds for the last several years, and virtually every sample has fallen within the one-half percent to one percent range, with a mean potency of six-tenths percent.[33]

Under the second method of distinguishing between samples of different potencies, the form approach, criminal penalties are imposed for the possession of hashish, resin, and flowering tops, but not for the usually less potent marijuana flowers, leaves, seeds, and small stems. There are two problems with the form approach. First, the form is not always correlated with potency. Some weak samples of hashish contain less THC than some strong marijuana compounds.[34] While the Drug Enforcement Administration has located hashish samples which contain as much as fourteen percent THC, the mean percentage is two and six-tenths percent, and two-thirds of the preparations analyzed were below this mean percentage. The person possessing weak hashish might successfully claim that a statute which punishes him while permitting a person possessing a more potent marijuana mixture to escape criminal liability is defective under the equal protection clause. Further, even if the potency-form relationship is close enough to survive constitutional challenge, it makes little sense as a matter of policy; since there is very little potency difference between the mean sample of each form, the distinction cannot be justified in terms of potentially disparate effects on health.

A second objection to the form approach is a definitional one. Hashish is typically defined as the resin of the cannabis plant,[35] but as the Marihuana Commission pointed out:

> [R]ather than representing a clear physical distinction, "resin" is merely a convenient label for ascribing certain substances exuded by many plants, all of which have certain properties in common. For example, they are brittle in solid form and melt when heated.

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[32] Telephone conversation with Dr. Robert Willette, National Institute on Drug Abuse (Oct. 15, 1976).

[33] *Id.* The DEA has found rare instances of compounds consisting of up to 5 % THC.

[34] *See* Goode, *supra* note 20, at 405.

[35] *See, e.g.*, MISS. CODE ANN. § 41-29-105(0) (Supp. 1976); "[T]he resin extracted from any part of the plants of the genus Cannabis and all species thereof or any preparation, mixture or derivative made from or with said resin."

> The problem is that "marijuana" mixtures contain some resins and "hashish" preparations often contain plant parts other than resins. So, for legal purposes, resin is not the only factor. How could it be defined? Predominantly resin? Substantially resin? Any such formulation might well fall to a vagueness attack.[36]

Despite these objections, six of the ten states which have decriminalized some marijuana-related behavior have retained the criminal sanction for possession of any amount of hashish, and each relies on the form approach to make the necessary distinction.[37] Two additional states relied entirely on the form approach to decriminalize possession of different amounts of cannabis products: both Ohio and North Carolina decriminalized possession of 100 grams of marijuana, five grams of hashish, and one gram of hashish oil.[38] Only two of the reform jurisdictions, Alaska and Minnesota, decriminalized possession of equal amounts of cannabis products without regard to form or potency.[39]

If lawmakers are determined to exert a greater deterrent against the use of the most potent preparations, the most sensible approach would be to distinguish between hashish oil and other forms of cannabis. Since hashish oil is a liquid concentrate, this distinction would be a simple one to make for both users and police. Furthermore, there is a significant difference in terms of average potency between hashish oil and the other two forms of the drug. While nearly all samples of both marijuana and hashish contained less than three percent THC in the Drug Enforcement Administration study, the lowest potency found for hashish oil was ten percent, and the mean was seventeen percent.[40] Thus, hashish oil is easily defined in terms of both form and potency.[41]

B. Distributive Conduct

The sale or distribution offense must be classified in two or more categories to distinguish adequately between commercial activity and

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[36] MARIHUANA COMMISSION REPORT, *supra* note 1, at App. Vol. II 1173.

[37] CAL. HEALTH & SAFETY CODE §§11065, 11018, 11357 (West Supp. 1977); COLO. REV. STAT. §§ 12-22-403 (1.5), (1.6)(4), 12-22-412(12)(d) (Supp. 1977); ME. REV. STAT. tit. 17-A §§ 1101(1), (5), 1102(2)(c), 4(b) (Supp. 1977) tit. 22, § 2383 (1965); MISS. CODE ANN. §§ 41-29-105(o)(r). 49-29-139, 41-29-149 (Supp. 1977); OR. REV. STAT. § 474.010(13), (14), (15) (Supp. 1975); N.Y. PUB. HEALTH LAW § 3302(5) (McKinney Supp. 1977).

All states except New York rely on the form distinction alone; New York adopted alternative definitions of hashish (concentrated cannabis): separated resin or cannabis preparations which contain more than 2-½ % THC by weight.

[38] N.C. GEN. STAT. §§ 90-95 *as amended by* Act of 1977, ch. 862, 1977 N.C. Sess. Laws; OHIO REV. CODE ANN. §§ 2925.01, 3719.01(D)(Q), 3719.41 (Page Supp. 1976).

[39] ALASKA STAT. §§ 17.12.150(4), 17.12.110 (1975); MINN. STAT. ANN. §§ 152.01(9), 152.09, 152.15 (West Supp. 1977).

[40] Telephone conversation with Dr. Robert Willette, National Institute on Drug Abuse (Oct. 15, 1976).

[41] *See, e.g.*, VA. CODE § 54.524.2(b)(16) (Supp. 1977):

> " 'Hashish oil' means any oily extract containing one or more cannabinoids, but shall not include any such extract with a tetrahydrocannabinol content or less than twelve percent by weight."

activity which is primarily consumption- related. Casual, noncommercial transfers are commonplace in the experience of most marijuana users, partly because of the difficulty of obtaining the drug and partly because marijuana use, unlike the use of narcotics, is often a communal experience. The most frequent type of transfer is probably the gift of a small amount for immediate use, but other kinds of noncommercial transfers are also quite common. Collective purchases of up to one pound may be distributed among friends with each buyer paying his share of the aggregate cost. In addition, students and other users with limited income sometimes sell small amounts at a slight profit in order to pay for their own use.

Casual distribution of small amounts of marijuana is the functional equivalent of possession of small amounts of the drug. Recognizing this fact, Congress and eighteen states treat transfers of small amounts of marijuana without remuneration or without profit as misdemeanors rather than as felonious sales.[42] In 1972, the National Commission on Marijuana and Drug Abuse concluded, under the same rationale, that these casual transfers should be decriminalized if they occur in private.[43]

Undoubtedly, it is possible to distinguish these casual, distributive transactions, at least on a quantitative basis, from smuggling and other commercial activity involving large amounts of marijuana and large profits. If, for the same reasons that have prompted decriminalization of noncommercial possessory activity, legislators wish to draw a line at some point along the spectrum of distributive activity and to decriminalize below-the-line transfers, the primary decision to be made is how and where to draw the line.

One criterion which may be used in classifying distributive activity is the nature of the transaction. A legislator attempting to decriminalize all consumption-related transfers might provide more lenient penalties when the transfer is a gift, when it does not result in profit to the transferor, or when the profit is less than a specified minimum. In terms of proof, it is most convenient to draw the line to exclude only gifts. Cost-only transfers arguably should not remain criminal, but efforts to distinguish nonprofit

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[42] 3 NATIONAL GOVERNORS' CONFERENCE, MARIJUANA: A STUDY OF STATE POLICIES AND PENALITIES 87 (1977) [hereinafter cited as GOVERNORS' CONFERENCE REPORT].

[43] The Commission noted:

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

MARIHUANA COMMISSION REPORT, *supra* note 1, at 157-58.

transactions from profitable ones will prove difficult,[44] and case-by-case adjudications of the profit issue hardly seem worth the effort when only small amounts are involved.

The second relevant criterion for evaluation of distributive activity is the amount transferred. A statute which stipulates a designated amount could avoid the problems of proving commercial purpose by creating a statutory presumption similar to the presumptions suggested for possession offenses. Of course, it is conceivable that retail dealers may adjust their behavior to the contours of the law, never transferring more than the specified amount. However, as evidence emerges regarding the operation of such a provision and its impact on retail distribution patterns, the legislature can respond intelligently by simply increasing or decreasing the designated amount.

Given the two available classification criteria, the nature of the transaction and the quantity transferred, there are several possible policy choices. Decriminalization of gifts only is probably the minimum revision consistent with decriminalization of possession. It makes little sense to refuse to accord gifts, which are rarely dectected and rarely involve substantial amounts of marijuana, the same penalty status as possession of small amounts; the donor is an accommodating user and different legal consequences seem fundamentally unfair.

The decision to extend the scope of the decriminalized offense beyond gifts to include nonprofit sales, sales of small amounts, or both, requires a sensitive effort to accommodate the goals of decriminalization with continuing law enforcement needs under a prohibitory scheme. One cannot ignore the risk that decriminalization of any sales will create a loophole for professional retailers. By adjusting his trading patterns so as to make many small sales instead of a few large ones, a retailer might be able to continue a profitable commercial operation without risking any sanctions more severe than an occasional fine. Undoubtedly, a legislator whose primary goal is to decrease criminal justice costs by reducing prosecutions of insignificant offenses will probably wish to limit decriminalization to gifts in order to avoid creating a loophole for retailers. On the other hand, maintaining criminal penalties for all sales will not be attractive to legislators who believe that the state's main objective in marijuana control is to contain the aggregate availability of the drug by deterring commercial activity. For such legislators, the aggregate market impact of distribution of small amounts will not be regarded as significant enough to warrant an overinclusive statutory provision which sweeps noncommercial distributors into the criminal justice system.

Legislators who take the latter view must design legislation that covers

[44] The burden of proof is, of course, crucial in any effort to fix a statutory line between profit and non-profit transfers. If the burden is on the prosecution to prove that a sale resulted in a profit, conviction of commercial dealers becomes that much more difficult; on the other hand, if the burden is on the defendant to prove that the sale was not for profit, it becomes more difficult for accommodating users to reap the benefits of decriminalization. These problems might be ameliorated over time, of course, if evidence about current market conditions is systematically collected.

most consumer activity without opening a wide loophole for commercial activity. Sales are much more ambiguous than gifts: a sale of two ounces may be a simple accommodation between users, one purchasing part of another's supply at cost; or it may be part of a large-scale, profit-making retail enterprise. The legislator must simply aim to devise a realistic classification which can be applied with reasonable convenience. One approach is to select a relatively low amount, one-half ounce or one ounce, for example, and impose a criminal penalty for all transfers of greater amounts. Another approach is to choose a higher amount and combine the profit and amount methods. For example, legislation could provide that sale of more than two ounces is not a criminal offense if the defendant proves that he made no profit.

Whether or not amount is the conclusive statutory element, the precise figure which the legislature chooses is obviously of major importance. As noted above, the loophole risk is increased by raising the amount, while designation of an unnecessarily small amount will extend the criminal sanction to too many users. Resolution of this dilemma depends, in part, on an assessment of the practical significance of the loophole effect. Decriminalization of sales of small amounts may in fact induce retailers to adjust distribution patterns to decrease the risk of apprehension, and it may also induce enterprising consumers to enter the marijuana trade at the retail level. Neither of these effects will be significant, however, unless the criminal penalties already in force, as well as those in effect after decriminalization, have a significant deterrent effect on persons inclined to engage in commercial activity. It is axiomatic that the deterrent effect of criminal sanctions depends to a large extent on the level of enforcement.[45] Thus, if the enforcement of laws against commercial sale is relatively passive, the loophole effect of an accommodation provision will be minor, and a designated amount which is too low may simply increase the risk of discriminatory enforcement without making any significant contribution to the deterrent process. On the other hand, if enforcement is active and the threat of detection is credible, enforcement objectives may well be compromised by an accommodation provision which permits careful retailers to escape punishment.

In summary, the wisdom and technique of decriminalizing accommodation sales depend mainly on the importance that lawmakers attach to prosecution of retailers who profit from the sale of small amounts. A designated amount of two ounces is not likely to affect dealers who customarily transfer amounts over five pounds, because it will be too inconvenient to divide up a transaction of that magnitude into enough separate transfers to qualify as decriminalized activity. If legislators believe that enforcement efforts should be concentrated on major sources of supply, a possible loophole for small-scale retailers is a matter of little

[45] *See generally* F. ZIMRING & G. HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL 158-72 (1973).

concern, and the distribution of amounts up to two ounces probably should be decriminalized.[46]

On the other hand, legislators who believe that vigorous enforcement at the retail level has a significant impact on the supply of marijuana will want to limit the scope of decriminalization to such small amounts or to gifts only. It should be emphasized, however, that legislators who take the latter view probably will still distinguish among commercial marijuana offenses for penalty purposes. Depending on the relative importance attached to proportionality as a limiting principle in the application of criminal sanctions to commercial activity, legislators will want to subdivide the criminal offense of sale into categories that reflect the relative seriousness of the offense. Thus, transfers too serious to qualify for decriminalization may merit petty offense or misdemeanor penalties rather than felony classification.

C. Cultivation for Personal Use

The overwhelming majority of marijuana consumed in the United States is imported from Mexico, the Caribbean, or Central and South America. Although visitors to these countries may smuggle small amounts for their own use, most illicit importation is commercial in nature and involves substantial amounts. Domestic cultivation of marijuana has never been a serious problem because its THC content is relatively low, but the plant is easily cultivated, can even be grown indoors, and is easily prepared for use. For this reason, small scale cultivation of marijuana is a relatively widespread practice in the United States.

Under most current statutes, cultivation of any amount is punishable as a serious felony, with penalties usually as severe as those for sale.[47] It seems clear that legislators interested in reforming their marijuana penalty statute should, at a minimum, revise cultivation penalties in order to distinguish between commercial and noncommercial activity. Assuming that cultivation of small amounts for personal use should be subjected to lesser sanctions than commercial cultivation, two problems remain: whether the reduced offense of cultivation for personal use merits a criminal penalty and what specific amount constitutes commercial cultivation.

A legislator interested only in conserving criminal justice resources while maximizing the deterrent value of the law probably will not be interested in decriminalizing cultivation. Few arrests are made for this activity and decriminalization of possession is not likely to increase cultivation arrests. On the other hand, a legislator aiming to remove

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[46] This view was taken by Senators Javits and Hughes who, as members of the National Commission on Marihuana and Drug Abuse, unsuccessfully urged the Commission to recommend withdrawal of the criminal sanction from all nonprofit transfers. Instead, the Commission limited its decriminalization recommendation to the "distribution of small amounts for insignificant remuneration." MARIHUANA COMMISSION REPORT, *supra* note 1, at 154-56.

[47] *See, e.g.*, 3 GOVERNORS' CONFERENCE REPORT, *supra* note 42, at 89, 235 (1977).

disproportionate criminal penalties from private, consumption-related behavior could decide to decriminalize cultivation for personal use because it is the functional equivalent of private use. Moreover, prohibitions against home cultivation are especially susceptible to arbitrary and discriminatory enforcement, and prosecution and punishment of the few who are detected usually arouses the same sense of unfairness which has provoked the decriminalization of possession.

It might be argued, however, that decriminalization of home cultivation will permit an increase in the availability of marijuana and in frequency of consumption by users. Under this view, there is a difference in kind as well as degree between decriminalization of possessory conduct and decriminalization of cultivation: decriminalization of possessory conduct makes it possible for marijuana users to keep a limited supply on hand without risking serious penalties, but decriminalization of cultivation will increase the number of users who maintain a potentially unlimited source of supply.[48]

One answer to this contention may be that the ultimate social goal of marijuana prohibition, reducing the adverse social consequences of marijuana use, is better served by a sanctioning system which covertly encourages rather than deters home consumption by users. Most homegrown marijuana will be less potent than imported marijuana and presumably will result in fewer adverse health consequences, both acute and chronic. Also, since users who grow their own marijuana will not be supporting the commercial market, decriminalizing personal cultivation might reduce the aggregate demand for smuggled contraband, reducing the price and ultimately reducing the supply. Finally, users who choose to grow their own marijuana are no longer in constant contact with dealers who may sell more dangerous drugs.

However the decriminalization issue is resolved, legislators should attempt to grade the penalties for cultivation, reducing to a misdemeanor the penalty for noncommercial cultivation of small amounts. Whether decriminalized or reduced to a misdemeanor, the question arises how this personal cultivation offense should be distinguished from commercial activity. Because much of the marijuana plant cannot be consumed, it is probably advisable to use a figure based on the number of plants rather than on the weight of the cannabis, and to designate a number that will yield approximately the amount of usable marijuana which defines the line between criminal and noncriminal possessory offenses. Alternatively, policy makers may wish to set a smaller amount which reflects the importance they attach to discouragement of cultivation, or a larger amount which reflects the fact that a single planting is often intended to yield a year's supply of marijuana.

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[48] If cultivation for personal use is decriminalized, it will be theoretically possible for every user to grow and consume, in relative safety, as much marijuana as he pleases. Even the risk of incurring a fine or having the plants confiscated would not be very great, as long as the cultivation was carried out on private property, out of public view.

II. SELECTING SANCTIONS FOR MARIJUANA USERS: THE THEORETICAL CONTEXT

The trend toward marijuana decriminalization must be viewed in the context of generic efforts to redefine the scope of the criminal law. For almost two decades, criminal law scholars and increasing numbers of politicians have called attention to the adverse institutional effects of overcriminalization and have repeatedly urged the repeal of criminal sanctions for consensual sexual behavior, gambling, public drunkenness and, more recently, illicit drug use.[49] The explosion of drug use in general, and marijuana use in particular, in the 1960's became a major political issue and triggered a sometimes volatile debate over the wisdom and legitimacy of drug laws.[50] Jail terms for middle class marijuana users sparked controversy, and critics of marijuana laws suddenly had a public audience for the libertarian and social cost arguments against overcriminalization which had been so thoroughly discussed in the scholarly literature during the preceding decade.

When the National Commission recommended decriminalization in 1972, it tried to avoid the political polemics which ensnared marijuana use in wider social conflicts concerning countercultural politics and war protest. Instead, the Commission placed its recommendation squarely in the context of the widely acknowledged need to reallocate law enforcement resources, to restore and preserve the institutional integrity of the criminal justice system, and to strike an appropriate balance between protection of legitimate public interests and the value of personal liberty.[51] Similarly, the American Bar Association,[52] the National Conference of Commissioners on Uniform State Laws,[53] the National Advisory Commission on Criminal Justice Standards and Goals,[54] and other expert bodies concerned with the administration of criminal justice have tied their endorsements of marijuana decriminalization to the general need for criminal law reform rather than to the more contentious arguments concerning the rights of drug users.

The theoretical context of marijuana law reform accounts for the incremental nature of the legislative efforts. Since the focus has been on the institutional inappropriateness of criminal punishment, rather than on the rights of marijuana users to use the drug, legislators have generally sought to modify the nature and consequences of the prescribed punishment rather than to immunize the decriminalized behavior from legal control. Whereas the National Commission saw no need to treat consumption-

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[49] *See, e.g.*, H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968); Kadish, *The Crisis of Overcriminalization*, 374 ANNALS 157 (1967); Junker, *Criminalization and Criminogenesis*, 19 U.C.L.A. L. REV. 697 (1972).

[50] *See generally* R. BONNIE & C. WHITEBREAD, *supra* note 4, at 222-93.

[51] MARIHUANA COMMISSION REPORT, *supra* note 1, at 138-46.

[52] *See* R. Bonnie & C. Whitebread, *supra* note 4, at 286-89.

[53] *Id.* at 288-89.

[54] NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, A NATIONAL STRATEGY TO REDUCE CRIME 201-04 (1973).

related behavior as a punishable offense, most reform-minded politicians have been unwilling to go this far; instead, every statutory implementation of the Commission's recommendation has aimed to achieve the benefits of decriminalization without depenalizing the behavior. While many legislators seem to agree that traditional criminal penalties, especially incarceration,[55] are too severe for marijuana users, a consensus seems to have emerged that their conduct must nonetheless remain punishable to effectuate society's interest in discouraging use.[56] For this reason, the marijuana reform movement must be viewed as the first systematic effort to implement another generic penal code reform: the formulation of noncriminal or civil sanctions for disapproved behavior which is not considered serious enough to warrant traditional criminal sanctions.

The drafters of the Model Penal Code argued that the criminal sanction is too potent, too stigmatizing, and too cumbersome from a procedural standpoint for much disapproved behavior, especially violations of regulatory provisions and local ordinances which are not regarded as morally offensive and many of which require no mens rea.[57] To deal with such conduct, the Code drafters recommended that legislatures create a civil violation, punishable solely by a fine with a maximum amount of $500 and resulting in none of the adverse legal consequences attendant upon conviction of a criminal offense.[58] Several years later, the 1970 Report of the National Commission on Reform of the Federal Criminal Laws discussed an infraction offense modeled after the Model Penal Code civil violation.[59] Similarly, in 1973, the National Advisory Commission on Criminal Justice Standards and Goals, with a mandate to formulate national standards for crime reduction and prevention at the state and local level, urged

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[55] Incarceration is rarely imposed on marijuana users under existing misdemeanor statutes. Even those legislators who oppose decriminalization frequently record their opposition to imprisonment of first offenders. This widely shared view may be based on a belief that the incremental deterrent value of a threat of incarceration is outweighed by the individual injustices and the procedural inefficiencies that are introduced into the system by authorizing imprisonment for the least serious marijuana behavior, however this is defined. In addition, many legislators may also have concluded that incarceration is a disproportionately severe sanction for the least serious marijuana offenses. For a statement which endorses repeal of incarceration but deals evasively with decriminalization, *see* NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, *supra* note 54, at 202-03.

[56] This reasoning was stated by Senator Birch Bayh during a colloquy with the author in May 1975; *Marijuana Decriminalization: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Comm. on the Judiciary*, 94th Cong., 1st. Sess., 109-12, 155-56 (1975).

[57] *See* Commentary to § 1.05 ALI MODEL PENAL CODE 8-9 (Tentative Draft # 2 1954).

[58] ALI MODEL PENAL CODE § 1.04(5) (Proposed Official Draft 1962).

> An offense defined by this Code or by any other statute of this State constitutes a violation if it is so designated in this Code or in the law defining the offense or if no other sentence than a fine, or fine and forfeiture or other civil penalty is authorized upon conviction or if it is defined by a statute other than this Code which now provides that the offense shall not constitute a crime. A violation does not constitute a crime and conviction of a violation shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense.

[59] II NATIONAL COMMISSION ON REFORM OF THE FEDERAL CRIMINAL LAWS, WORKING PAPERS 1302-03 (1970).

the creation of a separate administrative structure for processing minor traffic violations, violations of building codes, zoning ordinances, health and safety regulations, and evasions of state taxes.[60]

If the Model Penal Code civil offense concept had been widely adopted, it is conceivable that marijuana decriminalization proposals might have focused on the relatively simple question of whether the offense should be reclassified from a misdemeanor to a civil violation, and the legislation itself might have been limited to a simple cross-reference to the preexisting offense classification section of the code. However, most states have not adopted the civil offense concept and those that have done so have usually limited its application to traffic offenses which are not popularly regarded as crimes even when formally classified as misdemeanors.[61] For this reason, the effort to decriminalize marijuana use has occasioned a confusing array of proposals and statutes which differ significantly from state to state. For the most part, the statutes which purportedly decriminalize marijuana have only one thing in common: they preclude incarceration as the penalty for a first offender.

Marijuana decriminalization statutes convincingly demonstrate the descriptive inadequacy of the traditional distinction between civil and criminal penalties. Certainly the mere use of one label or the other has no operational significance, for even if legislators have concluded that traditional criminal sanctions, including imprisonment, are not appropriate for least serious marijuana offenses, the sanctions imposed for violating the law may be modified without changing the statutory label. For example, a criminal offense may be punishable by a fine only.[62] Even if an offense is punishable by imprisonment after conviction, systematic use of a preconviction diversion program may undermine the original classification as a

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[60] NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, TASK FORCE REPORT ON THE CRIMINAL JUSTICE SYSTEM 177-78 (1973).

[61] Only a few states have codified the violation concept in its entirety, setting a fine as the maximum punishment and expressly stating that offenses so classified are not crimes and that customary disabilities do not attach. *See, e.g.*, CONN. GEN. STAT. ANN. § 53a-24 (1971); FLA. STAT. ANN. § 775.08 (Supp. 1974); KY. REV. STAT. § 500.080(17) (1975); MINN. STAT. ANN. § 609.02(4)(a) (West Supp. 1976); N.H. Rev. Stat. § 625.9 (Supp. 1973); OR. REV. STAT. § 161.565 (Supp. 1973).

Several states classify some conduct as offenses, labeled petty misdemeanors, for example, which are punishable by fine only and usually citable, but which are still crimes. *See, e.g.* CAL. PENAL CODE §§ 16, 19(c) (Supp. 1968) (infraction); 1 COLO. REV. STAT. §§ 18-1-104, 18-1-107 (1973) (Class 2 petty offense); DEL. CODE tit. 11, §§4203, 4207(d) (1975) (violation); ILL. ANN. STAT. ch. 38, §§ 1005-1-15, 1005-1-17 (Smith-Hurd 1973) (petty offense) N. M. STAT. ANN. § 40-A-1-6 (1953) (petty misdemeanor); OHIO REV. CODE ANN. § 2901.02(6) (Page 1975) (minor misdemeanor); PENN. STAT. ANN. tit. 18, § 106(c) (Purdon 1973) (summary offense); UTAH CODE ANN. §§ 76-3-105, 76-3-205 (Supp. 1973) (infraction). Pennsylvania law is unclear whether the summary offense, which may entail up to ninety days in jail, is a crime. PENN. STAT. ANN. tit. 18, § 106(a) does not list a summary offense as one of the classes of crime, but the same section also provides that any offense for which a defendant may be jailed is a crime. To date the issue is unlitigated.

New York has adopted modified versions of the civil offense concept recommended in the Model Penal Code. New York's violation is not a crime but is nonetheless punishable by a sentence of imprisonment up to 15 days. N.Y. PENAL LAW § 10.00(6) (McKinney 1967).

[62] *See, e.g.*, CAL. PENAL CODE §§ 16, 19(c) (Supp. 1968); COLO. REV. STAT. §§ 18-1-104 (1973); DEL. CODE ANN. tit. 11, §§ 4203, 4207(d) (1975); ILL. ANN. STAT. ch. 38, §§ 1005-1-15, 1005-1-17 (Smith-Hurd 1973); OHIO REV. CODE ANN. § 2901.02(G) (Page 1975).

crime.[63] Finally, specific provisions mandating the use of citations minimize the likelihood of deprivation of liberty after arrest, and the consequences of convictions may be ameliorated through other specific provisions permitting record expungement or a statement of no record on job applications.[64]

Even when an offense is classified as a civil violation for purposes of record consequences, the legislature might provide that the offense is still punishable by confinement. For example, the current version of the Senate Judiciary Committee's bill revising the federal criminal law creates a noncriminal category of civil infractions but permits the judge to sentence a violator to up to five days in jail.[65]

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[63] The drug laws of at least 30 states now include provisions for some type of discretionary conditional discharge or preconviction diversion. Typically the judge or prosecutor is formally authorized to hold charges in abeyance pending the defendant's satisfactory performance of specified conditions. Upon passage of the statutory period, the judge may dismiss the charges without conviction. One state, West Virginia, has made conditional discharge mandatory for any first offender charged with possession or distribution of less than 15 grams of marijuana. *See generally* 3 GOVERNORS' CONFERENCE REPORT, *supra* note 42, at 91-92, 109-10. On diversion generally, *see* R. NIMMER, DIVERSION: THE SEARCH FOR ALTERNATIVE FORMS OF PROSECUTION (1974).

[64] *See generally* 3 GOVERNORS' CONFERENCE REPORT, *supra* note 42, at 105-11.

[65] The Criminal Code Reform Act of 1977, S. 1437, 95th Cong., 1st Sess., § 2301(b)(9) (1977). Similarly, New York classifies some offenses as violations which are not crimes but which are punishable by up to 15 days in jail. *See, e.g.*, vehicle offenses and violations of construction regulations in New York. *See* note 61 *supra*.

The history of the infraction provision of S. 1437 is instructive. The 1970 Report of the Brown Commission, the NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE (1970), included an offense called an infraction which is not a crime, *id.* § 109(h), and which is not punishable by imprisonment, *id.* § 109(n). Instead, the penalty is a fine of up to $500, *id.* § 3301(1)(d), or one year's probation, *id.* § 3102(1)(c). The Brown Commission concluded that the infraction would be particularly appropriate in the area of strict liability regulatory offenses, *id.* § 1006, but also applied this concept to first-time marijuana possession, *id.* § 1824(1), and to disobeying a public safety order, *id.* § 1804.

S. 1, the 1973 version of the federal criminal code, utilized the basic principle of the noncriminal offense but with an important difference. The S. 1 drafters provided for the first time that the infraction, now termed a violation, could be punished by a period of confinement, in this case up to 30 days. S. 1, 93rd Cong., 1st Sess., §1-4B1(c)(3) (1973). This proposal also increased the possible fine to $50 per day, *id.* § 1-4C1(a)(4), and reclassified the possession of marijuana as a misdemeanor, *id.* § 2-9E1(b)(6).

In 1974 S. 1400 replaced S. 1, and the concept was again revised. The sentence for an infraction was reduced to a $500 fine and a maximum of five days in jail. S. 1400, 93rd Cong., 1st Sess., §§ 2201(b)(9), 2002(a)(1)(D) (1974). This sanction was extended to apply to disorderly conduct, an offense which had not been included in the earlier drafts. *Id.* § 1871. The regulatory offense was abolished, however, removing the original rationale underlying the creation of the infraction.

The 1975 version of the Code retained the maximum five day jail sentence but increased the fine to a maximum of $10,000. S. 1437, 94th Cong., 1st Sess., S. 1, §§ 2301(b)(9), 2201(b)(2)(C) (1975). S. 1437, the Judiciary Committee's bill pending before the Senate, also contains the infraction in this form.

S. Rep. No. 90-00 at p. 918 provides one of the only references to this provision in the legislative history. The report acknowledges that the infraction punishable by imprisonment is a departure from the Brown Commission Report. The inclusion of a jail term is justified on the grounds that a short term of confinement will promote the deterrence and rehabilitation of the offender. Further, the drafters realized that, due to the holding in Tate v. Short, 401 U.S. 395 (1971), a fine is an ineffective sanction when applied to indigents. Tate v. Short held that an offender may not be imprisoned because of an involuntary inability to pay a fine.

In short, there is at present no clear division between criminal and civil sanctions; instead, legislators have at their disposal a continuum of sanctions of varied severity. Approaching the matter functionally, it is helpful to recognize that the sanctioning process begins after apprehension for the offense and that some sanctions take effect even before adjudication. For example, postarrest consequences may include injury to reputation arising from disclosure of information or records about the fact or circumstances of apprehension; deprivation of physical liberty occurring when a person is taken into custody or is required to appear in court; and deprivation of wealth occurring because a person must sustain the expenses of defending himself and may miss time on the job. Similarly, postconviction consequences may include injury to reputation arising from disclosure of information or records about the fact or circumstances of conviction; deprivation of physical liberty occasioned by sentences to continuous or periodic confinement or even by probation, community service orders and other community-based alternatives to confinement;[66] and deprivation occasioned by the payment of fines and lost economic opportunities.

The choice of a particular sanctioning device implicates constitutional procedural requirements which do not necessarily parallel the use of criminal or civil labels. For example, a jail term may not be imposed, even for a day, unless indigent defendants have been represented by counsel.[67] On the other hand, no jury trial is required unless the defendant can be sentenced to more than six months in jail.[68] The confusion surrounding sanctions is reflected in the uncertainty over whether the applicable standard of proof must be the criminal standard of beyond a reasonable doubt or a civil standard of clear and convincing evidence or a preponderance of the evidence.[69]

III. MODIFYING THE CRIMINAL SANCTION: POSTCONVICTION CONSEQUENCES

If imprisonment is regarded as an unjust or inefficient sanction for consumption-related conduct, many important issues must be resolved

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The current version of the infraction proposal is also supported by the Committee on Reform of the Federal Criminal Laws of the American Bar Association. The ABA Committee endorsed the provision on the same grounds stated in the Senate Report and further suggested that it could be usefully applied to cases of parole violation.

[66] On noncustodial or semicustodial penalties, *see generally* BRITISH HOME OFFICE, REPORT OF THE ADVISORY COUNCIL ON THE PENAL SYSTEM: NON-CUSTODIAL AND SEMI-CUSTODIAL PENALTIES (1970); NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, TASK FORCE REPORT ON CORRECTIONS, 150-54, 569-71 (1973).

[67] Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).

[68] Baldwin v. New York, 399 U.S. 66 (1970); Duncan v. Louisiana, 391 U.S. 145 (1968).

[69] *See* Brown v. Multnomah County District Court, 22 CRIM. L. REP. 2220 (BNA) (Ore. Dec. 7, 1977). *See generally In re* Winship, 397 U.S. 358 (1970).

regarding the legal consequences of being found guilty of such conduct. The primary problem is to determine what, if any, legal sanctions are appropriate for consumption-related behavior. If the sanction includes a fine, the amount of the fine and the consequences of nonpayment must be determined. Legislators must also decide if the violation should be punishable by the imposition of a criminal record and if the ordinary consequences of such a record should be ameliorated for consumption-related conduct. Finally, the possibility of increasing the sanction for subsequent offenses and making special provision for minor offenders must also be considered.

A. Are Legal Sanctions Against Use Necessary?

Two of the traditional purposes of penal provisions, incapacitation of dangerous offenders and punishment of intrinsically immoral behavior, are wholly inapplicable to consumption-related marijuana offenses. Instead, the possible utility of a sanction for this conduct lies in its implementation of a policy aimed at discouraging marijuana consumption. In theory, there are three ways that legal coercion, short of a threat of imprisonment, can accomplish this purpose: by deterring the prohibited behavior; by providing legal leverage to channel detected users into specific programs designed to discourage consumption; and by symbolizing social disapproval of the behavior, thereby reinforcing attitudes unfavorable to consumption.

Individual decisions to experiment with marijuana have not been significantly influenced in recent years by the fear of legal sanctions,[70] and, as a practical matter, the incremental deterrent effect of a fine is probably not substantial. Instead, it is the prohibition against distribution which circumscribes the population with an opportunity to experiment by forcing the traffic underground, making the drug inconvenient to obtain. Similarly, these prohibitions against distribution, by establishing the conditions of availability, play a much more significant role in containing the population of continuing users, which includes less than fifty percent of the experimenters, than does the threat of sanctions for possession. A fine applied with certainty would, at most, decrease the rate of increase in experimentation. Although there are no data measuring the increase in the rate of experimentation when sanctions are removed altogether, the data in states which have enacted fines in lieu of jail terms are wholly consis-

[70] Despite felony possession penalties, it was estimated that some 20 million Americans had tried marijuana by 1969. *See* R. BONNIE & C. WHITEBREAD, *supra* note 4, at 237-38 (1973). The National Commission's survey indicated that 24 million had tried the drug by 1971, when possession was a misdemeanor in most states. MARIHUANA COMMISSION REPORT, *supra* note 1, at 32-33. The current figure is estimated to be at least 36 million who have used marijuana at least once. SECRETARY OF HEALTH EDUCATION AND WELFARE, MARIHUANA AND HEALTH: SIXTH ANNUAL REPORT TO THE UNITED STATES CONGRESS 4-5 (1976), although a recent statement by President Carter quoted a figure of 45 million, White House Press Release (Aug. 2, 1977).

tent with this analysis.[71] Since the opportunity to consume occurs mainly in private, continuing sanctions against possession will serve, at most, to discourage regular users from transporting marijuana on their person or in their vehicles when in public.

While legal sanctions may be of significant value in providing the leverage to channel alcoholics and heroin addicts into treatment programs, they appear to be of minimal value where marijuana users are concerned. The overwhelming majority of persons who experiment with marijuana and use it recreationally are not in need of treatment; they are indistinguishable from their non-marijuana-using peers by any criterion other than their marijuana use.[72] Instead, the main value of leverage is educational and preventive rather than therapeutic. It must be questioned, however, whether the costs of enforcing such a sanction and maintaining an educational program are worth the probable benefits. Persons who have been apprehended for marijuana possession will probably not be told anything that they do not already know. If the objective is simply to counsel against the use of more harmful substances, the imposition of legal sanctions seems to be a costly and unnecessarily coercive

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[71] In its study of the impact of decriminalization in 1976, the National Governors' Conference compiled information on use patterns in California and Oregon. *See generally* 2 GOVERNORS' CONFERENCE REPORT, *supra* note 42, at 32-38. The most reliable source of information about use patterns is a series of surveys sponsored by the Drug Abuse Council, Inc. in Oregon in 1974, 1975, and 1976. These studies show the patterns of marijuana use remain relatively stable, both in absolute terms and compared with national trends, despite the enactment of noncriminal penalties for possession. Although the long term effects of such penalty reductions are unclear, the recent statutory revisions have not resulted in significant increases either in the number of ever users, the number of current users, or the amount which they use.

The apparent short term stability of use implies, first, that the sporadically enforced misdemeanor criminal penalties for possession which are now in force in most states are not a major factor in personal decisions whether to initiate or continue marijuana use in teenage and young adult years. Second, these findings demonstrate that decriminalization is consistent with, and will not undermine, a discouragement policy. Changing the law does not connote approval of use and is not perceived by either users or the nonusing public as an endorsement of marijuana. Third, decriminalization does not open the floodgates to significantly increased experimentation. In Oregon, for example, 76% of the adults questioned still had not tried the drug three years after the law went into effect. The overall incidence of experimentation does not exceed the national average; indeed, it is surprising that more nonusers were not interested in tasting the long-forbidden fruit after criminal penalties were withdrawn.

Perhaps the most crucial finding is that the proportion of recreational users and the prevalence of heavy users are substantially the same in decriminalized and nondecriminalized jurisdictions. In other words, the patterns of use (the frequency of use and amount consumed) remained stable. In Oregon, for example, one-half of the users indicated in 1976 that they had not changed the frequency with which they used the drug since decriminalization had been adopted; another 39% indicated that they had reduced their consumption; only 9% said they had increased it. Since the discouragement policy is rooted primarily in concerns about the psychological and physiological consequences of heavy use, these findings are extremely important.

[72] In 1972, the National Commission warned against the tendency to characterize marijuana users as sick and therefore in need of treatment rather than deserving of punishment. MARIHUANA COMMISSION REPORT, *supra* note 1, at 90-91. The warning apparently went unheeded. A Presidential Task Force found in 1975 that casual marijuana users were being inappropriately referred to drug treatment centers by judges and prosecutors looking for an alternative to the criminal justice system. DOMESTIC COUNCIL DRUG ABUSE TASK FORCE, WHITE PAPER ON DRUG ABUSE: A REPORT TO THE PRESIDENT 70 (1975).

method of reaching this result. Indeed, it seems unwise to pervert the criminal justice system to serve functions which ought to be performed by the public school system. If children and adolescents apprehended for marijuana possession need to be channeled formally into appropriate counseling or education programs, the jurisdiction of the juvenile justice system is sufficient for this purpose. In sum, leverage is an inadequate justification, by itself, for imposing legal sanctions on consumption-related activity by all marijuana offenders, including responsible adults.

The most convincing argument for retaining some legal sanction for consumption-related behavior is its presumed symbolic effect. It can be argued that the educative or moralizing influence generated by a formal expression of social disapproval reinforces other sociocultural forces which shape desired attitudes toward consumption of psychoactive drugs in general and marijuana in particular.[73] Fom a purely empirical standpoint, the pertinent question is whether the penalty for consumption significantly augments the symbolic message conveyed by the total prohibition against cultivation, importation and distribution; or, whether the absence of a sanction connotes approval of marijuana possession despite enforcement of prohibitions against availability. The data compiled in Oregon and other reform jurisdictions strongly support the hypothesis that decriminalization does not, in itself, encourage use, although the penalty reduction does seem to convey and reinforce the message that use of marijuana is not as harmful as it was formerly thought to be.[74]

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[73] *See generally* J. ANDENAES, PUNISHMENT AND DETERRENCE 3-33 (1974).

[74] Although the incidence and patterns of use remained virtually unchanged in Oregon for the two years immediately following decriminalization, the 1976 data did show a large increase relative to the two previous years: the proportion of ever users among adults rose from 20 to 24% and the proportion of current users rose from 9 to 12%. Although both figures are now slightly above the national average, they are not higher than the regional averages for the Western states. One is led to ask, however, why the acceleration in experimentation and recreational use has occurred. Although the acceleration may suggest that the criminal prohibition was containing use and that these patterns will now continue, the most plausible hypothesis is that the incidence of experimental and recreational use in Oregon and elsewhere has been largely restrained by exaggerated perceptions of the harmfulness of marijuana. More realistic assessments of the effects of use contributed to an increase in use in the late 1960's and early 1970's, followed by a levelling off in use nationwide. The Oregon data suggests that the change in the law, combined with national publicity, symbolized and communicated the message that marijuana is not as harmful as it was thought to be. Thus, deterrence in the classic sense is not operating here: the reduced penalty did not quickly lead to increased experimentation among those who previously had been interested but were fearful of arrest and punishment. Instead, the educative and declaratory functions of the law may be involved in this trend. That is, when it became apparent to large segments of the population that marijuana use was not very dangerous, use increased despite the law, and the legislature responded by changing the law, thus reflecting and symbolizing these changing attitudes. Because the law is intertwined with other sociocultural factors which shape attitudes of potential users, it is conceivable that one long term effect of decriminalization is to reinforce tht public's increasingly accurate perceptions about the effects of use.

This interpretation, that the increase in use is responsive to assessments of the effects of marijuana use rather than to a change in the law is supported by two key findings. First, the number of persons reporting fear of adverse health effects as a reason for not using marijuana declined dramatically between the 1974 (23%) and 1976 (7%) surveys. Second, the increase in use among Oregonians is concentrated among teenagers and young adults; yet this change could have been predicted on the basis of national and regional trends. The data have indicated since 1972 that a majority of the 16-25 age group have experienced marijuana

The utility of legal sanctions for marijuana consumption depends on whether the incremental deterrent and symbolic effects of the legal sanction in decreasing the number of users and the frequency of use warrant the resulting administrative costs and invasions of personal privacy. Ten members of the National Commission did not think so, although three members endorsed the civil fine primarily for symbolic reasons.[75] Legislators have neglected to address the question and have apparently assumed that some sanction is better than none at all. Even from a purely fiscal point of view, this assumption may be unjustified, since the administrative costs of enforcing the law and processing violations probably substantially exceed the amount collected in most jurisdictions. The costs of criminal justice processing can be reduced substantially, however, by foregoing the customary incidents of the criminal process such as booking, custody, and personal appearance in court.[76] Also, as the experience with the California fine statute has shown, a large number of detected and sanctioned violations can produce a sizable amount in fines.[77]

In summary, these observations suggest that a legislator who believes that some legal penalty for marijuana consumption is necessary to discourage marijuana use should select a fine, not a leverage sanction, and should facilitate its efficient and minimally intrusive administration. On the other hand, a lawmaker who believes that the incremental symbolic and deterrent benefits of a consumption penalty do not significantly exceed the preventive effects of continuing prohibitions against distribution, or who believes that any penalty for possession is disproportionate to the harm engendered by the conduct, should withdraw all legal sanctions from least serious consumption-related behavior, as the National Commission recommended.

Even if the legislature concludes that least serious marijuana offenses should remain punishable by some sanction, it should consider limiting the application of the prescribed penalties to violations which occur in public places, including moving vehicles. A clear statutory distinction between public and private behavior would tend to channel marijuana use into private locations, thereby reducing the likelihood of intoxicated driving and incapacitated behavior in public. The main reason for excluding possession in a private location from the sanctioning provision, however, is that the threat of intrusions into the home is of limited deterrent value under any foreseeable enforcement circumstances. The overwhelming proportion of marijuana arrests under current criminal statutes occur as a result of police patrol activities, either on the street or in connection with vehicle searches.[78] Further, the detection of marijuana consumption in the home should have a low priority for police investigative resources, and explicit decriminalization of private possession will both establish a

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use, and ever-use among this group has long been over 60% in the West.

[75] MARIHUANA COMMISSION REPORT, *supra* note 1, at 152-53.

[76] *See* text at notes 116-31 *infra*.

[77] NARCOTICS AND DRUG ABUSE STATE OFFICE, A FIRST REPORT OF THE IMPACT OF CALIFORNIA'S NEW MARIJUANA LAW (SB95) (1977).

[78] MARIHUANA COMMISSION REPORT, *supra* note 1, at App. Vol. II, 634.

clear legislative directive on this point and eliminate the risk of harassment and discriminatory enforcement associated with searches of private locations.

Retention of civil penalties for private possession will not eliminate these problems; if private possession of less than the statutory amount remains a noncriminal offense, users will still be subject to apprehension in the home.[79] Moreover, possession of a small amount might be used as a pretext for searching the home for larger amounts, or even for arrest on suspicion of possessing larger amounts. In order to prevent these intrusions, which occur too sporadically to represent a credible deterrent, private possession of less than the designated amount could be excluded from the definition of noncriminal as well as criminal marijuana offenses.[80]

No state has yet depenalized private possessory conduct, but Alaska has taken an important step in this direction. Public possession of more than one ounce is a misdemeanor, as is public use of the drug, whereas public possession of one ounce or less is punishable as a civil offense. In contrast to the amount approach used for public behavior, however, private conduct is graded by the pure intent approach: private use or private possession of any amount is a civil offense unless there is proof of intent to sell.[81]

B. The Record Consequences of Arrest and Conviction: Is Stigma Necessary?

If the legislature decides to impose a fine for least serious marijuana-related behavior, it must also decide to what extent, if at all, the commission of such an offense will subject the offender to the criminal process. A criminal arrest, even if no conviction follows, will normally be a traumatic experience, particularly for the first offender. Even if the arrestee is ultimately released without charge or is acquitted, he will suffer the inconvenience and embarassment of being brought to the police station, photographed, and fingerprinted. This deprivation of liberty could last a significant length of time, especially if bail is required and the defendant is unable to post it immediately. He also may miss work while being detained, and, even if he loses no working time, his employer may dismiss him upon learning of the arrest.

The existence of an arrest record can also detrimentally affect the arrestee in subsequent encounters with the criminal justice system: he is less likely than a person without a record to receive lenient treatment

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[79] Of course, the legislature might limit the grounds for issuance of warrants, thus vitiating the decision to make the offense punishable. *See* text at notes 124-25 *infra*.

[80] Alternatively, the designated amount for private possession could be increased or replaced by a requirement that the state prove intent to sell whenever the drug was seized in a private location.

[81] ALASKA STAT. § 17.12.110(d) (1975). The Alaska Supreme Court contributed to this statutory response by holding unconstitutional the imposition of a criminal penalty for possession for personal use in the home. Ravin v. State, 537 P.2d 494 (Alaska 1975).

from the prosecutor in the form of dropped or reduced charges, and an arrestee with a record may receive a harsher sentence than a similarly situated first offender.[82] An arrest record may also limit the arrestee's employment opportunities, especially if this information is accessible to potential employers. Even if the information is not disseminated, the arrestee may be prejudiced by being asked whether he has ever been arrested or convicted of a crime, a common question on most applications.[83]

If the arrestee is subsequently convicted of a criminal offense, all of these record consequences are exacerbated by the numerous legal disabilities flowing from the criminal conviction, even for a misdemeanor. The records may be accessible to both public and private employers. The convicted misdemeanant may be precluded by licensing laws from engaging in certain occupations and from securing public employment. A convicted felon in virtually all states is ineligible for occupational licenses and public employment and is usually disenfranchised as well.[84]

A number of state legislatures have enacted generic provisions for reducing these consequences of criminal arrest and conviction records,[85] and federal regulations now govern the dissemination of arrest records.[86] Thus far, however, the piecemeal nature of the effort to modify criminal sanctions for marijuana use has required legislators to focus on these questions for this offense alone rather than as part of a general reconsideration of the effect of criminal records. Thus, it is worthwhile to consider alternative methods for ameliorating the record consequences of arrest and conviction as part of a reduction or elimination of criminal penalties for consumption-related marijuana behavior. Of course, the extent to which record consequences are ameliorated may differ according to the rationale for changing the sanctions applied to the use of marijuana.

There is reason to believe that favorable legislative sentiment for decriminalization is largely attributable to a widely shared view that the stigma associated with traditional criminal processes is a disproportionately severe punishment for such a minor, widely committed, offense. Reform-minded legislators and their constituents as well[87] apparently

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[82] *See* Loder v. Municipal Court, 17 Cal. 3d 859, 132 Cal. Rptr. 464, 553 P.2d 624 (1976); Davidson v. Dill, 180 Colo. 123, 503 P.2d 157 (1972).

[83] *See* NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE CRIMINAL JUSTICE SYSTEM (1973); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF CRIMINAL JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 75 (1967).

[84] *See generally Tentative Draft of American Bar Association Standards on the Legal Status of Prisoners, Part X Civil Disabilities*, 14 AM. CRIM. L. REV. 377 (1977).

[85] *See* U.S. DEPARTMENT OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, OFFICE OF GENERAL COUNSEL, COMPENDIUM OF STATE LAWS GOVERNING PRIVACY AND SECURITY OF CRIMINAL JUSTICE INFORMATION (1975).

[86] 28 C.F.R. Part 20, 41 Fed. Reg. No. 55 (1976). *See generally* ZIMMERMAN, *et. al.*, HOW TO IMPLEMENT PRIVACY AND SECURITY (1976); *Criminal Justice Information and Protection of Privacy Act of 1975: Hearings Before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary*, 94th Cong., 1st Sess., (1975).

[87] A Gallup poll released in May 1977 indicated that 53% of the nation's adults believed that possession of a small amount of marijuana should not be a criminal offense.

believe that possession of marijuana for personal use simply is not a sufficiently serious offense to warrant the imposition of all the legal, economic, and social disabilities ordinarily associated with the criminal sanction. Apart from this elementary notion of proportionality, a related rationale may be the unfairness to the individual and the counterproductive social effect of stigmatizing marijuana offenders with criminal labels. For either reason, a legislator may well believe that any type of criminal stigma associated with marijuana use engenders a disrespect for the criminal justice system as a whole.

Legislators who adopt this view are not influenced by arguments that the criminal stigma generates deterrent and symbolic effects not associated with noncriminal processes and penalties. Even those legislators who are not categorically opposed to serious, even stigmatizing, sanctions may nonetheless believe that the incremental preventive value of criminal processes and records is offset by the administrative costs of implementing them. A legislature might easily determine, for example, that the police resources now employed in booking, recording, and maintaining the records of marijuana offenders could be better expended in the prevention and punishment of crimes against person or property. Similarly, legislators might well find that the procedural system necessary to process criminal offenses is too costly, and they may be willing to sacrifice the stigmatizing effects of the sanction to facilitate expeditious and convenient processing of offenders.

Whether for reasons of fairness or expediency, five of the ten reform jurisdictions have reclassified least-serious marijuana behavior as a civil offense and have eliminated all the record incidents of apprehension, adjudication, and other aspects of the criminal process.[88] Ohio has specifically eliminated all of the record consequences of the criminal process but has nevertheless insisted on classifying the offense as criminal.[89] A

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[88] ALASKA STAT. § 17.12.110(d) (1975) (offense punishable by a civil fine); ME. REV. STAT. tit. 22, § 2383 (Supp. 1978) (civil violation); MISS. CODE ANN. § 41-2-9-139(d)(2) (Supp. 1977) (offense punishable by a civil fine); Marihuana Reform Act, ch. 360, § 221. 05, 1977 N.Y. Laws 500 (violation); OR. REV. STAT. § 167.207(3) (1975) (violation).

[89] Under Ohio law, possession of less than 100 grams of marijuana is a minor misdemeanor, a criminal offense, but arrest or conviction for this offense does not produce a criminal record. A person arrested or convicted under this provision is expressly relieved of the obligation to report such a record in response to inquiries about his or her criminal record, including inquiries on employment or license applications. OHIO REV. CODE ANN. § 2925.11(D) (Page Supp. 1976).

The City Council of the District of Columbia recently approved a bill which continues to classify possession of one ounce or less of marijuana as a misdemeanor but which provides for mandatory citation for the first three offenses and stipulates that criminal justice records, which must be maintained separately, are not criminal records. The Washington Post, Nov. 9, 1977, at C1. Similarly, the Senate Judiciary Committee's approved version of S. 1437, *supra* note 3, the Criminal Code Reform Act of 1977, includes a marijuana provision which classifies possession of up to an ounce of marijuana as a criminal infraction, provides that possession of 10 grams or less is punishable by a maximum fine of $100, and that criminal records are automatically expunged after six months for the first two offenses. The Washington Star, Nov. 2, 1977, at A6. In a preliminary vote a week earlier a majority of the committee then present had voted to classify the offense of possession of up to one ounce as a civil infraction. The Washington Post, Oct. 27, 1977, at A1. An even earlier compromise provision would have depenalized possession of up to 10 grams while possession of more than 10 grams would have remained a misdemeanor punishable by up to one year in jail. *Id.*

more explicit statement of the presumed symbolic, moralizing effects of the mere labelling of disapproved behavior as a crime can hardly be imagined.

In contrast, the legislatures in the remaining four states not only retained the criminal classification of the offense but also retained some of the normal record consequences of the criminal process. Analysis of these statutes reveals no consistent pattern: arrest records are created in some but not in others; adjudications of guilt constitute convictions in some but not in others; and arrest and conviction records are automatically expunged or sealed in some but not in others.[90]

It is difficult to offer guidance to legislators who wish to ameliorate but not eliminate the record consequences of the criminal process. To the extent that the reform is designed primarily to accomodate the presumed deterrent and symbolic value of the criminal penalty while reducing the cost of administering it, several devices are available. First, eliminating formal booking procedures will save police the time and arrestees the inconvenience associated with fingerprinting and photography. Persons apprehended could simply be issued citations to appear in court. In addition, two basic approaches involving various degrees of destigmatization are available to adjust the severity of the record consequences to the less serious nature of the offense: expunging or sealing records immediately after conviction or expunging or sealing the records after expiration of a stipulated period of time. Either of these two approaches could be supplemented with the right to state the nonexistence of any arrest or conviction for a criminal offense to employers or other questioners.

The choice among immediate or postponed expungement or sealing depends upon how the legislature balances the presumed deterrent effect of the criminal penalty against the unfairness of stigmatizing minor marijuana offenders. If the legislature is seriously concerned about adverse economic effects of criminalization, a crucial feature of the reform

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[90] Under California law, possession of one ounce or less of marijuana is a citable misdemeanor punishable as an infraction. CAL. HEALTH & SAFETY CODE § 11357(b)-(c) (West Supp. 1977). Arrest and conviction do result in criminal records, but the offender is automatically entitled to petition for expungement of his record after two years from the date of conviction, or, if he is not convicted, after two years from the date of arrest. *Id.* at § 11361.5.

Under Colorado law, possession of one ounce or less of marijuana is a class two petty offense, a crime. While citations are mandatory, conviction results in a criminal record. The law includes no provision modifying the record consequences of conviction. COLO. REV. STAT. § 12-22-412(a) (Supp. 1977).

In Minnesota, possession of 1½ ounces or less of marijuana is punishable as a petty misdemeanor. While citations are not mandatory, records are not accessible on the same terms as criminal records. Instead, the law requires the courts to send a report of conviction to the Department of Public Safety which is required to retain a private, nonpublic record for no more than two years; this nonpublic record is solely for the courts' use in determining the applicability of penalties for subsequent offenses by the same offender. MINN. STAT. ANN. § 152.15(5) (West Supp. 1977).

North Carolina law did little more than preclude incarceration of first offenders. N.C. GEN. STAT. §§ 90-95(d)(4) *as amended by* Act of 1977, ch. 862, 1977 N.C. Sess. Laws. The legislature did not alter any of the stigmatizing consequences of the criminal process. Possession of less than one ounce remains a misdemeanor, and only those first offenders who apply for conditional discharge and comply with the conditions are entitled to expungement. *Id.*, §§ 90-96.

should be to permit the offender to deny any criminal arrests in connection with employment inquiries. To be effective, the remedy should take effect immediately after arrest.

The central consideration in choosing between expunging and sealing the records is whether future access to the records is considered necessary for certain limited purposes, such as research needs. If penalties are to be increased for subsequent offenses by the same offender, immediate expungement could not be employed. If a sealing provision is enacted, however, measures should be taken to prevent unauthorized dissemination by removing information identifying offenders or segregating sealed files and restricting access to them.[91]

A legislative decision to retain the stigmatizing consequences of marijuana violations should be carefully considered. Quite apart from the interrelated notions of proportionality and fairness noted earlier, potent utilitarian arguments may be interposed against efforts to derive deterrent and symbolic benefits from the imposition of criminality. Scholars have argued, for example, that the moralizing value of the criminal sanction may be diluted by its application to minor, widely committed offenses.[92] "The ends of the criminal sanction are disserved," Herbert Packer claimed, "if the notion becomes widespread that being convicted of a crime is no worse than coming down with a bad cold."[93] Although this hypothesis is not easily tested, the oft-repeated assertion that marijuana law enforcement generates disrespect for law signifies its plausibility. Already, bar examiners, medical licensing boards, colleges, graduate schools, and other licensing and screening agencies are routinely confronted by applicants who have been convicted of marijuana offenses but seek to escape the customary consequences of criminality.[94] When the

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[91] Among the civil offense jurisdictions, Alaska, Maine, and Oregon do not increase the penalty for subsequent offenses; therefore, there are no specific provisions for the maintenance of records. Mississippi and New York provide for increased penalties for second and subsequent offenses. Mississippi, adopting a law similar to a Minnesota provision provides for a "private, non-public record" maintained by the Bureau of Narcotics. *Compare* MISS. CODE ANN. § 41-29-139(d)(2)(A) (Supp. 1977) *with* MINN. STAT. ANN. § 152.15(5) (West Supp. 1977). In New York, on the other hand, the legislature failed to enact provisions concerning maintenance of records for purposes of assessing applicability of the increased penalty provisions; instead, the act provides for expungement of cases adjourned in contemplation of dismissal if no arrest occurs within one year. The absence of a systematic recordkeeping system has left judges unequipped to apply the increased penalty provisions which are, as a result, being ingored altogether. *See* Molotsky, *Marijuana: A Cloud of Misinformation and Lighter Penalties*, N.Y. Times, Oct. 13, 1977 at 36, col. 2.

[92] *See* H. PACKER, *supra* note 49; Walker, *Caution: Some Thoughts About the Penal Involvement Rate*, in PROGRESS IN PENAL REFORM (1974).

[93] H. PACKER, *supra* note 49, at 261 (1968).

[94] Regarding the impact of marijuana arrests or convictions on admission to the bar, *see generally* Neisser, *Draft Refusal, Marijuana and Bar Admission*, 57 A.B.A.J. 140 (1971): Note, *The Good Moral Character Requirement For Admission to The Bar*, 4 U.S. F.V. L. REV. 317 (1975); Note, *Recent Developments in the Character and Fitness Qualification For the Practice of Law*, 40 B. EXAMINER 4 (1971). *See also In re* Higbie, 6 Cal. 3d 562, 493 P.2d 97, 99 Cal. Rptr. 865 (1972), where the California Supreme Court imposed only a one year suspension and one additional year's probation on an attorney who had participated in a marijuana smuggling scheme and had served 90 days in jail. "Possession or use of mauijuana is, of course, unlawful, but measured by the morals of the day, its possession or use does not

social meaning of a disapproved behavior is severed from the presumption of immorality, perpetuation of stigmatizing penalties may serve only to undermine the social meaning of the sanction itself.

C. The Imposition of Noncriminal or Less Criminal Sanctions

Whether or not the sanctioning process generates criminal record consequences, several operational questions are raised regarding the administration of the residual penalty: the amount of any fine, the consequences of nonpayment, and the structure of any educational program.

If a fine is chosen as the sanction for least serious consumption-related behavior, there are a number of reasons for limiting the maximum fine to an amount comparable to the penalty for a serious traffic offense, $100, for example. First, there is no evidence that the deterrent effect will differ according to the amount of the fine once it reaches a certain nonnuisance level, $25 for example. Second, symbolic effects are retained by any fine, regardless of the amount, as long as it is not de minimis. Third, the practical and legal difficulties associated with administering the sanction, discussed below, are mitigated if the amount of the fine is held to a minimum.[95]

The administration of a financial penalty for marijuana offenses raises several important issues. The most efficient way to collect a fine, of course, is to insist upon payment immediately after apprehension and conviction. However, any procedure for enforcement of payment, even against defendants who are in fact able to pay, must provide an initial hearing to determine ability to pay. Although the Supreme Court has not fully described the procedural requirements of this hearing, it seems likely that they include the right to counsel and the right to present witnesses in support of a claim of indigency.[96] Moreover, it has been held that, prior to the indigency hearing, the defendant cannot be confined.[97]

[involve moral turpitude per se] or indicate that an attorney is unable to meet the professional and fiduciary duties of his practice." *Id.* at 572, 493 P.2d at 103, 99 Cal. Rptr. at 871.

A federal district court recently held that the United States Civil Service Commission cannot dismiss a federal employee for the private occasional use of marijuana without showing that this habit had some deleterious effect on his work. Plaintiff, a supply clerk at the Veterans Administration Health Center in Philadelphia, had been dismissed after admitting that he had used marijuana in the evenings and on weekends for three years. MacEahron v. United States Civil Serv. Comm'n, No. 76-1667 (E.D. Pa. Jan. 18, 1977).

[95] Under current reform statutes, the maximum fine for first offenses of the least serious behavior is $100 in Alaska, California, Colorado, Minnesota, New York, North Carolina, Ohio, and Oregon. Only Maine ($200) and Mississippi ($250) provide a higher maximum amount, and only Mississippi appears to provide a minimum figure ($100). Data have not been systematically collected concerning the amounts of fines actually being assessed by judges in the reform jurisdictions, but anecdotal information suggests that the average fine is $60 in California and $25 in Columbus, Ohio. *See* 3 GOVERNORS' CONFERENCE REPORT *supra* note 42, at 159, 168.

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

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

If a defendant is judged able to make immediate payment and refuses to do so, or if he is given a reasonable opportunity to pay the fine consistent with his financial situation and he fails to take advantage of this opportunity, he can be incarcerated for a period of time, although the constitutional limits of this period are not yet settled.[98] It is no longer constitutional, however, to imprison a defendant who is financially unable to pay his fine.[99] Such a defendant must be allowed a period of time that affords him a realistic opportunity, under the circumstances of his case, to make payment through installments or otherwise.[100]

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

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

If the preferred sanction is an educational program rather than a fine, it should resemble, in terms of time and convenience, the driver education program required for youthful violators or multiple adult offenders. Experience with drug education programs clearly indicates that the objective cannot be to teach participants about the evils of marijuana use.[101] Instead, the objective must be to instill responsible and mature attitudes toward the use of psychoactive substances, including both marijuana and

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

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

[100] When a defendant, through no fault of his own, is unable to make payments under a plan providing a reasonable opportunity to do so, one court suggested that imprisonment based solely on inability to pay would deprive the poor of equal protection of the laws. Hendrix v. Lark, 482 S.W.2d 427, 430 (Mo. 1972); *see also* ABA STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES, § 6.5(b), 288-89. Another court, however, suggested that discharge of an indigent defendant, while other defendants are forced to pay a penalty, would deprive the affluent defendant of equal protection. State v. DeBonis, 58 N.J. 182, 198-199, 276 A.2d 137, 146-47 (1971). This difficult case is unlikely to occur often, however, if courts utilize their discretionary powers to reduce fines and postpone payments for defendants without means.

[101] NATIONAL COMMISSION ON MARIHUANA AND DRUG ABUSE, DRUG USE IN AMERICA: PROBLEM IN PERSPECTIVE 347-59 (1973).

alcohol. The Minnesota educational program for marijuana offenders follows this model.[102] A mandatory leverage sanction, applied in lieu of a fine in all cases involving the least serious consumption-related behavior, amounts to legislative overkill.[103] On the other hand, it should be emphasized that an educational program may be a useful optional sanction for persons unable to pay the fine, and it may also be an appropriate dispositional alternative for some repeat offenders[104] or youthful violators. The latter situations, however, involve generic questions regarding the desirability of different, more burdensome sanctions for subsequent offenses and violations by minors.

D. Should Penalties Be Increased For Subsequent Offenses?

Assuming a state has decided to decriminalize some marijuana behavior and to impose a civil fine for these least serious offenses, the question arises whether the sanction applied should vary with the number of such offenses committed by the same offender. There are three alternatives: to retain the same penalty for subsequent offenses as for first offenses; to impose a larger fine for subsequent offenses; or to apply more severe criminal sanctions for subsequent offenses, in the form of stigmatizing record consequences, incarceration, or both.

Again, the rationale which underlies the initial decision to reform the marijuana prohibitions will affect the evaluation of possible alternatives. If the legislature wishes to minimize the involvement of marijuana users in the criminal system because of its concern about the fairness of enforcement and the disproportionality of criminal sanction to the offense, then it makes little sense to alter the nature of the penalty for second offenders.[105] Only an increase in the fine would comport with the goals of decriminalization, and the cost of retaining and searching records is hardly warranted by any increased deterrent effect. On the other hand, if the legislators' primary goal is simply to decrease the cost of enforcing

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[102] *See* note 72 and accompanying text *supra*. Bloom, An Approach For Casual Drug Users, Technical Paper of the National Institute on Drug Abuse, Department of Health Education and Welfare 6-9 (1977).

[103] Under the Minnesota statute, a first offender is punishable by participation in the drug education program unless the court enters a written finding that such a program is inappropriate. MINN. STAT. ANN. § 152.15(2)(5) (West Supp. 1977). A second offender within two years must be evaluated for chemical dependency and can be ordered to participate in a treatment program. The Mississippi law is similar. MISS. CODE ANN. § 41-29-139(d)(2) (1977).

[104] In California, a person charged with possession of up to one ounce who has been previously convicted of this offense three times within a two-year period, must be diverted to an educational or treatment program in lieu of being fined. CAL. HEALTH & SAFETY CODE § 11357(b) (West Supp. 1977).

[105] If the legislature has decided that a first offender should receive only a civil fine, it seems patently unfair, especially in light of the high degree of selectivity and arbitrariness prevalent in marijuana law enforcement, to apply the full panoply of criminal sanctions—with the embarassment of arrest and booking, the economic and social consequences of having a record, and especially incarceration—merely because a casual marijuana user has been unlucky enough to have been caught a second time.

marijuana prohibitions while retaining maximum preventive effects, then imposing penalties for subsequent offenses may be a rational course. Such an approach is not without cost, however. Apart from the costs of processing and punishing repeat offenders, increased penalties also require retention of records of initial violations in order to determine whether a violator is a second offender.

The costs of enforcement will be substantially increased if the legislature authorizes imprisonment rather than civil fines for subsequent offenses. Aside from the obvious expense of incarceration, one principal advantage of the fine-only scheme, the elimination of costly trials, will be lost if incarceration is authorized, because defendants will be less likely to plead guilty if they face possible confinement. The threat of imprisonment may also engender more technical search and seizure claims both at trial and on appeal, all of which will operate to drain already scarce judicial resources. Even a criminal sanction which excludes imprisonment will add significantly to the cost of deterring marijuana behavior. More formal procedures will have to be utilized during arrest because the offender must be brought to the station, fingerprinted, and photographed; criminal records will have to be maintained; some defendants may be inclined to contest the charge either to avoid the higher fine or the criminal stigma; and notions of procedural fairness may require that publicly paid counsel be offered to indigent offenders.[106]

Apart from considerations of fairness and cost, the legislature may wish to evaluate the possible utility of the sanctioning system as a leverage device in cases involving recidivists. Repeated apprehension for marijuana offenses may indicate, in some cases, that the individual has progressed beyond purely recreational use of marijuana to a more intensified pattern of psychoactive drug use. Nonetheless, a judicious use of discretion to utilize optional educational or counseling programs is a more efficacious way of dealing with this problem than the enactment of categorical increases in sanctions for subsequent offenses.

Whether for reasons of fairness or efficiency, six of the ten states which have decriminalized least serious marijuana behavior do not enhance the penalty for subsequent offenses.[107] However, legislators in the four other reform jurisdictions have apparently been persuaded that the incremental deterrent effects of more severe penalties justify the cost of imposing them on repeat offenders. Threatened penalties for second offenses vary widely: the fine is merely doubled in New York;[108] a large fine and up to

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[106] Appointed counsel is not constitutionally mandated if imprisonment is not authorized. Argersinger v. Hamlin, 407 U.S. 25 (1972). Legislators may decide, however, that indigent defendants who are subject to criminal liability should be represented by appointed counsel.

[107] Alaska, California, Colorado, Maine, Ohio, and Oregon.

[108] New York provides a graduated scheme of sanctions for subsequent violations within a three year period. Possession of 25 grams or less of marijuana constitutes a violation, punishable for a first offense by a maximum fine of $100, for a second offense by a fine of up to $200, and for a third offense by a fine of up to $250 and/or 15 days in jail. Marijuana Reform Act, ch. 360, § 221.05, 1977 N.Y. Laws 500.

60 days may be imposed in Mississippi, although the violator earns no criminal record;[109] and criminal fines and jail terms of three months and six months may be imposed in Minnesota[110] and North Carolina,[111] respectively.

E. Applicability to Minors

A further question raised by the decriminalization of marijuana is whether the reforms should recognize a distinction between juvenile and adult offenders. The same legislator who does not object to reducing the penalty for possession for personal use to a fine paid by mail when the offender is an adult, may wish to grant jurisdiction to the juvenile court when the offender is a minor. The issue is whether decriminalizing possession of marijuana for personal use will require a change in the definition of juvenile delinquency in order to allow possession of marijuana to remain an allegation sufficient to support a juvenile delinquency petition.[112]

Some states have reduced the criminal penalties for possession and sale of small amounts of marijuana, while continuing to label such acts as criminal. In these states, no change in the definition of juvenile delinquency is necessary to support continued intervention in the case of juveniles, because the commission of an act by a minor which is criminal if committed by an adult is sufficient to give the juvenile court jurisdiction. If the legislature does not label this conduct a crime, however, juvenile court jurisdiction would have to be based on the court's authority

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[109] In Mississippi, first offenders are issued a citation similar to a traffic ticket, and are subject to a civil fine. Second offenders within a two-year period face a possible jail sentence of 5 to 60 days, a mandatory fine of $250 and possibly court-ordered participation in a drug education program. Third time offenders within a two year period face a possible jail sentence of 5 to 60 days, a mandatory fine of $250 to $500 and a misdemeanor criminal record. MISS. CODE ANN. § 41-29-139(d)(2)(A) (Supp. 1977).

[110] In Minnesota, the first offense of possessing 1½ ounces or less is a petty misdemeanor punishable by a maximum fine of $100 and possibly by court-ordered participation in a four to eight hour drug-education course. However, a second or subsequent offense within two years is a misdemeanor punishable by a maximum fine of $300, a criminal record, and a jail term up to 90 days. MINN. STAT. ANN. § 152.15(2)(5) (West Supp. 1977); 3 GOVERNORS' CONFERENCE REPORT, *supra* note 42, at 235 (1977).

[111] North Carolina stipulates a maximum fine of $100 for the first violation of possession of marijuana up to one ounce or one-tenth ounce of hashish. Subsequent offenses carry penalties of a maximum $500 fine and/or 6 months in jail. N.C. GEN. STAT. §§ 90-95(d)(4) *as amended by* Act of 1977, ch. 862, 1977 N.C. Sess. Laws.

[112] M. PAULSEN & C. WHITEBREAD, JUVENILE LAW AND PROCEDURE 32 (1974) indicate that juvenile court jurisdiction may extend to four types of cases: where the juvenile has allegedly committed an act which would be a crime if committed by an adult; where the child is allegedly beyond the control of his parents or is engaging in conduct which, though not criminal, is thought to be deleterious to his health and welfare; where the youth's parents, though able to offer proper care and guidance, allegedly fail to do so; and where the child's parents are allegedly unable to care for him. Although possession of marijuana will clearly not support juvenile court intervention in the last two situations, this conduct may support jurisdiction in the first two situations, depending upon the type of marijuana reform law enacted and upon the statutory definition of juvenile delinquency.

to entertain petitions alleging noncriminal conduct by a child injurious to his health, welfare, or morals,[113] although it is questionable whether occasional marijuana use would support such a petition.[114] If the statutory definition of juvenile delinquency is more narrowly drawn and does not include this broad category,[115] juvenile court jurisdiction will not extend to cases involving noncriminal possession of marijuana. In these states, the legislator who wishes the juvenile court to retain jurisdiction in such cases either must amend the juvenile delinquency definition to include possession and sale of even small amounts of marijuana or must include in the marijuana decriminalization bill a statement that possession of marijuana for personal use by a juvenile supports juvenile court jurisdiction. Even in the states where the statutory definition of juvenile delinquency encompasses conduct injurious to health or morals, the legislature will be well advised to address the matter explicitly in the marijuana legislation.

If the legislature decides that greater intervention in the case of juvenile offenders is desirable, it may wish to specify precisely what kind of disposition is permissible. For example, it is doubtful that a legislature which adopts a fine-only policy for adults would intend to permit confinement in a reformatory for a juvenile engaging in the very same activity. The legislature may well decide, however, that appearance in juvenile court should be mandatory or that attendance at a drug education course is appropriate. Alternatively, the legislature may wish to specify that, although confinement may not be authorized for noncriminal possession alone, such activity is one factor to be assessed along with others in determining whether confinement is justified. While many possible dispositions, either mandatory or discretionary, are conceivable, the important point is that the legislature should not leave its intention unexpressed.

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[113] N.J. STAT. ANN. § 2A:4-14(m) (1952). This statute was upheld against a challenge on vagueness grounds. State v. L.N., 109 N.J. Super. 278, 263 A.2d 150 (1970), *aff'd* 57 N.J. 165, 270 A.2d 409 (1970), *cert. denied*, 402 U.S. 1009 (1971). Most statutes of this kind have survived due process attacks. M. PAULSEN & C. WHITEBREAD, *supra* note 112, at 48-49.

[114] Proponents of the repeal of status offense jurisdiction frequently assert that juvenile courts currently assume jurisdiction in cases involving possession of alcohol and tobacco, even though these acts are not illegal and would not support a delinquency petition. *See, e.g.*, ABA INSTITUTE OF JUDICIAL ADMINISTRATION, JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO NONCRIMINAL MISBEHAVIOR, 35, 41 (Tentative Draft 1977). Even if the jurisdiction is not abolished, the pressure to reform or abolish status offenses may lead appellate courts to give the vague statutory language an interpretive gloss which precludes jurisdiction in cases involving possession of alcohol and tobacco. If marijuana use were decriminalized, the courts might preclude jurisdiction on the same ground.

[115] *See, e.g.*, CAL. WELF. & INST. CODE §§ 600-602 (West Supp. 1977):

> § 602. *Minor violating laws defining crime; minors failing to obey court order*
>
> Any person who is under the age of 18 years when he violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime . . . *other than an ordinance establishing a curfew based solely on age*, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court. (emphasis original).

IV. MODIFYING THE CRIMINAL PROCESS: DETECTION AND POSTARREST CONSEQUENCES

In addition to selecting the appropriate postconviction sanctions for least serious marijuana behavior, legislators supporting decriminalization will also want to modify police behavior in detecting offenses and arresting violators, and postarrest processing by police, prosecutors, and courts. For those who believe that society's interest in suppressing marijuana use does not warrant the invasion of privacy and deprivation of liberty normally implicit in the criminal process, a central goal of decriminalization will be to minimize the offender's involvement in the criminal justice system. However, procedural reform is a necessary goal even for those who seek mainly to reduce the amount of criminal justice resources allocated to marijuana cases.

Assuming that the legislature has decided to enact a decriminalization scheme which removes incarceration as an authorized penalty for the least serious marijuana behavior, four procedural issues must be addressed from both constitutional and policy perspectives: the extent to which police search authority is affected by decriminalization; the circumstances under which a person may be taken into custody and detained after apprehension; whether the offender may be required to appear in court; and, if the case is contested, the types of procedures and safeguards which should be employed during the adjudication.

A. Detection

In addition to the considerations of personal liberty, fairness, institutional integrity, and conservation of criminal justice resources discussed above in the context of postconviction consequences, reform-minded legislators may also be concerned with the protection of individual privacy. Even if legislative reform prevents severe deprivations of liberty after conviction, marijuana users may still be subjected to serious invasions of privacy associated with arrest, detention, and search procedures. Legislators who doubt the legitimacy of coercive efforts designed to suppress marijuana use will be inclined to remove all legal sanctions for possession of less than the designated amount, thereby eliminating the indignities associated with being stopped, searched, arrested, and detained. Although the marijuana itself will still be subject to seizure as contraband under federal law,[116] a state could modify its own contraband provisions or rules of criminal procedure to restrict the occasions for legitimate police searches for small quantities of marijuana.

As noted above, however, legislators may retain some civil penalty in the belief that removal of all sanctions from consumption-related activity is inconsistent with society's interest in discouraging marijuana use. These legislators are relying mainly on the presumed symbolic effects of

[116] *See* MARIHUANA COMMISSION REPORT, *supra* note 1, at 152-54, 165-66, for a discussion of the contraband issue.

the legal penalty, rather than the anticipated deterrent effects. Since the probability of detection is relatively low even under an active enforcement strategy, much enforcement activity actually wastes resources, and it might be more efficient to attempt to reduce the level of enforcement under a civil offense statutory scheme. While aiming for a credible threat of detection for public use and flagrant possessory violations, lawmakers should strive to accommodate privacy interests by discouraging unnecessarily zealous and intrusive law enforcement efforts. Destigmatization and passive enforcement represent complementary strategies for tailoring the sanctioning process to its most efficient and fairest use in the effort to contain marijuana consumption.

Empirical studies have consistently shown that most drug arrests are warrantless and that the police frequently operate on the fringes of constitutional limitations.[117] If the legislature wishes to minimize the invasions of privacy which ordinarily attend discovery of a minor marijuana violation, the crucial question is whether detection of such an offense should provide the legal basis for a search of the violator's person or property. For example, warrantless searches of an offender's person and the area under his immediate control can ordinarily be conducted incident to a lawful arrest, in order to prevent him from either obtaining a weapon or destroying evidence while he is in custody.[118] To authorize a full search, the arrest must be based on a probable cause, and it must be a full-custody arrest which includes transportation to the stationhouse for booking, or any equivalent prolonged contact with the suspect.[119] In many jurisdictions a search of a suspect upon arrest is routine and may even be required by departmental regulations.[120]

Because the authority to search depends upon the fact of detention, both privacy and liberty may be protected by prohibiting full-custody arrests for decriminalized offenses. A citation procedure, discussed below, should suffice for the apprehension of most offenders. There may be occasions when prolonged detention is unavoidable, but these situations can be handled by specific exceptions to a general statutory rule that a noncriminal offender should not be subjected to a full-custody arrest[121]

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[117] *See, e.g.*, Johnson and Bogomolny, *Selective Justice: Drug Law Enforcement in Six American Cities*, in NATIONAL COMMISSION ON MARIHUANA AND DRUG ABUSE, DRUG USE IN AMERICA: PROBLEM IN PERSPECTIVE, App. Vol. III 498-547 (1973).

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

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

[120] LaFave, *"Case-by-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 S. Ct. Rev. 127, 131; ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE 493 (1975).

[121] The *Robinson* opinion, which approved police authority to conduct a full personal search whenever they make a full-custody arrest, did not define that term, and the case itself involved an arrest plus booking; however, since the decision was rationalized on the ground that a search is necessary to protect policemen from attack with a hidden weapon during prolonged contact with a suspect, it seems clear that a search incident to any form of detention that requires the policeman to drive the suspect in his squad car will be upheld as reasonable. United States v. Robinson, 414 U.S. 218, 221-23 n.2; LaFave, *supra* note 120, at 148, 152.

and should not be detained longer than necessary for citation purposes.[122]

Another important question is whether the police ought to be discouraged from seeking out minor marijuana offenses, especially in private locations. The demonstrable trend in recent years has been for drug investigative units to adopt a relatively passive stance toward possession offenses,[123] and the mere decision to decrease the penalty for marijuana offenses may influence the police to place an even lower priority on detecting them, thereby conserving police resources as well as protecting personal privacy. But the legislature may wish to place formal limitations on the power of police to search property by regulating the authority of magistrates to issue search warrants and the authority of police to make warrantless searches.

Traditionally, a suspect person and property cannot be searched against his will unless a search warrant, describing the place to be searched and the things to be seized, has been issued upon probable cause. When the object to be seized is marijuana, the primary requirement for the issuance of a search warrant is a showing of probable cause that marijuana will be found in the place to be searched. A warrantless search may be made, where probable cause exists, if delay might result in loss of the evidence, for example, if the object to be seized is in a moving automobile.[124] Empirical studies consistently show that vehicle searches account for more than one-third of all drug possession arrests.[125]

If a legislature wishes to protect the property of persons who commit decriminalized offenses from these otherwise valid searches, a provision similar to the following could be enacted:

> A search warrant will not issue for the seizure of marijuana or of evidence in connection with a marijuana related offense, if the amount of marijuana to be seized is less than [the designated amount], or if the offense in question is [include reference to least serious offenses]. Furthermore, the presence on a person or premises of less than [the desginated amount] of marijuana, or the commission of [include refer-

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[122] For example, if an offender has inadequate identification, it may be necessary either to transport him to a magistrate, to post bond, or to detain him at the stationhouse until his identity has been established. Although neither of these procedures amounts to arrest for the purpose of authorizing a search, both require prolonged contact between officer and offender. Since the occasions for such detention procedures and the searches incident to them cannot be eliminated, they should be held to a minimum and designated in the statute as exceptional situations.

Once the legislature has made its judgment that marijuana offenders should not be routinely booked like other arrestees or, by implication, subjected to searches incident to full-custody arrests, the police are unlikely to abuse their authority. If they do, however, the arrest may be an unreasonable seizure under the fourth amendment because, even though based on probable cause, it is unnecessary in order to insure an appearance in court. *See* Gustafson v. Florida, 414 U.S. 260, 266-67 (1973) (Stewart, J., concurring). The Ninth Circuit has held unconstitutional the arrest of a material witness and the forcible detention of a person wanted for questioning, where those procedures were unnecessary to secure the cooperation of the subjects. Bacon v. United States, 449 F.2d 933 (1971); United States v. Ward, 488 F.2d 162 (1973); *see also* LaFave, *supra* note 120, at 159-61.

[123] MARIHUANA COMMISSION REPORT, *supra* note 1, at App. Vol II 626-42.

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

[125] MARIHUANA COMMISSION REPORT, *supra* note 1, at App. Vol. II 634-36.

> ence to least serous offenses], does not, in the absence of additional evidence of a substantial nature, constitute probable cause for the issuance of a search warrant authorizing the seizure of larger amounts of marijuana, or the seizure of evidence in connection with more serious marijuana-related offenses; nor shall it constitute reasonable grounds, for purposes of an arrest, to believe that any marijuana offense other than [include reference to least serious offenses] has been committed.

Note that such a provision applies to warrantless automobile searches as well as searches under warrant, because the legality of the former depends on the existence of probable cause for the issuance of a search warrant, even though no warrant is issued. The second sentence of the sample provision is designed to prevent searches and arrests in connection with more serious offenses from being made solely on the basis of evidence that the decriminalized offense was committed. This part of the provision is somewhat ambiguous, since it leaves open to case-by-case determination the question of how much additional evidence is needed. If additional protection is thought necessary, the legislature could prohibit searches of private homes unless there is probable cause to believe that the home is used for the sale of marijuana.

B. Custody After Arrest

If minor marijuana offenses are punishable by fine, the apprehending officer must be authorized to detain the offender long enough to issue a citation which explains the options for paying or contesting the fine. Whether any further custody should be authorized is a separate question. At one extreme, the statutory scheme could provide for full custody, with the marijuana offender treated like any felon or misdemeanant who, upon apprehension, may be fingerprinted, booked, and photographed. At the other end of the spectrum, the legislature could prohibit detention beyond the initial apprehension and issuance of a citation. Between these extremes lies a variety of options: there may be additional custody for the limited purpose of identification; full custody unless the defendant can post collateral; or discretion to invoke full custody if the defendant does not give adequate identification or has no local address.

Any of these options will probably meet constitutional standards. At least two of the states which have adopted the Model Penal Code's civil violation concept also authorize arrest without a warrant and permit custody when an offense is committed in an officer's presence,[126] and, thus far, no constitutional challenges have been raised. It is arguable, however, that a state may not deprive a person of liberty during a process for penalizing the commission of an offense which has no criminal record consequences and is not punishable by a loss of liberty. Supreme Court decisions holding that summary seizure of property before an adjudication of liability is a denial of due process may preclude a state from

[126] CONN. STAT. ANN. § 6-49 (1972); MINN. STAT. ANN. § 629. 34 (1947).

initiating an action for payment of a purely civil fine with a deprivation of personal liberty.[127] On the other hand, the Court might conclude that the relatively minor deprivation of liberty occasioned by a full-custody arrest is not a denial of due process when the offense has been personally observed by the apprehending officer. The Court might also emphasize the state's interest in insuring that its civil and criminal prohibitions are enforced, and hold that taking the defendant into custody in order to guarantee either appearance at a subsequent trial or payment of a fine is a reasonable means of achieving that end. Since the Supreme Court has never addressed this issue, a definitive answer cannot be given. It is important to note, however, that authorizing full custody implicates values of constitutional dimension. This factor, when considered with others discussed below, may lead to a policy judgment that custody should not be authorized, irrespective of the merits of the constitutional challenge and irrespective of the severity of the postconviction record consequences of a violation.

Mandating full custody for every offender apprehended clearly disserves the twin goals of decriminalization. Full custody exacts significant costs in police resources, both in processing the offender at the time of arrest and in maintaining his records thereafter. Arrest and custody also serve as sanctions in themselves, regardless of the subsequent disposition of the case: the offender is subject to the potentially demeaning process of booking and the formal record of the arrest, as well as to the greater notoriety involved.

In the vast majority of cases, therefore, the most efficacious procedure appears to be to permit intervention only to the degree necessary to issue a citation. In some cases, however, due to the failure of the defendant to provide either adequate identification or a local address, the officer may justifiably be concerned that the defendant will neither appear in court nor pay the fine; in such cases, a policy of allowing the officer discretion to bring the defendant into custody seems warranted. To be consistent with the twin goals of fairness and efficiency, the sole purpose of custody should be to obtain adequate identification. While the state admittedly has an interest in enforcing and collecting its civil penalties, it is doubtful that this need justifies further intervention. Once apprehended and identified, few individuals will later flee the jurisdiction to avoid going to court or paying the fine. The risk of avoidance is too slight to justify an elaborate custody procedure, especially when the decriminalization scheme applies only to the least serious marijuana-related behavior.

C. Court Appearance

Alternatives to requiring the defendant's appearance in court include, in decreasing degrees of intervention and cost: discretionary decisions

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

regarding the need for court appearances by arresting officers, posting of collateral with forfeiture upon nonappearance, and payment of a fine by mail. The appearance requirement may be regarded as a reasonable means of implementing the policy of discouraging the use of marijuana. Appearance in court imposes a greater burden on the offender than mere payment by mail and, therefore, may impress upon him the relative seriousness of the official disapproval of his conduct.[128] On the other hand, removing these minor offenses from already severely overloaded state court dockets is one major reason behind the drive for decriminalization. Whether the marginal deterrence to be derived from the court appearance is worth this extra cost in court time is an issue which policymakers must resolve.[129]

In the interest of effecting some cost savings, policymakers may be tempted to authorize the police to require court appearance in certain instances. The problem with this approach is that meaningful standards will be difficult to frame and will introduce additional sources of selective punishment, an evil partly responsible for diminishing the institutional integrity of the present marijuana proscriptions. Absent a clearly defined standard, legislators should mandate court appearance in all instances or in none.[130]

D. Adjudicatory Process

Legislative choices about appropriate adjudicatory procedures are closely tied to the postconviction consequences discussed above. Once the criminal postconviction consequences of stigma and incarceration have been eliminated for marijuana violations, most defendants will not contest their guilt by seeking to suppress evidence or insisting upon an evidentiary trial. In fact, the defendant in such circumstances is not constitutionally entitled to the cumbersome and costly procedural safeguards designed to protect against unwarranted criminal convictions. On the other hand, if a conviction can result in incarceration or stigma,

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[128] The fear of appearing in court may play a significant role in the deterrent process. A British Home Office survey of the attitudes of young men aged 15-21 years indicated that after family relations and job prospects, the public notoriety of having to appear in court ranked the highest among things that might worry people if they broke the law and were found out. *See* J. WILLCOCK, DETERRENTS AND INCENTIVES TO CRIME AMONG BOYS AND YOUNG MEN AGED 15-21 YEARS 46-53 (1968).

[129] The National Governors' Conference found that the states which did not require a court appearance realize substantial savings in terms of judicial and prosecutorial resources. *See* 2 GOVERNORS' CONFERENCE REPORT, *supra* note 42, at 43-44.

[130] If the legislature chooses not to require court appearances at all, the choice between the final two alternatives is likely to be of little significance. Whether the scheme involves posting collateral followed by forfeiture for nonappearance or mailing the fine, most defendants can be expected to forfeit the collateral or pay the fine rather than contest the charge. Requiring payment of collateral before release may result in a greater number of fines being paid; however, this procedure seems to impose unfair burdens on those offenders who do not have available funds to post collateral. Payment of the fine may be encouraged by adopting a procedure which has been used in the collection of parking tickets: the fine is doubled if it is not paid or contested within a certain time following the violation, after which a civil proceeding may be brought to collect the judgment.

defendants will be more likely to invoke the procedural protections to which they are constitutionally entitled.

The range of legislative choice is therefore fairly constricted. If the postconviction consequences have been decriminalized, the legislature will undoubtedly wish to capture the cost savings by providing summary procedures, much like those at traffic court. On the other hand, if the postconviction consequences remain more or less criminal, the legislature will have no choice but to utilize formal misdemeanor processes involving prosecutorial officials and probably defense attorneys.

Several constitutional propositions establish the outer boundaries for the procedural choices available to the legislature. If the offense is punishable by incarceration, two important and costly procedural protections are required. The right to a court-appointed attorney arises only in cases where incarceration is likely to be imposed.[131] Therefore, even if the offense is labelled a crime and has not been destigmatized, the state may not be constitutionally required to provide indigents with state-paid counsel as long as imprisonment is not authorized. Similarly, the defendant has no right to a jury trial if the potential sanction is imprisonment for less than six months[132] or a small fine.[133] On the other hand, if the legislature reduces the penalty for the least serious marijuana-related behavior to a fine but retains the criminal label and adverse record consequences, the state must still establish some formal trial process, affording the defendant the right to confront adverse witnesses, the right not to have a verdict directed against him, and the right not to be tried for the same offense in another proceeding.[134] However, if the legislature labels the offense noncriminal and destigmatizes its record consequences, it can probably provide summary procedures without including these procedural rights.

In summary, if the legislature classifies the least serious marijuana offense as a civil violation, punishable only by a fine[135] and without stigmatizing record consequences, it may constitutionally provide summary adjudication procedures: the defendant will not be entitled to have

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[131] Argersinger v. Hamlin, 407 U.S. 25 (1972).

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

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

[134] Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379, 398 (1976). The Court has never determined whether the accused is also entitled to the additional sixth amendment rights to a speedy trial and to compulsory process or to the due process right to be tried under an evidentiary standard requiring proof beyond a reasonable doubt.

[135] Under prevailing constitutional jargon, the Supreme Court will probably determine that a purely civil fine is not punitive because the dominant purpose of the statute, derived from its legislative history or from the severity of the fine, is not to condemn. For a thoughtful review of the relevant cases, *see* Clark, *supra* note 134, at 411. *But see* Spevack v. Klein, 385 U.S. 511 (1967) (revocation of professional license); Uniformed Sanitation Men Ass'n v. Commissioner, 392 U.S. 280 (1968) (loss of public employment); Lefkowitz v. Turley, 414 U.S. 70 (1973) (loss of government contract) which indicate that even under summary procedures, the defendant cannot be deprived of his fifth amendment right to remain silent. Helvering v. Mitchell, 303 U.S. 391, 400 n. 3 (1938), *quoting* United States v. Regan, 232 U.S. 37, 50 (1914).

appointed counsel, to subpoena witnesses, to confront adverse witnesses, to put the state to a criminal burden of proof, or to be tried by a jury or legally trained judge. It should be added, of course, that the absence of a constitutional entitlement does not imply that the legislature should, as a matter of policy, establish purely summary procedures. This choice will depend, in part, on whether a summary court system, separate from the misdemeanor court system, such as a traffic court, is already established. If such a court exists, the legislature will undoubtedly want to expand its jurisdiction to cover these least serious marijuana offenses, according these defendants the same rights available to traffic defendants. On the other hand, if traffic cases are handled within the lower criminal court system, the accommodation between efficiency and procedural rights will be made as a matter of practice, just as it is in more serious traffic cases. If the legislature or city council has defined a separate less formal set of procedures for petty traffic cases, it should simply enter a cross-reference in the decriminalization bill.

V. CONCLUSION

This article has considered the drafting implications of altenative rationales for enacting substantial revisions in traditional criminal penalties for possession of marijuana for personal use. Different methods of defining the least serious offense and of formulating any residual sanctions for such behavior have been analyzed in light of alternative policy premises and empirical assumptions.

The author has his own views, of course, and presumes the reader will not object if he states them briefly here.[136] First, traditional criminal penalties against marijuana use are indefensible on both retributive and utilitarian grounds. The retributive concerns about proportionality and fairness provide the overriding arguments for reform. Therefore, criminal penalties should be withdrawn from all behavior which is clearly consumption-related rather than some more restricted category of conduct. Second, no residual sanctions should be imposed on decriminalized behavior, because the costs of applying them would exceed the social benefits attributed to their preventive effects. Third, even if a residual sanction is imposed, the main preventive effects would be symbolic, not deterrent, in nature; accordingly, the sanction should be a summarily administered civil fine. Each of these propositions will be defended briefly below.

Prevention and containment of marijuana use is the presumptively legitimate objective of current policy; it is, in H.L.A. Hart's terminology,

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[136] These views have remained consistent since first published in 1970. *See* Bonnie & Whitebread, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 57 VA. L. REV. 971, 1177-80 (1970); R. BONNIE & C. WHITEBREAD, *supra* note 4, at 298-304.

the "general justifying aim" of any implementing prohibitions and punishments.[137] Preventive justifications are qualified and limited, however, by retributive concepts such as proportionality, the principle that any punishments imposed may not be disproportionately severe in light of the seriousness of the offense.[138] Although full theoretical elaboration for the assertion cannot be provided here, the principle of proportionality does bar condemnatory punishments[139] for conduct like marijuana use, which the prevailing normative climate does not regard as inherently deserving of condemnation. Experts unanimously agree that moderate use of the drug is not harmful to the user's health or well-being and does not lead to socially undesirable behavior.[140] Consumption of marijuana is no longer regarded by informed opinion as morally distinguishable from the use of alcohol. Moreover, even polls of public opinion show that a majority of the adult population believes criminal penalties are inappropriate.[141] Although a consensus of informed opinion supports continued disapproval and discouragement of use, the residual justification is regulatory in nature and depends on considerable speculation about the aggregate effects of consumption on the public health and welfare. Current efforts to suppress moderate, recreational consumption are premised on the presumed direct associations between availability, overall consumption, and excessive consumption. The success of prohibitions against simple consumption can be evaluated only by measuring the aggregate social effects of impaired individual functioning.

Under such normative conditions, any penalty for personal use may be illegitimate. According to the libertarian arguments of Mill, H.L.A. Hart, and others, the state may not prohibit behavior which does not, in itself, have socially harmful effects; aggregated speculative effects are insufficient to support any coercive interventions.[142] For present purposes, however, the point is more limited: even if some penalty may be justifiable in utilitarian terms, that penalty may not be condemnatory in purpose or effect. From a theoretical standpoint, the condemnatory effects of alternative penalties are measured according to the social meaning of various processes and deprivations, reflected in the stigmatizing effects traditionally associated with sanctions denominated criminal.

If criminal penalties for marijuana use are impermissible on retributive grounds, then such penalties should not be imposed on any consumption-related behavior, and the line between decriminalized and other offenses must at least approximate the border between unequivocably consumption-related behavior and behavior which is conceivably commercial.

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[137] H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 8-11 (1968).

[138] *Id.* at 230-37.

[139] Although the line between criminal and noncriminal punishments is increasingly blurred, the essential difference, which ought to be preserved, lies in the condemnatory purpose, and associated stigmatizing effects, of criminal punishment. *See* Hart, *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROB. 401, 403 (1958).

[140] MARIHUANA COMMISSION REPORT, *supra* note 1, at 90-91.

[141] *See* note 87 *supra*.

[142] *See, e.g.*, H.L.A. HART, LAW, LIBERTY AND MORALITY (1963).

Whether or not one accepts the view that criminal penalties are barred on retributive grounds, stigmatizing penalties are also demonstrably inappropriate in utilitarian terms. The application of criminal sanctions generates social costs which can be measured in terms of actual enforcement costs, reduced social and economic productivity of stigmatized offenders, and the more amorphous crime-generating impact of reduced respect for law which far exceed the preventive benefits of criminal sanctions compared with noncriminal ones.

The question whether a noncriminal penalty is warranted must be explored in utilitarian terms. The National Commission, the National Conference of Commissioners on Uniform States Laws, and the author are persuaded that society's presumed interest in discouraging marijuana use is adequately served by a prohibition against commercial activity and that the incremental preventive effect of any penalty against consumption-related behavior is not warranted by the costs of enforcing the prohibition and punishing violators. Accordingly, in the author's view, a decriminalization bill should simply revise the definition of prohibited acts so that possession or private use of small amounts, perhaps up to 100 grams, of marijuana or hashish is not a punishable offense.

A legislature may reasonably believe, however, that the preventive effects of a prohibition are substantial enough to warrant some penalty against consumption-related behavior. Any such preventive effects are attributable mainly to the symbolic force of the mere expression of illegality, although a fifty dollar fine may also have a direct and measurable effect on behavior by channeling use into private locations. These preventive effects can be captured without invoking any of the customary consequences of the criminal sanction; however, the offense should be explicitly classified as a civil violation or infraction, and apprehension or payment of the fine should have no derivative legal or economic consequences. Persons apprehended for a decriminalized offense should be issued citations and should not be subject to a full-custody arrest. A court appearance should be required only for minors, and the sole penalty should be a small fine, twenty-five or fifty dollars, payable by mail. If the legislature believes that such a penalty exerts an inadequate deterrent, a court appearance should be required for all violators. Penalties should not be enhanced for subsequent offenses. The definition of decriminalized offenses should encompass all clearly consumption-related behavior involving any natural cannabis products except the liquid concentrate. In defining consumption-related behavior, the legislature ought to rely on specified amounts, classifying as infractions conduct such as possession or private use of 100 grams or less, distribution of one-half ounce or less, and cultivation of ten plants or less.

State	Scope of Least Serious Offense	Statutory Label or Classification	Arrest or Citation	Mandatory Court Appearance	Record Consequences	Maximum Penalty Upon Conviction for First Offense	Maximum Penalty Upon Conviction for Subsequent Offenses
Alaska	nonpublic possession of any amount for own use; public possession of ≦ 1 ounce (marijuana or hashish)	offense punishable by civil fine	civil complaint or citation only	no: court may establish procedure for payment by mail	no record consequences	fine ≦ $100	same
California	possession ≦ 1 ounce (marijuana only)	misdemeanor	citation only	yes	automatic expungement after 2 years	fine ≦ $100	same (except that upon conviction of third offense within 2 years offender may be diverted to community program with no fine)
Colorado	nonpublic possession of ≦ 1 ounce; transfer of any amount for no consideration (marijuana only)	class 2 petty offense	citation only	yes	no specific provision	fine ≦ $100	same
Maine	possession ≦ 1 ounce (marijuana only)	civil violation	no specific provision	no specific provision	no record consequences	fine ≦ $200	same
Minnesota	possession ≦ 1.5 ounces (marijuana or hashish)	petty misdemeanor	no specific provision	no specific provision	no record consequences (except nonpublic record for appying recidivist provisions)	fine ≦ $100; possible participation in drug program	subsequent offenses within 2 years are misdemeanors punishable by $300 fine and jail term up to 90 days; offender must be evaluated for mandatory participation in a chemical dependency treatment

State	Scope of Least Serious Offense	Statutory Label or Classification	Arrest or Citation	Mandatory Court Appearance	Record Consequences	Maximum Penalty Upon Conviction for First Offense	Maximum Penalty Upon Conviction for Subsequent Offenses
Mississippi	possession ≦ 1 ounce marijuana only)	offense punishable by civil fine	citation only	yes	no record consequences for first or second offense (except nonpublic record for applying recidivist provisions); criminal record for third offense	fine ≦ $100-250	second offense within 2 years: 5-60 days in jail; or mandatory $250 fine; participation in drug education program third offenders within 2 years: 5 days-6 mos. in jail; fine $250-500; misdemeanor criminal record
New York	possession ≦ 25 grams (marijuana only)	violation punishable by civil fine	citation only	yes	no record consequences	fine ≦ $100	second offense within 3 years: ≦ $200 third offense within 3 years: ≦ $250 and/or 15 days jail
North Carolina	possession marijuana ≦ 1 ounce, hashish ≦ .10 ounce	misdemeanor	no spcific provision	no specific provision	no specific provision (except conditional discharge for first offenders under 21)	fine ≦ $100	second or subsequent offenses: fine ≦ $500 and/or 6 mo. jail
Ohio	possession marijuana ≦ 100 grams, hashish ≦ 5 grams, hashish oil ≦ 1 gram	misdemeanor of fourth degree (minor misdemeanor)	no specific provision	no specific provision	no record consequences	fine ≦ $100	same
Oregon	possession or use of ≦ 1 ounce (marijuana only)	violation	citation only	yes	no record consequences	fine ≦ $100	same